

**Statement of Steven P. Lehotsky  
on behalf of the  
U.S. Chamber of Commerce**

**“Examining Mandatory Arbitration in Financial Services Products”**

**Hearing before the Senate Committee on Banking, Housing, and Urban  
Affairs**

**March 8, 2022**

Chairman Brown, Ranking Member Toomey, and Members of the Committee:

Thank you for the opportunity to appear before you today to present the views of the U.S. Chamber of Commerce. The Chamber strongly supports arbitration because it is a fair, less complicated, and lower-cost alternative to our overburdened court system.

The arbitration process uses impartial decision-makers and is subject to strict fairness rules. Courts are obligated to adjudicate claims that an arbitration agreement contains provisions that are unconscionable under generally applicable contract law, and they can and do invalidate arbitration agreements that impose unfair procedures.

Empirical studies show that consumers do as well or better in arbitration as in litigation. They prevail on their claims at the same rate or more frequently, and they recover as much or more when they prevail.

Arbitration is much simpler and less costly than court litigation—in terms of the money, time, and effort required by the dispute-resolution process. All parties benefit from the reduced expense and complexity—as a result, consumers can resolve their claims quicker in arbitration than in litigation and, most importantly, they can seek redress for claims that could not practically be brought in court.

Notwithstanding the benefits of arbitration, the Consumer Financial Protection Bureau (CFPB) in July 2017 issued a rule that would have effectively eliminated the use of arbitration agreements in disputes between consumers and providers of consumer financial products and services, leaving consumers wholly dependent on class action lawyers’ willingness to take on and effectively litigate their disputes—even though most consumer complaints are individualized and cannot be litigated as class actions. The CFPB’s anti-arbitration rule resulted from an opaque, biased process, in which the Bureau ignored requests for greater transparency from members of Congress and the public, misapprehended the relevant data, and failed to address key considerations. The rule would have harmed consumers and businesses and benefited only class action lawyers.

In November 2017, Congress invalidated the CFPB’s rule by passing a resolution of disapproval under the Congressional Review Act. That action bars the CFPB from issuing any new anti-arbitration rule that has the practical effect of broadly restricting or eliminating the use of arbitration. Any argument to the contrary is wrong as a matter of law and contrary to the basic purpose of the CRA—ensuring that regulators remain accountable to the democratically elected representatives of the American people.

## **I. ARBITRATION PROVIDES SIGNIFICANT BENEFITS TO CLAIMANTS AND TO COMPANIES.**

Congress enacted the strong federal policy favoring arbitration almost 100 years ago in the Federal Arbitration Act. The Supreme Court repeatedly has recognized and applied that law to uphold the enforceability of arbitration agreements. Consequently, the use of arbitration to resolve consumer disputes has been a common practice for decades. It has many benefits. Unlike litigation, arbitration minimizes transaction costs and facilitates speedy, efficient, and fair dispute resolution, providing significant advantages to consumers and the public at large. Importantly, arbitration gives consumers the ability to bring claims that they could not realistically assert in court, including the small and individualized claims that they care about the most.

### **Consumers in Arbitration Generally Do Better Than—And At Least As Well As—Plaintiffs in Court.**

Arbitration critics frequently assert that consumers do worse in arbitration than in court. That is wrong; consumers who arbitrate their claims win more often, and recover more, than consumers who pursue similar claims in court.

A study sponsored by the Chamber’s Institute for Legal Reform (ILR) compared decisions on the merits in consumer arbitrations and consumer lawsuits in court. It found that consumer-plaintiffs win more frequently in arbitration—44% compared to 30%. Consumer plaintiffs also receive higher monetary awards in arbitration than in court. The median award to a consumer in arbitration was \$20,019, compared to \$6,565 in court; the mean award in arbitration was \$68,198, compared to \$57,285 in litigation.<sup>1</sup> A forthcoming study with an updated, larger dataset found similar results.

Another study found consumers won relief 53.3% of the time in arbitration, compared with a success rate of roughly 50% in court.<sup>2</sup> Just as in court, the plaintiffs who win in arbitration recover not only compensatory damages but also “other types of damages, including attorneys’ fees, punitive damages, and interest.”<sup>3</sup>

The Financial Industry Regulatory Authority (FINRA)—a self-regulatory organization that is overseen by the SEC—administers broker-dealer arbitration. Statistics show that FINRA

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<sup>1</sup> NDP Analytics, *Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration* 7-10 (November 2020), available at <https://instituteforlegalreform.com/research/fairer-faster-better-ii-an-empirical-assessment-of-consumer-arbitration/>.

<sup>2</sup> Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010).

<sup>3</sup> Drahozal & Zyontz, *Empirical Study*, *supra* note 2, at 902.

arbitrations resolve claims quickly.<sup>4</sup> Most claims are settled—which of course requires the investor’s agreement. Of those cases decided on the merits, investors won 31%<sup>5</sup>—a success rate comparable to consumer litigation in court.<sup>6</sup>

Studies of dispute resolution outside the traditional consumer context reach similar conclusions. For example:

- The Kaiser Foundation Health Plan uses arbitration to resolve disputes with its more than 8 million California members, and an independent review found that 90% of those who used the system said it was better than or the same as court. Awards ranged from \$40,000 - \$1,677,649.<sup>7</sup>
- A May 2019 ILR-sponsored study comparing employment arbitrations and employment lawsuits in court found that employees’ win rate in arbitration was three times employees’ success rate in court—32% compared to 11%—and employees who prevailed in arbitration recovered approximately twice as much as employees who prevailed in court.<sup>8</sup> A forthcoming study of employment claims found similar results.

These studies probably understate arbitration’s advantages over litigation because of “selection effects.” Arbitration makes it feasible for consumers (and employees) to pursue claims that are too small to attract a contingency-fee lawyer and therefore cannot be brought in court. Thus, studies that compare the average amount obtained by prevailing parties in arbitration and litigation probably tilt in favor of litigation, where claims tend to be larger. And, “relatively weaker claims . . . are more likely to go to an arbitration hearing on the merits than in litigation” because arbitration lacks the additional procedural hurdles present in litigation.<sup>9</sup> If these skewing effects were eliminated, arbitration outcomes for consumers in arbitration would be even more favorable than the results in court.

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<sup>4</sup> FINRA, *Dispute Resolution Statistics, Arbitration Statistics through September*, available at Dispute Resolution Statistics | FINRA.org (arbitration claims closed in 2021 through September were pending only 14.7 months on average).

<sup>5</sup> *Id.* at *Results of Customer Claimant Arbitration Award Cases*.

<sup>6</sup> See NDP Analytics, *Consumer Arbitration*, *supra* note 1, at 8 (reporting 30% success rate for consumer plaintiffs in court).

<sup>7</sup> Office of the Independent Administrator, *Annual Report of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System (2020)*, <https://www.oia-kaiserarb.com/pdfs/2020-Annual-Report.pdf>.

<sup>8</sup> See NDP Analytics, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* 5-10 (May 2019), available at <https://institutelegalreform.com/wp-content/uploads/media/Empirical-Assessment-Employment-Arbitration.pdf>. These results are consistent with other empirical analyses of employment arbitration. See Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 *Disp. Resol. J.* 56, 58 (Nov. 2003-Jan. 2004); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 *Disp. Resol. J.* 44, 45-50 (Nov. 2003/Jan. 2004).

<sup>9</sup> See Samuel Estreicher et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 *Rutgers U. L. Rev.* 375, 389-93 (2018).

In sum, as one academic survey of the relevant studies concluded, “there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true.”<sup>10</sup>

### **Arbitrations Employ Fair Procedures.**

The legal rules governing arbitration require fair procedures. America’s largest arbitration providers accept cases for arbitration only when the governing arbitration agreement satisfies basic fairness standards. Most important, courts invalidate arbitration agreements that contain unfair provisions.

The American Arbitration Association (AAA), the country’s largest arbitration provider, developed fairness rules for consumer arbitrations more than two decades ago. It will not accept a case unless the arbitration agreement complies with those rules.<sup>11</sup> Those rules:

- require that arbitrators must be neutral and disclose any conflict of interest and give both parties an equal say in selecting the arbitrator;
- limit the fees paid by consumers to \$200—less than the filing fee in federal court;
- empower the arbitrator to order any necessary discovery; and
- require that damages, punitive damages, and attorneys’ fees be awardable to the claimant to the same extent as in court.

The AAA rules also require that consumers be given the option of resolving their dispute in small claims court. JAMS, another leading arbitration provider, imposes similar protections—as do other arbitration providers.<sup>12</sup> Moreover, both AAA and JAMS employ arbitrators of the highest caliber, including former judges and accomplished attorneys.<sup>13</sup>

The courts provide another layer of oversight. If an arbitration provision is unfair, courts can and do step in to declare those arbitration agreements unconscionable and unenforceable. For example, courts invalidate limits on recovery of damages permitted under state and federal law<sup>14</sup>; excessive

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<sup>10</sup> David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 *Stan. L. Rev.* 1557, 1578 (Apr. 2005); *see also, e.g.*, Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 *Ohio St. J. on Disp. Resol.* 1, 16 (2017).

<sup>11</sup> Am. Arbitration Ass’n, *Consumer Due Process Protocol Statement of Principles* (Apr. 17, 1998), [perma.cc/VPW4-KXUV](https://perma.cc/VPW4-KXUV).

<sup>12</sup> JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (July 15, 2009), <https://perma.cc/NBA4-4U3N>.

<sup>13</sup> The AAA, for example, uses a thorough application process to evaluate arbitrators, selecting only those candidates with substantial expertise and qualifications. AAA, *Application Process for Admittance to the AAA National Roster of Arbitrators*, [https://www.adr.org/sites/default/files/document\\_repository/application\\_process\\_for\\_admittance\\_to\\_the\\_aaa\\_national\\_roster\\_of\\_arbitrators.pdf](https://www.adr.org/sites/default/files/document_repository/application_process_for_admittance_to_the_aaa_national_roster_of_arbitrators.pdf).

<sup>14</sup> *See, e.g.*, *Ziglar v. Express Messenger Sys. Inc.*, 2017 WL 6539020, at \*3 (D. Ariz. Aug. 31, 2017), *vacated on other grounds*, 739 F. App’x 444 (9th Cir. 2018) (arbitration agreement was unconscionable because it purported to prevent employees from recovering treble damages under state employment law); *Smith v. D.R. Horton, Inc.*, 790 S.E.2d 1, 5 (S.C. 2016) (arbitration agreement that prevented claimants from recovering damages was unconscionable); *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (arbitration agreement that barred

fees for accessing the arbitral forum<sup>15</sup>; requirements that the arbitration take place in inconvenient locations for claimants<sup>16</sup>; attempts to shorten the applicable statutes of limitations<sup>17</sup>; “loser pays” provisions under which a claimant might have to pay the full costs of the arbitration,<sup>18</sup> or must pay the drafting party’s costs regardless of who wins;<sup>19</sup> unreasonable limits on discovery;<sup>20</sup> and unfair procedures for selecting arbitrators.<sup>21</sup>

This judicial oversight ensures that companies have an incentive to craft arbitration agreements that are fair to their customers—and that companies will not be able to enforce arbitration agreements that are unfair to consumers.

### **Arbitration is Quicker and Easier to Navigate Than Court Adjudication.**

Litigation in court is extremely expensive, immensely time-consuming, and highly complicated. Arbitration is, as the Supreme Court explained in an opinion written by Justice Breyer, “usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the

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punitive damages was unconscionable); *Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008) (same).

<sup>15</sup> The Supreme Court has held that a party to an arbitration agreement may challenge enforcement of the agreement if the claimant would be required to pay excessive filing fees or arbitrator fees in order to arbitrate a claim. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000). Since *Randolph*, courts have protected consumers and employees who show that they would be forced to bear excessive costs to access the arbitral forum. *See, e.g., Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-26 (9th Cir. 2013) (refusing to enforce an arbitration agreement that required the employee to pay an unrecoverable portion of the arbitrator’s fees “regardless of the merits of the claim”); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (reaffirming that a challenge to an arbitration agreement might be successful if “filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable” for a plaintiff). Courts also have reached the same conclusion under state unconscionability law.

<sup>16</sup> *See, e.g., Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012) (travel from Oregon to California); *Coll. Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807 (D. Md. 2012) (travel from Maryland to Colorado); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (travel from Nebraska to Texas); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001) (travel from Virginia to California).

<sup>17</sup> *See, e.g., Zaborowski v. MHN Gov’t Servs., Inc.*, No. C 12–05109 SI, 2013 WL 1363568 (N.D. Cal. Apr. 3, 2013); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004) (180 days); *see also Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (refusing to enforce arbitration agreement in debt-collection contract that required debtor to present claim within 30 days after dispute arose); *Alexander*, 341 F.3d at 256 (same, for an employee); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 138 (rejecting provision that imposed shortened one-year statute of limitations).

<sup>18</sup> *See Gandee*, 293 P.3d at 1197; *Alexander*, 341 F.3d at 256; *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).

<sup>19</sup> *See, e.g., In re Checking Account Overdraft Litig.*, 485 F. App’x 403 (11th Cir. 2012); *see also Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492 (Cal. Ct. App. 2012) (attorneys’ fees).

<sup>20</sup> *See, e.g., Narayan v. Ritz-Carlton Dev. Co.*, 400 P.3d 544, 555 (Haw. 2017).

<sup>21</sup> *See, e.g., Chavarria*, 733 F.3d at 923-26 (arbitration agreement was unconscionable and unenforceable when it “would always produce an arbitrator proposed by [the company] in employee-initiated arbitration[s]” and barred selection of “institutional arbitration administrators”); *Ruiz v. Millennium Square Residential Ass’n*, 156 F. Supp. 3d 176, 182 (D.D.C. 2016) (refusing to enforce arbitrator selection provision that “gives [the claimant] no say in the arbitrator-selection process”); *Magno v. Coll. Network, Inc.*, 204 Cal. Rptr. 3d 829, 840 (Cal. Ct. App. 2016) (arbitration provision was unconscionable because, among other things, it allowed the defendant to select the arbitrator and “contain[ed] no assurances of neutrality”).

parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices.”<sup>22</sup>

Arbitrations are also resolved quickly, which means that claimants receive relief faster than they could in court litigation. The NDP empirical study of consumer arbitrations and court cases described above found that arbitrations in which the consumer-plaintiff prevailed averaged 299 days in length, whereas cases in court required an average of 429 days.<sup>23</sup> Another study found that awarded arbitrations took an average of just 11 months to decision, versus an average of 26.6 months to verdict in state court jury trial cases.<sup>24</sup> An updated study has similar findings.

### **Arbitration Allows Consumers to Vindicate Claims They Cannot Practically Assert in Court.**

Most harms suffered by consumers are relatively small in economic value and are individualized, based on facts specific to the individual consumer.<sup>25</sup> Litigation in court, with its formality and intricate procedures—and resulting expense—simply is not a realistic option for resolving such claims. Without arbitration, as Justice Breyer explained in a Supreme Court opinion, “the typical consumer who has only a small damage claim (who seeks, say, the value of only a defective refrigerator or television set) [would be left] without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.”<sup>26</sup> Arbitration thus expands access to justice by enabling consumers to pursue claims that they would be unable to litigate in court.

A key obstacle to pursuing individualized, small-value claims in court is the cost of hiring counsel. Because these claims are fact-specific, they are not eligible for class action treatment. Unrepresented parties have little hope of navigating the complex procedures that apply to court litigation, yet a lawyer’s fee may itself exceed the amount at issue in many garden-variety consumer claims. Many lawyers, especially those working on a contingency basis, are unlikely to take cases when the prospective of a substantial payout is slim. Studies indicate that a claim must exceed \$60,000, and perhaps \$200,000, to attract a contingent-fee lawyer.<sup>27</sup> The bottom line: there is no realistic way for individual consumers to assert these claims in court.

Arbitration empowers individuals and enables them to pursue smaller claims because they can realistically bring a claim in arbitration without the help of a lawyer. While a party always has the

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<sup>22</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)); see also, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) (“[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.”).

<sup>23</sup> NDP Analytics, *Consumer Arbitration*, *supra* note 1, at 11.

<sup>24</sup> Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 51 (2019).

<sup>25</sup> Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *Re: Notice of Proposed Rulemaking on Arbitration Agreements*, Dkt. No. CFPB-2016-0020-3941 at 3, Appendix A 13-14 (Aug. 22, 2016).

<sup>26</sup> *Allied-Bruce*, 513 U.S. at 281.

<sup>27</sup> Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 783 (2003). In some markets, this threshold may be as high as \$200,000. Minn. State Bar Ass’n, *Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force* 11 (Dec. 23, 2011), [perma.cc/VJ8L-RPEY](http://perma.cc/VJ8L-RPEY).

choice to retain an attorney, arbitration procedures are sufficiently simple and streamlined that in many cases, no attorney is necessary.<sup>28</sup>

Indeed, a study of 200 AAA employment awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf.<sup>29</sup> These employees were often able to pursue their arbitrations without an attorney and won at the same rate as individuals with representation.<sup>30</sup>

That expansion of the ability to obtain justice is a significant benefit of arbitration.

## **II. CONGRESS CORRECTLY CONCLUDED THAT THE CFPB’S ANTI-ARBITRATION RULE WOULD HAVE HARMED CONSUMERS AND BENEFITTED ONLY CLASS ACTION LAWYERS.**

The CFPB’s anti-arbitration rule was fundamentally flawed, both in substance and in the process by which it was promulgated. As Members of Congress noted when invalidating the rule, it would have “hurt[] the very people the CFPB is supposed to protect.”<sup>31</sup> In the words of another Member of Congress, the anti-arbitration rule was “a rule to benefit the plaintiff’s bar.”<sup>32</sup>

### **The Anti-Arbitration Rule Would Have Harmed Consumers by Eliminating an Efficient and Fair Dispute Resolution Forum.**

The CFPB’s anti-arbitration rule purported to permit some continued use of arbitration by targeting only arbitration agreements that specified individualized dispute resolution and prohibited class actions. However, the rule’s real-world practical effect would have been the elimination of arbitration.

Facing the certainty of high litigation costs associated with class-action suits, businesses would no longer have been willing to take on the expense of supporting an alternative arbitration mechanism—for which businesses shoulder the lion’s share of the costs. Rather than paying costs associated with two dispute resolution systems—arbitration and court—they would have dropped arbitration, because the Bureau’s rule would have made it impossible to avoid court-related litigation costs.

Post-dispute arbitration agreements would not substitute for pre-dispute arrangements, because they are as rare as a blue moon.<sup>33</sup> The lawyers for one or both sides (assuming that the claim is

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<sup>28</sup> St. Antoine, *supra* note 10, at 15 (“it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer”).

<sup>29</sup> Hill, *supra* note 27, at 794.

<sup>30</sup> *Id.*

<sup>31</sup> 163 Cong. Rec. H6268, H6271 (July 25, 2017) (statement of Rep. Luetkemeyer).

<sup>32</sup> 163 Cong. Rec. S6738, S6740 (Oct. 24, 2017) (statement of Sen. Crapo).

<sup>33</sup> *E.g.*, Theodore J. St. Antoine, *Making Employment Arbitration Fair and Accessible*, 12 Penn. St. Arb. L. Rev. \*1, \*18 (2020) (“Insisting solely on post-dispute agreements could be the death-knell for most private employment

large enough to attract representation) have strong incentives to induce their clients to opt for litigation in court rather than arbitration. Litigation in court—which takes much longer than arbitration and involves many more procedural hurdles—offers lawyers the opportunity to earn much higher fees than they could earn in arbitration. Consciously or not, they typically advise clients to choose a judicial forum that is really in the lawyers’ own best interest. The practical effect of the Bureau’s rule therefore would have been the elimination of arbitration—depriving consumers of the benefits that arbitration provides.

### **The Anti-Arbitration Rule Would Have Provided A Windfall For Class Action Lawyers.**

In contrast to the many benefits of arbitration, the class actions favored by the Bureau’s rule provide little to no benefit to consumers. Although the features of class actions—aggregation of claims and spreading of litigation costs over many class members—may sound appealing in theory, class members rarely, if ever, realize these benefits. In fact, most class actions provide no benefit at all to consumers. The indisputable beneficiaries of the overwhelming majority of class actions, rather, are the plaintiffs’ attorneys who file them and receive large fees when the cases are settled.

Most wrongs suffered by consumers are relatively small and individualized—excess charges on a bill, a defective piece of merchandise, and the like. Because these claims are individualized, they do not share the common factual basis required for a class action to be certified. A study of complaints made to the CFPB by consumers—and not by class action lawyers—found that the overwhelming majority could not be asserted in a class action.<sup>34</sup>

When a case is pursued as a class action, class members rarely benefit. The CFPB’s own study found that 87% of class actions are resolved without any benefit to class members.<sup>35</sup> Other studies have reported comparable results—66% in one and 60-80% in another.<sup>36</sup>

Class actions are virtually never decided on the merits; cases that survive a motion to dismiss in which a class is certified invariably are resolved through settlements. In those cases, the benefits for class members are largely illusory, because most class action settlements do not involve automatic distribution of settlement funds and the vast majority of class members do not file claims for payment from these settlement funds.

Thus, both the CFPB’s study and a study by the Federal Trade Commission found that lawyer-driven class actions deliver no benefit to 96 percent of class members, reporting a “weighted

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arbitration.”); Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 Or. L. Rev. 861, 895 (2004) (same).

<sup>34</sup> Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *supra* note 25, at 3, Appendix A 13-14.

<sup>35</sup> CFPB, *Arbitration Study: Report to Congress 2015* section 6, page 37 (Mar. 2015), [perma.cc/8AX5-AYWN](https://perma.cc/8AX5-AYWN) (hereinafter *CFPB Study*).

<sup>36</sup> Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013), [goo.gl/3B27FQ](https://www.mayerbrown.com/insights/publications/2013/12/do-class-actions-benefit-class-members) (*Mayer Brown Study*); Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 Colum. Bus. L. Rev. 1 (2017).

average” or “weighted mean” claims rate in class actions of just 4 percent.<sup>37</sup> That figure comports with academic studies, which regularly conclude that only “very small percentages of class members actually file and receive compensation from settlement funds.”<sup>38</sup> Another empirical study explains that “[a]lthough 60 percent of the total monetary award may be available to class members, in reality, they typically receive less than 9 percent of the total.”<sup>39</sup> The author concluded that class actions “clearly do[] not achieve their compensatory goals.”<sup>40</sup>

To summarize, the CFPB’s own findings showed that an average of only 4 percent of class members (weighted by size of the class) made claims in settlements and only 13 percent of class actions result in settlements to begin with—meaning that that only a tiny percentage of the members of potential classes ever receive any recovery.

In addition, class actions typically take significantly longer to resolve than arbitrations. That means the few class members who benefit must wait much longer to obtain any relief that might be available. The CFPB’s own study found that class actions that produced a class-wide settlement took an average of nearly two years to resolve.<sup>41</sup> That two-year average duration, moreover, may not even include the time needed for class members to submit claims and receive payment *after* a settlement is reached. Another study found that 14% of the class actions were still pending *four years* after they were filed, with no end in sight.<sup>42</sup>

While class members get little benefit from class actions, the lawyers who file these cases profit handsomely. Those payments to lawyers, of course, are subtracted from the funds available to class members, and therefore are highly relevant in assessing the benefit that class actions provide to class members. The CFPB’s own study found that the average settlement payment was no better than \$32.35 per class member,<sup>43</sup> but attorneys’ fees averaged \$1 million per case.<sup>44</sup> The average fee paid to plaintiffs’ lawyers—as a percentage of the announced settlement (not the smaller amount actually distributed to class members)—was 41%, with a median of 46%.<sup>45</sup>

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<sup>37</sup> Fed. Trade Comm’n, *Consumers and Class Actions: A retrospective and Analysis of Settlement Campaigns* 11 (Sept. 2019), <https://perma.cc/CM66-ZVCX>; *CFPB Study*, *supra* note 35, at section 8, p. 30 (reporting a “weighted average claims rate” in class actions of just 4%); *see also Mayer Brown Study*, *supra* note 36, at 7 & n.20 (in the handful of cases where statistics were available, and excluding one outlier case involving individual claims worth, on average, over \$2.5 million, the claims rates were minuscule: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%).

<sup>38</sup> Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 *Emory L.J.* 399, 419 (2014).

<sup>39</sup> Joanna Shepherd, *An Empirical Study of No-Injury Class Actions* 2, 5 (Emory Univ. Sch. of L., Legal Studies Research Paper Series No. 16-402, Feb. 1, 2016), [perma.cc/TU9R-UDSM](https://perma.cc/TU9R-UDSM).

<sup>40</sup> *Id.*

<sup>41</sup> *CFPB Study*, *supra* note 35, at section 8, p. 37.

<sup>42</sup> *Mayer Brown Study*, *supra* note 36, at 1.

<sup>43</sup> *CFPB Study*, *supra* note 35, at section 8, pp. 27-28; *see also* Statement of the U.S. Chamber of Commerce, *supra* note 25, at Appendix, page 5 (explaining calculation), [perma.cc/TJ92-CE9G](https://perma.cc/TJ92-CE9G).

<sup>44</sup> *CFPB Study*, *supra* note 35, at section 8, p. 33.

<sup>45</sup> *CFPB Study* *supra* note 35, at section 8, p. 34.

These massive attorneys' fees are just one part of the equation: They do not include the other very large transaction costs associated with litigating class actions—the defense costs that companies must pay in all cases, and the cost to the courts of handling these cases. It is telling that the Bureau did not even attempt to determine whether the class action system justifies these enormous costs.

In sum, the CFPB rule would have eliminated the significant benefits of arbitration for consumers in favor of a class action system that produces little if any benefits to consumers.

### **The CFPB Rule Could Not Be Justified on a Deterrence Rationale.**

Perhaps recognizing that class actions cannot rationally be justified as a mechanism for compensating injured consumers, the CFPB contended that class actions serve a broader social purpose of deterring wrongdoing. By threatening companies that violate the law with huge liability, the CFPB claimed, class actions make companies “less likely to engage in unlawful practices.”<sup>46</sup> But this deterrence argument crumbles upon a closer look.

For class actions to provide appropriate deterrence, companies must believe that they will be subject to class action liability if they act wrongfully. If liability is imposed without regard to the wrongfulness of the targeted conduct, then class actions deter both lawful and unlawful conduct. That *over*-deterrence is harmful because it deters conduct that is perfectly permissible, and often beneficial to society.<sup>47</sup>

Plaintiffs' lawyers don't choose which class actions to bring based on the merits of the underlying claims; rather, they simply look for any claims that can withstand a motion to dismiss and satisfy the standards for class certification. That is because in any case where class certification is granted, the rational thing for a defendant to do is settle rather than risk going to trial, even if it has done nothing wrong; as one appellate judge has put it, class certification “is, in effect, the whole case.”<sup>48</sup> The CFPB's own findings back up this analysis: the CFPB found that classwide judgments for plaintiffs on the merits after a trial are virtually unheard of, occurring in “less than 1% of cases.”<sup>49</sup>

Because the threat of class action liability is a function of who plaintiffs' lawyers choose to sue, and motions to dismiss and for class certification that are unrelated to the factual merits of the plaintiff's claim, class actions cannot—and do not—generally deter *wrongful* conduct. On the contrary, even law-abiding businesses must treat class actions as an inevitable cost of doing

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<sup>46</sup> Press Release, CFPB, CFPB Issues Rule to Ban Companies From Using Arbitration Clauses to Deny Groups of People Their Day in Court (July 10, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/>.

<sup>47</sup> Steven P. Lehotsky & Jonathan Urick, ‘*The Conservative Case for Class Actions’ Doesn’t Pass the Smell Test* (Nov. 26, 2019), National Review, <https://www.nationalreview.com/2019/11/conservative-case-for-class-action-suits-not-convincing-not-conservative/>.

<sup>48</sup> Hon. Diane Wood, Circuit Judge, Remarks at the FTC Workshop: Protecting Consumer Interests in Class Actions (Sept. 13–14, 2004), in *Panel 2: Tools for Ensuring that Settlements are “Fair, Reasonable, and Adequate,”* 18 Geo. J. Legal Ethics 1197, 1213 (2005).

<sup>49</sup> CFPB Study, *supra* note 35, at section 6, p. 37.

business. As one civil procedure scholar put it bluntly, class actions “serve [only] a slight deterrent function and provide scant compensatory redress to class members.”<sup>50</sup>

In contrast, companies *are* likely to be deterred by the threat of government enforcement action. That is especially true in the consumer financial services context, in light of the enhanced enforcement capabilities in that context. Not only are the monetary penalties higher, but an enforcement action brought by the government reflects the government’s judgment that its resources should be focused on what it considers improper activity.<sup>51</sup> Class actions not only fail to provide deterrence—additional deterrence is not needed because of the significant government resources devoted to enforcement.

### **The Anti-Arbitration Rule Would Have Inflicted Increased Costs Threatening The Stability Of Financial Institutions And Subjecting Consumers To Increased Prices.**

Litigation in court—especially class-action litigation—imposes substantial transaction costs on businesses. Because arbitration offers a less-expensive forum for the resolution of disputes, it reduces the transaction costs that businesses bear in the judicial system. As Professor Stephen Ware has explained, lower litigation costs for businesses are “also a benefit to consumers. That is because whatever lowers costs to businesses tends over time to lower prices to consumers.”<sup>52</sup>

The CFPB rule, by effectively eliminating arbitration, would have imposed significant increased costs on financial institutions. The Comptroller of the Currency—who is responsible for the safety and soundness of the federal banking system—raised concerns about the rule’s impact on “safety and soundness,” stating that “[t]he increased cost associated with litigation and the loss of arbitration as a viable alternative dispute resolution mechanism could adversely affect reserves, capital, liquidity, and reputations of banks and thrifts, particularly community and midsize institutions.”<sup>53</sup>

Alternatively, as one commentator concluded, “[f]orcing consumers and financial institutions to litigate class action lawsuits will impose enormous costs on what are relatively low-cost transactions,” and these enormous costs will surely “make [their] way to the cost and benefits of the financial products being regulated,” making consumers worse off by producing higher prices.<sup>54</sup>

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<sup>50</sup> Mullenix, *supra* note 38, at 440.

<sup>51</sup> *CFPB Study*, *supra* note 35, at section 9, p. 12.

<sup>52</sup> Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration Of Class Actions and Arbitration Fees*, 5 J. Am. Arbitration 251, 254-57 (2006) (emphasis added; footnotes omitted; citing, *inter alia*, Richard Posner, *Economic Analysis of Law* (6th ed. 2003)).

<sup>53</sup> Letter from Keith A. Noreika, Office of the Comptroller of the Currency to The Honorable Richard Cordray, Dir., CFPB (July 10, 2017), <https://www.consumerfinance.com/wp-content/uploads/sites/14/2017/07/OCC-Letter-to-CFPB-re-Arbitration-Rule-07-10-2017.pdf>.

<sup>54</sup> Rob Berger, *The CFPB Declares War on Arbitration*, *Forbes*, Oct. 18, 2015, available at <http://www.forbes.com/sites/robertberger/2015/10/18/the-cfpb-declares-war-on-arbitration>.

## **The CFPB’s Anti-Arbitration Rule Was The Product Of A Fundamentally Unfair Process.**

Congress in the Dodd-Frank Act expressly limited the CFPB’s authority to regulate arbitration by requiring the Bureau, first, to conduct a study of the use of predispute arbitration. Second, Congress specified that the findings underlying any rule limiting predispute arbitration “shall be consistent with the study.”<sup>55</sup> The CFPB’s unfair study process improperly limited public participation and precluded meaningful public comment on the key issues. It is not surprising that a biased, non-transparent process produced an unjustified and unjustifiable rule.

The CFPB issued only one Request for Information—in April 2012—which sought public comment on the topics that it should address in its study of arbitration.<sup>56</sup> It never informed the public of the topics it was studying and never sought public comment on them—even though multiple commenters suggested that it do so. It never convened public roundtable discussions on key issues, as many other agencies routinely do. It also never sought public input on its tentative findings.

The Bureau’s staff professed to be willing to meet with interested parties seeking information regarding the study and to accept written submissions. But without any information regarding the topics that the CFPB was studying and the timeline for its study process, those one-way conversations did not constitute anything close to meaningful input. The CFPB never invited such input from the public at large.

The CFPB not only rejected public input—it also repeatedly disregarded inquiries from Congress.

- On March 22, 2013, the Chairmen of the House Financial Services and Judiciary Committees, together with the Chairmen of the relevant Subcommittees of those Committees, wrote to David Silberman, the CFPB’s Associate Director for Research, Markets, and Regulations, pointing out that “[n]early eleven months [had] passed since the CFPB first sought suggestions from the public about the appropriate scope of its forthcoming arbitration study, as well as appropriate methods and sources of data,” and urged the CFPB “to solicit additional public input and comment in the process.” The letter sought answers to nine specific questions regarding the CFPB’s study process. The CFPB’s response conspicuously ignored the request for additional opportunities for public comment. It answered only two of the nine questions—refusing to provide any information regarding the CFPB’s study methodology and time line, among other categories of information requested by Congress.<sup>57</sup>

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<sup>55</sup> 12 U.S.C. § 5518.

<sup>56</sup> *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements*, 77 Fed. Reg. 25,148 (Apr. 27, 2012).

<sup>57</sup> Letter from David Silberman, Assoc. Dir. For Research, Markets, and Regulations, CFPB, to The Honorable Bob Goodlatte, Chairman, House Comm. on the Judiciary et al. (Apr. 5, 2013), <http://www.cfpbmonitor.com/wp-content/uploads/sites/5/2013/04/April-5-Letter-from-David-Silberman.pdf>.

- In June 2015, the CFPB ignored requests from more than 80 members of Congress and the public for transparency.<sup>58</sup>
- More than 140 Senators and Representatives wrote to the CFPB in August 2016 asking it to reconsider its proposed rule and seek additional public input.<sup>59</sup> Again, the CFPB ignored the request.

As a result of this biased process, the CFPB produced—and relied on—a seriously flawed arbitration study that was criticized as methodologically unsound by distinguished academics, who concluded that “[s]ubstantially more and different evidence would be necessary to conclude that consumers are harmed by arbitration or that they would benefit from unleashing class action litigation more routinely.”<sup>60</sup>

The study also entirely ignored benefits of arbitration, including the fact that many arbitration agreements contain provisions that incentivize pre-arbitration settlement. It also failed to assess what impact a ban on enforcing pre-dispute class waivers in arbitration agreements would have on providers’ willingness to make arbitration available to customers (in fact, it would have ended all consumer arbitration in the financial services sector), among other omissions. This flawed study formed the basis of the anti-arbitration rule.

### **III. THE CONGRESSIONAL REVIEW ACT BARS THE CFPB FROM PROMULGATING A NEW ANTI-ARBITRATION RULE.**

The invalidation of the CFPB’s anti-arbitration rule pursuant to the CRA bars the Bureau from promulgating a new rule that limits or prohibits the use of pre-dispute arbitration agreements.

The CRA states that, when a rule is invalidated under the Act, the rule “may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”<sup>61</sup>

No court has interpreted the “substantially the same” language in the CRA. However, the plain meaning of that language and other relevant case law compels the conclusion that the CRA bars any rule with the same essential effect of the invalidated rule. As the Tenth Circuit has observed in interpreting the statutory phrase “substantially the same” in the False Claims Act’s public disclosure bar, “[t]he ordinary meaning of ‘substantial’ is: ‘concerning the essentials of

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<sup>58</sup> Letter from The Honorable Patrick McHenry et al. to The Honorable Richard Cordray, Dir., CFPB (June 17, 2015), <https://mchenry.house.gov/uploadedfiles/mchenry-scott-to-cordray-letter-re-arbitration.pdf>.

<sup>59</sup> Letter from The Honorable Patrick McHenry et al. to The Honorable Richard Cordray, Dir., CFPB (Aug. 22, 2016), [https://www.cuna.org/uploadedFiles/CUNA/Legislative\\_And\\_Regulatory\\_Advocacy/Track\\_Regulatory\\_Issues/Pending\\_Regulatory\\_Changes/2016/Congressional%20Letter%20to%20Cordray%20re%20arbitration5b25d%20\(1\).pdf](https://www.cuna.org/uploadedFiles/CUNA/Legislative_And_Regulatory_Advocacy/Track_Regulatory_Issues/Pending_Regulatory_Changes/2016/Congressional%20Letter%20to%20Cordray%20re%20arbitration5b25d%20(1).pdf).

<sup>60</sup> Jason Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau’s Arbitration Study: A Summary and Critique* 8, Mercatus Working Paper, Mercatus Center at George Mason University (Aug. 2015).

<sup>61</sup> 5 U.S.C. § 801(b)(2).

something.”<sup>62</sup> The “substantially the same” standard thus “requires only the essentials” of the two things being compared to be the same, not a complete or “hyper-specific” overlap.<sup>63</sup>

Common sense and respect for the democratic process lead to the same interpretation. Permitting an agency to make minor tweaks to achieve the same result as the invalidated rule would fail to accord proper respect the judgment of the people, through their elected political representatives, to invalidate the original rule.

As explained above, the practical effect of the Bureau’s anti-arbitration rule would have been to cause companies to eliminate arbitration agreements. The CFPB therefore is barred from issuing a new rule banning class action waivers or explicitly banning arbitration clauses. It also may not issue a rule that has the practical consequence of broadly restricting or prohibiting arbitration clauses; that rule would be “essentially” or “substantially” the same as the Bureau’s anti-arbitration rule, even if framed differently, and would unlawfully circumvent Congress’s and the President’s disapproval of the Bureau’s prior rule.

Indeed, the reasons offered by Members of Congress for invalidating the anti-arbitration rule make clear that any new rule broadly restricting the use of arbitration to resolve consumer disputes would raise the very concerns that led to the prior anti-arbitration rule’s invalidation.<sup>64</sup>

- The disapproval resolution’s principal sponsor in the House explained that “consumers get meaningful relief” in arbitration, yet “the CFPB has finalized a rule that would effectively get rid of arbitration and promote class actions as the preferred dispute resolution process. This hardly seems fair.”<sup>65</sup>
- One of the resolution’s House co-sponsors similarly criticized the Bureau’s rule for threatening to “deprive consumers of a low-cost, easy way to resolve legal disputes” through arbitration.<sup>66</sup>
- Another of the resolution’s House co-sponsors noted that “the Bureau’s arbitration rule does absolutely nothing to ensure that consumers are treated fairly,” including because “[t]he Bureau’s own study” demonstrates “that arbitration helps consumers and that the alternatives are far less successful.”<sup>67</sup>
- In the Senate, the resolution’s principal sponsor similarly explained that the Bureau’s anti-arbitration rule “could result in less effective consumer protection and fewer remedies

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<sup>62</sup> *United States ex rel. Reed v. KeyPoint Gov’t Solutions*, 923 F.3d 729, 748 n.12 (10th Cir. 2019) (quoting THE NEW OXFORD AMERICAN DICTIONARY 1687 (2d ed. 2005)).

<sup>63</sup> *Id.*

<sup>64</sup> See Congressional Research Service, *The Congressional Review Act (CRA): Frequently Asked Questions* 20 (Nov. 12, 2021), <https://sgp.fas.org/crs/misc/R43992.pdf> (observing that “the CRA’s sponsors appear to have envisioned that the debate over a disapproval resolution would provide some guidance to the agency on next steps”).

<sup>65</sup> 163 Cong. Rec. H6270 (July 25, 2017) (statement of Rep. Rothfus).

<sup>66</sup> 163 Cong. Rec. H6269 (July 25, 2017) (statement of Rep. Hensarling).

<sup>67</sup> 163 Cong. Rec. H6271 (July 25, 2017) (statement of Rep. Luetkemeyer).

while simply enriching class action lawyers,” and at the same time “potentially decrease the products offered to consumers while increasing their costs.”<sup>68</sup>

- As the then-Chairman of the House Judiciary Committee summarized, the CFPB’s “anti-consumer” rule “threaten[ed] to undo” the well-documented benefits of arbitration; “force [companies] into choosing whether to continue to fund their arbitration programs or, instead, to shutter those programs to preserve funds for high-dollar class action defense”; and “burden[.]” freedom of contract.<sup>69</sup>

Finally, the courts would likely step in and invalidate any effort by the Bureau to revive its anti-arbitration rule. Better-reasoned decisions have concluded that the CRA’s provision limiting judicial review<sup>70</sup> applies only to Congress’s actions under the CRA and does not restrict courts from reviewing the validity of subsequent agency action—including review of the validity of any new rule promulgated by the Bureau in the wake of CRA invalidation of a prior rule.<sup>71</sup>

In sum, the CRA disapproval passed by Congress and signed by the President bars the CFPB from issuing any new rule that has the practical effect of broadly restricting or eliminating the use of arbitration.

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Thank you again for the opportunity to testify today. I look forward to answering your questions.

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<sup>68</sup> 163 Cong. Rec. S6746 (Oct. 24, 2017) (statement of Sen. Crapo).

<sup>69</sup> 163 Cong. Rec. H6277 (July 25, 2017) (statement of Rep. Goodlatte).

<sup>70</sup> 5 U.S.C. § 805 (“No determination, finding, action, or omission under this chapter shall be subject to judicial review.”).

<sup>71</sup> See, e.g., *Tugaw Ranches, LLC v. United States Dep’t of the Interior*, 362 F. Supp. 3d 879, 884-86 (D. Idaho 2019); *United States v. Southern Indiana Gas and Elec. Co.*, 2002 WL 31427523, at \*5 (S.D. Ind. Oct. 24, 2002). Although not deciding the issue because it was not presented in the case before the court, the Tenth Circuit has similarly expressed doubt “that an agency’s decision to reissue a disapproved of rule—pursuant to authority conferred by statutes other than the CRA—would fall within § 805’s limited scope.” *Kansas Nat’l Res. Coalition v. United States Dep’t of the Interior*, 971 F.3d 1222, 1236-37 (10th Cir. 2020).