

Prepared Remarks of Alan S. Kaplinsky  
CFPB Field Hearing on Arbitration  
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1. My name is Alan Kaplinsky. I am a Partner at Ballard Spahr LLP and Chairman of the firm's Consumer Financial Services Group, which has well over 100 members. I am past Chair of the American Bar Association's Committee on Consumer Financial Services, the first President of the American College of Consumer Financial Services Lawyers. I have advised consumer financial services companies on consumer arbitration issues for the past 20 years. More recently, I have been heavily involved in counseling and representing clients in a wide variety of matters involving the Bureau. We also produce a widely read blog, CFPBMonitor.com, focused on the Bureau's activities. I appreciate the Bureau's invitation to speak today.
2. Apropos today's meeting, I pioneered the use of consumer arbitration clauses in bank and credit card agreements in the mid-1990s. My clients considered the legal system to be broken. They were being sued in locations that are commonly referred to as "judicial hellholes" where a big company cannot get fair shake in the court system. In many cases my clients would find out about a class action at the same time they received a court order certifying the class.
3. My partners and I fought vigorously to have consumer arbitration agreements enforced and played a central role in what became a great debate over the role of arbitration as a forum for resolving consumer disputes. And while we were advocating on behalf of our company clients, I have always personally and professionally believed that arbitration is good not only for companies, but also for consumers and the public at large.
4. The vast majority of consumer disputes are resolved without either arbitration or court litigation. Most consumers are able to resolve disputes with companies using help lines or informal dispute procedures or third parties such as the Better Business Bureau or even the complaint portals maintained by this Bureau and most state attorneys general. But if a dispute does escalate beyond that point, we need to ask the question – what does the average consumer really want for himself or herself in a dispute resolution process? What has been the experience of consumers who have actually participated in arbitration? I have not had a chance yet to read the Bureau's report. But I did read the Bureau's press release, and it appears they completely ignored this critical question. If so, that is very

unfortunate, because actual consumer satisfaction is central to the question of whether consumer arbitration is in the public interest.

5. From the very beginning I counseled clients to implement arbitration programs that were fair, so that both parties, whether they won or lost, would view dispute resolution in a positive way. It has always seemed to me that arbitration is a great solution for both consumers and companies because everyone benefits from a process that is faster, cheaper and more efficient and congenial than court litigation. At the same time, we were aware of arguments that consumers should not be bound by arbitration clauses contained in form contracts, so we even urged clients to give consumers an unconditional right to opt out of the arbitration clause without affecting any other terms of the contract. I am pleased to say that the vast majority of our clients accepted that advice.
6. Since my firm has participated in many arbitrations, I have witnessed firsthand the many benefits that consumers do realize from arbitration. In what other forum can a consumer sit down at a conference table with the decision maker and tell his or her story virtually without interruption? In what other forum can the consumer get a result in a matter of months rather than years? And, arbitration costs for the consumer are far less than what it costs to file a lawsuit in court. In my experience, in terms of results, consumers really do fare at least as well in arbitration as in court, and probably better. And if you were to ask consumers to describe their actual experience with arbitration, as opposed to asking people who never experienced it what their hypothetical views are, I think you would hear a lot of positive things about arbitration. But again, it appears that the Bureau's study does not reflect actual interviews with people who went through arbitration.
7. Compared to the court system, consumer arbitration is in its infancy. In my view, it is not really probative to say that consumers must not like arbitration because there are relatively few arbitrations compared to the number court cases, because the benefits of arbitration are only beginning to be recognized. Another reason for this is that many plaintiff's lawyers don't like arbitration and have railed against it. This is basically a "public relations" problem and it has dissuaded consumers from getting a complete picture of what arbitration is and what benefits it can offer.
8. This is where the Bureau could play a constructive role by having its Consumer Education and Engagement arm explain to consumers in a neutral way how the court system works and how arbitration works. And also remind consumers that there are contracts that go along with credit cards and loans and other consumer accounts. The Bureau's press release emphasizes that "More than 3 in 4 Consumers Surveyed Do Not Know If They Are Subject to an Arbitration Clause." We in the industry have bent over backwards to clearly and conspicuously disclose to consumers if a contract has an arbitration clause. So if the Bureau's statistics are correct, to us that means that people are not reading what we are disclosing. The cure for that, in our view, is to better educate consumers to pay some attention to what they are signing.
9. We also believe that if the Bureau fairly presents consumers with the facts, consumers will choose arbitration over litigation in many cases. And part of this education should be a balanced presentation of not just the benefits, but also the drawbacks, of class

actions. Yes, there are drawbacks. After litigating class actions for most of my career I can say from experience that consumers rarely obtain any meaningful benefit, especially when compared to what they can recover in arbitration. Many class actions have flawed legal theories and are brought to try to force a settlement in which the plaintiff's lawyer receives a windfall. By contrast, if the consumer prevails in arbitration, the consumer can be made whole.

- (a) I did not see in the press release any mention of the negative aspects of class actions. But another lengthy empirical study which looked at class actions over the past several years concluded that "The hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys." In two-thirds of the class actions studied, the plaintiffs either settled individually or the court dismissed the case, meaning that the class members got nothing. And the cases tended to linger for years. Based upon the Bureau's press release, it appears we are not going to hear about the millions of class members who got nothing, or next to nothing, from class actions.
  - (b) Congress itself, when it enacted the Class Action Fairness Act, spoke about the "parade of abuses" in class actions. It stated that "[a] mounting stack of evidence ... demonstrates that [these] abuses are undermining the rights of both plaintiffs and defendants" in class actions. It does not appear that we will hear about these abuses, either.
10. I sincerely hope that the Bureau takes these important points into account in considering what, if any, regulation it believes will further the public interest.