

September 25, 2017

Senator Mike Crapo, Chairman
Senator Sherrod Brown, Ranking Member
Senate Committee on Banking, Housing & Urban Affairs
U.S. Senate
Washington, DC 20510

Re: Oppose H.J. Res. 111/S.J. Res. 47 Blocking CFPB's Forced Arbitration Rule

Dear Senator Crapo and Brown:

The 423 undersigned law school, university and college professors from all 50 states and the District of Columbia write in strong opposition to H.R. Res. 111/S.J. Res. 47, which would block the Consumer Financial Protection Bureau's new forced arbitration rule.¹

As a group of experienced academics, we approach the issues of pre-dispute arbitration clauses and bans on class proceedings from a myriad of different perspectives and political sensibilities. Nonetheless, based on our varied scholarship and teaching backgrounds, we all agree (1) it is important to protect financial consumers' opportunity to participate in class proceedings; and (2) it is desirable for the CFPB to collect additional information regarding financial consumer arbitration.

Class action lawsuits are an important means of protecting consumers harmed by violations of federal or state law. Class actions enable a court to see that a company's violations are widespread and to order appropriate relief. The CFPB's study shows that, over five years, 160 million class members were awarded \$2.2 billion in relief – after deducting attorneys' fees. Class actions are especially important for small dollar claims, because the time, expense and investigation needed for an individual claim typically make no sense either for the consumer or for an attorney. Additionally, class actions provide behavioral relief both for the plaintiffs and the public at large, incentivizing businesses to change their behavior or to refrain from similar practices.

Individual arbitrations are not a realistic substitute for class actions. Compared to the annual average of 32 million consumers receiving \$440 million per year in class actions, the CFPB's study found an average of only 16 consumers per year received relief from affirmative claims and another 23 received relief through counterclaims; in total, those consumers received an average of \$180,770 per year. While the average per-person arbitration recovery may be higher than the average class action payment, the types of cases are completely different. The few arbitrations that people pursue tend to be individual disputes involving much larger dollar amounts than the smaller claims in class actions. Most consumers do not pursue individual claims in either court or arbitration for several reasons: they may not know their rights were

¹ The signatories are representing their own views and not those of their educational institutions.

violated; they may not know how to pursue a claim; the time and expense would outstrip any reward; or they cannot find an attorney willing to take an individual case. Thus, if a class action is not permitted, most consumers will have no chance at having their dispute vindicated at all. Class actions, on the other hand, are an efficient method of resolving claims impacting a large number of people.

The U.S. legal system depends on private enforcement of rights. Whereas some countries invest substantial resources in large government agencies to enforce their laws, the United States relies substantially on private enforcement. The CFPB's study shows that, in those cases where there was overlap between private and public enforcement, private action *preceded* government enforcement 71% of the time. Moreover, consumer class actions provide monetary recoveries and reform of financial services and products to many consumers whose injuries are not the focus of public enforcers. American consumers can't solely depend on government agencies to protect their rights.

Reporting on individual arbitrations will increase transparency, broaden understanding of arbitration, and improve the arbitration process. As scholars, we heartily endorse the information reporting requirements of the rule for individual arbitrations. This reporting will address many questions that have gone largely unanswered, due to the lack of transparency that currently exists in this area of law. For example, the public will now know the rate at which claimants prevail, whether it is important to be represented by an attorney, and whether repeat arbitrators tend to rule more favorably for one side than the other. The reporting will permit academic study, which will prompt a necessary debate on how to strengthen and improve the process.

In conclusion, we strongly support the CFPB rule as an important step in protecting consumers. We believe it is vital that Congress not deprive injured consumers of the right to group together to have their day in court or block important research into the arbitration process.

Yours very truly,

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