IPA SUMMARY OF ARBITRATION CLAUSES WITH CLASS-ACTION WAIVERS

Arbitration is a widely used method of dispute resolution for consumer financial products. When compared with other forms of dispute resolution, arbitration offers consumers numerous and significant benefits including a more flexible, more convenient, and comparatively inexpensive means of settling a dispute.[1] Notably, providers of financial services subject to an arbitration clause typically agree to pay for the cost of the arbitration, saving the consumer, as well as the provider, from the high cost of litigation. Moreover, the arbitration proceedings usually take place in a location convenient to the consumer, and in some instances involving small amounts, the consumer may even choose to conduct the arbitration proceedings by phone. In addition, the arbitration process actually gives consumers a broad array of potential remedies that may not be available in other forms of dispute resolution, such as class-action litigation, because arbitrators may generally award any form of individual relief, including injunctions and punitive damages, rather than merely making a determination and award for actual damages.

The IPA believes that federal and state measures that prohibit pre-dispute arbitration agreements along with class-action waivers often fail to consider the impact these kinds of laws and regulations would impose on consumers and industry participants. In regard to restrictions on the use of class-action waivers in particular, it must be noted that providers usually pair arbitration clauses with class-action waivers because providers are only able to take on the significant costs of providing arbitration programs because the providers do not also have to absorb the enormous litigation costs of defending a class-action lawsuit. The cost of defending a determination of class certification alone is enough to drive many providers out of a particular market or put them out of business altogether. For this reason, arbitration clauses, when paired with class-action waivers, give providers the freedom to operate without threat that the costs of defending a single class-action lawsuit could drive them out of business. In light of this fact, there are not significant benefits to providers in offering arbitration without the incorporation of a class-action waiver. Federal and state laws that restrict the use of arbitration clauses or that restrict the use of class-action waivers will thus result in providers simply not offering the arbitration process as an alternative dispute resolution mechanism, depriving consumers of the significant benefits described above.

Notably, some of the best evidence of the relative benefits of arbitration as compared to other forms of dispute resolution, such as class-action litigation, comes from the Consumer Financial Protection Bureau's ("CFPB") 2015 Study on Arbitration ("the Study"), which notes that, as compared with class-action lawsuits, arbitration is less timely, less expensive, and generally more effective than class-action litigation. Specifically, the Study shows that while the average class-action lawsuit takes two years or more to complete, the average time for completion of the arbitration process is only two to seven months. Similarly, while the average cost to a consumer for participating in the arbitration process totals $200, the cost to a consumer seeking to resolve a dispute through litigation is much higher as the cost just to file a complaint in court can reach as high as $400. In addition, the Study reveals that the average consumer participating in a class-action receives a cash settlement of only $32.35. Contrast this amount with the average amount a consumer receives after prevailing in an arbitration proceeding, which is $5,389. Further, the Study makes it clear that in the class actions that were reviewed by the CFPB, the lawyers representing the class more often than not benefitted more by the litigation than the members of the class themselves. The IPA believes these findings in the CFPB's own Study evidence the fact that consumers benefit far more from arbitration than they do from class-action lawsuits.

[1] 2015 CFPB Study on Arbitration:
https://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf

It is important to highlight that the CFPB's Study also dispels the misconception that companies have an unfair advantage in arbitration. In fact, the Study found that 81% of arbitrations in which customers prevailed involved a company that was a "repeat player" or one that had repeat experience in the arbitration process. Lastly, the vast majority of cases produced no benefits to most members of the putative class – even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process.

One of the more troubling aspects about proposals to prohibit arbitration is the tendency to apply uniform requirement on all financial services providers. This fact is particularly worrisome for smaller providers who are less equipped to bear the significant costs of defending a class-action lawsuit and therefore face a very real risk of being driven out of business by such proposals. The IPA is thus concerned that proposals to restrict and prohibit the use of arbitration and class-waivers, if left unchecked, may create a barrier to entry for smaller entities looking to enter the consumer financial services market out of fear of the financial risks described above. In turn, this barrier to entry would lead to less competition, greater industry consolidation, and ultimately fewer choices for consumers in the marketplace.

In light of these concerns, the IPA believes that during any debate on arbitration, policymakers must consider the benefits afforded by the arbitration process to consumers and the likely negative impact restrictions on the arbitration process may therefore take on both consumers and businesses alike. In addition, if a state, despite these concerns, moves forward with a proposal to limit or restrict the arbitration process, including the use of class-action waivers, then policymakers in that state, instead of a one-size-fits-all proposal, should contemplate solutions that take an industries' track record of responding to and resolving customer complaints in a timely and effective manner into consideration. Policymakers should, at a minimum, consider excluding such industries from any final restrictions imposed on the arbitration process so that they have the opportunity to continue to resolve consumer disputes in a manner that is consistent with their positive track record without the lingering threat of class-action litigation.