"Examining the CFPB's Proposed Rulemaking on Arbitration: Is it in the Public Interest and for the Protection of Consumers?"

Subcommittee on Financial Institutions and Consumer Credit,

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[1] Public Justice pursues high impact lawsuits to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. I oversee Public Justice's docket of consumer, environmental and civil rights cases. I have argued or co-argued and won more than 30 reported decisions from federal and state courts across the nation, including cases in six of the federal Circuit Courts of Appeal and at least one victory in nine different state high courts. I was named the "Vern Countryman" Award winner in 2006 by the National Consumer Law Center, which "honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the well being of vulnerable consumers." In 2013, I received the Maryland Consumer Rights Coalition's "Legal Champion" award. In 2010, I received the Maryland Legal Aid Bureau's "Champion of Justice" Award. In the late 1980s, I was Chief Nominations Counsel to the U.S. Senate Judiciary Committee. I graduated from Harvard Law School in 1986, and Georgetown University in 1983. For more than 15 years, Public Justice has operated a special project devoted to fighting abuses of mandatory arbitration. We have represented consumers in a large number of cases challenging abuses of forced arbitration clauses, in state and federal courts, for more 15 years. While arbitration clauses are widely enforceable as a matter of federal law, we have successfully represented consumers in cases where corporations added outrageous terms to their arbitration clauses (such as requiring consumers with small claims to travel across the country), or corporations have attempted to enforce arbitration clauses against consumers who never agreed to them, and similar abuses.

INTRODUCTION

The Consumer Financial Protection Bureau's Proposed Rulemaking on Arbitration is unquestionably in the public interest and will serve to protect consumers. Specifically, it will protect consumers from the use of forced arbitration clauses that ban them from filing or participating in class actions, a widespread practice that large banks, payday lenders and various sorts of predatory lenders have used to exempt themselves from most private enforcement of America's consumer protection laws.

Exempting the financial industry from the normal legal system has had far-reaching – and disastrous – consequences. Predatory lending and dishonest lending practices have pushed millions of people right into desperation. Far too many Americans have been tricked into taking out loans that were far more expensive than they realized.

In recent years, for example, if a bank systematically cheated 10,000 customers in the same way, the bank could use its arbitration clause to stop those customers from going to court together. Each individual had to figure out the scam, figure out what their rights were and then spend time and money fighting the bank. In the incredibly inefficient system that banks foisted on their own customers, everyone was essentially on their own. In contrast, a class action could offer all 10,000 people a fair shot at justice.

The CFPB conducted an extensive empirical study of forced arbitration. Its results, reported to Congress in March of 2015, are entirely consistent with what most experts in consumer law would have predicted:

- The vast majority of credit card issuers, payday loan lenders, and other financial institutions require their consumers to submit any disputes that they might have – even if the bank has plainly broken the law – to a private arbitrator. The arbitrator is generally picked by a company that itself is picked by the bank. The arbitration system is largely secretive, and there is no meaningful judicial review of an arbitrator's decision (even if she makes a glaring error of law or engages in "silly" fact-finding). These arbitration clauses overwhelmingly ban consumers from bringing or participating in class actions.
- Very few consumers understand the fine print disclosures about the forced arbitration clauses, which are written in dense legalese and slipped by consumers in ways that few if any of them would read.
- Incredibly few consumers ever actually take cases to arbitration, and very few of them recover much. The CFPB looked at *every single arbitration* conducted by the American Arbitration Association (by far the largest private arbitration company in the United States that handles consumer cases) over a period of three years in cases against lenders. In those three years, the TOTAL number of cases that consumers arbitrated against lenders was 411 per year. Out of hundreds of millions of arbitration clauses, and compared to the legal system, where more than 13 million consumers received recoveries in class actions. That is not a typo. *Throughout, the entire United States*, the total number of arbitrations against lenders each year was 411. Sec. 1, p. 11.

- Over those three years, and again for the entire United States, 32 (thirty two) consumers won recoveries from arbitrators in cases against lenders, where the arbitrators issued decisions. Sec. 1, p. 11. In those 32 cases, the consumers recovered 12 cents for every dollar of their legal claims. Sec. 5, p. 13.
- By contrast, in a study of 400 private lawsuits that were brought in court and litigated as class actions, more than 13 million customers received more than $2.7 billion in recoveries. Sec. 1, p. 16. The attorneys' fees in those class actions amount to 16% of the gross relief received by the consumers. Sec. 8, pp. 23, 32-33.
- Banks that use forced arbitration clauses that banned class actions did NOT reduce the interest and fees they charged consumers. An empirical comparison of four of the largest credit card issuers in the United States (Bank of America, Chase, Capitol One and HSBC) that did not have forced arbitration clauses with class action bans for 3 ½ years (they stopped using them for this time period as part of a settlement of an antitrust case) with other banks that *did* have forced arbitration clauses shows that the lenders that used forced arbitration clauses with class action bans did not reduce their interest or fees at all. The claim that "consumers will benefit from lower costs if corporations can exempt themselves from the consumer protection laws with fine print contracts" is simply empirically false. It hasn't happened, and it never did happen.

I. FEW CONSUMERS UNDERSTAND THE FORCED ARBITRATION CLAUSES IN THE FINE PRINT OF THEIR CONTRACTS

The supporters of forced arbitration and class action bans like to talk about this as a "voluntary choice" that consumers make. There is no polite way to say the truth here: these claims are a joke. Almost no consumers meaningfully "choose" to enter into arbitration clauses. These fine print legalese documents are slipped by consumers in ways that ensure they will never notice them.

The CFPB study concluded, based upon extensive empirical survey data, that "consumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally do not know whether they can sue in court or wrongly believe that they can do so." Sec. 1, p. 11.

Moreover, when one compares what consumers think about their arbitration clauses with what the clauses actually say, it turns out that most consumers misunderstand them. "Consumer beliefs about credit card dispute resolution rights bear little to no relation to the dispute resolution provisions of their credit card contracts. Most consumers whose agreements contain arbitration clauses wrongly believe that they can participate in class actions." *Id.* For example, "Less than 7% of consumers whose credit card agreements included pre-dispute arbitration clauses stated that they could not sue their credit card issuers in court." Sec. 3.1, p. 4.In one extensive empirical survey quoted by the CFPB at length, researchers at St. John's law school found that even when consumers were pointed to the arbitration clause and asked to

read it, only "approximately 13% understood that the contract they had just been shown prohibited them from participating in a class action lawsuit."

The conclusions in the CFPB's study are hardly surprising. Most people first learn that a company says they have lost the right to sue – and have "waived" their constitutional right to trial by jury and a day in court – only after a dispute arises. In most cases, an individual's first awareness of an arbitration clause comes as a bitter surprise. We have spoken to literally hundreds of persons on this topic over the past few years, including homeowners, farm operators, consumer and civil rights attorneys, consumers, employees, journalists and arbitrators. Again and again in those conversations, we have heard from people – often very angry and very dissatisfied people – who were utterly unaware that they had been sent an arbitration clause, and who believed that they had never agreed to such a clause.

A wealth of scholarship supports the conclusions of the CFPB St. Johns studies. Another recent study conducted by Credit.com found that 66% of credit cardholders did not know what, if any, changes had been made to their credit card agreements. Eileen A.J. Connelly, *Credit Card Holders Frequently Don't Pay Attention to Changes Made to Accounts, Survey Finds*, Star Trib. (Minneapolis), March 1, 2009. In at least one case, evidence showed that a bank knew only four percent of cardholders would read its bill stuffers. *See* Sen. Russell D. Feingold, Mandatory Arbitration: What Process Is Due?, 39 Harv. J. on Legis. 281, 296 (2002) (citing case); *see also* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 Am. Bus. L.J. 723, 730-31 (2008) ("empirical evidence shows that most consumers do not read [standard form contracts]"); Amy J. Schmitz, *Consideration of "Contracting*

Culture" in Enforcing Arbitration Provisions, 81 St. John's L. Rev. 123, 160 (2007) ("consumers rarely read or understand" arbitration agreements); Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, NYU J. Law & Business (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1340166 (discussing studies showing that consumers are unlikely to read standard-form contracts).

II. INCREDIBLY FEW CONSUMERS EVER GO TO ARBITRATION

The CFPB's study,[2] as shown above, demonstrates that only a tiny number of consumers ever go forward with claims against lenders in arbitration. The numbers are almost unbelievably small – slightly over 400 cases of any sort brought anywhere in the U.S. each year against lenders and, over a three year period, only 32 consumers actually winning awards in arbitration.

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[2] After roughly a year of collecting data and comments, the Bureau released a preliminary report in late 2013. It then spent another year and a half gathering more data, analyzing primary documents from hundreds of court cases and arbitration records, soliciting further comments, and conducting extensive interviews with consumers and industry representatives before publishing its final report in March 2015. The final report provides an extensive and exhaustive analysis of the prevalence of arbitration clauses in consumer financial contracts, their effects on consumer protection, and the relative merits of arbitration and court litigation as means of protecting consumers' interests. The final report ran nearly 800 pages long, and has been rightly called the most comprehensive study of this issue to date. The industry claims that the agency needs to engage in further study are like those from people who say that we need more evidence to tell us cigarette smoking is bad for children. The industry claims that it didn't have enough input into the study are almost bizarre – bank CEOs, CFOs and bank lobbyists, lawyers and advocates have held literally hundreds of meetings with the CFPB over a period of nearly four years where they have had every opportunity (and have regularly exercised that opportunity) to voice their views about why forced arbitration is supposedly good for consumers.

This is consistent with Public Justice's experience: Very few consumers have any interest in bringing cases in arbitration. There are a number of factors that we see again and again:

- The arbitration system is foreign and confusing to consumers. Most consumers don't know what the word means, or wrongly assume they can still go to court.
- The rules of the arbitration providers are lengthy, hard to find, and often it's not clear which set of rules apply. The American Arbitration Association has many different sets of rules, and cases are often litigated for some time as to which set of rules will govern in a given case.)
- Consumers often must pay up front expenses that exceed what they'd have to pay in a court. It is not at all uncommon for corporations to refuse to pay their share of arbitrators' fees (even when their customer contracts promise that they will pay most of the costs of arbitration), so when consumers do go to arbitration there are often extensive delays while the arbitration company collects fees from the company.
- There are a number of examples of arbitrators requiring consumers to pay enormous "loser pays" awards (meaning that even if a consumer brought a well-grounded case and they end up losing before the private corporate arbitrator, they are forced to pay the corporation's attorneys' fees, in some cases amounting to several hundred thousand dollars), which makes consumers reluctant to go to arbitration.

- Most private consumer lawyers are very reluctant, or completely unwilling, to represent clients in a system that they believe is rigged against consumers. Unlike the banking industry lawyers, consumer lawyers generally only get paid if they win cases. Many of them have a reasonable, earned distrust of forced arbitration, and extensive surveys of consumer lawyers consistently show that most will walk away from a case rather than go to arbitration.

The CFPB study's findings that very, very few consumers go to arbitration are not even slightly surprising to experienced consumer lawyers. Let me start with an example. I represented a client who was cheated by a bank in a case, but because the U.S. Supreme Court changed the law governing forced arbitration clauses fairly dramatically while the case was pending, our client ended up receiving nothing and none of the other consumers who were cheated in the same way received anything. In *Homa v. American Express*, our client, Mr. Homa, agreed to purchase a credit card based on the company's offer of a specific set of conditions and terms. In fact, however, he discovered that the terms that were advertised were far better than what a cardholder could ever receive and that the credit card company was misleading people about the true cost of its loans (by exaggerating the size of the rebates the cardholders were supposed to receive).

Mr. Homa, who is far better at numbers than the average consumer, figured out the scam – that his rebate was much lower than he had been promised -- and tried to get his money back. The company rebuffed him at every turn, telling him he had miscalculated the rates and that he was not entitled to his money. He finally went to a lawyer, who told him that, while he had a valid claim, the damages in his case were so

small that it did not make financial sense to pursue his claim on an individual basis. After realizing that the company had likely cheated many consumers in this bait and switch scheme, Mr. Homa sought to hold the company liable for its unfair and deceptive lending practice by filing a class action complaint in federal court.

Because the amount of individual damages was so small and the nature of the claims was so complex, no one could actually obtain a remedy on an individual basis. The company nevertheless sought to force Mr. Homa into arbitration on an individual basis, but this effort was rejected by the U.S. Court of Appeals for the Third Circuit, which found that the American Express arbitration clause's ban on class actions was "unconscionable." In other words, because the ban on class actions would gut the state of New Jersey's consumer protection laws, and give the bank a 'get of jail free' card, the court struck down the arbitration clause as unenforceable.

Then the U.S. Supreme Court intervened, with its notorious decision in *Concepcion v. AT&T Mobility*, 131 S. Ct. 1740 (2011).[3] In this 5-4 decision, Justice Scalia invented a new rule of federal law that wiped away state contract laws that refused to enforce contracts that undermined consumer protection or civil rights laws. After *Concepcion*, the district court was provided with a powerful evidentiary record that proved no consumer could effectively vindicate his or her statutory rights relating to the claims at issue in the case under American Express's arbitration clause, including expert testimony, testimony from Mr. Homa, and records of the paltry number of

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[3] Justice Ginsburg recently gave a speech where she compared the Court's decision in *Concepcion* with the infamous *Lochner*-era decisions from the U.S. Supreme Court back in the early part of the 20th Century, when the Court would strike down laws such as minimum wage and child labor laws as an infringement of freedom of contract.

arbitrations pursued. This evidence, as well as the plaintiff's briefs, is available at our website, www.publicjustice.net, on the page dedicated to the *Homa* case. American Express did not bother to challenge the evidentiary record, taking the position that these facts did not matter, after *Conception*. Notwithstanding this evidence, the district court dismissed the case and enforced the arbitration clause without comment.

On a final appeal to the Third Circuit, the Court of Appeals accepted the factual record showing that American Express's ban on class actions would gut Mr. Homa's case: "We accept this characterization, for the record demonstrates that the significant cost of arbitrating Homa's claim and the likelihood that there would be a limited recovery even if his arbitration was successful makes it unlikely that an attorney would take his case. Furthermore, in view of the complexity of the issues pertaining to the merits of Homa's claim, it would be very difficult for him to prosecute the case without the aid of an attorney whether in a judicial proceeding or in arbitration."

Notwithstanding these facts, in light of the *Concepcion* case, the Third Circuit said that American Express's arbitration clause should be enforced even though the arbitration offered only an "illusory remedy": "Even if Homa cannot effectively prosecute his claim in an individual arbitration **that procedure is his only remedy, illusory or not**. Though some persons might regard our result as unfair, [the Federal Arbitration Act] requires that we reach it." 494 Fed. Appx. 191 (2012).

Similarly, I was co-counsel in a class action that was litigated in Maryland state court, *Wells v. Chevy Chase Bank*. The credit card issuer had promised in promotional materials and in its contract that it would "never" raise its interest rates above 24%, and

then it did raise its interest rates (as well as add a number of other charges) for a number of people. It was a classic bait-and-switch. The case was settled for $16.1 million (as well as actions taken to remove improper negative information from class members' credit records), and checks were mailed to more than 200,000 class members. (Compare this, again, to the 411 people who take cases to arbitration each year against lenders throughout the entire United States.)

During the challenge to the arbitration clause in the *Wells* case, however, evidence was put before the trial court that if the arbitration clause had been enforced, no consumers would have been able to pursue their claims on an individual basis. This evidence was never challenged or refuted by the defendant, who argued that this did not matter. Our clients had approached a number of lawyers without finding any willing to handle the case, and the case was only filed shortly before the limitations period ended. This was an important case that needed to be brought, and which resolved very favorably for the consumers, but if the arbitration clause had been enforced, no consumers would have received any recovery.

As one further example, I was co-counsel in five cases brought against payday lenders in North Carolina state court. While payday lending is legal in many states, it was not in North Carolina. The judge divided the five cases into two groups, to better manage them. The first three cases were litigated and resolved before the *Concepcion* decision. We settled those cases for $45 million, and sent checks to more than 200,000 class members. The second two cases were thrown out because of the payday lenders' class action bans, and so far as I know, not a single one of the consumers pursued their claims in arbitration and recovered anything. The contrast is striking:

200,000 consumers who retained their constitutional rights to go to court recovered $45 million and received checks, and tens of thousands of consumers who were subject to forced arbitration clauses with class action bans received nothing.

III. CLASS ACTIONS HAVE BROUGHT ENORMOUS BENEFITS TO CONSUMERS.

As set forth above, the CFPB studied more than 400 private class actions over a period of several years. It found that these class actions delivered very substantial benefits to more than 13 million Americans. Consumers received direct payments for cash (refunds of overcharges, for example); credits to their accounts; the elimination of illegal or inflated debts; and the removal of false information from their credit records. Despite the widespread use of forced arbitration clauses, the consumers who WERE able to go forward in court were able to receive substantial recoveries.

The Bureau also compared, side-by-side, banks that were all engaged in the same illegal practice – manipulating the order in which checks were paid out, so as to dramatically increase the number of hefty late fees that were levied on consumers. Banks which either did not have arbitration clauses with class action bans or which were not able to enforce them in court for various reasons were forced to (a) compensate their customers for the illegal practice and refund hundreds of millions of dollars; and (b) change their illegal practice. Banks who did have arbitration clauses that banned class actions did not pay out anything (unless some of the 32 Americans who recovered monies in forced arbitration over three years might have gotten back money for this particular practice), and continued the illegal practice.

My own experience is consistent with the Bureau's conclusions. As set forth in the previous section, I have personally been counsel in a number of cases (I gave four examples, but I could have given many more) where hundreds of thousands of consumers recovered substantial sums, and had incorrect information removed from their credit records.

It is also important to note that the Bureau's conclusion that attorneys' fees were modest compared to the magnitude of the consumers' recovery has been supported by substantial academic scholarship. Consider this study by a law professor who had been a clerk for Justice Scalia: Fitzpatrick, Brian T., An Empirical Study of Class Action Settlements and Their Fee Awards (July 7, 2010). Journal of Empirical Legal Studies, Vol. 7, 2010; CELS 2009 4th Annual Conference on Empirical Legal Studies Paper; Vanderbilt Public Law Research Paper No. 10-10; Vanderbilt Law and Economics Research Paper No. 10-06. Available at SSRN: http://ssrn.com/abstract=1442108 or http://dx.doi.org/10.2139/ssrn.1442108 ("Although there have been prior empirical studies of federal class action settlements, these studies have either been confined to securities cases or have been based on samples of cases that were not intended to be representative of the whole (such as those settlements approved in published opinions). By contrast, in this article, I attempt to study every federal class action settlement from the years 2006 and 2007. As far as I am aware, this study is the first attempt to collect a complete set of federal class action settlements for any given year. I find that district court judges approved 688 class action settlements over this two-year period, involving nearly $33 billion. Of this $33 billion, roughly $5 billion was awarded to class action lawyers, or about 15 percent of the total.")

IV. IT IS IMPORTANT TO REMEMBER A KEY POINT OF HISTORY: THE COMPANY THAT WAS THE LARGEST PRIVATE ARBITRATION PROVIDER IN THE U.S. FOR ABOUT 10 YEARS WAS SHUT DOWN FOR CORRUPT AND ILLEGAL BEHAVIOR

The Committee should look back at history of the late (but not lamented) National Arbitration Forum (NAF). This testimony will cite to a wealth of information that demonstrates the following propositions: (a) for about a decade, NAF was by far the largest provider of arbitration services to lenders for consumer arbitration; (b) NAF's operations were outrageously unfair to consumers, and favorable to lenders, to a degree where words such as "corrupt" are entirely fair characterizations; (c) the overwhelming majority of courts took no action with respect to the NAF, as courts were reluctant or unwilling to probe into the fairness of a major arbitrator who was used by many corporations, in the wake of the Supreme Court's rush to favor mandatory arbitration; and (d) the exact same factors that gave rise to the NAF – corporate desire for immunity from consumer protection law; a desire to win all or nearly all of the cases that were brought by consumers; a willingness by some actors to do ANYTHING to favor corporations if this would bring them substantial income; and the unwillingness of courts to meaningfully police arbitration – could easily give rise to a very similar actor down the road.

Simply put, there is no reason whatsoever that such an entity could not arise again, cloak itself in respectability (as the NAF did by spending a ton of money on articles and studies praising itself, hiring former judges and prominent political figures, energetically litigating to block any discovery into its operations and to get secrecy orders covering any documents that did become public, etc.), and operate in a similarly unfair situation for an indefinite period. Indeed, if the Minnesota Attorney General had

not happened to discover that the NAF had crossed the most blatant line of inappropriate conduct – taking tens of millions of dollars for shares of a wholly owned corporation from entities who were currently litigating tens of thousands of cases in front of NAF – the NAF might well still be cheating consumers and operating as a semi-secret arm of the bank-defense community. Various lovers of mandatory arbitration like to say things along the lines of "the NAF is gone, the entities left are all much better, no one should think about that period any more; nothing to see here, move on." I suggest that the reality is more complex than that, and pose the question: "How can mandatory arbitration by lenders be fair when by far the largest provider of arbitration services for a decade operated in a dishonest and lawless manner, nothing happened, and there is nothing to stop this from happening again?"

Before it was shut down by a law enforcement action brought by the Minnesota Attorney General, however, very few courts ever struck down NAF arbitration clauses on the basis of bias, and the organization operated on a large scale for about a decade after the first evidence emerged that its neutrality was questionable. It took the discovery that NAF had a substantial undisclosed conflict of interest before it was shut down. On July 14, 2009, the Attorney General of Minnesota sued the NAF and its corporate affiliates for consumer fraud, deceptive trade practices, and false advertising based on the NAF's undisclosed financial relationship with one of the country's largest debt collection law firms. *See* Compl. at ¶ 5, *State v. Nat'l Arbitration Forum, Inc.* (Minn. Dist. Ct. July 14, 2009). Within days, the NAF announced that it would cease conducting consumer arbitrations. *See* Robin Sidel and Amol Sharma, *Credit-Card Disputes Tossed Into Disarray*, Wall Street Journal (July 21, 2009).

Although the NAF did not initially acknowledge any wrongdoing after the Minnesota action was filed, a year and a half later the company *did* admit that the key allegations in the Minnesota complaint were true:

> On April 6, 2011 the NAF executed a settlement agreement in which it formally stipulated that effective June 27, 2007 it became a holding company, transferred its operations to two subsidiaries and sold a 40% ownership interest in one of the subsidiaries to participants in the consumer debt collection industry for $42 million.

Torrence v. Nationwide Budget Finance, No. 05-0047, 2012 WL 335947 at ¶ 30 (N.C. Super. Ct. Jan. 25, 2012).

NAF aggressively marketed itself to credit card companies and debt collectors.[4] While it NAF trumpeted itself to the public as fair and neutral, "[b]ehind closed doors, NAF sells itself to lenders as an effective tool for collecting debts."[5] In its solicitations

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[4] *See* Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, Wash. Post, Mar. 1, 2000, at E1 ("[A]rbitration industry experts say [that] the forum's business involves more corporate-consumer disputes, in large part because of the company's aggressive marketing.").

[5] Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008. *See also* Sean Reilly, *Supreme Court Looks at Arbitration in Alabama Case This Week*, Mobile Reg., Oct. 1, 2000, at A1 ("In marketing letters to potential business clients, [NAF's] executives have touted arbitration as a way of eliminating class action lawsuits, where thousands of small claims may be combined."); Sarah Ovaska, *3 Cases Cite Payday Lending: Consumer Groups Say Arbitration Clauses Deny People Recourse to Courts*, News & Observer, Jan. 7, 2007 ("[NAF], which in 2006 resolved $3 billion worth of claims involving debts and other disputes, has been singled out by consumer advocates, who criticize it for advertising its services to businesses.").

and advertising, NAF "has overtly suggested to lenders that NAF arbitration will provide them with a favorable result."[6] BusinessWeek described a September, 2007, PowerPoint presentation aimed at creditors—and labeled "confidential"—that promises "marked increase in recovery rates over existing collection methods."[7] The presentation also "boasts that creditors may request procedural maneuvers that can tilt arbitration in their favor. 'Stays and dismissals of action requests available without fee when requested by Claimant—allows claimant to control process and timeline.'" Speaking on condition of anonymity, an NAF arbitrator told BusinessWeek that these tactics allow creditors to file actions even if they are not prepared, in that "[i]f there is no response [from the debtor], you're golden. If you get a problematic [debtor], then you can request a stay or dismissal."[8] BusinessWeek also highlighted another disturbing NAF marketing tactic: NAF "tries to drum up business with the aid of law firms that represent creditors." Neither AAA nor JAMS cooperate with debt-collection law firms in such a manner.[9]

NAF had an arsenal of other ways of letting potential clients know that NAF can immunize them against liability. One NAF advertisement depicted NAF as "the alternative to the million-dollar lawsuit."[10] Additionally, NAF sent marketing letters to potential clients in which it "tout[s] arbitration as a way of eliminating class action

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[6] Ken Ward, Jr., *State Court Urged to Toss One-Sided Loan Arbitration*, Charleston Gazette & Daily Mail, Apr. 4, 2002, at 5A.

[7] Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008.

[8] Id.

[9] Id.

[10] Nadia Oehlsen, *Mandatory Arbitration on Trial*, Credit Card Mgmt., Jan. 1, 2006, at 38

lawsuits, where thousands of small claims may be combined . . . ."[11] NAF's marketing letters also urged potential clients to contact NAF to see "how arbitration will make a positive impact on the bottom line" and told corporate lawyers that "[t]here is no reason for your clients to be exposed to the costs and risks of the jury system."[12]

The NAF also manipulated who was selected to be arbitrators, so that favored clients got better results. The Center for Responsible Lending analyzed this data and reached two conclusions: (a) companies that arbitrate more cases before certain arbitrators consistently got better results from those arbitrators, and (b) individual arbitrators who favored creditors over consumers got more cases in the future.[13] Similarly, the Christian Science Monitor analyzed one year of data and found that NAF's ten most frequently used arbitrators—who were assigned by NAF to decide nearly three out of every five cases—ruled for the consumer only 1.6% of the time. In contrast, arbitrators who decided three or fewer cases during that year found in favor of the consumer 38% of the time.[14] Likewise, Public Citizen's analysis found that one particular arbitrator, Joseph Nardulli, handled 1,332 arbitrations and ruled for the corporate claimant 97% of the time. On a single day—January 12, 2007—Nardulli

[11] Sean Reilly, Supreme Court Looks at Arbitration in Alabama Case This Week, Mobile Reg., Oct. 1, 2000, at A1.

[12] See Caroline E. Mayer, Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided, Wash. Post, Mar. 1, 2000, at E1.

[13] Joshua M. Frank, Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration* (2009), http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf.

[14] Simone Baribeau, *Consumer Advocates Slam Credit-Card Arbitration*, Christian Sci. Monitor, July 16, 2007.

signed 68 arbitration decisions, giving debt holders and debt buyers every cent of the nearly $1 million that they demanded. [15] If Nardulli worked a ten-hour day on January 12, 2007, he would have averaged one decision every 8.8 minutes. Busy arbitrators like Nardulli are well-compensated for workdays like this one—as one former NAF arbitrator noted, "I could sit on my back porch and do six or seven of these cases a week and make $150 a pop without raising a sweat, and that would be a very substantial supplement to my income. . . . I'd give the [credit-card companies] everything they wanted and more just to keep the business coming."[16]

NAF also blackballed arbitrators who dared to rule in favor of consumers. Harvard law professor Elizabeth Bartholet went public with her concerns that, after she awarded a consumer $48,000 in damages, NAF removed her from 11 other cases, all of which involved the same credit card company, on the credit card company's objection. As Bartholet described her experience to BusinessWeek, "NAF ran a process that systematically serviced the interests of credit card companies."[17] Bartholet told the Minneapolis Star-Tribune that "[t]here's something fundamentally wrong when one side has all the information to knock off the person who has ever ruled against it, and the little guy on the other side doesn't have that information. . . .That's systemic bias."[18]

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[15] Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* 17 (2007), http://www.citizen.org/documents/ArbitrationTrap.pdf.

[16] Chris Serres, Arbitrary Concern: Is the National Arbitration Forum a Fair and Impartial Arbiter of Dispute Resolutions? Star Trib. (Minneapolis), May 11, 2008, at 1D.

[17] Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008.

[18] Chris Serres, Arbitrary Concern: Is the National Arbitration Forum a Fair and Impartial Arbiter of Dispute Resolutions? Star Trib. (Minneapolis), May 11, 2008, at 1D.

Another deeply troubling element of Bartholet's experience comes from how NAF explained Bartholet's removal from her cases to the parties in those cases. NAF sent letters to the parties stating that "due to a scheduling conflict, the Arbitrator previously appointed is not available to arbitrate the above case." When Bartholet asked the NAF case administrator about the letters, the administrator "agreed that [Bartholet] was likely being removed simply because of [her] one ruling against the credit card company." NAF's legal counsel did not deny this explanation.[19]

Similarly, former West Virginia Supreme Court Justice Richard Neely stopped receiving NAF assignments after he published an article accusing the firm of favoring creditors. In that article, Justice Neely lamented that NAF "looks like a collection agency" that depends on "banks and other professional litigants" for its revenue; he described NAF as a "system set up to squeeze small sums of money out of desperately poor people."[20]

As one final note, in testimony that I submitted to the Subcommittee on Domestic Policy of the House Committee on Oversight and Government Reform in July 22, 2009, I set forth extensive evidence of how the NAF regularly entered awards against people who had been the victims of identity theft, who had been sued on debts that were far past the statute of limitations, and other abuses.

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[19] Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations, 110th Cong. (2008) (statement of Elizabeth Bartholet), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3485&wit_id=7313.

[20] Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008.

The supporters of forced arbitration have never yet offered a convincing explanation for why the Congress, the CFPB or policymakers should just ignore the fact that for nearly a decade, the company that handled more consumer arbitrations than any other provider operated in a flagrantly biased, pro-bank manner.

CONCLUSION

The CFPB is living up to its name. The Bureau really IS protecting consumers. The banking industry's attacks on the CFPB's proposed rule should be seen for what they are: an effort to let the banks and payday lenders just exempt themselves from laws that they don't feel like following.

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Has argued and won more than 25 reported cases, including victories in five of the U.S. Courts of Appeal and at least one decision in the high courts of nine different states.

2006 Recipient of the National Consumer Law Center's Vern Countryman Award, which "honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the well being of vulnerable consumers." Recipient of Maryland Consumer Rights Coalition's 2013 "Legal Champion" Award, and 2010 Maryland Legal Aid Bureau's "Champion of Justice" Award

Has presented at more than 100 continuing legal education or professional conferences in more than 25 states; has testified in both houses of Congress, several state legislatures and administrative agencies; has been quoted in more than 100 periodicals throughout the country and has appeared in several radio and TV stories.

Has argued and won appeals where courts rejected claims that various federal laws preempted pro-consumer state laws: ***Aguayo v. U.S. Bank***, 653 F.3d 912 (9th Cir. 2011) (National Bank Act did not preempt state debt collection law); ***Epps v. J.P. Morgan Chase Bank***, 675 F.3d 315 (4th Cir. 2012) (same); ***Singh v. Prudential Health Care Plan, Inc.***, 335 F.3d 278 (4th Cir. 2003) (claims under Maryland HMO Act survived ERISA's preemption); **McKee v. AT&T Corp.**, 191 P.3d 845 (Wash. 2008) (Federal Communication Act does not preempt state contract law); ***Sweeney v. Savings First Mortgage***, 897 A.2d 1037 (Md. 2005) (federal law does not preempt state statute limiting mortgage brokers' fees); ***Wells v. Chevy Chase Bank***, 832 A.2d 812 (Md. 2003) (Home Owners Lending Act does not preempt state contract law claims against credit card issuer).

Has argued and won several appeals where courts limited abuses of mandatory arbitration clauses: ***Lee v. Intelius, Inc.***, 705 F.3d 1129 (9th Cir. 2013) (arbitration clause not enforceable where "even an exceptionally careful consumer would not have understood" that they were agreeing to arbitration by clicking on icon on website); ***Gibson v. Nye Frontier Ford, Inc.***, 205 P.3d 1091 (Ak. 2009) (selective appeal provision unconscionable; employer must pay all substantial costs of arbitration); ***Cordova v. World Fin. Corp.***, 208 P.3d 901 (N.M. April 29, 2009) (one-sided arbitration provision unconscionable); ***Toppings v. Meritech Mortgage,*** 569 S.E.2d 149 (W.Va. 2002) (where a lender's arbitration clause designates an arbitration forum that is paid through a case volume fee system, and the arbitration forum's income is dependent on continued referrals from the creditor, this so impinges on neutrality and fairness that the clause is unconscionable); ***Raymond James Fin. Servs., Inc. v. Saldukas***, 896 So.2d 707 (Fl. 2005) (broker waived right to compel arbitration, even though investor proved no prejudice); ***Lewallen v. Green Tree Servicing, LLC***, 487 F.3d 1085 (8th Cir. 2007) (also finding waiver of right to compel arbitration by a lender).

Other successful oral arguments include: ***Rhodes v. R+L Carriers, Inc.***, 491 Fed. Appx. 579 (6th Cir. 2012) (employment discrimination claim pled with sufficient specifity to meet ***Iqbal*** standards); ***United States v. United States ex rel Thornton***, 207 F.3d 769 (5th Cir. 2000) (relators under *qui tam* provisions of the False Claims Act are entitled to receive a statutory share of the value of some non-cash proceeds of a settlement between the U.S. and the defendants); ***Dua v. Comcast/Harvey v. Kaiser***, 805 A.2d 1061 (Md. 2002) (statute that retroactively stripped consumers of accrued cause of action violated provisions of state constitution).

Formerly Chief Nominations Counsel, U.S. Senate Judiciary Committee, 1989-1990
EDUCATION: **Harvard Law School** – J.D. 1986; **Georgetown University** – A.B. 1983

United States House of Representatives
Committee on Financial Services

"Truth in Testimony" Disclosure Form

Clause 2(g) of rule XI of the Rules of the House of Representatives and the Rules of the Committee on Financial Services require the disclosure of the following information. A copy of this form should be attached to your written testimony.

1. Name:	**2. Organization or organizations you are representing:**
F. Paul Bland, Jr.	Public Justice, P.C. The Public Justice Foundation
3. Business Address and telephone number: 1620 L Street, N.W., Suite 630 Washington, D.C. 20036 (202) 861-5223	
4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2012 related to the subject on which you have been invited to testify?	**5. Have any of the organizations you are representing received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2012 related to the subject on which you have been invited to testify?**
☐ Yes ☑ No	☐ Yes ☑ No
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7. Signature: F. Paul Bland	

Please attach a copy of this form to your written testimony.