

Statement for the Record
On Behalf of the
American Bankers Association
Before the
United States Senate
Committee on
Banking, Housing, and Urban Affairs
March 8, 2022



Statement for the Record
On Behalf of the
American Bankers Association
Before the
United States Senate
Committee on
Banking, Housing, and Urban Affairs
March 8, 2022

Chairman Brown, Ranking Member Toomey, and Members of the Committee, the American Bankers Association (ABA)¹ appreciates the opportunity to submit a statement for the record on the use of arbitration clauses in consumer financial products and services for the March 8, 2022, hearing entitled, “Examining Mandatory Arbitration in Financial Service Products.”

Background. Financial institutions resolve the vast majority of customer disputes informally, with a phone call or through digital channels. When situations arise that require a more formal dispute resolution mechanism, many financial institutions use arbitration because it is fair and more consumer-friendly than litigation. Indeed, in 1995, the U.S. Supreme Court recognized arbitration’s benefits as: less expensive than litigation with simpler rules, less hostile and intimidating for consumers, not disruptive to dealings among the parties, and more convenient and flexible in scheduling and location.

In July 2017, the Consumer Financial Protection Bureau (Bureau) issued a rule that would have prohibited requiring financial services consumers to waive their ability to participate in class action suits and would have drastically limit the use of mandatory arbitration agreements for financial products and services. Two weeks later, the House of Representatives voted to overturn the rule under the Congressional Review Act. The Senate followed suit on October 24, and President Trump signed the resolution overturning the rule on November 1.

Arbitration Benefits Consumers. The overwhelming majority of customer disputes with their bank do not require arbitration. Most are resolved long before they get to court or arbitration by the financial institutions themselves. Customer satisfaction is paramount in today’s competitive marketplace. Banks have every incentive to maintain robust dispute resolution procedures to

¹ The ABA is the voice of the nation’s \$23.7 trillion banking industry, which is composed of small, regional and large banks that together employ more than 2 million people, safeguard \$19.7 trillion in deposits and extend \$11.2 trillion in loans.

ensure almost all disputes are resolved without the need for arbitration or court. Moreover, financial disputes are often resolved through the Bureau's consumer complaint portal.

Arbitration is a time-tested legal proceeding used to resolve disputes, particularly for small dollar disputes. For financial service disputes, consumers receive more money in arbitration than they do in class action suits and have their disputes resolved more quickly. Consumers are much more likely to receive an award through arbitration than they are through class action. Indeed, the Bureau's extensive study based on four years of research found that in arbitration, consumers receive \$5,389 on average compared to \$32.35 in litigation, and that consumers received *nothing at all in 87% of class actions*.²

Arbitration is generally less expensive and less daunting and provides faster resolution than going to court. Particularly for small dollar claims, consumers are likely to conclude that prosecuting the claim in court is more trouble than it is worth. Arbitration scheduling and locations are more flexible, and the rules are simpler. For example, consumers do not need to take time off from work and endure the stress and complications of going to court. Arbitration can be held in an office, or even over the phone or internet, at a time convenient to the consumer.

Parties get a legal decision much faster using arbitration than the courts. Disputes can often be resolved in a fraction of the time compared to court trials. The Bureau found that the median desk arbitration in financial services was resolved in four months, the median telephone arbitration in five months, and the median in-person hearing in seven months. By contrast, the average class action settlement took 1.89 years and federal court multi-district litigation class actions 2.07 years. A national study by Harris Interactive showed the majority of consumers who had engaged in arbitration found it to be faster (74%), simpler (63%) and less expensive (51%) than legal proceedings.³ In fact, two-thirds (66%) of consumers say they would likely use arbitration again,⁴ which is clear testament to the value of this process.

Studies have found that consumers prevailed more often in arbitrations than in court. Consumers win some relief in the majority of cases that go to an arbitration hearing. A study of consumer-lending cases that faced an arbitration decision shows consumers are more likely to prevail than the businesses involved. Consumers won some relief in 53.3% of the cases filed and recovered an average of \$19,255 (52.1% of the amount claimed).⁵ In addition, arbitrators awarded

² *Arbitration Study: Report to Congress*, CFPB (2015). Retrieved from: http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

³ Harris Interactive, Survey of Arbitration Participants (2005).

⁴ *Id.*

⁵ See, Christopher R. Drahozal & Samantha Zyontz, An Empirical Study of AAA Consumer Arbitration, 25 Ohio State J. of Dispute Res. (2010) at 845-846.

attorneys' fees to prevailing consumers in more than 63% of the cases in which consumers sought them.⁶

Arbitration is fair to bank consumers. In arbitration, arguments and evidence are presented to an independent third party, an arbitrator, who decides the case. Arbitrators are often legal professionals, such as former judges, empowered to award the same legal remedies that parties could receive in court. The Bureau found that: "In arbitration, if the parties agree on the individual they want to serve as arbitrator, they can choose that person..." If they cannot, the arbitrator is selected following a procedure outlined in the contract. The Bureau also found that many agreements offer consumers more than one choice for arbitration administrator. In contrast, consumers cannot select the judge assigned to hear their case in court.

Eliminating mandatory arbitration will also permanently increase taxpayers' expense and cause court delays in administering and resolving lawsuits. The Bureau in its study estimated that eliminating class action waivers will lead consumers to file 6,042 additional class actions in federal and state court against 53,000 providers every five years,⁷ which amounts to 100 new lawsuits a month. The additional suits will create permanent costs and related to the substantial delay in judicial administration and permanent increased costs to federal and state courts. Taxpayers will suffer delays and will pay for the extra resources needed to deal with the additional class actions — taxpayers who will not even benefit from 87% of the cases for which there is no compensation and who will receive only a little if any from the 13% that do settle after years of meandering through the courts.

Legislation has been introduced this Congress, such as S. 505, the "Forced Arbitration Injustice Repeal (FAIR) Act," which would effectively outlaw arbitration provisions in private contracts. Eliminating arbitration clauses will only benefit class action lawyers and will harm consumers by replacing a cost-effective and fair arbitration process with expensive and time-consuming litigation. ABA will continue to oppose the FAIR Act and similar legislation that limits the use of arbitration clauses.

⁶ *Id.*

⁷ The Bureau estimated that over a five-year period financial services providers will be sued in 514 additional federal court class actions. It further estimated that there will be 2,507 additional federal court class action cases filed during the five-year period that will settle individually. The Bureau anticipated that an equal number of class actions would be filed in state courts. Proposed Rule *supra* note 4, at 32907, 32909. 514 additional federal court class action cases settled on a class basis + 2,507 federal court class action cases settled on an individual basis = 3,021 additional federal court class actions + 3,021 additional state court class action cases = 6,042 total additional federal court and state court class action cases.