Boston College Law Review

Volume 60 | Issue 6 Article 4

6-28-2019

Problem with Your Bank Account? Tell It to the... Arbitrator?

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PROBLEM WITH YOUR BANK ACCOUNT? TELL IT TO THE . . . ARBITRATOR?

Abstract: An increasing number of consumer financial products have begun to come pre-packaged with binding individual arbitration agreements. The Consumer Financial Protection Bureau's rule forbidding these agreements sought to ensure that consumers damaged by their banks' actions could have their day in court. When Congress chose to repeal the so called "Arbitration Rule" in 2017, it dealt a serious blow to consumers' rights. Consumers are nearly universally precluded from joining class action claims against large financial institutions due to the widespread and largely unfettered use of class-action waivers in arbitration agreements. This Note argues that class-action waivers should be regulated to ensure that individuals with inferior bargaining power and legal resources are not subjected to poor treatment at the hands of their banks.

INTRODUCTION

Lawrence Mitchell opened a checking account with First Security Bank in April of 1982.[1] At that time, Mitchell did not think he had agreed to an arbitration clause when he opened that account.[2] When First Security Bank announced that it had agreed to merge with Wells Fargo Bank, N.A. ("Wells Fargo") in 2000, Mitchell was still unaware that he was bound by an individual arbitration clause.[3] It was not until seventeen years later that Mitchell would find out that Wells Fargo did not share his understanding.[4]

In September 2016, the Consumer Financial Protection Bureau ("CFPB") entered a consent order against Wells Fargo.[5] The consent order recited four

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[1] Third Amended Class Action Complaint at 59, Mitchell v. Wells Fargo Bank, No. 2:16-cv-00966-CW, 2017 WL 5905535 (D. Utah Nov. 29, 2017) (stating the facts of the claim).

[2] *Id.* at 59–60.

[3] *See id*. at 59–60 (alleging that Mitchell was not subject to an arbitration agreement on his First Security Bank account); *Wells Fargo & Company and First Security Corporation Agree to Merge*, WELLS FARGO (Apr. 10, 2000), https://archive.is/20121217225441/https://www.wellsfargo.com/press/firstsec20000410 [https://perma.cc/UDE7-3C9G] (announcing that Wells Fargo & Company and First Security Corporation agreed to a merger between the two companies).

[4] Class Action Complaint at 1, *Mitchell*, 2017 WL 5905535 (No. 2:16-cv-00966-CW); *see* Motion and Memorandum in Support of Motion to Compel Arbitration Pursuant to FAA §§ 3–4 at xxix, *Mitchell*, 2017 WL 5905535 (No. 2:16-cv-00966-CW) [hereinafter Motion to Compel Arbitration] (alleging that Mitchell signed up for online banking services in 2005, the terms of which included a dispute resolution clause).

[5] Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015, at 1 (Sept. 8, 2016), https://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf [https://perma.cc/Q7NT-J968] [hereinafter Wells Fargo Consent Order]. The CFPB issues a consent order when it initiates an enforcement action because it believes an entity has broken consumer financial protection laws. *En-*

types of Wells Fargo's acts or practices that the CFPB determined to be unlawful: (1) creating unauthorized deposit accounts on behalf of existing customers without consent, (2) submitting credit card applications in existing customers' names without their consent, (3) registering existing customers for online banking services without consent, and (4) obtaining and activating debit cards in existing customers' names without consent.[6] It was later discovered that Wells Fargo had opened approximately 3.5 million additional potentially fake accounts in relation to the CFPB's prior findings.[7]

In the wake of the consent order, Mitchell and a group of other affected Wells Fargo customers filed a class-action lawsuit in the U.S. District Court for the District of Utah on behalf of themselves and other customers affected by the unlawful activities noted in the CFPB's consent order.[8] Mitchell alleged that Wells Fargo violated Section 1036(a)(1)(B) of the Consumer Financial Protection Act.[9] Wells Fargo, in response, filed a motion and memorandum in support of a motion to compel arbitration based on arbitration agreements many of the plaintiffs, Mitchell included, did not remember signing.[10]

The district court reserved ruling on the motion to compel pending resolution of several material questions of fact.[11] Wells Fargo's attempt to compel

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forcement Actions, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/policy-compliance/enforcement/actions/ [https://perma.cc/VT83-TDPL]. The CFPB is broadly empowered to investigate a variety of financial product- or service-providers where it suspects such providers may be violating federal consumer financial law. 12 U.S.C. § 5511(c)(4) (2012). To enforce compliance with these laws, the CFPB is empowered to initiate hearings as to whether it should issue a cease-and-desist order to covered persons and service-providers who have violated or are violating consumer financial laws. *Id.* § 5563(b)(1)(A). These cease-and-desist orders are referred to as "consent orders." Wells Fargo Consent Order, *supra*, at 1.

[6] Wells Fargo Consent Order, *supra* note 5, at 1. The CFPB concluded that the practices noted were violations of 12 U.S.C. §§ 5531 and 5536(a)(1)(B). *Id.*; *see* 12 U.S.C. §§ 5531, 5536(a)(1)(B) (defining and making unlawful "unfair, deceptive, or abusive acts or practices").

[7] Uri Berliner, *Wells Fargo Admits to Nearly Twice as Many Possible Fake Accounts—3.5 Million*, NAT'L PUB. RADIO (Aug. 31, 2017), https://www.npr.org/sections/thetwo-way/2017/08/31/547550804/wells-fargo-admits-to-nearly-twice-as-many-possible-fake-accounts-3-5-million [https://perma.cc/CM76-HEMN].

[8] Class Action Complaint, *supra* note 4, at 1.

[9] *Id.* at 8; *see* 12 U.S.C. § 5531(c)–(d) (defining unfair acts or practices and abusive acts or practices); 12 U.S.C. § 5536(a)(1)(B) (mandating that engaging in "unfair, deceptive, or abusive acts or practices" related to consumer financial products or services is unlawful). The complaint largely focuses on a practice referred to as "gaming" which stemmed from Wells Fargo bankers and managers attempting to meet aggressive sales quotas. Class Action Complaint, *supra* note 4, at 2, 3. The alleged gaming consisted of creating and controlling fee-generating accounts without customer signatures or adding secondary accounts to existing primary accounts without customer permission. *Id.* at 3. Further alleged activities included lying regarding costs, benefits, or fees that came with an account or product. *Id.*

[10] *See* Motion to Compel Arbitration, *supra* note 4, at i; Third Amended Class Action Complaint, *supra* note 1, at 35–75.

[11] *Mitchell*, 2017 WL 5905535, at *1. The district-court judge reserved judgment pending the results of a summary hearing on several material questions of fact. *Id.* These questions were: (1) whether plaintiffs named in Wells Fargo's motion had agreed to arbitration clauses; (2) whether the

individual arbitration, however, belies a concerning issue in the consumer banking context.[12] Depositors are routinely subjected to binding arbitration clauses paired with class action waivers, threatening their ability to obtain relief and to hold large corporate banks accountable for their actions in a court of law.[13] In response to these concerns, the CFPB in 2017 enacted what became known as the "Arbitration Rule."[14] The Arbitration Rule sought to prevent providers of financial products and services from binding their customers to individual arbitration and forcing them to sacrifice their rights to sue individually or as a class.[15] Depositors, therefore, could not be barred from joining a class action claim based on an arbitration clause in their account agreement.[16]

If this were the end of the story, Mitchell and the other plaintiffs in the case against Wells Fargo would be resting easier.[17] Congress, however, repealed the Arbitration Rule as of November 1, 2017.[18] The law, therefore, returned to its pre-Arbitration Rule position, allowing banks to force binding, individual arbitration on their depositors.[19]

Mandatory arbitration clauses, which often come packaged with class action waivers, create significant risks and challenges to protecting financial consumers.[20] One consumer may feel confident enough to request a refund of an

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remaining plaintiffs not named had agreed to arbitration; and (3) whether Wells Fargo had intentionally waived its arbitration rights. *Id.*

[12] *See id.* (holding that judgment must be reserved pending findings of fact either that the plaintiffs have or have not agreed to binding individual arbitration clauses).

[13] *See* Hossam M. Fahmy, *Arbitration: Wiping Out Consumer Rights?*, 64 TEX. B.J. 917, 920 (2001) (arguing that arbitration clauses are designed to protect the interests of the companies seeking to employ them and to deny to consumers their right to sue in court).

[14] *See* Elizabeth Dexheimer, *CFPB Issues Rule Making It Easier for Consumers to Sue Banks*, BLOOMBERG (July 10, 2017), https://www.bloomberg.com/news/articles/2017-07-10/cfpb-releases-rule-making-it-easier-for-customers-to-sue-banks [https://perma.cc/3WN5-C9RJ] (discussing the Arbitration Rule and quoting the CFPB Director Richard Cordray saying that the Arbitration Rule prevents companies from avoiding blame by blocking class actions). *See generally* Arbitration Agreements, 82 Fed. Reg. 33,210, 33,210 (July 19, 2017) (to be codified at 12 C.F.R. § 1040).

[15] *See* Dexheimer, *supra* note 14 (detailing a statement made by the CFPB indicating that the rule restricts financial firms' ability to block class action claims); Arbitration Agreements, *supra* note 14, at 33,210 (mandating that no provider of certain financial products or services shall rely on predispute arbitration agreements related to any aspect of a class action).

[16] *See* Arbitration Agreements, 82 Fed. Reg. at 33,210 (noting that the CFPB found that arbitration clauses were commonly being used to block class action claims).

[17] *See Forced Arbitration and Wells Fargo: The CFPB's Rule Protects Victims of Bank Fraud*, NAT'L CONSUMER LAW CTR., https://www.nclc.org/issues/forced-arbitration-and-wells-fargo.html [https://perma.cc/TL8G-T6DQ] (arguing that the Arbitration Rule would block Wells Fargo from forcing arbitration in several of the areas in which it stands accused of violating consumer financial laws).

[18] Joint Resolution of Nov. 1, 2017, Pub. L. No. 115-74, 132 Stat. 1290.

[19] *See, e.g.*, Gadomski v. Wells Fargo Bank N.A., 281 F. Supp. 3d 1015, 1021 (E.D. Cal. 2017) (granting defendant's motion to compel individual arbitration pursuant to an arbitration agreement).

[20] *See* Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329, 333 (2015) (arguing that class actions are important in defending consumer rights and that arbitration

incorrect overdraft fee and, as a result, feel comfortable arbitrating that claim.[21] Where the issue is not quite so simple, such as when a consumer discovers several accounts opened in her name without her consent, a pooling of resources through a class action claim may significantly increase her likelihood of seeking and obtaining relief.[22] Trying the claim in court adds the further benefit of bringing public attention to the conduct giving rise to the claim.[23]

This Note examines Wells Fargo as a case study to explore the threats posed to consumers of financial products by the repeal of the Arbitration Rule.[24] Part I of this Note discusses the development of consumer protection law in the United States.[25] Part II introduces arbitration law, class action waivers, and their use in consumer financial product and service agreements.[26] Part III explores the effects of the repeal of the Arbitration Rule on consumers. Furthermore, Part III argues that class action waivers in arbitration agreements limit consumers' ability to redress injuries and provides banks with a convenient way around public accountability.[27] Part IV proposes that the Arbitration Rule should be reformed and promulgated as a regulation striking a middle ground between the interests of financial consumers and the interests of the banks with which they transact.[28]

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interferes with the goals of class action claims); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 93 (2012) (arguing that although individual arbitration may be useful for simple claims consumers can generally handle on their own, class action waivers hamper consumers' ability to bring claims that are procedurally more complex and that they cannot handle individually or do not know exist).

[21] *See* Sternlight, *supra* note 20, at 106 (arguing that procedurally easy claims possess four elements: (1) the consumers know they have been injured; (2) the consumers know that they likely have a right to legal action; (3) the complication and cost of the claim is not disproportionate to the likelihood of recovery; and (4) the consumer can seek individual money damages). Sternlight offers several examples of simple claims such as an overcharge from a dentist or a defective product. *Id*. In these instances, consumers likely know both that they were harmed and that the harm should be recoverable. *Id.* Furthermore, consumers in these circumstances likely feel that they can sufficiently testify and present evidence to make a reasonable case. *Id.* at 106–07.

[22] *See* Brief for NAACP Legal Defense & Education Fund, Inc. as Amicus Curiae Supporting Respondents at 3, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (No. 09-893) (discussing that individual litigants may not proceed due to lack of individual resources) [hereinafter Brief for NAACP].

[23] *See* Dexheimer, *supra* note 14 (quoting the CFPB director as saying that the Arbitration Rule prevents companies from avoiding accountability through blocking class action claims).

[24] *See infra* notes 29–282 and accompanying text.

[25] *See infra* notes 29–50 and accompanying text.

[26] *See infra* notes 56–154 and accompanying text.

[27] *See infra* notes 155–252 and accompanying text.

[28] *See infra* notes 253–282 and accompanying text.

I. CONSUMER PROTECTION LAW IN THE UNITED STATES

Consumer protection law in the United States, especially as it relates to financial products, has not always been what most would consider robust.[29] Consumer financial transactions were previously governed primarily by the notion of *caveat emptor*, or "buyer beware."[30] While some consumer protection laws, such as rules against usury, date back to the time of Hammurabi, the United States did not begin to dive deeply into this area of law until the twentieth century.[31] This dive began generally with the passage of the Wheeler-Lea Act of 1938, providing for governmental enforcement actions against banks and other businesses engaged in unfair or deceptive acts and practices.[32] The Wheeler-Lea Act, however, did not provide for a private right of action for consumers affected by such acts or practices, leaving enforcement up to governmental agencies.[33]

Congress would not begin to tackle protections for consumers related specifically to financial products until the 1960's with the passage of the Consumer Credit Protection Act of 1968 ("CCPA") containing the Truth in Lending Act ("TILA").[34] TILA was the first set of consumer financial protections

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[29] *See* Eric Hellend & Joshua D. Wright, *The Dramatic Rise of Consumer Protection Law*, *in* THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW 361, 364 (F.H. Buckley ed., 2013) (discussing the original motivations for the rise of consumer protection law including inadequate protection from the FTC, popular demand for regulation, and disagreement with protections afforded by common-law causes of action); *A History of Consumer Rights and Improvements*, LEXINGTON LAW (Aug. 23, 2011), https://www.lexingtonlaw.com/blog/credit-repair/history-consumer-rights-improvements.html [https://perma.cc/3SMR-LU8M] (observing that, prior to the 1960s, very few consumer protection laws existed).

[30] *See* Arbitration Agreements, 82 Fed. Reg. at 33,211 (discussing the evolution of consumer protection laws in the United States, including historical reliance on "caveat emptor").

[31] *See* James A. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 ARIZ. ST. L.J. 61, 66–67 (discussing the inclusion of interest rate controls in the Code of Hammurabi).

[32] 15 U.S.C. § 45(a)(2) (2012); *see* Address of Hon. R.E. Freer, Comm'r, Fed. Trade Comm'n, Before the Annual Convention of the Proprietary Association 1–2 (May 17, 1938), https://www.ftc.gov/system/files/documents/public_statements/676351/19380517_freer_whe_wheeler-lea_act.pdf [https://perma.cc/3DBP-FWZG] (discussing the amendments to Section 5 of the Federal Trade Commission Act and referring to them as the Wheeler-Lea Act) [hereinafter Freer Remarks].

[33] *Id.* Under the Wheeler-Lea Act, the FTC was empowered to issue cease and desist letters and hold hearings where it had reason to believe that any person or business engaged in unfair or deceptive acts or practices. *Id.* § 45(b). Any violation of a cease and desist order was punishable by up to $10,000 per violation and was recoverable in a civil action. *Id.* § 45(*l*)–(m).

[34] *See generally* Consumer Credit Protection Act of 1968 ("CCPA"), 15 U.S.C. §§ 1601–1693r; Truth in Lending Act of 1968 ("TILA"), 15 U.S.C. §§ 1601–1667f (1968). The Wheeler-Lea Act focused primarily on false or misleading advertisements. *See* Freer Remarks, *supra* note 32, at 1–2 (noting that Wheeler-Lea was introduced in response to a need to address issues related to abusive advertising). Wheeler-Lea also expanded the FTC's authority from merely preventing unfair methods of competition to protecting consumers directly by eliminating the need to establish injury to a competitor. *Id.* at 1. CCPA and TILA expanded these protections for consumers related to credit cards and other sources of consumer credit to include individual rights of action for injured consumers. *See, e.g.*,

that provided for a private right of action against a bank that an injured consumer could bring.[35] This began a wave of other consumer protection laws aimed specifically at financial products, including the Fair Credit Reporting Act ("FRCA") in 1970, the Equal Credit Opportunities Act ("ECOA") in 1974, and the Fair Debt Collection Practices Act ("FDCPA") in 1977.[36] States in the 1960s began following suit and passing laws modeled after the Federal Trade Commission Act ("FTCA").[37] These state laws immediately provided for private rights of action as well as governmental enforcement actions.[38]

Despite the rising tide of consumer protection laws, irresponsible lending practices found cracks in this new legal armor, contributing to the financial crisis of 2008.[39] In response, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 ("Dodd-Frank"), which was designed in part to close the gaps in the new consumer protection legal framework.[40] A significant portion of the legislation focused on reformulating the

15 U.S.C. § 1640(a)(2)(A) (making creditors who do not comply with the provisions under the CCPA liable to any person for actual damage sustained by that person as a result of the compliance failure).

[35] *See* 15 U.S.C. § 1640(a) (stating that creditors who do not comply with the requirements of TILA are liable to any consumer that such creditor injures as a result of its non-compliance).

[36] *See generally* Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x (2012) (promoting accuracy, fairness, and privacy of consumer information contained in files of consumer reporting agencies); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (2012) (making creditor discrimination based on race, color, religion, national origin, sex, marital status, or age unlawful); Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692p (2012) (establishing legal protection from abusive debt collection practices).

[37] Arbitration Agreements, 82 Fed. Reg. at 33,212.

[38] *See id.* (discussing American consumer protection law's evolution toward private rights of action).

[39] *See* Jeffrey Friedman, *Capitalism and the Crisis: Bankers, Bonuses, Ideology, and Ignorance*, *in* WHAT CAUSED THE FINANCIAL CRISIS 1, 2 (Jeffrey Friedman, ed., 2011) (arguing that one of the primary causes of the Financial Crisis of 2008 was the sub-prime lending market which was characterized by unsafe, irresponsible lending to underqualified borrowers); Lawrence J. White, *The Credit-Rating Agencies and the Subprime Debacle*, *in* WHAT CAUSED THE FINANCIAL CRISIS, *supra*, at 228, 232–33 (arguing that, in addition to the unsafe lending practices, the credit-rating agencies played a pivotal role in facilitating the crisis).

[40] *See generally* Dodd-Frank Act, 12 U.S.C. §§ 5301–5461 (2012); *see also* John Maxfield, *The Dodd-Frank Act Explained*, MOTLEY FOOL (Feb. 3, 2017), https://www.fool.com/investing/2017/02/03/the-dodd-frank-act-explained.aspx [https://perma.cc/6L66-RMZP] (stating that Dodd-Frank was designed to prevent factors that led to the Financial Crisis of 2008). Senator Elizabeth Warren initially suggested the creation of the CFPB while a professor at Harvard Law School in a paper entitled *Unsafe at Any Rate*. Nik DeCosta-Klipa, *The Story Behind the Strange Controversy Engulfing Elizabeth Warren's Brainchild Agency*, BOSTON.COM (Nov. 29, 2017), https://www.boston.com/news/politics/2017/11/28/elizabeth-warren-cfpb-trump-mulvaney-english [https://perma.cc/3C9D-KDFG]; *see also* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY: A JOURNAL OF IDEAS, Summer 2007, at 8, 16–18 (proposing a Financial Product Safety Commission as a response to the subprime lending crisis in 2008).

capital and asset structures required in banks in the United States, especially in the biggest banks.[41]

Part of the reform introduced in Dodd-Frank was the creation of the CFPB, an agency which was to be given significant authority over federal consumer financial protection.[42] The CFPB has the power to both write and enforce rules aimed at protecting consumers of financial products and services.[43] The CFPB was further mandated to study the use of arbitration agreements and to provide a report to Congress summarizing findings related to use, prevalence, and outcomes of arbitration proceedings.[44] The CFPB performed and published the results of this study (the "Arbitration Study") in March 2015.[45] On July 19, 2017, the CFPB passed 12 C.F.R. § 1040 entitled "Arbitration Agreements," which was meant to overhaul the interplay between arbitration agreements related to financial products and class-action lawsuits instituted by consumers of those products.[46]

Congress, however, exercised its power under the Congressional Review Act and, as of November 22, 2017, passed a joint resolution repealing the Arbitration Agreements rule.[47] The rule, which would have been effective as of

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[41] Maxfield, *supra* note 41. Asset structure deals with the way businesses categorize the asset-side of their balance sheets. Marty Schmidt, *Asset Structure*, BUSINESS-CASE-ANALYSIS.COM (Feb. 2, 2010), https://www.business-case-analysis.com/asset-structure.html [https://perma.cc/TPL8-RT5N]. Capital structure, on the other hand, deals with the way businesses categorize and utilize equity-holder or creditor funds, those captured under liabilities and equity on the balance sheet. *Id.* Dodd-Frank required banks to keep larger amounts of highly-liquid assets (e.g. cash and treasury bonds) on hand. Maxfield, *supra* note 41. A larger supply of liquid assets was intended to better-equip banks for any future runs on deposits. *Id.* Dodd-Frank also introduced more stringent regulatory requirements and increased monitoring for banks with more than $50 billion in assets. *Id.*

[42] *See FACTBOX—New U.S. Consumer Financial Bureau Has Wide Powers*, REUTERS: FIN. REGULATORY FORUM (Sept. 14, 2010), http://blogs.reuters.com/financial-regulatory-forum/2010/09/14/factbox-new-us-consumer-financial-bureau-has-wide-powers/ [https://perma.cc/7MZG-PCR8] (observing that the CFPB would have wide powers to regulate banks including creating rules, examining banks, and monitoring and reporting on consumer financial markets).

[43] 12 U.S.C. § 5512(b)(1) (2012).

[44] *Id.* § 5518(a).

[45] *See generally* CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY, http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [http://perma.cc/86TM-AHPH] [hereinafter CFPB ARBITRATION STUDY].

[46] *See* 12 C.F.R. § 1040.4(a)(1) (2012) (prohibiting providers of certain financial products from relying on pre-dispute arbitration agreements with respect to a class action suit relating to those financial products). The CFPB passed the rule in an effort to continue an active congressional effort to begin limiting the use of arbitration agreements related to consumer financial products and services. Arbitration Agreements, 82 Fed. Reg. at 33,211.

[47] Arbitration Agreements, 82 Fed. Reg. 55,500, 55,500 (Nov. 22, 2017) [hereinafter Arbitration Agreements Repeal].

September 18, 2017, was thus rendered ineffective.[48] The rule and its repeal will be discussed in further depth in section D of Part II *infra*.[49]

II. The Rise of Arbitration Agreements and the Fall of Class Actions

Mandatory individual arbitration agreements fuse two important concepts into one, to the detriment of consumers.[50] To demonstrate the detriment, it is first necessary to understand arbitration agreements' general mechanics.[51] Additionally, it is important to recognize the purpose and function of class action claims to understand how denying them to consumers closes an important and potent avenue for the redress of a group's grievances.[52] Finally, it is crucial to understand how class action waivers are used to close this avenue.[53] This background leads to the discussion of the Arbitration Rule itself and how it helped alleviate these concerns prior to its repeal.[54]

A. Arbitration Agreements: Avoiding Court and Holding the High Ground

Arbitration as a form of dispute resolution has been a thorn in the side of legislators and parties to disputes alike since its codification nearly a century ago.[55] Congress passed the Federal Arbitration Act ("FAA") in 1925, which unequivocally endorsed arbitration and made arbitration agreements equivalent to other types of contracts.[56] Arbitration provides a forum outside of the traditional judicial system to allow for the efficient and cost-effective resolution of legal disputes.[57] Stepping away from the traditional judicial system, however, may implicate due process concerns, especially related to the right to a jury trial and the availability of appellate review.[58] Arbitration includes the appointment of an impartial third party who hears the case and issues a final,

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[48] Arbitration Agreements, 82 Fed. Reg. at 33,210; Arbitration Agreements Repeal, 82 Fed. Reg. at 55,500.

[49] *See infra* notes 106–154 and accompanying text.

[50] *See infra* notes 56–82 and accompanying text.

[51] *See infra* notes 52–67 and accompanying text.

[52] *See infra* notes 68–82 and accompanying text.

[53] *See infra* notes 83–105 and accompanying text.

[54] *See infra* notes 106–154 and accompanying text.

[55] *See* 9 U.S.C. §§ 1–16 (2012) (covering the entire text of the FAA); Barnes, *supra* note 20, at 333–34 (discussing the values of class action and how arbitration frustrates the class action goals).

[56] 9 U.S.C. § 2; *see* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336 (2011) (citing 9 U.S.C. § 2 stating that arbitration agreements are equal with all other contracts).

[57] *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014); Fahmy, *supra* note 13, at 918.

[58] *See* U.S. CONST. amend. V (granting a right to due process of the law before deprivation of life, liberty, or property); 9 U.S.C. § 2 (stating that arbitration agreements are equal to contracts); Arbitration Agreements, 82 Fed. Reg. 33,210, 33,216 (July 19, 2017) (to be codified at 12 C.F.R. § 1040) (discussing due process concerns that the AAA noted related to arbitration in the debt collection context).

binding decision.[59] These arbitrators are not bound by the same principles of *stare decisis* as judges and therefore have higher degrees of latitude in making their decisions.[60]

Another of arbitration's concerning attributes is the experience gap between consumers, who may never have faced arbitration before, and companies, who may have come before arbitrators numerous times.[61] The repeat player effect suggests that parties that appear often in arbitration proceedings gain certain advantages over what are referred to as one-time players.[62] Often, banks and merchants are repeat participants while consumers are one-time players.[63] Repeat players are generally better able to utilize legal resources to benefit themselves while one-time players are typically in unknown territory and are often lacking in resources of their own.[64] It has been suggested that arbitrators favor repeat players because the repeat players are more likely to hire the arbitrator in the future where the arbitrator's decisions have been favorable toward the repeat player.[65] Arbitration does, however, provide an efficient, timely, and cost-effective venue for resolving disputes.[66] It, therefore, is no surprise that companies, including banks, continue to employ arbitration clauses in their consumer contracts.[67]

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[59] *Arbitration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[60] *See* Timegate Studios v. South Peak Interactive, 713 F.3d 797, 803 (5th Cir. 2013) (citing Executone Info. Sys. v. Davis, 26 F.3d 1314, 1325 (5th Cir. 1994)) (holding that the arbitrator's choice in terms of remedy should be given significant deference); Myriam Gilles, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*, *in* FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT 7, 17 (Pound Civil Justice Inst. ed., 2015) (noting that arbitrators are not bound by *stare decisis*); W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 95–96 (2007) (arguing that arbitrators are afforded a large degree of flexibility in deciding cases).

[61] *See* Christopher Drahozal & Samantha Zynontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. DISP. RESOL. 843, 857–58 (2010) (discussing the positive benefits companies and arbitrators derive from being repeat players in the arbitration system); Fahmy, *supra* note 13, at 920 (discussing concerns related to companies being repeat players).

[62] *See* Fahmy, *supra* note 13, at 920 (discussing some of the possible benefits repeat players gain in arbitration).

[63] *See id.* (discussing concerns related to companies being repeat players).

[64] *Id.* (arguing that repeat players have a number of distinct advantages over one-time players).

[65] Drahozal & Zynontz, *supra* note 61, 857; Fahmy, *supra* note 13, at 920 (discussing concerns related to the advantages repeat players gain in arbitration). The repeat-player effect is especially disconcerting in the arbitration context due to the relatively low incidence of consumers obtaining representation prior to arbitration proceedings. *See* CFPB ARBITRATION STUDY, *supra* note 45 § 1.4.3 (reporting that consumers were represented by legal counsel in only sixty percent of arbitration proceedings, whereas companies were nearly always represented by legal counsel).

[66] *See* Fahmy, *supra* note 13, at 918 (stating that arguments in favor of arbitration's efficient, cost-saving nature are justified and that even vehement arbitration critics generally agree that arbitration has utility).

[67] *See* Barnes, *supra* note 20, at 336 (stating that 99.9% of mobile wireless subscribers are subject to arbitration clauses due to seven of the eight largest wireless providers including them in their contracts); *see also, e.g.*, CLIENT MANUAL—CONSUMER ACCOUNTS, CITIBANK, N.A., https://online.citi.com/JRS/popups/ao/Consumer_Client_Manual.pdf [https://perma.cc/863Q-2V3E] [hereinafter CITI-

B. Class Action Claims: David's Sling Against Goliath

The tension between arbitration and the judicial process is evident enough as it relates to single arbitration, however, mandatory individual arbitration also clashes with class action claims.[68] Class action claims allow similarly situated plaintiffs to pool their claims together in an effort to increase judicial and individual efficiency and allow widespread recovery where a significant number of people have been injured.[69] Class action claims trace their roots to early English law, though it was not until the 1966 amendments to the Federal Rules of Civil Procedure ("FRCP") that class actions gained widespread endorsement in American law.[70]

Class action claims are governed by rule 23 in the FRCP and permit an individual or a small group of individuals to pursue a claim on behalf of a much larger group of people where all members suffered substantially similar harm from the same defendant or defendants.[71] Individuals who obtain class certification gain a degree of power against the (often corporate) opposition, lessening the inherent disparity between individual and corporate resources.[72] The 1966 amendments were important in the financial consumer context because they came at a time where new, private rights of action were granted through TILA and the host of other federal reforms in the 60s and 70s.[73] Thus,

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BANK AGREEMENT]; CONSUMER ACCOUNT AGREEMENT, WELLS FARGO, https://www08.wellsfargomedia.com/assets/pdf/personal/online-disclosures/caa-en.pdf [https://perma.cc/RX7P-5B2H] [hereinafter WELLS FARGO AGREEMENT]; DEPOSIT ACCOUNT AGREEMENT, JP MORGAN CHASE & CO., https://www.chase.com/content/dam/chasecom/en/checking/documents/deposit_account_agreement.pdf [https://perma.cc/23KK-C2HX] [hereinafter CHASE AGREEMENT]; DEPOSIT AGREEMENT AND DISCLOSURES, BANK OF AM., https://www.bankofamerica.com/deposits/resources/deposit-agreements.go [https://perma.cc/49UP-8SUP] [hereinafter BANK OF AMERICA TERMS].

[68] *See* DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015) (holding that the FAA preempts CA state law making class action waivers unconscionable because it does not place arbitration agreements equally with other contracts consistent with the FAA); *Concepcion*, 563 U.S. at 344 (holding that mandating the availability of class arbitration is inconsistent with the purposes of the FAA).

[69] *Class Action*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[70] *See* Arbitration Agreements, 82 Fed. Reg. at 33,213 (discussing the advent of the class action claim and FRCP rule 23); Samuel Estreicher, *Federal Class Actions After 30 Years*, 71 N.Y.U. L. REV. 1, 1 (1996) (posing a question as to the need for change to class action rules since the 1966 amendments); Raymond B. Marcin, *Searching for the Origin of Class Action*, 23 CATH. U. L. REV. 515, 516 (1974) (discussing the case of *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676), which has been identified as potentially the first class action claim).

[71] FED. R. CIV. P. 23(a).

[72] *See* Brief for NAACP, *supra* note 22, at 3 (discussing that individual litigants may not proceed due to lack of individual resources).

[73] *See* Arbitration Agreements, 82 Fed. Reg. at 33,213; Barnes, *supra* note 20, at 333 (observing that a number of State Attorneys General have written to the CFPB noting the importance of class actions under FRCP rule 23 in ensuring financial consumers can recover when businesses injure them). *See generally* Truth in Lending Act, 15 U.S.C. § 1640 (2012); Fair Credit Reporting Act, 15 U.S.C. §§ 1681n–1681o (2012); Equal Credit Opportunity Act, 15 U.S.C. § 1691e; Fair Debt Collection Practices Act, 15 U.S.C. § 1692k.

consumers of financial products who were injured by the businesses providing them were allowed to pursue private rights of action as a class unless explicitly prohibited by the statute giving rise to the claim.[74]

Often, individuals may shy away from bringing otherwise very strong claims where they believe that they are in a "David vs. Goliath" situation.[75] Furthermore, individuals may not, alone, believe their claim to be worth pursuing in court, or know that they have a claim whatsoever.[76] Pooling claims enables these individuals to see value in an otherwise minor, though no less colorable, claim and may notify unaware individuals of a claim they may otherwise have missed entirely.[77]

Lastly, class action claims may more easily obtain representation than would individual, otherwise minor claims.[78] A plaintiff's attorney may not assign much value to one person's minor claim, but where that minor claim is multiplied by hundreds or thousands, that attorney is significantly more likely to work on the case.[79] This is likely attributable to the prevalence of plaintiff's attorneys who work on a contingent fee basis, meaning they derive their fees from damages or settlements awarded to their clients.[80] Where these damages are extremely low, contingent fee attorneys may not be willing to, or possibly able to, take the case due to skewed cost-benefits.[81]

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[74] *See, e.g.*, Wilcox v. Commerce Bank of Kan. City, 474 F.2d 336, 343–44 (10th Cir. 1973) (holding that nothing in TILA indicates that class action claims were intended to be precluded).

[75] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)) (noting that there is a power disparity between an individual-discrimination claim and a group of people with the same discrimination claim); Jennifer Turner, *A Modern Day David Versus Goliath*, 37 CONN. L. TRIB. 18, 18 (2011) (discussing *Dukes* and arguing that denying class certification significantly hampers individuals' ability to obtain relief when up against a much larger and better-equipped corporation).

[76] *See* Brief for NAACP, *supra* note 22, at 3 (arguing that individuals have a variety of reasons for avoiding individual claims, including fear of retaliation or insufficient resources); Katie Melnick, *Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticism*, 22 ST. JOHN'S J.L. COMM. 755, 769 (2008) (arguing that individual claimants may lack incentive to pursue small claims against large defendants).

[77] *See* Brief for NAACP, *supra* note 22, at 3 (arguing that class action claims provide an important method by which to overcome the time and resource disparities when individuals attempt to pursue individual claims against larger defendants); Melnick, *supra* note 76, at 769 (arguing that class actions alleviate the lack of economic motivation that individual plaintiffs may feel when facing a much larger defendant).

[78] *See* Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) (noting that the basic premise of class action claims is to allow the individual claimant to surmount the disincentives related to bringing small claims).

[79] *See id.* (observing that attorneys are more likely to take a case where a number of individuals have aggregated otherwise small claims).

[80] *Mace*, 109 F.3d at 344–45; *Contingent Fee*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[81] *See Mace*, 109 F.3d at 344 (observing that class actions are meant to solve the problem of *de minimis* recoveries and their lack of incentive for an individual to bring an action by allowing for aggregation of claims such that an attorney is more likely to view the class action as worthy of their time and effort).

C. Class Action Waivers: Taking Away David's Sling

Every benefit discussed above for class action claimants represents an analogous annoyance to defendants.[82] These negative feelings have contributed heavily to the rise and current prominence of arbitration clauses as a way to avoid potentially costly class action claims.[83] This was not always the case—until the advent of the class action waiver in arbitration clauses, defendants often had no choice but to defend themselves against class action claims in traditional court and to incur the accompanying costs.[84] Many companies, however, are finding ways around these risks through the use of class action waivers in arbitration clauses.[85]

The FAA, in placing arbitration agreements on level ground with other contracts, also limited enforcement of the agreements to their terms, as is the case with other contracts.[86] While FRCP rule 23 explicitly provides for the availability of a class action claim (provided certain requirements are met), the FAA does not contain an analogous provision.[87] Therefore, consumers that are subject to arbitration clauses are not guaranteed the ability to enter into a class action if the terms of the arbitration clause do not provide as such.[88]

This limitation carries special significance in the business-consumer relationship, where the business often unilaterally controls the terms of the con-

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[82] *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 811 (2010) (stating that corporations are afraid of class actions); Michael Hiltzik, *Banks and Credit Card Companies Really Hate Class Action Lawsuits. Will Trump Help to Outlaw Them?*, L.A. TIMES (Apr. 14, 2017), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-class-action-dodd-frank-20170414-story.html [https://perma.cc/FJL9-UB3N] (observing that the financial services industry expressed significant displeasure with the Arbitration Rule).

[83] *See* Barnes, *supra* note 20, at 335 (observing that companies in the past twenty years have increasingly included arbitration agreements in their contracts); Fitzpatrick, *supra* note 82, at 813 (observing that from 2006 to 2007, district-court judges approved settlements in 688 class action suits totaling over $33 billion in payments).

[84] *See* Brief for NAACP, *supra* note 22, at 8 (arguing that class action claims play an important role in the civil rights and employment discrimination arenas); Barnes, *supra* note 20, at 335, 338 (noting that consumers often have little choice in accepting arbitration agreements and noting that consumers over a four-year period from 2008 through 2012 recovered nearly $3 billion from class action claims); Fitzpatrick, *supra* note 82, at 813 (detailing the results of the study and the awards over a two-year period to consumers involved in class action claims).

[85] *See, e.g.*, Gadomski v. Wells Fargo Bank N.A., 281 F. Supp. 3d 1015, 1021 (E.D. Cal. 2017) (granting defendant's motion to compel individual arbitration pursuant to an arbitration agreement).

[86] 9 U.S.C. § 2; CompuCredit Corp. v. Greenwood, 565 U.S. 95, 98 (2012) (holding that the FAA represents an expansive federal policy favoring arbitration, requires courts to enforce arbitration agreements according to their terms, and requires override by contrary Congressional command to deviate from the FAA).

[87] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010) (holding that absent explicit mention of class arbitration in the governing arbitration agreement parties were not compelled to submit to class arbitration). *Compare* FED. R. CIV. P. 23(a), *with* 9 U.S.C. §§ 1–16.

[88] *See Stolt-Nielsen*, 559 U.S. at 687 (holding that companies cannot be forced into class arbitration absent explicit allowance in the governing agreement).

tract governing the relationship.[89] Furthermore, these unilaterally designed contracts are often presented to consumers on a "take-it-or-leave it" basis as contracts of adhesion.[90] Consumers may feel unwilling or unable to negotiate or seek another company in these situations and thus may be forced to sacrifice their ability to pursue a class action claim.[91]

Class action waivers in arbitration agreements represent the two-fold result of companies exercising their power over their consumer contracts and seeking to avoid potentially costly class litigation or settlements.[92] A class action waiver is a term in a contract in which one or both parties forego their right to form a class.[93] Class action waivers and arbitration clauses in general, often are buried deep within complex contracts and written in typically archaic legalese.[94] Whether by design or otherwise, this placement frequently leads to situations in which consumers agree to these terms with no knowledge of the rights foregone.[95]

The backlash from the development and implementation of class-action waivers has been largely ineffective.[96] The Supreme Court has proved to be a

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[89] *See* Batya Goodman, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 319–320 (1999) (discussing contracts wherein the consumer becomes bound with no opportunity to negotiate, thus placing the terms of the contract fully in the control of the business); Philip Shuchman, *Consumer Credit by Adhesion Contracts*, 35 TEMP. L. REV. 125, 127 (1964) (discussing consumer-credit contract of adhesion and noting that once a bank or other similar company makes a uniform contract, the form and content rarely changes).

[90] *See* Goodman, *supra* note 89, at 320 (noting the take-it-or-leave-it nature of shrink-wrap contracts); Shuchman, *supra* note 89, at 131 (noting the regularity with which judgment notes and security agreements are issued on a take-it-or-leave-it basis).

[91] *See* Goodman, *supra* note 89, at 319 (noting that consumers may not even know about some shrink-wrap contracts); Shuchman, *supra* note 89, at 131 (noting several common types of contracts that are commonly used as contracts of adhesion).

[92] *See* Fitzpatrick, *supra* note 82, at 813 (observing that from 2006–2007, district-court judges approved settlements in 688 class action suits totaling over $33 billion in payments); Goodman, *supra* note 89, at 320 (noting the take-it-or-leave-it nature of shrink-wrap contracts); Shuchman, *supra* note 89, at 131 (noting the regularity with which judgment notes and security agreements are issued on a take-it-or-leave-it basis).

[93] *Class-Action Waiver*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[94] *See, e.g.*, BANK OF AMERICA TERMS, *supra* note 67, at 68 (placing a "Resolving Claims" section which includes an arbitration agreement as the last section of the agreement beginning on page 68); CHASE AGREEMENT, *supra* note 67, at 15–17 (placing an arbitration agreement on pages 15–17 of the 27 page agreement); CITIBANK AGREEMENT, *supra* note 67, at 1, 10, 52–55 (including notice of the arbitration clause on the cover page and page 10 but placing the arbitration clause itself on pages 52–55 of the 56 page agreement).

[95] *See* CFPB ARBITRATION STUDY, *supra* note 45, § 3.2, at 8 (finding that 87% of consumers interviewed that indicated that they had never entered into a consumer contract with an arbitration clause had in fact done so).

[96] *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 236 (2013) (holding that arbitration clauses are effective regardless of whether the costs of arbitration outweigh the recoverable claim); *CompuCredit*, 565 U.S. at 98 (holding that the FAA represents an expansive federal policy favoring arbitration, requires courts to enforce arbitration agreements as they would any other con-

major obstacle both in interpreting the FAA and preventing state law from usurping it.[97] California has been an especially fertile ground for these decisions, as the *Discover Bank* rule continues to bump against the FAA.[98] In 2005, in *Discover Bank v. Superior Court*, the California Supreme Court held that class action waivers in arbitration agreements were unconscionable when the waivers were in a contract of adhesion setting.[99] The United States Supreme Court in *AT&T Mobility LLC v. Concepcion*, however, concluded that the FAA pre-empted the *Discover Bank* rule in 2011.[100] Despite numerous other challenges, class action waivers remain generally enforceable in California and the rest of the nation alike.[101]

Arbitration has been lauded as a positive force in reducing costs for consumers by reducing costs for businesses using it.[102] This argument is predicated on the idea that the cost savings businesses derive from arbitration are eventually passed on to consumers through lower prices.[103] Thus, despite the criti-

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tract, and requires override by contrary congressional command to deviate from the FAA); *Concepcion*, 563 U.S. at 351 (holding that the FAA pre-empted California's *Discover Bank* rule).

[97] *See, e.g.*, *Italian Colors*, 570 U.S. at 230 (holding that the fact that arbitration costs may outweigh recovery does not eliminate a potential plaintiff's right to pursue a remedy and that therefore arbitration clauses may not be deemed unenforceable on this ground); *CompuCredit*, 563 U.S. at 975 (citing 9 U.S.C. § 2) (noting that the FAA embodies a policy that is liberally in favor of arbitration); *Concepcion*, 563 U.S. at 351 (holding that the FAA pre-empted California's *Discover Bank* rule).

[98] *See Concepcion*, 563 U.S. at 346–347 (discussing how the *Discover Bank* rule in CA interferes with arbitration and therefore with the FAA).

[99] Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

[100] *Concepcion*, 563 U.S. at 351. The Court found that *Discover Bank* interfered directly with the purpose of the FAA. *Id.* at 346. Although *Discover Bank* limited unconscionability to contracts of adhesion, the Court reasoned that this was a meaningless distinction, as all consumer contracts in a modern context are contracts of adhesion. *Id.* at 346–47; *see Discover Bank*, 113 P.3d at 1110; *see also* Carbajal v. H&R Block Tax Servs., Inc., 372 F.3d 903, 906 (7th Cir. 2004) (holding that consumer contracts are rarely negotiated term-by-term and form, take-it-or-leave-it contracts reduce costs of doing business and reduce costs for consumers).

[101] *See, e.g.*, Bernardino v. Barnes & Noble Booksellers, Inc., No. 17-CV-04570 (LAK) (KHP) 2017 U.S. Dist. LEXIS 192814, at *20, *39–*40 (S.D.N.Y. Nov. 20, 2017) (recommending granting defendant's motion to compel arbitration where plaintiffs agreed to arbitration by agreeing to the Terms of Use of the defendants website); Marcario v. Midland Credit Mgmt., No. 2:17-cv-414 (ADS)(ARL), 2017 U.S. Dist. LEXIS 175129, at *14 (E.D.N.Y. Oct. 23, 2017) (granting defendant's motion to compel arbitration and dismissing all class claims where plaintiff agreed to an arbitration agreement in his credit cardholder agreement by using his credit card); Credit Acceptance Corp. v. Vansteenburgh, No. l:17-cv-00040-GHD-DAS, 2017 U.S. Dist. LEXIS 169535, at *2, *14 (N.D. Miss. Oct. 11, 2017) (granting defendant's motion to compel arbitration and dismissing class claims where plaintiff purchased a vehicle and agreed to an arbitration clause in an electronic retail installment contract); *see also Concepcion*, 563 U.S. at 352 (holding that the *Discover Bank* rule was preempted by the FAA and reversing the Ninth Circuit's prior judgment).

[102] *See* Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254–55 (2006) (discussing the benefits of mandatory arbitration agreements to both businesses and consumers).

[103] *See id.* at 255 (noting that lower costs for businesses, over time, lead to proportionately lower prices for consumers). While the idea that arbitration yields economic benefit is ubiquitous, there exists some debate as to whether the cost-savings are a result of smaller claim amounts in arbitration

cisms, arbitration does yield important economic benefits for broad classes of consumers who potentially benefit from price reductions.[104]

D. The Passage of the CFPB Arbitration Rule and Its Repeal

As previously discussed, in July of 2017, the CFPB announced a new rule dealing with arbitration agreements.[105] This rule, which was codified as 12 C.F.R. § 1040, placed two sets of limitations on the use of arbitration agreements when employed by covered providers.[106] The rule's first limitation, and the primary subject of this Note, was on the use of arbitration clauses to prevent those subject to them from class action claims in courts.[107] Covered providers were further required to place language into their contracts detailing the limitation.[108] This limitation was introduced because of the CFPB's findings that a large number of consumers were being blocked from bringing class action claims while simultaneously failing or refusing to file individual claims or arbitration cases.[109]

The CFPB was mandated as part of Dodd-Frank to perform a study on arbitration agreements related to offering or providing consumer financial services and products.[110] The study, which focused on nine topics, was published in March 2015.[111] Based on its findings, the CFPB held several roundtable discussions with stakeholders and a small business review panel, and, in May 2016, issued its proposed rule.[112]After issuing the proposal and allowing for a comment period, the CFPB published its final rule in July 2017.[113]

(the "self-help deregulation" source), or from savings related to the reduced process costs in arbitration (the "process-cost savings" source). *Id.* at 257–58. The self-help deregulation source tends to support the argument that class action claimants recover more and thus detracts somewhat from this argument in favor of arbitration. *See id.* (discussing the self-help deregulation source and how lower awards paid out in arbitration may be both a benefit to consumers at-large and a cost to the consumers involved in the arbitration).

[104] *See id.* at 255, 277 (observing that a consensus does exist as to businesses cost-savings as a result of arbitration and, while the source of the savings may be debatable, a consensus exists that these cost-savings are eventually passed-through to consumers through price reductions).

[105] Arbitration Agreements, 82 Fed. Reg. at 33,210.

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] 12 U.S.C. § 5518(a); Arbitration Agreements, 82 Fed. Reg. at 33,210.

[111] Arbitration Agreements, 82 Fed. Reg. at 33,220; CFPB ARBITRATION STUDY, *supra* note 45, at § 1.3.

[112] Arbitration Agreements, 82 Fed. Reg. at 33,245–46. The stakeholder roundtable was made up of industry groups, banking trade associations, and consumer advocates. *Id.* at 33,220. The small business roundtable involved the Chief Counsel for Advocacy of the Small Business Administration and the Administrator of the Office of Information and Regulatory Affairs with the Office of Management and Budget as well as eighteen Small Entity Representatives. *Id.* at 33,245–46. The Small Business Regulatory Enforcement Fairness Act of 1966 mandates a small business roundtable of this

Subsection 1 of this Section lays out the process by which the CFPB determined that creating the Arbitration Rule was within its authority.[114] Subsection 2 of this Section discusses Congress's and the President's repeal of the rule and the reasons for it.[115]

1. The CFPB's Authority to Promulgate the Arbitration Rule

Under Dodd-Frank, the CFPB was empowered to regulate arbitration agreements only if the CFPB found that such regulation "was in the public interest and for the protection of consumers" (hereinafter, together, "the Standard").[116] The CFPB found the Standard to be ambiguous and therefore was obligated to interpret it as part of the issuance of the rule.[117] The interpretation required determining whether to treat the Standard as integrated or as a two-prong test.[118] The CFPB determined that treating the Standard as a two-prong test would ensure complete consideration of all applicable factors.[119] As a result, the CFPB was required to define "in the public interest" and "for the protection of consumers."[120]

The CFPB defined "in the public interest" primarily by examining its purposes and objectives under Title X of Dodd-Frank.[121] Thus, whether the regulation was sufficiently "in the public interest" required consideration of value and costs to consumers and covered persons.[122] The CFPB's interpretation also required consideration of the broader general concerns with the functioning of and possible changes in the market as a result of the regulation.[123]

Because the interpretation for "in the public interest" addressed the wide concerns under Title X, the CFPB faced a more difficult challenge in defining

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nature any time a proposed regulation may have a significant economic impact on a large number of small businesses. 5 U.S.C. § 609 (2012).

[113] Arbitration Agreements, 82 Fed. Reg. at 33,210.

[114] *See infra* notes 117–138 and accompanying text.

[115] *See infra* notes 139–145 and accompanying text.

[116] 12 U.S.C. § 5518(b); Arbitration Agreements, 82 Fed. Reg. at 33,247.

[117] Arbitration Agreements, 82 Fed. Reg. at 33,247–48.

[118] *Id.* at 33,248.

[119] *Id.* The CFPB did not break new ground in coming to this conclusion, other agencies have treated "in the public interest" and "for the protection of consumers" (the "Standard") as separate, conjunctive standards. *See, e.g.*, Verizon & AT&T Inc. v. FCC, 770 F.3d 961, 964 (D.C. Cir. 2014) (holding Section 10(a) of the Communications Act laid out 3 separate, conjunctive requirements).

[120] Arbitration Agreements, *supra* note 14, at 33,248.

[121] *See generally* 12 U.S.C. § 5511; Arbitration Agreements, *supra* note 14, at 33,248.

[122] Arbitration Agreements, *supra* note 14 at 33,249. A covered person under Dodd-Frank is a person who offers or provides any consumer financial product or service. 12 U.S.C. § 5481(6). Consumer financial products are defined broadly as financial products provided to consumers for noncommercial use. *See id.* § 5481(5) (listing all of the financial products and services that Dodd-Frank and the CFPB regulate).

[123] Arbitration Agreements, *supra* note 14, at 33,249.

"for the protection of consumers."[124] The chosen interpretation required a finding that a proposed regulation would impact deterrence or redressability of violations of financial product consumers' rights.[125] Whereas the "in the public interest" prong addressed broad, general concerns, the CFPB sought to ensure that the "protection of consumers" prong was more narrow and dealt specifically with discouraging violations and improving consumers' ability to recover in the event of a violation.[126]

Treating these prongs separately, in the CFPB's opinion, would prevent the danger of regulating arbitration agreements based only on loose public policy rationales.[127] Rather, the passage of the rule required a finding of direct and meaningful consumer impact, in both a broad sense and a narrow.[128] Furthermore, the dual-prong interpretation would ensure that the Arbitration Rule would not undercut public interest and disproportionately burden businesses as a trade-off for mildly increased protections.[129]

Pairing this legal authority with the findings from the Arbitration Study, the CFPB determined that limiting covered persons' ability to restrict class rights satisfied both prongs.[130] The CFPB found that forbidding class action waivers in arbitration agreements would better allow consumers to vindicate their rights, thus satisfying the "protection of consumers" prong.[131] Furthermore, the rule was determined to be "in the public interest" for its effect on protecting consumers' rights and because it would create more parity between providers complying with it and providers seeking to leverage arbitration agreements.[132] Additionally, the CFPB found that the rule would serve the public interest by increasing compliance with the law, balancing benefit to consumers with a relatively light burden on providers.[133]

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[124] *Id.* The CFPB normally treated the Standard as integrated and not differentiating between the two prongs. *Id.* Therefore, other regulations passed under it did not require separate interpretation and the CFPB could satisfy the Standard under Title X alone. *Id.* Here, however, because "in the public interest" was broadly defined as requiring all considerations under Title X, the CFPB had to turn elsewhere to define "for the protection of consumers." *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.* at 33,280.

[131] *Id.*

[132] *Id.* at 33,296–97. The CFPB determined that providers that relied heavily on arbitration clauses to manage liability may have had advantages in the market over those investing heavily into compliance activities. *Id.* at 33,296–97. By restricting class action waivers in arbitration agreements, the CFPB believed that some of these advantages could be eliminated. *Id.* at 33,297.

[133] *Id.* at 33,297. The CFPB recognized a degree of overlap between the two prongs. *Id.* at 33,250. The two-prong treatment, however, alleviated some risk that the standard would become too flexible and therefore subject to challenges on its validity. *Id.* at 33,249.

The final rule prevented providers of certain financial products and services from relying on pre-dispute arbitration agreements with class action waivers concerning those products or services.[134] The rule defined a provider as any person engaged in an activity within the scope of the rule.[135] Covered products and services under the rule included providing extensions of credit, providing accounts subject to TILA (i.e. deposit accounts), and a host of other financial products and services.[136] Essentially, the Arbitration Rule guaranteed consumers of covered products and services the ability to certify as a class, avoiding motions to compel individual arbitration that would otherwise prevent such certification.[137]

2. The Arbitration Rule's Reception and Repeal

The Arbitration Rule was lauded as a victory for consumers over banks and credit card companies.[138] This victory, however, was extremely short-lived as the Arbitration Rule was removed from the Code of Federal Regulations ("C.F.R.") as of November, 22, 2017.[139] Under the Congressional Review Act ("CRA"), any rule that a Federal agency proposes is subject to Congressional review.[140] Congress is empowered under the CRA to block rules by issuing a joint resolution of disapproval.[141] The United States House of Representatives passed House Joint Resolution 111 disapproving of the Arbitration Rule on July 25, 2017.[142] The United States Senate, however, deadlocked on the vote and ultimately disapproved after the tiebreaking vote from the Vice President

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[134] Arbitration Agreements Repeal, 82 Fed. Reg. at 55,500.

[135] *Id.* at § 1040.2(d)(1).

[136] *Id.* at § 1040.3; Arbitration Agreements, *supra* note 14, at 33,210.

[137] *See, e.g.*, *Gadomski*, 2017 U.S. Dist. LEXIS 213675, at *13 (granting defendant's motion to compel individual arbitration pursuant to an arbitration agreement and dismissing plaintiff's class action claim).

[138] *See* Lisa Lambert, *New Rule Requires U.S. Banks to Allow Consumer Class Actions*, REUTERS (July 10, 2017), https://www.reuters.com/article/us-usa-consumers-arbitration/new-rule-requires-u-s-banks-to-allow-consumer-class-actions-idUSKBN19V28C?il=0 [https://perma.cc/9A59-MVUU] (characterizing the Arbitration Rule as launching an impending battle over consumer rights); David Lazarus, *Banks and Credit Card Companies Can't Try to Stop You from Joining a Class Action Lawsuit—For Now*, L.A. TIMES (July 11, 2017), http://www.latimes.com/business/lazarus/la-fi-lazarus-cfpb-arbitration-20170711-story.html [https://perma.cc/NN6A-29FD] (observing that the Arbitration Rule was a reason for consumers to celebrate); Megan Leonhardt, *Consumers Notched a Big Win Against Fine Print 2 Weeks Ago. The House Just Voted to Roll It Back*, MONEY (July 25, 2017), http://time.com/money/4872474/house-votes-down-arbitration-rule/ [https://perma.cc/G5YY-KURT] (characterizing the Arbitration Rule as a "win against predatory fine print").

[139] Arbitration Agreements Repeal, 82 Fed. Reg. at 55,500.

[140] *See generally* 5 U.S.C. § 801 (2012).

[141] *Id.* §§ 801(b)(1), 802(a).

[142] Joint Resolution of Nov. 1, 2017, Pub. L. No. 115-74, 131 Stat. 1243. The House of Representatives passed this resolution by a vote of 231 to 190. *Final Vote Results for Roll Call 412*, HOUSE OF REPRESENTATIVES (July 25, 2017), http://clerk.house.gov/evs/2017/roll412.xml. [https://perma.cc/XZ9X-EQDL].

of the United States on October 24, 2017.[143] Finally, the President of the United States signed the disapproval into law on November 1, 2017, thus repealing the Arbitration Rule.[144]

As the passage of the Arbitration Rule was considered a consumer victory, its demise was considered a win for banks and other financial companies.[145] The repeal was not without its share of support in both the private and public sectors.[146] The United States Department of the Treasury ("U.S. Treasury") released a paper stating several powerful counterarguments to the Arbitration Rule.[147] Chief among these counterpoints was the potential immense costs the Arbitration Rule may impose on the market.[148] According to the U.S. Treasury's estimates, covered providers could incur upward of $2.5 billion in costs from the potential spike in class action claims.[149] The U.S. Treasury also expressed concerns about large payouts to plaintiffs' attorneys and small or nonexistent payouts to class members.[150]

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[143] Joint Resolution of Nov. 1, 2017; *Roll Call Vote 115th Congress—1st Session*, SENATE (Oct. 24, 2017), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00249 [https://perma.cc/AQY9-PZRE].

[144] Arbitration Agreements Repeal, 82 Fed. Reg. at 55,500.

[145] *See* Gail Ablow, *Trump Kills CFPB Arbitration Rule: The Little Guy Loses Again*, MOYERS & CO. (Nov. 2, 2017), http://billmoyers.com/story/trump-kills-cfpb-arbitration-rule-little-guy-loses/ [https://perma.cc/E2ML-2A9D] (referring the repeal of the Arbitration Rule as a loss for consumers); Andrew Ackerman & Yuka Hayashi, *Congress Makes It Harder to Sue the Financial Industry*, WALL ST. J. (Oct. 24, 2017), https://www.wsj.com/articles/congress-votes-to-overturn-cfpb-arbitration-rule-1508897968 [https://perma.cc/TY28-N6VQ] (discussing the repeal of the Arbitration Rule and how it will likely make it more difficult for classes of consumers to escape arbitration).

[146] *See, e.g.*, U.S. DEP'T OF THE TREASURY, LIMITING CONSUMER CHOICE, EXPANDING COSTLY LITIGATION: AN ANALYSIS OF THE CFPB ARBITRATION RULE 1–2 (2017), https://www.treasury.gov/press-center/press-releases/Documents/10-23-17%20Analysis%20of%20CFPB%20arbitration%20rule.pdf [https://perma.cc/D4RZ-TGWE] (presenting several counterarguments to and negative consequences arising from the passage of the Arbitration Rule); Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Study and Critique* 2 (Mercatus Ctr. Working Paper, 2015), https://www.mercatus.org/system/files/Johnston-CFPB-Arbitration.pdf [https://perma.cc/FL97-LAK3] (arguing that the Arbitration Study failed to consider significant data from arbitration settlements, public policy questions, and high payouts to plaintiffs' attorneys).

[147] *See generally* U.S. DEP'T OF THE TREASURY, *supra* note 146, at 1–2 (presenting several counterarguments to and negative consequences arising from the passage of the Arbitration Rule).

[148] *Id.* at 1.

[149] *Id.* Analogously to cost savings from arbitration flowing through to consumers, increased costs of class action claims are likely to lead to increased consumer prices in general. *See id.* at 11 (discussing an Office of the Comptroller of Currency study in response to the Arbitration Study that found that there was an 88% chance that the price of credit would increase as a result of the Arbitration Rule); Ware, *supra* note 103, at 259 (observing that higher awards may lead to higher prices).

[150] U.S. DEP'T OF THE TREASURY, *supra* note 147, at 1–2. The U.S. Treasury also noted: (1) even when class actions provide relief to class members, few consumers are actually interested in recovering; (2) the CFPB did not adequately explore the possibility of enhanced disclosures related to arbitration agreements; (3) the CFPB, during the Arbitration Study, did not consider the number or frequency of meritless class action claims; and (4) the CFPB claimed that the rule would improve compliance with regulations but presented no evidence supporting that claim. *Id.*

Consumers subject to arbitration clauses remain in a similar position today as they were in only a few months prior.[151] Nevertheless, the Arbitration Rule, despite its repeal, appears to have put in motion some change, as some companies have begun to alter their arbitration policies.[152] Other companies, however, continue to seek to enforce arbitration agreements already in place.[153]

III. CLASS ACTION WAIVERS HURT CONSUMERS TO BENEFIT BANKS

Class action claims are an important mechanism to ensure consumers can defend their interests against much larger banks with more robust resources.[154] Class action waivers create a unique detriment in the consumer banking context and threaten to prevent consumers from recovering fully when injured and from holding their banks accountable in the public eye.[155] Section A of this part discusses the intersection of consumer financial products, contracts of adhesion, and arbitration agreements and the results of the Arbitration Study, which showed that consumers rarely exercised their right to individual arbitration.[156] Further, it argues that the Arbitration Rule played an important role in matching consumer expectations about their rights related to their checking accounts with the legal effect of the agreements.[157] Section B of this part discusses the results of the Arbitration Study in terms of plaintiff recovery through arbitration and class action claims.[158] It further argues that class action claims lead to better outcomes for plaintiffs than do individual arbitration proceedings.[159] Section C of this part discusses the importance of public account-

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[151] *See* Joint Resolution of Nov. 1, 2017 (expressing displeasure with the Arbitration Rule and suggesting the CFPB return to the *status quo ante*).

[152] *See* Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html [https://perma.cc/GH46-53UD] (detailing that Microsoft removed arbitration agreements from employee contracts).

[153] *See* David Dayen, *The CEO of Wells Fargo Might Be in Big, Big Trouble*, THE NATION (Jan. 3, 2018), https://www.thenation.com/article/the-ceo-of-wells-fargo-might-be-in-big-big-trouble/ [https://perma.cc/9CA9-G9KG] (detailing how Wells Fargo, as part of its defense in the ongoing case, *Mitchell v. Wells Fargo Bank*, filed a motion to compel arbitration against the plaintiffs—individuals affected by the fake accounts scheme).

[154] *See* Barnes, *supra* note 20, at 340 (arguing that individual consumers do not commonly pursue claims in arbitration and that when they do their recovery is generally small); Caitlin Toto, Note, *Sharing Economy Inequality: How the Adoption of Class Action Waivers in the Sharing Economy Presents a Threat to Racial Discrimination Claims*, 58 B.C. L. REV. 1355, 1372 (2017) (arguing that class action waivers can limit the ability of those affected by racial discrimination to advocate for their rights adequately in court).

[155] *See* Barnes, *supra* note 20, at 338–39 (arguing that arbitration's largely confidential nature detracts from the deterrent effects of lawsuits and therefore allows companies to sidestep accountability for their wrongful actions).

[156] *See infra* notes 163–187 and accompanying text.

[157] *See infra* notes 163–187 and accompanying text.

[158] *See infra* notes 188–207 and accompanying text.

[159] *See infra* notes 188–207 and accompanying text.

ability and its deterrent effect on banks, and argues that class actions play a large role in ensuring such public accountability.[160] Section D of this part confronts counterarguments that class actions disproportionately compensate plaintiffs' attorneys and that deterrence theory is an inadequate justification for allowing easier access to the class forum.[161]

A. Do Consumers Exercise Their Arbitration Rights?

In the United States, as of 2015, 93% of households utilized a bank account.[162] Many different banks held those deposits.[163] The CFPB found in the Arbitration Study, however, that the 100 largest depository institutions held nearly 60% of all funds deposited in checking accounts.[164] Of those funds, nearly half are subject to arbitration agreements.[165] More concerning is the finding that nearly all of the deposited funds that were subject to arbitration clauses expressly did not allow for class-action claims or class arbitration.[166]

Inclusion of arbitration agreements in contracts, alone, would not be problematic were consumers better-equipped to negotiate on the terms of their bank accounts.[167] Often, however, consumers trying to open a checking account are presented agreements as "take-it-or-leave-it" contracts and therefore feel pressured to take, rather than leave, them.[168] Faced with this situation, consumers often agree to arbitration clauses of which they were unaware or that they do not understand.[169] To paint this picture starkly, consumers seeking a checking account are often handed form contracts that they do not understand but feel pressured to sign without negotiation.[170] These agreements may or may not

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[160] *See infra* notes 208–228 and accompanying text.

[161] *See infra* notes 229–252 and accompanying text.

[162] Martin J. Gruenberg, Chairman, Fed. Deposit Ins. Corp., Remarks at the FDIC 16th Annual Bank Research Conference, FED. DEPOSIT INS. CORP. (Sept. 8, 2016), https://www.fdic.gov/news/news/speeches/spsep0816.html [https://perma.cc/HE7S-SX5X].

[163] *See* FED. DEPOSIT INS. CORP., STATISTICS AT A GLANCE AS OF DECEMBER 31, 2017 (2017), https://www.fdic.gov/bank/statistical/stats/2017dec/fdic.pdf [https://perma.cc/7264-V2BN] (reporting that as of December 31, 2017 there were 5,670 FDIC-insured banks in the United States).

[164] CFPB ARBITRATION STUDY, *supra* note 45, § 2.3.2.

[165] *Id.*

[166] *See id.* § 2.5.5 (noting that 88% of funds subject to an arbitration clause were also subject to class action waivers).

[167] *See* Barnes, *supra* note 20, at 335–36 (arguing that providers of financial products and services rely on the fact that consumers and employees' ability to negotiate form agreements including arbitration clauses is severely limited).

[168] *Id.*

[169] *See* CFPB ARBITRATION STUDY, *supra* note 45, § 3.1 (reporting that no consumer interviewed said that dispute-resolution procedures such as arbitration played a role in their financial decisions, and reporting that more than half of consumers interviewed indicated that they did not know whether they had agreed to binding individual arbitration connected with their credit cards).

[170] *See* Barnes, *supra* note 20, at 335–36 (discussing the prevalence of contracts of adhesion in the consumer financial products and services context); *see also* CFPB ARBITRATION STUDY, *supra*

contain an arbitration clause, but those that do almost certainly deny that consumer the right to join a class action.[171]

This phenomenon would be less concerning if it was supported by robust data showing consumers bringing a large number of arbitration claims.[172] Available data suggests that this is not the case relative to litigation claims.[173] Of the approximately 1,850 arbitration claims studied, more than 1,400 were filed either by a company alone or jointly by a company and a consumer.[174] This statistic shows that consumers acting alone were vastly in the minority of arbitration claims filed in the period studied.[175] Of the claims filed, nearly all were for more than $1,000.[176] Thus, it appears that consumers both rarely filed individual arbitration claims and only did so when the claims were for a substantial amount of money.[177]

Consumers appear to favor litigation over arbitration and, in some cases, mistakenly believe that agreeing to arbitration does not restrict their right to

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note 45, § 3.1 (reporting that no consumer interviewed said that dispute-resolution procedures such as arbitration played a role in their financial decisions, and reporting that more than half of consumers interviewed indicated that they did not know whether they had agreed to binding individual arbitration connected with their credit cards).

[171] *See* CFPB ARBITRATION STUDY, *supra* note 45, § 2.5.5 (stating that of the checking account funds subject to arbitration clauses, 88% were also barred from class action claims or class arbitration).

[172] *See* Richard Cordray, Director, CFPB, Prepared Remarks at Arbitration Field Hearing (Mar. 10, 2015), http://www.consumerfinance.gov/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing/ [http://perma.cc/3DVN-29VB] [hereinafter Cordray Remarks] (observing that consumers did not appear to be pursuing arbitration proceedings).

[173] *Compare* CFPB ARBITRATION STUDY, *supra* note 45, § 1.4.3 (detailing the CFPB findings on incidence of arbitration proceedings, and reporting that between 2010 and 2012, nearly 1,850 disputes were filed), *with id.* § 6.2.1 (detailing the CFPB findings on incidence of individual and class litigation claims and reporting that between 2010 and 2012 consumers filed more than 4,000 individual and class action claims). The CFPB collected data across six different financial products for arbitration claims. *Id.* § 1.4.3. The products studied were: credit cards, checking accounts/debit cards, payday loans, prepaid cards, private student loans, and auto loans. *Id.* For litigation claims, the CFPB collected data related to five products: credit cards, checking accounts/debit cards, prepaid cards, payday loans, and private student loans. *Id.* § 6. For class litigation, the CFPB also collected data related to automobile loans. *Id.*

[174] *Id.* § 1.4.3. The CFPB limited its scope to arbitration claims filed with the Arbitration Association of America ("AAA"). *Id.* § 5.1. The CFPB noted that the AAA is employed in the vast majority of consumer-financial arbitration cases and thus was comfortable examining data based solely on cases filed with the AAA. *Id.*

[175] *See id.* § 1.4.3. (finding that only just over four hundred claims per year in the study were filed by consumers alone).

[176] *See id.* (reporting that claims involving less than $1,000 accounted for fewer than twenty-five claims per year of the study).

[177] *See id.* (reporting relatively small numbers of arbitration claims filed by consumers alone and small number of claims filed where the amount in dispute was less than $1,000); *see also* Cordray Remarks, *supra* note 167 (observing that the results of the Arbitration Study indicate that consumers did not feel that small claims justified pursuing arbitration proceedings).

litigate disputes.[178] Consumer interests would be better served and substantial confusion avoided were the Arbitration Rule still in place.[179] The Arbitration Rule would guarantee to consumers the ability to bring a class action claim.[180] Consumers would thus have unrestricted access to their dispute resolution forum of choice, even where their claims individually are relatively small or otherwise seem unworthy of pursuit.[181] The Arbitration Rule would also close the gap between consumers' expectations about their rights against financial products providers and reality when they are subject to arbitration clauses.[182] Consumers' ability to access information is a key aspect of robust consumer protection.[183] Informed consumers are better-able to make decisions that are in line with their preferences.[184] One of the CFPB's foundational goals is ensuring that consumers are empowered with information necessary to make financial decisions.[185] The Arbitration Rule, therefore, was and would be a significant step toward accomplishing this goal in the consumer banking market.[186]

[178] *See* CFPB ARBITRATION STUDY, *supra* note 45, § 3.1 (finding that more than one-third of consumers interviewed whose credit card agreements included an arbitration clause believed that they would be able to sue their credit card provider in court); Barnes, *supra* note 20, at 338 (observing that where consumers have the option to opt out of a class action claim in favor of arbitration they almost always elect to remain part of the class action claim).

[179] *See* CFPB ARBITRATION STUDY, *supra* note 45, § 3.1 (finding that more than one-third of consumers interviewed whose credit card agreements included an arbitration clause believed that they would be able to sue their credit card provider in court); Barnes, *supra* note 20, at 338 (observing that where consumers have the option to opt out of a class action claim in favor of arbitration they almost always elect to remain part of the class action claim). The Arbitration Rule would prevent providers from precluding consumers from class action disputes simply on the grounds that the consumers agreed to an arbitration clause. *See* Arbitration Agreements, 82 Fed. Reg. 33,210, 33,210 (July 19, 2017) (to be codified at 12 C.F.R. § 1040) (preventing providers from blocking consumer class action claims in court by way of arbitration clauses in consumer agreements).

[180] Arbitration Agreements, 82 Fed. Reg. at 33,210.

[181] *See id.* (prohibiting providers from blocking consumer class action claims); Cordray Remarks, *supra* note 172 (observing that data showing small numbers of arbitration claims filed by consumers alone and the relatively large size of arbitration claims suggests that individual consumers with claims under $1,000 do not see individual arbitration as worth the time and money).

[182] *See* CFPB ARBITRATION STUDY, *supra* note 45, § 3.1 (finding that more than one-third of consumers interviewed whose credit card agreements included an arbitration clause believed that they would be able to sue their credit card provider in court); Barnes, *supra* note 20, at 338 (observing that where consumers have the option to opt out of a class action claim in favor of arbitration they almost always elect to remain part of the class action claim).

[183] *See generally* NATALI HELBERGER, FORM MATTERS: INFORMING CONSUMERS EFFECTIVELY (2013), https://web.archive.org/web/20140708062650/http://www.ivir.nl/publications/helberger/Form_matters.pdf [https://perma.cc/J4R9-PJE7] (studying consumer information and its role in consumer protection and policy).

[184] *See id.* (asserting that consumer information is important in part because it decreases informational discrepancies which enables consumers to make decisions that fit more closely with their aims).

[185] *See* 12 U.S.C. § 5511(a) (2012) (detailing the purpose of the CFPB and its role in ensuring, among other goals, transparency in the consumer-financial-products markets); *id.* § 5511(b)(1), (5) (detailing the objectives of the CFPB including providing consumers with timely and understandable information to make responsible decisions about financial transactions and ensuring the transparent operation of markets for consumer financial products); *About Us*, CONSUMER FIN. PROT. BUREAU,

B. Class Action's Role in Ensuring Fair Recovery, Even on Small Claims

Class action claims play an important role in ensuring that consumers injured by their banks have the best opportunity for recovery and the best chance of recovering fully.[187] As discussed above, consumers rarely bring individual arbitration claims, especially where the amount in dispute is small.[188] When consumers did bring arbitration claims they tended to fare poorly both in frequency of favorable outcomes and amount of award.[189] The CFPB's Arbitration Study examined recoveries for plaintiffs engaged in a sample of class action settlements and in a sample of cases that went to individual arbitration.[190] Class action settlements yielded higher total recoveries over the same two-year period than did claims that went through individual arbitration.[191]

The CFPB found that over a two-year period arbitrators issued decisions in only 158 cases in which a consumer filed an affirmative claim.[192] Of these cases, only thirty-two yielded results that were favorable to the consumer.[193] Even when the arbitrators in these cases decided in favor of the consumer, the consumers were awarded cents on every dollar claimed.[194] Turning to both affirmative claims and disputed debts, the CFPB found that consumers in 2010 and 2011 recovered, in total, less than $175,000 in damages and less than $190,000 in debt forbearance.[195]

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https://www.consumerfinance.gov/about-us/the-bureau/ [https://perma.cc/9XCP-2M8F] (discussing the CFPB's purposes and objectives).

[186] *See* Arbitration Agreements, 82 Fed. Reg. at 33,210 (prohibiting companies from enforcing binding individual arbitration agreements to block consumer class actions and thus closing the information gap between consumers' expectations of their rights and reality).

[187] *See* Barnes, *supra* note 20, at 338 (examining the Arbitration Study and the results); Sternlight, *supra* note 20, at 106 (noting that class actions provide a chance for consumers to bring procedurally difficult cases where individual arbitration may prevent such claims).

[188] *See supra* notes 162–181 and accompanying text.

[189] *See* CFPB ARBITRATION STUDY, *supra* note 45, § 5.2.2 (detailing outcomes for consumers in arbitration claims).

[190] *Id.* §§ 8.1, 8.4.

[191] *Compare id.* § 5.2.2 (finding that consumers in individual arbitration from 2010 to 2011 recovered less than $175,000 in cash relief and less than $195,000 in debt forbearance relief), *with id.* § 8.4 (finding that consumers involved in class actions between 2010 and 2011 recovered nearly $900 million in gross relief).

[192] *Id.* § 5.2.2. As noted above, the CFPB's study was limited to cases filed with the American Arbitration Association because the CFPB determined that the AAA handled a significant majority of consumer arbitration claims in the time period of the study. *Id.* § 5.1. The CFPB differentiated between affirmative claims—claims in which a consumer was asserting injury—and arbitration claims based solely on disputed debts. *See id.*

[193] *Id.* § 5.2.2.

[194] *See id.* The median claim amount in the cases in which the arbitrator decided for the consumer was $13,000. *Id.* The median award amount, however, was $2,700. *Id.* Consumers in these cases received, on average, fifty-seven cents on each dollar claimed. *Id.*

[195] *Id.* § 1.4.3. The CFPB differentiated between affirmative claims and debt dispute claims. *Id.* § 5.1 n.11. A debt dispute claim is a claim in which the arbitrator award takes the form of debt relief

These recovery totals pale in comparison to recoveries from class action settlements.[196] The CFPB studied 419 consumer financial class action settlements between 2008 and 2012 and found that at least 350 million class litigants recovered $2.7 billion in gross relief.[197] Of these settlements, 178 occurred in 2010 and 2011.[198] These settlements encompassed approximately 33 million consumers and awards of $872 million in gross relief.[199] This data paints a clear picture showing that consumers who are allowed to join class action claims experience greater incidence of positive outcomes as well as greater amounts of relief.[200]

The statistics discussed above indicate that, while gross relief is significant in class action settlements, recovery per member of the class is small.[201] The comparison is, admittedly, somewhat comparing apples to oranges.[202] As previously discussed, however, one important feature of the class action claim is that it empowers individuals with otherwise small claims to assert their rights.[203] Where a bank has inflicted an injury on its consumers, it should be required to remedy that injury, despite its relatively minor value to the individual.[204] Forcing consumers with small claims into arbitration is likely to significantly diminish their likelihood of pursuing their claims.[205] Ensuring that consumers have access to class action claims, therefore, is an integral aspect of

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or forbearance. *Id.* An affirmative claim is a claim in which the arbitrator award takes the form of monetary relief. *Id.*

[196] *See id.* § 8.1 (detailing the CFPB's findings related to class action claim recovery amounts).

[197] *Id.* The CFPB utilized a sample of 419 settlements. *Id.* Of these 419 classes, the CFPB could determine approximate class size in only 329 settlements. *Id.* The figure of 350 million class litigants was missing data from 90 class settlements and, therefore, understated the actual number of class litigants who were granted recovery. *See id.*

[198] *Id.* § 8.3.1.

[199] *Id.* §§ 8.3.2, 8.3.3.

[200] *Compare id.* § 5.2.2 (detailing relief granted in individual consumer arbitration claims), *with id.* §§ 8.3.1, 8.3.2, 8.3.3 (detailing relief granted in class action settlements).

[201] *See id.* § 8.1 (reporting figures for both total class claimants and total cash and in-kind relief). Dividing the total amount of relief granted ($2.7 billion) by the total number of class members (350 million) yields a result of $7 per class members. *See id.*

[202] *See* Arbitration Agreements, 82 Fed. Reg. at 33,241–42 (criticizing the Arbitration Study for purportedly comparing arbitration awards to class action settlements on an apples-to-apples basis, despite various differences in the data points presented and the time period for each sample).

[203] *See* Brief for NAACP, *supra* note 22, at 3 (arguing that individuals have a variety of reasons for avoiding individual claims, including fear of retaliation or insufficient resources); Melnick, *supra* note 77, at 769 (arguing that class actions alleviate the lack of monetary motivation that individual plaintiffs may feel when facing a much larger defendant).

[204] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF THE LAW 349–50 (2007) (arguing that the most important point of litigation is that the entity that caused an injury is confronted with the costs of the violation to achieve the allocative purpose of the suit).

[205] *See* CFPB ARBITRATION STUDY, *supra* note 45, § 1.4.3 (detailing the very small number of arbitration claims brought by individual consumers and the likewise very small number of arbitration claims brought where the claim is for less than $1,000).

ensuring complete consumer financial protection and providing maximum opportunity for recovery in the event that an injury occurs.[206]

C. Deterrence Theory: Dodging Public Accountability Behind Arbitration's Closed Doors

One of the primary benefits of bringing claims in a court is the deterrent effect that the courtroom's visibility has on those who risk entering it.[207] While parties to litigation may request confidentiality on some information, generally, evidence related to federal litigation is presumptively open to public view.[208] Conversely, matters in arbitration are afforded a significantly higher degree of privacy, though not full confidentiality.[209] A significant deterrent force is lost where banks can reliably count on arbitrating individual claims with little-to-no-fear of class action claims in open court.[210]

It is a foundational concept of law that bringing claims in court acts as a deterrent against similar wrongful acts in the future.[211] Where a judge has handed down a decision affixing liability to a wrongdoer, a clear message is sent to similar entities—should you engage in this type of conduct, you risk liability too.[212] The dissemination of this message relies heavily on the publicity of lawsuits.[213]

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[206] *See* Arbitration Agreements, 82 Fed. Reg. at 33,210 (prohibiting providers of financial products and services from enforcing arbitration clauses with class action waivers to block consumers from entering into class action claims, thus granting them access to the judicial forum).

[207] *See* Myriam Gilles, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*, *in* FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT, *supra* note 60, at 7, 17 (arguing that the social benefits of providing open access to litigation in courts include, critically, deterrence).

[208] City of Greenville v. Syngenta Crop Prot., LLC, 764 F.3d 695, 697 (7th Cir. 2014) (quoting *In re* Specht, 622 F.3d 697, 701 (7th Cir. 2010)).

[209] *See* Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1211 (2006) (arguing that arbitration is a cloistered process, and that although information revealed during arbitration *may* become public, it is not *presumed* public as is information revealed in federal court); Samuel Estreicher & Steven C. Bennett, *The Confidentiality of Arbitration Proceedings*, 240 N.Y.L.J., Aug. 13, 2008, http://www.jonesday.com/files/Publication/3c7c5ff7-ec4a-4b01-979a-6960d29c663f/Presentation/PublicationAttachment/58f159e4-8b12-4012-9532-241147d2b4c9/EstreicherBennett_NYLJ_081308.pdf [https://perma.cc/2X9V-9H28] (discussing Rule 23 of the American Arbitration Association (AAA) which mandates that the arbitrator and the AAA protect the privacy of arbitration proceedings).

[210] *See* Gilles, *supra* note 208, at 17 (arguing that arbitration prevents legal norms from adequate publication such that deterrence is practically a non-factor).

[211] *See id.* (arguing that it is nearly beyond debate that claims brought in court serve as deterrents against similar wrongful conduct in the future); Andrew Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 183 (2011) (arguing that cases that result in clear statements of the law or legal principles have a better deterrent effect than those that do not).

[212] *See* Popper, *supra* note 211, at 183 (stating that any case at common law carries the possibility of articulating a legal norm or principle and, therefore, carries a deterrent effect).

[213] *See* Gilles, *supra* note 208, at 17 (stating that litigation's deterrent effect arises in primarily from publicity); Popper, *supra* note 212, at 199 (stating that, even in the absence of a judicial opinion,

Publicly published judicial opinions serve the function of creating legal norms and precedents with weight.[214] Where an opinion has been published there is no defense of ignorance, the public is on notice that the legal system has considered certain conduct and determined that it should not be condoned.[215] In doing so, the common law shapes behavior to fit what is considered lawful.[216] Arbitration, conversely, functions in nearly the opposite fashion.[217] Arbitration represses the deterrent effect of judicial opinions both by moving proceedings behind largely closed doors and, as previously discussed, deterring some claims from ever being brought.[218] No arbitrators require keeping a record of proceedings before them.[219] Arbitrators are generally not required to explain the reasoning behind their decisions.[220] In fact, these practices detract from the very attributes that draw companies to arbitrators in the first place.[221]

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conduct that could serve as the basis for civil liability, once known to the public, can change a market on its own).

[214] *See* Gilles, *supra* note 208, at 17 (observing that legal standards and norms require publicity to have an effect on behavior, and that lawsuits provide for this publicity).

[215] *See id.* (noting that once a norm or precedent obtains publicity it may then begin to influence behavior).

[216] *See id.* (arguing that litigation's deterrent effect relies heavily on publicity and that public dissemination of judgments is necessary for those judgments to affect behavior).

[217] *See, e.g.*, Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to That of the Rest of the World*, 56 U. MIAMI L. REV. 831, 835 (2002) (noting that an important aspect of arbitration is the elimination of the consumer's or employee's right to advocate for his or her rights in front of a judge and jury and therefore preventing litigants from affecting precedent in the public eye).

[218] *See* Schmitz, *supra* note 209, at 1211 (arguing that arbitration is a closed process, and although information revealed during arbitration *may* become public, it is not *presumed* public as is information revealed in federal court); Estreicher & Bennett, *supra* note 209 (discussing Rule 25 of the American Arbitration Association (AAA) which mandates that the arbitrator and the AAA maintain the privacy of arbitration proceedings); *see also* CFPB ARBITRATION STUDY, *supra* note 45, § 1.4.3 (observing that consumers rarely file arbitration claims independently, and almost never file arbitration claims for less than $1,000).

[219] *See, e.g.*, United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) (holding that arbitrators are not required to write opinions). The Supreme Court of the United States observed that arbitrators are under no obligation to the courts to explain their decisions, and that requiring otherwise may cause arbitrators to cease keeping records of their decisions at all. *Id.* The implication here is that the arbitrator would be within his or her rights to do so, especially if the court were to attempt to place requirements on arbitral opinions. *See id.*; *see also* AM. ARBITRATION ASS'N COMMERCIAL R. 28(a) (providing that one party may arrange for a stenographer to keep a record provided that party pays the costs associated); *id.* R. 28(b) (forbidding any means of recording the proceedings other than a stenographer under Rule 28(a) and subject to agreement among the parties and the arbitrator).

[220] *United Steelworkers of Am.*, 363 U.S. at 598.

[221] *See* AM. ARBITRATION ASS'N COMMERCIAL R. 25 (requiring that arbitrators and the AAA must maintain the privacy of hearing unless another body or law allows publication). AAA Commercial Rule 25 further restricts attendance at arbitration hearings to parties with direct interest in the arbitration. *Id.*

Arbitration proceedings do not, like lawsuits and judicial decisions, become woven into a publicly-disseminated framework dictating how entities interact lawfully.[222] Because of this, arbitration proceedings lose their deterrent effect and consumers may lose their ability to recognize what types of actions to which they should or should not be subject.[223] Individual arbitration is a poor substitute for class action litigation on the deterrence front.[224] Where trials and judicial decisions disseminate clear, publicized messages about what behavior is acceptable, arbitration and its closed doors represent the chance to cover up mistakes cheaply and efficiently for companies wishing to avoid public rebuke.[225] Consumers' interests are best advocated and represented when interference with them is placed in the public eye.[226] While the courtroom may not be a perfect forum, it is far closer to it than the cloistered arbitration room.[227]

D. Responding to Criticisms of Plaintiffs' Attorneys and Deterrence Theory Shortcomings

There are several arguments that the class action waiver is not as detrimental to financial products consumers as the CFPB claimed. [228] This section will address the argument that freedom to bring class action claims is not in *consumers'* interests, but rather in their attorneys' interests.[229] This section will also address the argument that "deterrent effect" is too difficult to predict or quantify to justify providing free access to the courts to class action claimants.[230]

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[222] *See* Gilles, *supra* note 208, at 18 (observing that arbitration decisions are not made part of a publicly available judicial history or common law).

[223] *Id.*

[224] *See id.* at 19 (arguing that the rise of arbitration correlates with a downward trend in public accountability for companies in every sector).

[225] *Compare* Gilles, *supra* note 208, at 17 (stating that litigation's deterrent effect arises in large part from publicity), *and* Popper, *supra* note 212, at 199 (stating that, even in the absence of a judicial opinion, conduct that could serve as the basis for civil liability, once known to the public, can change a market on its own), *with United Steelworkers of Am.*, 363 U.S. at 598 (holding that arbitrators are under no obligation to record opinions or explain decisions to the court), *and* AM. ARBITRATION ASS'N COMMERCIAL R. 25 (requiring that arbitrators and the AAA must maintain the privacy of hearing unless the law provides otherwise).

[226] *See* Popper, *supra* note 212, at 183 (stating that any case at common law carries the possibility of articulating a legal norm or principle and, therefore, has a deterrent effect).

[227] *See* Gilles, *supra* note 208, at 18 (observing that criticisms of deterrence related to quantifying and accounting for variables are well-founded, but arguing that arbitration lacks deterrent effect whatsoever, whereas litigation reliably has some baseline deterrent effect).

[228] *See infra* notes 232–252 and accompanying text.

[229] *See infra* notes 232–242 and accompanying text.

[230] *See infra* notes 243–252 and accompanying text.

1. The Plaintiffs' Attorney Payday Problem

One of the primary counterarguments against class action claims is that class action settlements and awards generally result in proportionately little pay to actual claimants and large paychecks for plaintiffs' attorneys.[231] Plaintiffs' attorneys have come under question in terms of whether their interest in maximizing fees aligns with their clients' interests.[232] This problem is especially important in cases where the attorney brings and argues a claim with little or no interaction with any of the plaintiffs, named or otherwise.[233] This conflict of interest leads to concerns over plaintiffs' attorneys agreeing to class settlements that inadequately compensate class plaintiffs while lining the attorneys' pockets.[234]

The CFPB found, however, that of the studied class action settlements, only 16% of relief granted went toward paying attorneys' fees, meaning consumers retained 84% of relief granted.[235] While $424 million is no small sum of money, the compensation of plaintiffs' attorneys in this manner is often justified by the significant risk incurred in taking class action cases.[236] Plaintiffs' attorneys working on a contingent fee basis incur significant costs in trying class action suits while also incurring the risk of nonpayment in the event of a loss.[237] Contingent fee attorneys further provide access to the judicial forum where upfront costs may otherwise bar consumers with scarce resources, even pooled together.[238]

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[231] *See* U.S. DEP'T OF THE TREASURY, *supra* note 147, at 1 (arguing that the Arbitration Rule will transfer an additional $330 million over five years from financial products and services providers to plaintiffs' attorneys).

[232] *See, e.g.*, Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014) (noting the conflict of interest that arises between plaintiff's counsel, which is generally interested in fees, and consumer class-members, who are interested in the award to the class).

[233] *Id.*

[234] *See id.* (quoting Eubank v. Pella Corp., 753 F.3d 718, 720 (7th Cir. 2014)) (remarking on the concern that class counsel and defendants may work together to come to an agreement, backed by both plaintiffs' counsel and the defendant, that inadequately compensates the class but handsomely rewards the attorney); DEBORAH R. HENSLEY ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 79 (2000), https://www.rand.org/content/dam/rand/pubs/monograph_reports/2005/MR969.1.pdf [https://perma.cc/AXG8-HQPU] (arguing that the fear that plaintiffs' attorneys may, in the absence of oversight by actual clients, negotiate for settlements that serve their interests more so than their clients' interests).

[235] CFPB ARBITRATION STUDY, *supra* note 45, § 8.3.5.

[236] *See* Arbitration Agreements, 82 Fed. Reg. at 33,401 (discussing the balancing between contingent fee basis plaintiffs' attorneys and defense attorneys who incur comparatively less risk from being paid hourly). The figure of $424 million used represents class action claimants' total recovery across the studied cases in the Arbitration Study ($2.7 billion) multiplied by the percentage of those awards paid to plaintiffs' attorneys (sixteen percent). CFPB ARBITRATION STUDY, *supra* note 45, §§ 8.1, 8.3.5.

[237] *See* Arbitration Agreements, 82 Fed. Reg. at 33,401

[238] *See* Daniel L. Rubenfeld & Suzanne Scotchmer, *Contingent Fees for Attorneys: An Economic Analysis*, 24 RAND J. ECON. 343, 343 (1993), http://www.jstor.org.proxy.bc.edu/stable/pdf/2555962.

This argument further ignores the benefit derived from empowering consumers with small claims to form a class and therefore enabling them to assert their rights in court.[239] Recovery on a per consumer basis will inherently be in small amounts where the total claim is the result of an aggregation of hundreds or thousands of small claims.[240] Providing access to the judicial forum for small claims is an important measure toward ensuring that consumers are protected equally and that recovery is possible even for slight injuries.[241]

2. Deterrence Lacks Quantifiability and Predictability

One popular counterargument is to point to the difficulty of measuring the "deterrent effect" and the inconsistent and uncertain effect litigation can, in fact, have in terms of deterrence.[242] The prevalence of settlements particularly exacerbates this problem as settlement terms are often kept closely under lock and key.[243]

These arguments, however, fail on two fronts—they fail to rebut litigation's inherent deterrent effect and they fail to show how arbitration can function as an acceptable substitute.[244] While the argument may continue as to the degree of deterrence lawsuits offer, this argument presupposes that litigation

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pdf?refreqid=excelsior:c84fe2fe7c6f32d56a6610370f442fbf [https://perma.cc/D7ZW-6KC8] (observing that a central argument by proponents for contingent fees is the removal of barriers to entering the judicial forum).

[239] *See* Brief for NAACP, *supra* note 22, at 3 (arguing that individuals have a variety of reasons for avoiding individual claims, including fear of retaliation or insufficient resources); Melnick, *supra* note 77, at 769 (arguing that class actions alleviate the lack of monetary motivation that individual plaintiffs may feel when facing a much larger defendant).

[240] *See* DEP'T OF THE TREASURY, *supra* note 147, at 4 (observing that, according to the Arbitration Study, average payment per class member was $32.35). *But see* CFPB ARBITRATION STUDY, *supra* note 45, § 8.1 (observing that over five years, more than 350 million class action claimants were awarded $2.7 billion in gross cash and in-kind relief).

[241] *See* CFPB ARBITRATION STUDY, *supra* note 45, § 1.4.3 (finding that nearly all arbitration filings studied were either a company filing, or a consumer filing with a company and finding that almost all arbitration claims were for amounts greater than $1,000).

[242] Gilles, *supra* note 208, at 18 (observing that arbitration decisions are not made part of a publicly available judicial history or common law).

[243] *See, e.g.*, CFPB ARBITRATION STUDY, *supra* note 45, § 6.6.1 (finding that judgments on a class-wide basis occurred in less than one percent of cases studied). *But see id.* § 8.1 (observing that the Arbitration Study successfully determined the form and amount of total relief in 100% of class action settlements reviewed).

[244] *See* Gilles, *supra* note 208, at 18 (observing that although anti-lawsuit reformers are correct in stating deterrence resulting from litigation is hard to quantify and qualify, making such an argument presumes that litigation has a deterrent effect, and arguing that arbitration, as a substitute, has absolutely no deterrent effect).

has a deterrent effect.[245] Arbitration, on the other hand, lacks most of the attributes that contribute to litigation's deterrence.[246]

Litigation has also been attacked as inefficient, whereas arbitration is heralded as expeditious and cost-effective.[247] The question remains whether the deterrent end of litigation justifies the admittedly exhaustive means.[248] The added threat of governmental enforcement and active regulatory releases by regulatory bodies like the CFPB further bolsters this argument, especially in the consumer protection context.[249]

Historically, however, governmental enforcement, regulatory activism, and private litigation have worked in concert to maximize both deterrence and detection.[250] Where threats come from both consumers and governmental forces, companies that would otherwise feel temptation to toe the line may be deterred more holistically than if either force existed and the other did not.[251]

IV. FINDING THE MIDDLE: A PROPOSAL TO SUBSTITUTE CLASS ACTION WAIVERS WITH ALLOWABLE CLASS ARBITRATION

Without reform to the way class action waivers are implemented in the consumer financial products market, injured consumers will continue to struggle to collectively assert their rights in any forum, as Lawrence and his family

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[245] *See* Popper, *supra* note 212, at 183 (observing that every case at common law has at least the potential to create or reinforce a legal norm or precedent and therefore exert a deterrent effect).

[246] *See* Gilles, *supra* note 208, at 17–18 (detailing that the publicity and finality of litigation judgments are the cores of their deterrent effect and arguing that arbitration is lacking on both of these fronts).

[247] *See* U.S. DEP'T OF THE TREASURY, *supra* note 147, at 3–4 (criticizing the Arbitration Rule for failing to account for the costs associated with an influx of class action lawsuits that are likely to be brought); *see also* Barnes, *supra* note 20, at 340 (discussing arguments in favor of arbitration's fairness and efficiency).

[248] *See* U.S. DEP'T OF THE TREASURY, *supra* note 147, at 3–4 (estimating that the Arbitration Rule would impose nearly $575 million in additional defense costs and payments to named plaintiffs on defendants in class action claims).

[249] *See, e.g.*, Fair Credit Reporting Act, 15 U.S.C. § 1681n–1681o (2012) (promoting accuracy, fairness, and privacy of consumer information contained in files of consumer reporting agencies); Equal Credit Opportunity Act, 15 U.S.C. § 1691e (2012) (making creditor discrimination based on race, color, religion, national origin, sex, marital status, or age unlawful); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k (2012) (establishing legal protection from abusive debt collection practices). As discussed above, consumer protections afforded and enforceable by the government have surged since the 1960's. *See supra* notes 28–49 and accompanying text.

[250] *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 626 (2012) (observing that the intersection of public and private law is well established in the American legal system, and arguing that public agencies are often predicated on the idea that the private bar is available to leverage its resources in promoting the general welfare).

[251] *See* Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 106 (2006) (arguing that the class action serves as an additional and effective deterrent tool toward corporate misconduct).

struggle against Wells Fargo.[252] The Supreme Court remains entrenched in its support of class action waivers.[253] Thus, reform must originate from agencies like the CFPB.[254] This reform likely cannot take the form of a complete bar, as has been evidenced by the intense opposition in all branches of government to such regulations.[255] Section A of this part proposes a reform requiring enhanced disclosure when arbitration agreements are used in consumer financial products contracts.[256] Section B of this part explores the possibility of utilizing class arbitration in place of more costly class action litigation.[257]

A. Enhanced Disclosure as a Way to Keep Consumers Aware of Their Rights

The CFPB is not the only agency to pass a regulation banning predispute, mandatory, individual arbitration through class action waivers.[258] Likewise, the CFPB is not alone in having that regulation resisted.[259] In November 2016, the Center for Medicare and Medicaid ("CMS") passed a regulation prohibiting the use of pre-dispute arbitration agreements in contracts for services in long-term care ("LTC") facilities (the "CMS Rule").[260] In 2017, in

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[252] *See* Mitchell v. Wells Fargo Bank, Case 2:16-cv-00966-CW-DBP, 2017 WL 5905535, at *1 (D. Utah Nov. 29, 2017) (reserving judgment on Wells Fargo's motion to compel arbitration pending factual inquiries into whether the plaintiffs are subject to binding, individual, pre-dispute arbitration agreements).

[253] *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013) (holding that arbitration clauses are effective regardless of whether the costs of arbitration outweigh the recoverable claim); AT&T Mobility v. Concepcion, 563 U.S. 333, 344 (2011) (holding that the California *Discover Bank* rule was pre-empted by the FAA and reversing decision holding class action waiver unconscionable and void at state law).

[254] *See Italian Colors*, 570 U.S. at 233 (holding that arbitration clauses are effective regardless of whether the costs of arbitration outweigh the recoverable claim); *Concepcion*, 563 U.S. at 344 (holding that the California *Discover Bank* rule was pre-empted by the FAA and reversing decision holding class action waiver unconscionable and void at state law).

[255] *See* Joint Resolution of Nov. 1, 2017, Pub. L. No. 115-74, 131 Stat. 1243 (repealing the Arbitration Rule due to majority votes in the U.S House of Representatives, U.S. Senate, and approval of repeal by the President of the United States); *Italian Colors*, 570 U.S. at 233 (holding that arbitration clauses are effective regardless of whether the costs of arbitration outweigh the recoverable claim); *Concepcion*, 563 U.S. at 344 (holding that the California *Discover Bank* rule was pre-empted by the FAA and reversing decision holding class action waiver unconscionable and void at state law).

[256] *See infra* notes 259–271 and accompanying text.

[257] *See infra* notes 272–282 and accompanying text.

[258] *See* 42 C.F.R. § 483.70(n)(1) (2018) (prohibiting the use of pre-dispute arbitration clauses in contracts for long-term care facilities).

[259] *See* Kindred Nursing Ctrs. L.P. v. Clark, 137 S. Ct. 1421, 1428 (2017) (holding that the FAA pre-empted the Kentucky Supreme Court's clear-statement rule where it was used to invalidate an arbitration agreement).

[260] *See* 42 C.F.R. § 483.70(n)(1) (prohibiting the use of pre-dispute arbitration clauses in contracts for long-term care facilities); Fisher Phillips, *Nursing Home Arbitration Agreements: A Changing Landscape*, LEXOLOGY (Feb. 1, 2017), https://www.fisherphillips.com/resources-newsletters-article-nursing-home-arbitration-agreements-a-changing-landscape [https://perma.cc/BME5-L2RK] (discussing the status of the CMS Rule and its struggle to find footing in the federal courts).

Kindred Nursing v. Clark, the United States Supreme Court upheld a binding arbitration clause in a long-term care facility contract.[261] The Court's holding in *Kindred* caused the CMS to propose revisions to the CMS Rule.[262] These revisions focused primarily on enhancing disclosure and understandability, rather than on a complete bar to the use of arbitration clauses in long-term care facility contracts.[263]

The CFPB could, and should, propose similar revisions to the Arbitration Rule, as well as requirements that arbitration outcomes and other data be made public information.[264] The CFPB should revise the Arbitration Rule to require that arbitration clauses in financial product and service contracts are written in plain language.[265] This change would close the gap between consumers' understanding of their rights and the legal effect of their agreements with their banks.[266] Furthermore, the CFPB should require that banks make public certain information related to arbitration proceedings with their customers.[267] Consumers should have access to information regarding the types of claims brought in arbitration, amounts at stake in those claims, consumer representation, and outcomes.[268] This public disclosure would assuage concerns related to banks' lack of public accountability in arbitration proceedings.[269] Furthermore, consumers may feel more empowered to bring claims in arbitration

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[261] *See Kindred Nursing Ctrs.*, 137 S. Ct. at 1428 (holding that the FAA pre-empted the Kentucky Supreme Court's clear-statement rule where it was used to invalidate an arbitration agreement).

[262] *See* Proposed Rules, 82 Fed. Reg. 26,649, 26,651 (June 8, 2017) (to be codified at 42 C.F.R. § 438.70(n)(1)) [hereinafter Proposed CMS Changes] (proposing to remove the prohibition on pre-dispute arbitration agreements in favor of allowing arbitration clauses provided they are written in plain language and notice, also in plain language, is given to residents and their visitors).

[263] *Id.* at 22,650–51.

[264] *See id.* at 22,651 (proposing to remove the prohibition on pre-dispute arbitration agreements in favor of allowing arbitration clauses provided they are written in plain language and notice, also in plain language, is given to residents and their visitors); Ramona L. Lampley, *The CFPB Proposed Arbitration Ban, the Rule, the Data, and Some Considerations for Change*, AM. BAR ASS'N: BUS. LAW TODAY, https://www.americanbar.org/groups/business_law/publications/blt/2017/05/07_lampley/ [https://perma.cc/6RN2-BL8K] (arguing that the Arbitration Rule, as passed and repealed, went too far and should be reformed to focus on disclosure and consumer education).

[265] *See* Proposed CMS Changes, 82 Fed. Reg. at 22,651 (proposing to change the CMS Rule from barring arbitration clauses to requiring plain language arbitration clauses).

[266] *See* CFPB ARBITRATION STUDY, *supra* note 45, § 3.1 (reporting that no consumer interviewed said that dispute-resolution procedures such as arbitration played a role in their financial decisions, and reporting that more than half of consumers interviewed indicated that they did not know whether they had agreed to binding individual arbitration connected with their credit cards).

[267] *See* Lampley, *supra* note 13 (proposing that the CFPB may find more success promulgating a rule requiring data disclosure than with a rule proposing a complete bar to arbitration agreements).

[268] *See id.* (suggesting that the CFPB should provide more consumer education and arbitration transparency through data-reporting requirements).

[269] *See id.*; *see also* Gilles, *supra* note 208, at 17 (stating that litigation's deterrent effect arises in large part from publicity); Popper, *supra* note 212, at 183 (stating that, even in the absence of a judicial opinion, conduct that could serve as the basis for civil liability, once known to the public, can change a market on its own).

when they have access to data showing the circumstances and outcomes of similar claims other consumers brought.[270]

B. Class Arbitration as a Potential Answer

The FAA does not clearly allow or prohibit class arbitration, though the viability of class arbitration is a subject of significant debate.[271] In 2010 the Supreme Court in *Stolt-Nielsen v. AnimalFeeds International* held that only two situations could give rise to class arbitration proceedings: (1) the parties to the agreement explicitly agreed to allow class arbitration, and (2) in the absence of such agreement, the local or state law governing the agreement creates a default rule allowing for class arbitration.[272] Thus, it appears that class arbitration is, at the very least, a conceivable option for consumers and businesses.[273]

Recent court decisions, however, have not looked favorably on the use of class arbitration.[274] In 2018, the United States District Court for the Southern District of New York in *Jock v. Sterling Jewelers Inc.* found that an arbitrator lacked the authority to certify a class of arbitration claimants that included non-appearing claimants.[275] Judge Rakoff's primary reasoning for this finding was that the arbitrator could not decide whether the non-appearing claimants' arbitration agreements permitted class arbitration because they had not given her the opportunity to interpret them.[276] The court's decision dealt a serious

[270] *See* Langley, *supra* note 13 (arguing that one of the drawbacks of mandatory arbitration is its deterrent effect on consumers bringing claims, and that the CFPB could confront this problem by introducing data-reporting requirements).

[271] *See* Gilbert A. Samberg, *"Class Arbitration": The Current Law*, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C. (June 14, 2017), https://www.adradvice.com/2017/06/class-arbitration-the-current-law-2/#page=1 [https://perma.cc/H93T-74TF] (discussing the current state of class arbitration jurisprudence). *See generally* Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012) (covering the entire text of the FAA).

[272] *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 673, 684 (holding that the arbitration panel should have inquired into whether the FAA, maritime law, or New York law contained a default rule allowing for class arbitration when an agreement is silent on the matter and holding that a party may not be subjected to class arbitration absent explicit contractual basis for concluding that the party agreed to allow class arbitration).

[273] *See id.* (holding that two grounds exist by which parties to an arbitration agreement may be submitted to class arbitration).

[274] *See* Jock v. Sterling Jewelers Inc., 284 F. Supp. 3d 566, 571 (S.D.N.Y. 2018) (Rakoff, J.) (holding that an arbitrator did not have the authority to certify a class of arbitration claimants where the class included non-appearing claimants), *appeal filed*, Notice of Civil Appeal, Jock v. Sterling Jewelers Inc., No. 18-153 (2d Cir. Jan. 18, 2018).

[275] *Id.* The arbitrator in this case certified a class that included an estimated 70,000 non-appearing claimants. *Id.* at 568.

[276] *Id.* at 571.

blow to class arbitration claimants seeking to include non-appearing claimants in their proceeding.[277]

Despite this negative treatment, class arbitration remains an appealing compromise, taking advantage of arbitration's efficiency and class action's pooling of claims and resources.[278] The procedural complications arising from attempts to bring class arbitration significantly hamper its viability.[279] The matter, however, is far from settled.[280] The CFPB should consider revising the Arbitration Rule to include a default rule authorizing class arbitration in consumer financial product and service contracts as a first step in potentially rallying regulatory support for class arbitration as a viable method of dispute resolution.[281]

CONCLUSION

The Arbitration Rule promised consumers like the Mitchells almost entirely unfettered access to the class action litigation forum. Conversely, it promised financial product and service providers like Wells Fargo immensely increased costs, both monetary and temporal, related to class action litigation. Both broad power to force arbitration and broad power to bring class action litigation invite heavy criticism and heated debate in the market. A middle ground between these broad powers, therefore, seems to be necessary to ensure balanced, but complete protection on both sides of the consumer financial protection coin. The intertwining of the American population with the financial

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[277] *See id.* (holding that certifying a class for class arbitration that included non-appearing claimants exceeded the arbitrator's authority and granting Sterling's motion to vacate any award related to the non-appearing claimants); *see also* Gilbert Samberg, *Is "Class Arbitration" an Oxymoron—Another Shoe Drops in the Second Circuit*, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C. (Feb 20, 2018), https://www.adradvice.com/2018/02/is-class-arbitration-an-oxymoron-another-shoe-drops-in-the-second-circuit/?utm_source=Mintz+Levin+-+ADR+Litigation&utm_campaign=bd42194732-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_888e0c7865-bd42194732-72933861 [https://perma.cc/GLT3-3S3Q] (arguing that the Southern District's decision in *Jock* is the first step in eliminating the possibility of successfully pursuing a class arbitration proceeding).

[278] *See* Brief for NAACP, *supra* note 22, at 3 (arguing that individuals have a variety of reasons for avoiding individual claims, including fear of retaliation or insufficient resources); Barnes, *supra* note 20, at 340 (discussing arguments in favor of arbitration's fairness and efficiency); Melnick, *supra* note 76, at 769 (arguing that class actions alleviate the lack of monetary motivation that individual plaintiffs may feel when facing a much larger defendant).

[279] *See* Samberg, *supra* note 26 (arguing that the Southern District's holding in *Jock* impliedly limits any class arbitration award to original parties and other claimants who explicitly opt in to the proceeding, and further arguing that the holding in *Jock* is likely the first step in completely eliminating class arbitration as a viable form of dispute resolution).

[280] *See id.* (discussing the absence of decisions from the Supreme Court of the United States addressing the major issues related to the viability of class arbitration).

[281] *See Stolt-Nielsen*, 559 U.S. at 673 (holding that parties to an arbitration agreement may be compelled into class arbitration proceedings where the agreement is silent on class arbitration and a default rule exists in the law governing the contract at issue allowing for class arbitration).

system is only growing, and so too is the urgency with which reform is becoming necessary. Thus, the CFPB must take the initiative to revise and re-propose the Arbitration Rule in a form that has the best chance of garnering bilateral support from consumers and banks.

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