

University of St. Thomas Law Journal

Volume 13
Issue 2 *Winter 2017*

Article 12

2017

Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?

Nancy A. Welsh
nwelsh@law.tamu.edu

Bluebook Citation

Nancy A. Welsh, *Class Action-Barring Mandatory Pre-Dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?*, 13 U. St. Thomas L.J. 381 (2017).

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Law Journal. For more information, please contact lawjournal@stthomas.edu.

ARTICLE

CLASS ACTION-BARRING MANDATORY PRE-DISPUTE CONSUMER ARBITRATION CLAUSES: AN EXAMPLE OF (AND OPPORTUNITY FOR) DISPUTE SYSTEM DESIGN?

NANCY A. WELSH*

I. INTRODUCTION

In the field of dispute resolution, there has been significant controversy over the mandatory pre-dispute arbitration clauses that organizations impose upon consumers, patients, nursing home residents, clients, employees, and others. The controversy has intensified with the addition of class action waivers and the Supreme Court's repeated enforcement of such clauses—even in the face of state and federal legislation designed to guarantee that less-powerful parties have access to redress in the courts.¹ More recently, opponents of the clauses have worked to increase public awareness by coining the term “forced arbitration,” and they have distributed a video that focuses on the clauses’ negative impact on two individuals and a restaurant owner.² *Consumer Reports* has joined in, warning consumers against mandatory pre-dispute arbitration clauses in contracts for goods or services.³ The *New York Times* has even run a series detailing the effects of

* William Trickett Faculty Scholar and Professor of Law, Penn State University, Dickinson Law; Chair of the ABA Section of Dispute Resolution. I thank Lisa Amsler (formerly Bingham), Erin Archerd, Timothy Hoy, and Victor Quintanilla for their comments on an earlier draft, Professor Mariana Hernandez-Crespo for inviting me to participate in the symposium, and Hanna Borsilli and the law review’s student editors for their assistance. Any errors are my own.

1. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013).

2. *Lost in the Fine Print 2014*, ALLIANCE FOR JUSTICE, <http://www.afj.org/multimedia/first-monday-films/films/lost-in-the-fine-print>.

3. Mandy Walker, *The Arbitration Clause Hidden in Many Consumer Contracts: And the Consumer Rights You’re Giving Away as a Result*, CONSUMER REPORTS, <http://www.consumerreports.org/cro/shopping/the-arbitration-clause-hidden-in-many-consumer-contracts> (last updated Sept. 29, 2015).

mandatory pre-dispute arbitration clauses in particular cases⁴ and has devoted an editorial to the issue.⁵

All of these efforts appear designed to increase the “salience” of forced arbitration and class action waivers, especially for consumers. Interestingly, this is exactly the strategy that was suggested by Judge William H. Pauley III in his ninety-one-page opinion and order in *Ross v. Am. Express*,⁶ a case involving credit card-issuing banks’ alleged violation of federal anti-trust laws. Based on evidence admitted at trial, Judge Pauley’s opinion described a complicated series of group meetings, email exchanges, telephone calls, in-person conversations, and other events that culminated in most credit card issuers’ inclusion of mandatory pre-dispute arbitration clauses and class action waivers in their contracts with consumers. Despite the events and relationships detailed in his opinion, however, Judge Pauley concluded that the plaintiffs had failed to meet their burden in proving that the many meetings, conversations, creation of working groups, and other events amounted to anti-competitive collusion.⁷ In part, his holding was

4. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=1.

5. *Beware the Fine Print*, N.Y. TIMES (June 26, 2010), <http://www.nytimes.com/2010/06/27/opinion/27sun2.html>.

6. *Ross v. Am. Express Co.*, 35 F. Supp. 3d 407 (S.D.N.Y. 2014), *aff’d*, 630 F. App’x 79 (2d Cir. 2015) (holding that the district court’s finding that issuing banks did not engage in anti-trust conspiracy was not clearly erroneous). See Nancy A. Welsh & Stephan J. Ware, *Ross et al. v. American Express et al.: The Story Behind the Spread of Class Action-Barring Arbitration Clauses in Credit Card Agreements*, 21 DISP. RESOL. MAG. 18 (2014). After the plaintiffs’ claims in *Ross* survived a motion to dismiss, Professor Myriam Gilles wrote:

The development of collective action waivers was also aided by a brain trust of lawyers and business executives in the credit card industry. In a class action complaint filed in August 2005 against the major U.S. card-issuing banks, plaintiffs allege that defendants held a series of high-level, top-secret meetings beginning in 1998 to discuss the imposition and use of collective action waivers. Towards those ends, plaintiffs allege the defendants formed internal organizations “devoted to collectively promoting and implementing” these waivers by filing “amicus curiae briefs for the purpose of persuading courts to enforce onerous and one-sided arbitration clauses,” and “filing countersuits against class action lawyers and suits for abuse of process,” among other activities. According to the complaint, the defendant banks—normally cut-throat and fierce competitors—in this instance illegally colluded to fix material terms offered to cardholders. The plaintiffs’ allegations of defendants’ numerous clandestine meetings and other communications, which have withstood a motion to dismiss, tell a fascinating story of an entire industry conspiring to avoid class action exposure by working together on drafting, implementing, and defending collective action waivers. And for our purposes here, the plaintiffs’ story foreshadows the lengths to which corporate defendants are willing to go to implement these waivers and defend them against legal challenge.

Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 398–99 (2005). Query whether the complaint in *Ross* would survive a motion to dismiss today, post-*Twombly* and *Iqbal*. See Nancy A. Welsh, *I Could Have Been a Contender: Summary Jury Trial As a Means to Overcome Iqbal’s Negative Effects Upon Pre-Litigation Communication, Negotiation and Early, Consensual Dispute Resolution*, 114 PENN ST. L. REV. 1149 (2010).

7. See *Ross*, 35 F. Supp. 3d at 431 (observing that due to high barriers to entry, the credit card market is a oligopolistic market, which is “characterized by mutually independent behavior among firms, meaning that what is optimal for a firm depends on the conduct of the firm’s com-

due to the plaintiffs' failure to prove that the presence or absence of a class action-barring arbitration clause was sufficiently "salient" to consumers in deciding among credit card issuers. Without such salience, there could be no anti-competitive effect and thus no violation of the Sherman Act.⁸ Judge Pauley acknowledged, however, that the salience of a term may emerge over time "as a result of competition among sellers or consumer organizations' education of consumers."⁹

Judge Pauley also concluded that while there *was* an agreement among the credit card issuers to make mandatory pre-dispute class action-barring arbitration the industry norm, this did not constitute an advance and collusive agreement among them to adopt and maintain class action-barring arbitration clauses. Instead, Judge Pauley found that after twenty-eight meetings and sidebar conversations,¹⁰ the defendant banks had been sufficiently educated about the dangers of class action, the benefits of class action-barring arbitration, and the drafting of arbitration clauses that they could have chosen to adopt class action-barring arbitration clauses as a matter of "sequential conscious parallelism." If that was the case, there need

petitors" and that "if the clauses were adopted independently, there is no injury 'of the type the antitrust laws were intended to prevent'"). See also *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). At least the plaintiffs in *Ross* got to trial, with access to the expressive power of the courts—unlike the plaintiffs in *Twombly*.

8. See *Ross*, 35 F. Supp. 3d at 431 ("During the period of the alleged conspiracy. . . arbitration clauses were not salient to consumers. Salience describes the prominence to consumers of various aspects of a multidimensional product. . . Those product aspects which are visible or meaningful to consumers are 'salient.' . . Generally, firms are expected to compete as to salient terms, but not as to non-salient terms."). But perhaps the presence or absence of arbitration clauses, especially class action-barring clauses, is increasing in salience. See, e.g., *Lost in the Fine Print 2014*, *supra* note 2; *Beware the Fine Print*, *supra* note 5; Walker, *supra* note 3. Indeed, Judge Pauley acknowledged that the salience of a term may emerge over time. See *Ross*, 35 F. Supp. 3d at 431–32 (describing signs of the "incipient salience" of class action-barring arbitration clauses and noting that "[e]xamples of emerging salience abound in other consumer contracts" and that terms can become salient to consumers as a result of competition among sellers or consumer organizations' education of consumers. Judge Pauley also noted that "[c]ollusion can delay the rise of salience of product features that would normally become salient under competitive conditions."). See also Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KAN. L. REV. 985 (2012) (urging that consumer organizations rate the fairness of companies' arbitration programs and that consumer companies compete for high rankings).

9. See *Ross*, 35 F. Supp. 3d at 431–32 (describing signs of the "incipient salience" of class action-barring arbitration clauses and noting that "[e]xamples of emerging salience abound in other consumer contracts" and that terms can become salient to consumers as a result of competition among sellers or consumer organizations' education of consumers). See also Stipanowich, *supra* note 8.

10. See *Ross*, 35 F. Supp. 3d at 446–47. The Court acknowledged that First USA had adopted its clause more than a year before the first meeting of the Issuing Banks and that after the last Bank adopted a class action-barring clause, "the multi-year pattern of meeting nearly bimonthly dropped off" and "the Arbitration Coalition did not meet again for almost a year, and after two follow-up conference calls, appeared to have disbanded." *Id.*

not be an advance agreement among the competitors.¹¹ Judge Pauley added that the plaintiffs had not identified additional circumstantial evidence that was sufficient for him to “exclude the possibility that the alleged conspirators acted independently.”¹² Indeed, Judge Pauley determined that when the credit card issuers came together or communicated, they had acted more like an *ad hoc* trade association than a group of conspirators (even though some of the meetings of this alleged trade association were quite exclusive and limited to the in-house counsel of the interested companies).¹³

Thus, the defendants won, and the plaintiffs lost, in *Ross v. Am. Express Co.* The Second Circuit has since affirmed Judge Pauley’s judgment.¹⁴ But Judge Pauley concluded his opinion with words of warning directed to the credit card issuers and the lawyers (both outside counsel and inside counsel) who played key roles in the events leading to the widespread adoption of class action-barring mandatory pre-dispute arbitration clauses:

These actions are the latest installment in multidistrict litigation that spanned more than a decade and raised a spate of novel issues. They offer a cautionary lesson to all lawyers who labor under inexorable pressure to generate new business. When outside counsel convene meetings of competitors in the hope of propelling themselves to the forefront of an emerging trend—in this case, class-action-barring consumer arbitration agreements—they do so at their professional peril.

When the first meeting convened, only two defendants had class-action barring arbitration clauses in their card member agreements. By the time the last meeting concluded, all ten of the Issuing Banks, accounting for approximately 87% of all credit card transactions in the United States, had adopted class-action-barring arbitration clauses in their card member agreements. It was only by a slender reed that Plaintiffs failed to demonstrate that the lawyers who organized these meetings had spawned a Sherman Act conspiracy among their clients.

11. *Id.* at 451.

12. *See id.* at 444 (quoting *Matsushita Elec. Indus. Co. Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).

13. Further examination of these aspects of the opinion, focusing on the law of antitrust, will have to wait for another day. For now, however, it is worth noting that in plaintiffs’ appellate brief, they argued that Judge Pauley was wrong in requiring them “‘dispel’ the possibility of independent action to prove an antitrust violation[,]” and they urged instead that the existence of a conspiracy was required to be only a “‘reasonable inference that the [factfinder] could draw from that evidence; it need not be the sole inference.’” Brief for Appellant and Special App. at 50, 58–59, *Ross v. Citigroup, Inc.*, 630 F. App’x 79 (2d Cir. 2015) (citing to *In re Publ’n Paper Antitrust Litig.*, 690 F.3d 51 (2d Cir. 2012)). Plaintiffs also pointed out that courts have found collusion arising out of trade association activities. *Id.* at 76–77.

14. *Ross v. Citigroup, Inc.*, 630 F. App’x 79 (2d Cir. 2015) (holding that district court’s finding that issuing banks did not engage in antitrust conspiracy was not clearly erroneous).

In retrospect, the Issuing Banks' short-term goal of lowering litigation costs eluded them. Undoubtedly, retaining some of the most esteemed antitrust lawyers in the nation to counter the extraordinary talents of Plaintiffs' counsel imposed a significant burden on the Issuing Banks. Only the passage of time will reveal whether the Issuing Banks' longer-term goal of avoiding the expense of class action lawsuits can be achieved.¹⁵

Judge Pauley's observations warn of the danger of cooperative efforts in pursuit of an innovation that will assist an industry, at least when such cooperation involves companies that are supposed to be in competition with each other.

But exactly what did these lawyers, companies and others do? Most important for the purposes of this essay and symposium, could the actions detailed in Judge Pauley's opinion constitute a form of "dispute system design?"¹⁶ If yes, who were the designers? What were the roles of the dispute resolution professionals and organizations that were involved? And in the wake of the Consumer Financial Protection Bureau's (CFPB's) proposed regulation of mandatory pre-dispute consumer arbitration clauses in contracts for financial services and products, is there another opportunity for dispute system design? If yes, where should dispute resolution organizations and individual dispute resolution professionals fit today in any such design process?

Ultimately, this essay will conclude that a private, *ad hoc* dispute system design process *did* lead to the insertion of class action waivers in mandatory pre-dispute consumer arbitration clauses. In-house and outside counsel certainly played key roles in initiating this process, but it is unclear that any individual lawyers could claim credit or responsibility as "designers." The representatives of dispute resolution organizations, meanwhile, played supporting roles—as providers of information and as *amici* in Supreme Court litigation. The essay will consider whether dispute resolution professionals could have managed their role in the process differently—and if so, why they would have managed it differently.

This essay also concludes that the momentum generated by the CFPB's regulatory proposals has created another opportunity for dispute resolution organizations and professionals to play a role in designing a system for the resolution of disputes between consumers and businesses. However, the appropriate role played by these dispute resolution organizations and professionals depends upon the role played by the CFPB, particularly in light of the recent election. If the CFPB survives and acts as a third party, committed to hearing and considering the concerns of all stakehold-

15. *Ross*, 35 F. Supp. 3d at 457.

16. Professor Lisa Amsler has answered this question in the affirmative. *See generally*, Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 *LAW & CONTEMP. PROBS.* 221 (2004).

ers and acting in the public interest, and if the agency retains its independence and final decision-making authority over the dispute system's design, then experienced dispute resolution organizations and professionals should be able to play a very valuable dual role as both designers and stakeholders. If the CFPB does not survive or does not retain its independence and decision-making authority, then playing a dual role becomes more problematic. It will then be important to identify those dispute resolution organizations that either do not rely on referrals from corporate repeat players for their survival or those that do rely on such referrals but have nonetheless persisted in working to protect the integrity of the dispute resolution field. These are the organizations that will need to step up and play a design role for the benefit of the dispute resolution field and, even more importantly, for the benefit of our public justice system and our larger polity.

II. A BRIEF DESCRIPTION OF DISPUTE SYSTEM DESIGN

The field of dispute resolution generally credits William Ury, Jeanne Brett, and Stephen Goldberg with introducing "dispute system design" ("DSD") in their 1988 book *Getting Disputes Resolved*.¹⁷ In particular, Ury, Brett, and Goldberg focused attention on power, rights, and interests as the primary underlying "levers" that organizations can use to resolve conflicts. While working as consultants for a coal mine, the co-authors learned that the union contract provided for a tiered four-step grievance procedure (i.e., two negotiation steps at the local level; negotiation at the district level; and finally binding arbitration). However, little negotiation actually occurred at the local level, and the miners distrusted arbitration.¹⁸ Strikes, violence, and theft occurred regularly. Ury, Brett, and Goldberg worked with union and management officials to encourage them to focus their negotiations on the interests underlying their positions rather than their positions or contractual (i.e., legal) grievances. The focus on interests worked. Strikes, violence, and theft declined while productivity increased. Elsewhere in the coal industry, Goldberg inserted mediation between negotiation and arbitration, with the hope that mediators' involvement would encourage the parties' disclosure of the problems (or interests) underlying their grievances. In addition, Goldberg worked with the parties to motivate them to use the new dispute resolution system and provided them with the

17. WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1988). Of course, "dispute system design" builds on others' earlier work, including the work of Mary Parker Follett, Mary Rowe and Elinor Ostrom. See Lisa Blomgren Amsler et al., *Dispute Systems Design: Preventing, Managing and Resolving Conflict* (unpublished manuscript) (on file with author).

18. See Jeanne M. Brett et al., *Designing Systems for Resolving Disputes in Organizations*, 45 AM. PSYCHOL. 162, 162 (1990).

necessary negotiation skills and resources to increase their likelihood of success.¹⁹ This experiment also worked.²⁰

Based on these experiences, Ury, Brett, and Goldberg concluded that “resolving disputes on the basis of interests rather than rights or power results in lower costs and greater benefits.”²¹ They then developed the following six principles of DSD for disputes within and between organizations: (1) consult before disputes erupt and solicit feedback after a dispute has occurred; (2) put the focus on interests; (3) build in “loop-backs” to negotiation; (4) provide low-cost rights and power procedures; (5) arrange procedures in a low-to-high cost sequence; and (6) provide disputants with the necessary negotiation skills, resources, and motivation.²²

A few years later, in their 1996 book *Designing Conflict Management Systems*,²³ Cathy Costantino and Christina Sickles-Merchant focused on the creation of dispute resolution methods that would be responsive to organizations’ needs and could be implemented before conflicts ripened. Costantino and Sickles-Merchant categorized the array of dispute resolution processes as (1) preventative (e.g., dispute resolution clauses, partnering, consensus building), (2) negotiated, (3) facilitated (e.g., mediation, conciliation,²⁴ institutional ombuds), (4) fact-finding (e.g., neutral experts, masters), (5) advisory (e.g., early neutral evaluation, non-binding arbitration), or (6) imposed (e.g., binding arbitration).²⁵ Their DSD principles overlap in some respects with those that Ury, Brett, and Goldberg introduced, but Costantino and Sickles-Merchant also provided for more explicit customization and party self-determination. Their principles for DSD are: (1) develop guidelines for whether ADR is appropriate; (2) tailor the ADR process to the particular problem; (3) build in preventative methods of ADR; (4) make sure that disputants have the necessary knowledge and skill to choose and use ADR; (5) create ADR systems that are simple to use, easy to access, and resolve disputes early, at the lowest organizational level, with the least

19. *Id.* at 163.

20. *Id.* at 162.

21. *Id.* at 163.

22. *Id.* at 165–68. URY ET AL., *supra* note 17, at 42.

23. CATHY A. COSTANTINO & CHRISTINA SICKLES-MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (1996).

24. Confusingly, “conciliation” is often described as a facilitated process but in reality, it often appears to operate much like the advisory process of nonbinding arbitration. See Jeswald W. Salacuse, *Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution*, 31 *FORDHAM INT’L L.J.* 138, 173 (2007).

25. Today’s ADR procedures do not fit as neatly as they once did into the categories identified by Costantino and Merchant. See Lisa Blomgren Bingham, *Collaborative Governance: Emerging Practices and the Incomplete Legal Framework for Public and Stakeholder Voice*, 2009 *J. DISP. RESOL.* 269, 291 (2009) (explaining that processes for resolving conflict in policy-making vary along several dimensions, including the participants, their authority and power to influence policy decisions, and the process for communication and decision-making).

bureaucracy; and (6) allow disputants to retain maximum control over the choice of ADR method and selection of neutral wherever possible.²⁶

In their 2013 book, *Designing Systems and Processes for Managing Disputes*,²⁷ Nancy Rogers, Bob Bordone, Frank Sander, and Craig McEwen carefully acknowledged the concerns that had arisen regarding DSD. For example, if DSD principles focus on the disputants' *private* interests only and exclude consideration of *public* interests, the courts' and litigation's potential as a "public good"²⁸ may be undervalued or ignored entirely. In addition, some critics have pointed out that although sustained conflict can be painful for individuals and organizations, it may need to be allowed to build in order to create the conditions required to motivate social or political action.²⁹ Rather than creating new principles for DSD, Rogers and her colleagues chose to highlight the steps required: (1) taking the design initiative; (2) assessing or diagnosing the current situation (including assessing stakeholders, their goals and interests, and contexts); (3) creating the systems or processes; and (4) implementing the design, including evaluation and process or system modification. The first and last steps—particularly, identifying the decision to take the initiative as a step and making evaluation and modification part of the implementation process rather than "add-ons"—are especially noteworthy. The co-authors also identified key planning issues that could arise throughout the process: (1) planning how to select, engage, and prepare intervenors and parties; (2) determining the extent of confidentiality and openness in the process; (3) dealing with desires for change, justice, accountability, understanding, safety, and reconciliation; (4) enhancing relationships; and (5) incorporating technology.

Most recently, Lisa Amsler, Janet Martinez, and Stephanie Smith³⁰ have weighed in with the following guiding principles for DSD: (1) create a DSD that is fair and just; (2) consider efficiency for the institution and participants; (3) engage stakeholders—including users³¹—in design and

26. COSTANTINO & MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS *supra* note 23, at 120–21. See also DAVID B. LIPSKY ET AL., EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT (2003) (including case studies regarding systems for dispute resolution at Brown and Root, Kaufman and Broad, Warner Brothers, Universal-Studios, Kaiser Permanente, the United States Postal Service, Johnson & Johnson, Shell, and Prudential, among others).

27. NANCY H. ROGERS ET AL., DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES (2013).

28. *Id.* at 12–13.

29. *Id.* at 15. See also Howard Gadlin, *Bargaining in the Shadow of Management: Integrated Conflict Management Systems*, in THE HANDBOOK OF DISPUTE RESOLUTION 371 (Michael L. Moffit & Robert C. Bordone eds., 2005); Howard Gadlin, *Addressing the Thornier Complexities of Racial Discrimination Complaints in the Workplace*, 15 DISP. RESOL. MAG. 25, 26 (2009).

30. Amsler et al., *supra* note 17. See also Stephanie Smith & Jan Martinez, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 128 (2009); Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111 (Fall 2015).

31. See Lisa Blomgren Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 22–24 (2009)

implementation; (4) consider and seek prevention; (5) provide multiple and appropriate rights-based and interest-based process options; (6) assure users of flexibility in choice and sequence of process options;³² (7) match the design to the available resources, including training; and (8) make the DSD accountable through transparency and evaluation,³³ with appropriate concern for privacy, in order to improve it continuously.³⁴ As before, there is significant overlap with the principles developed by others, but the co-authors' explicit acknowledgement of the importance of fairness, justice, and transparency as well as their explicit inclusion of users in the design, implementation, and evaluation phases represent additional significant steps forward in DSD.³⁵

As Andrea Schneider and I have concluded elsewhere, dispute system design experts now agree that:

. . . the best systems are characterized by: (1) multiple process options for parties, including rights-based and interest-based processes; (2) ability for parties to “loop back” and “loop forward” among these options; (3) substantial stakeholder involvement in the system's design . . . ; (4) participation that is voluntary, confidential, and assisted by impartial third party neutrals; (5) system transparency and accountability; and (6) education and training of stakeholders on the use of available process options.³⁶

(expressing significant concern about the perceived unfairness of dispute systems designed by one disputing party and imposed upon the other, often less-powerful disputing parties).

32. This element is consistent with the arguments of commentators who have promoted acceptance of “process pluralism.” See, e.g., Carrie Menkel-Meadow, *Peace and Justice: Notes on the Evolution and Purposes of Legal Processes*, 94 GEO. L.J. 553, 554–56 (2006); John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 147–50 (2000).

33. See Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation in the Workplace*, *supra* note 31 at 32–33 (describing the evaluation of the USPS REDRESS system based on users' perceptions of interactional justice (satisfaction with interpersonal treatment experienced during mediation), procedural justice (satisfaction with the process), and distributive justice (satisfaction with the outcome)); Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002 J. DISP. RESOL. 101, 115 (2002) (observing that USPS established percentage goals for voluntary employee participation which substantially influenced the design of the REDRESS program).

34. Amsler et al., *supra* note 17.

35. See also Carrie Menkel-Meadow, *Are There Systematic Ethics Issues in Dispute System Design? And What We Should [Not] Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 229–30 (2009) (suggesting the following principles for the “well-meaning process designer—do no harm; do not become a ‘tool’; be sure that the end users . . . have had input into the design; take some responsibility for implementation and evaluation; know what participants' legal rights are; avoid systematic discrimination or harm to particular individuals; consider whether processes should include multiple choices, menus, gateways or tiers . . . ; ensure that any process designed can be adequately explained; [and] suggest that any system designed should be evaluated and revised as conditions change”).

36. Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 74, 93 (2013).

There also are some principles, though, that are *not* common among the DSD experts. Two are most important for this essay. First, Costantino and Sickles-Merchant specifically urge the development of guidelines regarding whether ADR is appropriate. Thus, they recognize that ADR may not always be appropriate. This recognition is less obvious in the writings of some others. Second, Amsler, Martinez, and Smith are alone in making the dispute system designer responsible for developing a system that is fair and just. Presumably, if the dispute system designer is not satisfied that the system is sufficiently fair and just, Amsler, Martinez, and Smith would urge that the designer should withdraw and avoid putting his or her stamp of approval upon the dispute system. Rogers and her colleagues also acknowledge that a dispute system designer must deal with the desire for justice, but they point out that the designer's sense of justice may conflict with that of the community within which the system will exist.³⁷ Currently, there is no code of ethics for a designer facing this dilemma. Thus, she will need to rely on the other professional codes that bind her, as well as her own personal sense of integrity.³⁸

In addition to defining the principles that should guide DSD, Amsler, Martinez, and Smith have created a structural framework to assist the analysis required in designing a dispute system. Their chart, below, lists key questions that should be asked in the DSD process.

1. Goals
 - a. What do the system's decision-makers seek to accomplish?
 - b. Which types of conflicts does the system seek to address?
2. Stakeholders
 - a. Who are the stakeholders?
 - b. What is their relative power?
 - c. What are their interests, and how are their interests represented in the system?
3. Context and Culture
 - a. How does the context of the dispute system design affect its viability and success?

37. ROGERS ET AL., *supra* note 27, at 79. Rogers and her co-authors are careful to acknowledge that a designer may face ethical dilemmas. For example, a client may hope to set up a "dispute resolution system that leans the client's way." The designer may counsel the client to consider whether such a system will be sustainable or whether it could ultimately harm the client's reputation in the broader community. Rogers and her colleagues ask, "But, if you fail to dissuade the client or the client prefers the gain, even if short-term, you face a dilemma. Do you design the uneven playing field, ignore the directives of the client and design a more power-equalizing system, resign as designer, or take some other action?" *Id.*

38. *Id.* See Tricia S. Jones, *Designing Systems and Processes for Managing Disputes* by Nancy Rogers, Robert Bordone, Frank Sander, and Craig McEwen, 20 DISP. RESOL. MAG. 34 (2013) (observing that "[i]t is not enough to know that design can be done; it is important to justify why it is being done and with what results").

- b. What aspects of culture (organizational, social, national, or other) affect the workings of the system?
- c. What are the norms for communication and conflict management?
- 4. Processes and Structure
 - a. Which processes are used to prevent, manage, and resolve disputes?
 - b. If there is more than one process, are they linked or integrated?
 - c. What are the incentives and disincentives for using the system?
 - d. What is the system's interaction with the formal legal system?
- 5. Resources
 - a. What financial resources support the system?
 - b. What human resources support the system?
- 6. Success, Accountability, and Learning
 - a. How transparent is the system?
 - b. Does the system include monitoring, learning, and evaluation components?
 - c. Is the system successful?³⁹

This essay will return to the DSD principles described *supra* and will use the framework developed by Amsler, Martinez, and Smith to assist analysis. At this point, however, the essay will turn to the rise of class action-barring mandatory pre-dispute arbitration clauses in the general credit card market in order to determine whether credit card issuers' development and gradual inclusion of such clauses represent an example of DSD.

III. THE RISE OF CLASS ACTION-BARRING MANDATORY PRE-DISPUTE ARBITRATION CLAUSES

A. *Ross, et al. v. American Express Company, et al.*

In 2014, a federal district court in the Southern District of New York conducted a trial and issued a decision in *Ross v. Am. Express Co.*,⁴⁰ a case involving allegations that a group of credit card-issuing banks had violated federal antitrust laws as they adopted class action-barring mandatory pre-dispute arbitration clauses. As noted *supra*, Judge Pauley wrote a ninety-one-page opinion filled with the details of meetings, the development of inter-related work groups (i.e., the "Arbitration Coalition," the "Consumer Companies Class Action Working Group" and the "In-House Working Group"), email exchanges, telephone calls, in-person conversations, and

39. Lisa Blomgren Amsler et al., *Christina Merchant and the State of Dispute System Design*, 33 CONFLICT RESOL. Q. S7, S18–19 (2015).

40. *Ross*, 35 F. Supp. 3d 407.

other events that culminated in all of the defendant banks' (and many other credit card issuers') inclusion of mandatory pre-dispute arbitration clauses and class action waivers in their contracts with consumers.⁴¹ Importantly, these issuers dominated the general purpose credit card market, collectively controlling over 80% of the market share.⁴²

Perhaps unsurprisingly, the events included in Judge Pauley's opinion describe the participation of representatives of both credit card-issuing banks and companies providing consumer products and services. Also in the picture were a few public relations firms and even a law professor. Conspicuously absent are consumers, consumer advocates, or representatives of consumer protection agencies. For purposes of this essay's focus on DSD, however, it is most important to note the roles played by lawyers and representatives of dispute resolution organizations.

According to Judge Pauley, lawyers were key players in the events that led to widespread adoption of class action-barring mandatory pre-dispute arbitration clauses. Outside counsel actually initiated the first meetings focusing on the potential inclusion of such clauses, apparently due to pressure they felt to market and enlarge their firms' practices. Ultimately, Judge Pauley's opinion describes a "phalanx"⁴³ of lawyers from top law firms participating in the meetings of the Arbitration Coalition and the Consumer Companies Class Action Working Group. Judge Pauley's opinion also reveals that a few of those firms specifically benefitted from solicitations for donations to support the production of *amicus* briefs in cases before the United States Supreme Court and federal circuit courts.⁴⁴ Among outside counsel, Ballard Spahr attorney Alan Kaplinsky was particularly active in helping to organize meetings, participating in them, writing *amicus* briefs, and advising clients regarding the inclusion of class action-barring

41. *Ross*, 35 F. Supp. 3d at 434–35 (observing that seven Issuing Banks had adopted class action-barring arbitration clauses by 2009 and that 13 of the 20 largest Issuing Banks have adopted such clauses) (citing to ARBITRATION STUDY, *infra* note 147, at 21). The Second Circuit affirmed the district court's finding that there was no violation of the Sherman Act, but newspaper reports suggest that the clearly erroneous standard of review was significant:

"If you had just read the facts in Judge Pauley's opinion you would have expected it to come out the other way," said Judge Jacobs, who heard the appeal alongside Circuit Judges Pierre N. Leval and Lynch. Judge Lynch also said he would have "expected it to come out the other way."

Pete Brush, *2nd Circ. Questions Tossing of AmEx, Citi Consumer Suits*, LAW 360 (Nov. 10, 2015, 6:31 PM), <http://www.law360.com/articles/725546/2nd-circ-questions-tossing-of-amex-citi-consumer-suits>.

42. *See Ross*, 35 F. Supp. 3d at 430 (observing that in 1999, the Issuing Banks' collective market share was 82.91% "as measured by transaction volume and 79.82% as measured by outstanding balances. . . . By 2005, this percentage had risen to 86.53% measured by transaction volume and 87.64% measured by outstanding balances. . .").

43. *Id.* at 428.

44. *See also* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015) (reviewing data that indicates that certain firms or lawyers also have become extreme repeat players in representing defendant corporations in consumer arbitration).

mandatory pre-dispute consumer arbitration clauses.⁴⁵ In-house counsel also were involved in all of the events described in Judge Pauley's opinion. Probably the person most active and most particularly focused on the use of arbitration to avoid class actions was Duncan MacDonald, a former Citi general counsel who was hired by First USA after it became an early adopter of a mandatory pre-dispute arbitration clause.⁴⁶ Importantly, *only* in-house counsel were involved in some of the teleconferences and the meetings of the In-House Counsel Working Group.

As this essay will describe *infra*, a few of the lawyers involved in these events focused on the need to develop arbitration clauses and practices that were demonstrably fair to consumers—or that at least would avoid being judged as heavy-handed or *unfair*.⁴⁷ But the lawyers who were the most vocal and insistent proponents of arbitration were more likely to highlight the dangers presented by class actions and, especially, by plaintiffs' class action lawyers.

Some representatives of national dispute resolution organizations, meanwhile, appear to have played supporting roles. They attended early meetings and even served as *amici* in some key cases before the Supreme Court. But Judge Pauley's opinion focuses most on the marketing efforts and "cross-fertilization" function of these representatives as they participated in sidebar teleconferences or email exchanges to encourage the expanded adoption of class action-barring mandatory pre-dispute arbitration clauses by updating credit card issuers about *other* issuers' internal discussions and experience with such clauses.

With this overview, this essay now will turn to a more detailed, year-by-year chronology of the events that led to the spread of class action-barring mandatory pre-dispute arbitration clauses in the general purpose credit card market. For the most part, the chronology is based on the events described in Judge Pauley's opinion. However, because of the timing of attempts to reform Rule 23 of the Federal Rules of Civil Procedure and initiatives undertaken (or attempted) by the American Arbitration Association (AAA) and the American Bar Association's Section of Dispute Resolution, the chronology also references these events.

45. See *Ross*, 35 F. Supp. 3d at 416–18, 420–26. 428–30.

46. *Id.* at 416–18, 420–25, 429.

47. *Id.* at 431 (describing efforts to develop best practices, Discover's adoption of an opt-out provision, but also noting: "This Court credits Plaintiffs' compelling evidence that Discover's opt-out option—utilized by less than 0.1% of cardholders—did not meaningfully counteract any loss in consumer choice.").

B. Chronology of Events Leading to the Spread of Class Action-Barring Mandatory Pre-Dispute Arbitration Clauses in the General Purpose Credit Card Market

1. 1996–1997

Perhaps any description of the events that led to the adoption of class action-barring mandatory pre-dispute arbitration clauses should begin with the very first attempts to undo Rule 23 of the Federal Rules of Civil Procedure, which provides for class actions. But the chronology in this essay will begin with revisions to Rule 23 that were proposed just prior to the series of events included in Judge Pauley’s opinion.⁴⁸

In April 1996, the Advisory Committee on Civil Rules recommended proposed revisions to Rule 23.⁴⁹ The revisions would have permitted certification of classes specifically for settlement and would have created both opt-in and hybrid classes.⁵⁰ For the purposes of this essay, it is most significant that the Advisory Committee proposed to add a few factors to determine whether the questions of law and fact common to class members predominated over individual questions and whether a class action represented a superior method for fair and efficient adjudication.⁵¹ These factors would be particularly relevant to proposed classes composed of members who had only small individual claims—e.g., consumers. In particular, proposed Rule 23(b)(3)(A) would have required courts to consider “the practical ability of individual class members to pursue their claims without class certification,”⁵² while proposed Rule 23(b)(3)(B) would have required con-

48. Professor Michael Green has similarly noted a temporal relationship between the 1991 amendment of Title VII to permit jury trials and employers’ adoption of mandatory pre-dispute arbitration clauses in their contracts with employees. See Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Employment Discrimination Claims*, 31 RUTGERS L. J. 399, 454–59 (2000); Michael Z. Green, *Measures to Encourage and Reward Post-Dispute Agreements to Arbitrate*, 8 NEV. L. J. 59–60, 74, n.78 (2007).

49. The Advisory Committee continuously studies the rules and recommends changes to the Judicial Conference of the United States through a Standing Committee on Rules of Practice and Procedure. See *Committee Membership Selection*, UNITED STATES COURTS, <http://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection> (last visited Oct. 30, 2016). The Standing Committee approved these proposed revisions for publication and public comment. See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, 167 F.R.D. 523 (West Group 1996).

50. Thomas E. Willging and Emery G. Lee III explain that the proposal before the Committee at this time:

. . . would have retained the (b)(1), (b)(2), and (b)(3) classes and added subsections that would have expanded certification options to include settlement classes (including “claims that could not be litigated on a class basis”), opt-in classes (using “permissive joinder” as the rubric), and hybrid classes that would join claims for injunctive relief with claims for individual damages under opt-in, opt-out, or settlement class certification.

Thomas E. Willging & Emery G. Lee III, *Class Certification and Class Settlement: Findings from Federal Question Cases, 2003–2007*, 80 U. CIN. L. REV. 315, 332 (2011).

51. Fed. R. Civ. P. 23.

52. Proposed Rules, 167 F.R.D. 523, 559.

sideration of “class members’ interests in maintaining or defending separate actions.”⁵³ Proposed Rule 23(b)(3)(F) would have provided for consideration of “whether the probable relief to individual class members justifies the costs and burdens of class litigation.”⁵⁴

The Committee’s meeting minutes and proposed Advisory Committee Notes describe the concerns that led to these proposals. Those concerns remain strikingly familiar today. On one hand, some members of the Committee expressed the conviction that class actions primarily serve the financial interests of plaintiffs’ class action lawyers and not the interests of individual class members.⁵⁵ On the other hand, other Committee members expressed the equally-strong conviction that class actions represent the only viable means for those with small claims to achieve individual relief and systemic change.⁵⁶

The Federal Judicial Center conducted research at the request of the Committee, and the research showed that the small claims involved in class actions were, indeed, quite small and thus very unlikely to be individually litigated. The research also showed that on a percentage basis, the fees of plaintiffs’ class action lawyers were not unreasonable.⁵⁷ The resulting proposed subparagraph A was meant to require courts to consider individual class members’ realistic ability to pursue their claims individually.⁵⁸ Its language likely would have permitted courts to find that some plaintiffs—

53. *Id.* See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 34–37 n.133 (2000) (also remarking on these proposals).

54. 167 F.R.D. 523, 559. Interestingly, broader language was proposed for subparagraph F in 1995: “(F) whether the public interest in—and the private benefits of—the probable relief to individual class members justify the burdens of the litigation.” See THOMAS E. WILLGING ET AL., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 107* (Federal Judicial Center 1996).

55. See 167 F.R.D. 523, at 540. For more recent commentary regarding such concerns, see, David Segal, *A Little Walmart Gift Card for You, a Big Payout for Lawyers*, N.Y. TIMES, Jan. 31 2006, at 3 (describing a class action settlement in which class members received gift cards from Walmart that “sounded as though the lawyers for Walmart and those for the plaintiffs had devised a settlement that would pump up fees for the latter while limiting outlays from the former”).

56. See 167 F.R.D. 523, at 540, 542, 546. See also Gilles, *supra* note 6.

57. See 167 F.R.D. 523, at 561; Willging & Lee, *supra* note 50, at 90. In the conclusion, the co-authors wrote:

Based on anecdotal evidence, we expected to find a high level of abuse in the form of attorney’s fees that were disproportionate to the class recoveries. Instead we found that attorney’s fees were generally in the traditional range of approximately one-third of the total settlement. While attorneys clearly derived substantial benefits from settlements, the recoveries to the class in most cases were not trivial in comparison to the fees. But, recoveries by individual class members were in amounts that could not be expected to support individual actions. This finding confirms that many cases satisfy an underlying purpose of Rule 23, which is to provide a mechanism for the collective litigation of relatively small claims that would not otherwise support cost-effective litigation. Our findings, however, do not address the monetary value or sufficiency of plaintiffs’ recoveries in relation to any monetary losses they may have incurred.

Id.

58. See 167 F.R.D. 523, at 537, 561–62.

e.g., those involved in mass tort claims, with very significant individual injuries—might be able to pursue their claims individually. Meanwhile, proposed subparagraph F likely would have permitted the denial of class certification for purposes of settlement if a court found that the real beneficiaries of a class settlement were the plaintiffs’ class action lawyers—e.g., settlements in which class members receive coupons while their lawyers receive cash.⁵⁹ In other words, when class action settlements appeared to benefit the defendants and lawyers more than members of the class, courts could reasonably conclude that the probable relief to individual class members would not justify the costs and burdens of class litigation.⁶⁰

Importantly, the Advisory Committee recognized that “there may be indirect benefits to the public at large in deterring wrongdoing, and in some cases it may be desirable to force disgorgement of wrongful profits without regard to individual benefits.”⁶¹ This recognition of class actions’ potential deterrent value, however, was not reflected in any of the new factors proposed for inclusion in Rule 23.

The American Bar Association (ABA) noticed this exclusion. In February of 1997, the ABA’s policy-making body, the House of Delegates, weighed in on the proposed amendments, voting to support many of them—including the “proposed revisions to 23(b)(3)(A) and (B) that would focus on the size of the individual claims in determining their viability without certification and the individual interest of class members in maintaining separate actions.” However, the House of Delegates “oppose[d] the proposed revision to Rule 23(b)(3)(F), which would provide for a balancing of probable relief to individual class members with the costs and burdens associated with class litigation *unless the Rule would further provide for the consideration of the deterrent effect of accumulating small recoveries.*”⁶²

In the spring of 1997, while the debate over the proposed amendments to Rule 23 continued, the venerable and non-profit American Arbitration Association (AAA) undertook its own initiative. This dispute resolution organization convened a “National Consumer Disputes Advisory Committee.”⁶³ The Advisory Committee’s membership included individuals drawn from the AAA, corporate general counsel, universities’ general counsel, as

59. See Class Action Fairness Act of 2005, Pub. L. No. 109–2, § 1712, 119 Stat. 4, 6 (2005) (providing that in such cases, lawyers are paid based on the number of people who actually redeem their coupons and not upon the number of people eligible to receive such coupons).

60. See 167 F.R.D. 523, at 540.

61. *Id.* See also Myriam E. Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1537–38 (2016) (arguing that “low-income groups are more likely to experience violations of statutory rights that give rise to class-wide and collective legal claims” and therefore “of vastly greater consequence for this population is the deterrent effect of class actions upon future wrongdoers.”).

62. See *Select ABA Resolutions on Class Actions*, 1997 A.B.A. SEC. LITIG. TORT AND INS. PRAC. SEC. REP. 116 (emphasis added).

63. See CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES, AM. ARBITRATION ASS’N 1, 4 (Apr. 17, 1998), https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014.

well as representatives from government-subsidized home loan agencies, state and federal regulatory agencies, and consumer organizations.⁶⁴ The National Consumer Disputes Advisory Committee began meeting.

A few months later, in October 1997, the Advisory Committee on Civil Rules chose to abandon the particular proposed revisions to Rule 23(b)(3) discussed here in favor of permitting further experimentation.⁶⁵ Therefore, at the end of the public comment period, these particular revisions were not forwarded to the Supreme Court.⁶⁶

2. 1998

Soon thereafter, in early 1998, arbitration clauses began to appear. Credit card issuer First USA adopted a mandatory pre-dispute arbitration clause for its contracts with consumers. For purposes of this essay, it is important to note that First USA was the first credit card issuer to do so. First USA also retained Duncan MacDonald, Citi's former general counsel and an outspoken opponent of class actions, as a consultant on arbitration issues and assigned him particular responsibility for developing a forum to talk about arbitration issues.⁶⁷ According to Judge Pauley's opinion in *Ross*, MacDonald was a constant presence and voice in the events that followed.

In April 1998, the AAA's National Consumer Disputes Advisory Committee (which had begun meeting in 1997) produced *A Due Process Protocol for Mediation and Arbitration of Consumer Disputes* to guide the use of ADR processes to resolve consumer disputes.⁶⁸ The Protocol's Statement of Principles asserted parties' entitlement to a "fundamentally-fair ADR process" with the Principles serving as "embodiments of fundamental fairness."⁶⁹ The Protocol provided, among other things, for: independent and impartial neutrals and administration; consumers' continued access to small claims court; reasonable costs for consumers (including

64. *Id.* at 32–33 (listing the signatories to the Due Process Protocol).

65. *See id.* at n.7; Willging & Lee, *supra* note 50, at 332.

66. *See* Fed. R. Civ. P. 23. *See* 7A WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 1753.1 (3d ed. 2009).

67. *Ross*, 35 F. Supp. 3d at 416.

68. *See* CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES, *supra* note 63, at 1–3. *See also* AM. BAR ASS'N, ADDRESSING DISPUTES IN ELECTRONIC COMMERCE: FINAL REPORT AND RECOMMENDATIONS OF THE AMERICAN BAR ASSOCIATION'S TASK FORCE ON ELECTRONIC COMMERCE AND ALTERNATIVE DISPUTE RESOLUTION 36, n.50 (2002); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, The Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2852–53 (2015) (observing that the AAA's decisions to produce the protocol "imposing fee schedules with caps, to create ethical standards, and to revise its rules and fee schedules" represented "matters of 'internal policy'" while other self-regulatory initiatives—like the adoption of ethical principles, the commitment to diversity, and information disclosure and dissemination also represent "choices" that are not universally followed by ADR providers; also reporting that many social media arbitration clauses do not meet the "'due process fairness tests'" of the AAA).

69. CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES, *supra* note 63, at 1, 9.

consideration of their ability to pay); arbitrator-supervised exchange of information; consumers' access to all remedies available in courts of law and equity; and consumers' access (upon request) to written explanations of arbitral awards.⁷⁰ The Protocol also strongly encouraged the use of mediation.⁷¹ It did not address class action waivers. (The AAA currently conditions its provision of service upon compliance with the Protocol⁷² and has been removed from some consumer agreements due to businesses' unwillingness to abide by the principles contained in the Protocol.)⁷³

Other credit card issuers also began to consider including mandatory pre-dispute arbitration clauses. In November 1998, American Express' lawyers successfully "pitched" the inclusion of an arbitration clause to top executives. They urged that the inclusion of arbitration was an "easy call" and would "lower[] litigation costs in the short term and [avoid] very expensive class action suits in the medium to longer term."⁷⁴

In the same month, Citi began considering the inclusion of an arbitration provision and contacted Ballard Spahr lawyer Alan Kaplinsky. Kaplin-

70. *Id.* at 1–3.

71. *Id.* at 2. The complete list of principles contained in the Protocol are:

1. Fundamentally-fair process
2. Access to information regarding ADR program
3. Independent and impartial neutral; independent administration
4. Quality and competence of neutrals
5. Small claims
6. Reasonable cost
7. Reasonably convenient location
8. Reasonable time limits
9. Right to representation
10. Mediation
11. Agreements to arbitrate
12. Arbitration hearings
13. Access to information
14. Arbitral remedies
15. Arbitration awards

Id. at 1–3. The Protocol does not address class action waivers.

72. See THOMAS J. STIPANOWICH ET AL., NATIONAL ROUNDTABLE ON CONSUMER AND EMPLOYMENT DISPUTE RESOLUTION: CONSUMER ARBITRATION ROUNDTABLE SUMMARY REPORT 48 (2012) ("Importantly, AAA reviews arbitration clauses for their compliance with the Due Process Protocol. When AAA has found deviation from the Protocol, it has rejected cases or has required the company to agree to correct deficiencies."); Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration* 44–45 (U. of Kan. Sch. Of Law, Working Paper No. 2011-4), <http://ssrn.com/abstract=1904545> (click on "Download This Paper") (reporting the results of first empirical study of the AAA's enforcement of its Consumer Due Process Protocol and finding that the AAA's review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations); Horton & Chandrasekher, *supra* note 44, at 91 (observing that the "prophylactic steps" resulting from the AAA's adoption and enforcement of its Consumer Due Process Protocols may make the AAA "more amenable to consumer plaintiffs than other venues").

73. See CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES, *supra* note 63, at 11.

74. *Ross*, 35 F. Supp. 3d at 415.

sky was a “thought leader”⁷⁵ according to Judge Pauley, and along with MacDonald, he would be a key player in many of the events to follow. Many describe him as the architect of mandatory pre-dispute consumer arbitration clauses, as well as class action waivers in such clauses.⁷⁶ Ultimately, Kaplinsky assisted American Express, Capital One, Citi, and Discover with their arbitration clauses.

3. 1999

In April 1999, one of Kaplinsky’s clients, American Express, joined First USA in including a mandatory pre-dispute arbitration clause in its credit card contracts. But American Express added a new wrinkle. Its arbitration clause also required consumers’ waiver of their right to pursue class actions.⁷⁷

Also in 1999, a group of lawyers, corporate representatives, and others met to explore arbitration. According to Judge Pauley’s opinion, this meeting originated with a conversation between Timothy Heine, Managing Counsel in American Express’ General Counsel’s Office, and two WilmerHale partners, Chris Lipsett and Ron Greene. Ultimately, the meeting was held at WilmerHale’s offices. It was designed to market WilmerHale’s capabilities and to demonstrate that the firm was “at the leading edge” on arbitration. This was in response to pressure to enlarge the firm’s practice.⁷⁸ Meeting co-sponsors included American Express, Citi, First USA, and Sears Roebuck & Co.⁷⁹ There were no dispute resolution organization representatives at this meeting.

After that first meeting, MacDonald, Heine, Lipsett, and Kaplinsky worked together to create the “Arbitration Coalition,” a group that met another 18 times. The Arbitration Coalition held its first meeting in July 1999. This inaugural session included in-house counsel, outside counsel, representatives of credit card-issuing banks and companies selling consumer goods and services, representatives of dispute resolution organizations (specifically, National Arbitration Forum (NAF) and JAMS), and even a representative of a public relations firm. According to Judge Pauley’s

75. *Id.* at 416.

76. See Alan S. Kaplinsky & Mark J. Levin, *FTC Continues to Ban Mandatory Arbitration in Magnuson-Moss Warranty Claims*, Ballard Spahr LLP (June 3, 2015), <http://www.ballardspahr.com/alertspublications/legalalerts/2015-06-03-ftc-continues-to-ban-mandatory-arbitration-in-magnuson-moss-warranty-claims.aspx>.

77. Although Judge Pauley indicates that American Express was the first general purpose credit card issuer to include a class action waiver, others have reported that Discover Platinum actually was the first credit card issuer to do this. See Johanna Harrington, *To Litigate or Arbitrate? No Matter—The Credit Card Industry is Deciding For You*, 2001 J. DISP. RESOL. 101, 102 (2001). Certain academics spotted the clash between arbitration and class actions early on. See Gilles, *supra* note 6, at 378; Sternlight, *supra* note 53, at n.5 (2000).

78. *Ross*, 35 F.Supp. 3d at 415.

79. *Id.*

opinion, Kaplinsky warned the attendees of the plaintiffs' bar's "take no prisoners" assault and the need to be equally well-networked in order to prevail.⁸⁰ Meanwhile, the meeting's agenda included "working together to turn the tide" with subheadings that included "sharing best practices" and "drafting fair, enforceable arbitration provisions."⁸¹

There were two more meetings of the Arbitration Coalition in 1999. The participants shared thoughts, materials, legal briefs, arbitration clauses, change-in-term notices, talking points, and answers to frequently asked questions. They also heard warnings regarding rogue or unsophisticated players whose attempts to be heavy-handed or unfair had the potential to cause consumer arbitration to be viewed in an unfavorable light.⁸² According to Judge Pauley, there were also expressions of concern about the satellite litigation that arbitration had already spawned and a description of NAF as a "creditor's tool."⁸³ The participants also discussed the need to establish a secure site for their communications, the value of developing a white paper, and potential funding of *amicus* briefs for submission by trade associations (and without any attribution to members of the Arbitration Coalition).⁸⁴

By this point, representatives of dispute resolution organizations were no longer attending the meetings of the Arbitration Coalition. Between the group meetings, however, individual conversations continued between NAF representatives and credit card issuers for updates regarding the experience of the credit card issuers that had already implemented arbitration provisions.⁸⁵ In addition, Steve Daily,⁸⁶ in-house counsel at Discover, circulated draft fairness guidelines, noting that the banks wanted to be able to convince customers that arbitration was being used in a fundamentally fair way and not to deprive customers of any rights.⁸⁷

Late in 1999, there were also solicitations for *amicus* briefs in an Eleventh Circuit case, *Baron v. Best Buy*,⁸⁸ appealing a district court's refusal to compel arbitration based in part on its finding that NAF did not represent a sufficiently "neutral, inexpensive and efficient forum" to determine the

80. *Id.* at 417.

81. *Id.*

82. *Id.* at 419

83. *Id.*

84. *Ross*, 35 F.Supp. 3d at 419.

85. *Id.* at 423 (Chase representative reporting that NAF representative told her that "First USA, Discover, American Express, Sears, Household, GE Capital, and MBNA had implemented arbitration provisions through change-in-terms notices sent to cardholders").

86. Daily left Discover and as of 2014, had his own companies. See *Steven C. Daily*, ZOOMINFO, <http://www.zoominfo.com/p/Steven-Daily/-768700> (last visited Oct. 7, 2016).

87. *Ross*, 35 F. Supp. 3d at 420. It is not clear from Judge Pauley's opinion whether Dailey was specifically referencing the Consumer Due Process Protocol.

88. *Baron v. Best Buy Co., Inc.*, 260 F.3d 625 (11th Cir. 2001).

claims at issue.⁸⁹ Ultimately, Ballard Spahr filed a brief on behalf of the American Bankers Association, the Consumer Bank Association and the American Financial Services Association. WilmerHale, meanwhile, filed a brief in the case on behalf of a dispute resolution organization, FedNet.⁹⁰

As 1999 came to an end, MBNA—a major consumer credit card issuer—notified its customers that it had now adopted an arbitration clause and class action waiver.

4. 2000

In 2000, the Arbitration Coalition's members held another five meetings. The lawyers and corporate representatives in attendance were asked to bring copies of their arbitration agreements, and there was discussion of arbitration litigation, regulatory developments, and a best practices protocol. There was also frequent discussion of public relations and the need for consumer education.

At the last meeting of the Arbitration Coalition in 2000, MacDonald presented the idea of creating a class action roundtable. He said that he intended to use the Arbitration Coalition as a base “to help [the] industry deal with the larger issue of the proliferation of class action lawsuits.”⁹¹ He conceived the one-day roundtable as a “brainstorming session that will focus exclusively on the growing epidemic of class actions and new, out-of-the-box ways that industry might adopt in responding to them.”⁹² He also suggested bringing in additional parties—Big Auto, manufacturing, pharmaceutical companies, brokerage houses, healthcare companies, retail stores, etc.

Separately, MacDonald also solicited support for more *amicus* briefs, this time for a petition for certiorari in *Green Tree Financial Corp.-Alabama v. Randolph*,⁹³ and with associations, not banks, serving as the signa-

89. See *Baron v. Best Buy Co., Inc.*, 75 F. Supp. 2d 1368, 1370 (S.D. Fla. 1999) (denying motion to compel arbitration, based in part on finding that the defendants had not sufficiently demonstrated that NAF was a “neutral, inexpensive and efficient forum” to determine the claims at issue, NAF’s procedures were unclear “given the changing nature of the rules they adopt and the almost total discretion of the director to issue or modify any award or rule” and enforcement of the arbitration clause “would raise an impermissible barrier to the Plaintiff’s exercise of her statutory rights”), *rev’d*, 260 F.3d 625 (11th Cir. 2001).

90. This organization consisted of former judges offering their services as arbitrators; it later became associated with the National Arbitration Forum. See Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1035 n.420 (2000) (“One such organization is FedNet, created by former federal judges, including Thomas Lambros, who retired after serving as Chief Judge of the U.S. District Court for the Northern District of Ohio. Some 30 former federal judges are affiliated, either as shareholders or as ADR providers.”).

91. *Ross*, 35 F. Supp. 3d at 423.

92. *Id.*

93. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000). The AAA and NAF also filed *amicus* briefs. The AAA pointed the court to its Consumer Due Process Protocol. NAF specified that its brief was in support of neither party and urged the court to require exhaustion of

tories. The funds for these *amicus* briefs would go to WilmerHale and Ballard Spahr, the same firms that had authored the briefs in *Baron*. Though MacDonald acknowledged that the cost was significant, he described *Green Tree Financial* as “important in the extreme” and asserted that victory “could send many class action lawyers to where they belong—to the employment lines.”⁹⁴

Other “sidebar” conversations also continued. A representative of NAF talked with one of the credit card issuers about collections and recovery issues, noting that First USA would share the information that it could. The NAF representative also acknowledged that at a certain point, such information would become proprietary and competitive.⁹⁵

In 2000, Bank of America and Household were the next credit card issuers to announce their adoption of class action-barring arbitration clauses. Citi also made the decision to include such clauses, while Citigroup indicated its plans to include an arbitration clause unless there were strong countervailing considerations.⁹⁶

In the same year, another dispute resolution organization—the ABA’s Dispute Resolution Section—established a Task Force on Consumer Arbitration, which began meeting. Kaplinsky was one of the members of this Task Force, representing the ABA’s Business Law Section.

5. 2001

The Arbitration Coalition held another five meetings in 2001. At one of these meetings, MacDonald urged the attendees to “help us keep the defense going” and warned that “our adversaries are determined to bring [the] industry to its knees” and “find weak links in our [d]efenses.”⁹⁷

However, another group also arose in 2001—and it was much more clearly focused on class actions. Its name was the “Consumer Companies’

all available remedies before coming to the court with pre-arbitration challenges: “First, make every reasonable effort to resolve the issue, without returning to the court; Second, exhaust the remedies for the alleged defect available within the arbitration structure; and Third, accept the offer of other parties to the contract to modify the contract or process to eliminate the alleged flaw.” Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 20, *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000) (No. 99-1235).

94. *Ross*, 35 F. Supp. 3d at 422. Plaintiffs’ class action lawyers were also described as “old fashioned protection rackets,” “a form of ‘legalized extortion to pay ransom,’” and “‘barbarians’ seeking to undermine the card industry.” Brief for Appellant and Special App., *supra* note 13, at 20.

95. *Ross*, 35 F. Supp. 3d at 420.

96. A Skadden associate working full-time at Citigroup’s General Counsel’s Office (pursuant to a “secondment”) recommended this decision in a memo that was forwarded to other Citi affiliates. *Id.* at 427. Apparently, this associate was embedded within the company. Corporations have encouraged firms to place third-year or fourth-year associates with them. The corporations will pay the costs for such associates, but not the profit margin. See David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 *FORDHAM L. REV.* 2067, 2092–93 (2010).

97. *Ross*, 35 F. Supp. 3d at 424–25.

Class Action Working Group.” The “organizing committee” for this group was comprised of MacDonald and representatives of Capital One, WilmerHale, Ballard Spahr (Kaplinsky again), and Pepper Hamilton. This group’s first meeting attracted a very large and impressive group, including representatives of major law firms, credit card-issuing banks, and other credit card-issuing consumer companies. The announcement of the group’s first meeting also included a manifesto that championed the fight against abusive class actions and observed “it’s the plaintiffs’ lawyers versus the companies. Suing companies is their business.”⁹⁸ MacDonald was at the first meeting of this group, urging that “class actions have become a gaming business and a shakedown racket” and warning that the “[t]rial bar [is] more organized because as competitors we are conditioned to go it alone due to a century plus of [the] Sherman Act.”⁹⁹ MacDonald called for the development of an “efficient action plan.”¹⁰⁰ At the group’s second—and last—meeting later in the year, a Yale law professor made a presentation regarding class action abuse.

By May 2001, there was discussion of the need to organize yet another, and smaller, group that was limited to in-house counsel. In-house counsel, especially those at financial services companies, had not found the recently organized Consumer Companies’ Class Action Working Group to be sufficiently relevant. In particular, they did not value the discussion of non-financial issues, and they perceived that outside counsel “d[id] not see the same internal issues that in-house counsel face.”¹⁰¹ In addition, there was fear that the larger group was too academic, too theoretical, and insufficiently practical.

Thus a new, more targeted group came into being—the “In-House Counsel Working Group”—and it held its inaugural telephone conference call in July 2001. Its goals were to create an informal “information please” network and identify means to “protect employees from the plaintiffs’ network.”¹⁰² Their password was “ARBITRATION”—although at the *Ross* trial, witnesses denied that they ever discussed arbitration.¹⁰³

The In-House Counsel Working Group met by teleconference another three times during 2001. Some of these calls began with an antitrust admonition. In his opinion, Judge Pauley expressed greatest concern about the In-House Counsel Working Group, in part because there was little evidence of the topics that were discussed.¹⁰⁴ This degree of non-transparency represents just the sort of circumstance that could constitute a “plus factor” in

98. *Id.* at 424.

99. *Id.*

100. *Id.*

101. *Id.* at 426.

102. *Id.*

103. *Ross*, 35 F. Supp. 3d at 426.

104. *Id.*

support of an inference of conspiracy or collusion.¹⁰⁵ In addition, even though Discover had been one of the credit card issuers that was quite active in the early days of the Arbitration Coalition, Discover was never invited to the In-House Counsel Working Group's meetings.¹⁰⁶ Recall that Discover's in-house counsel, Daily, had been most vocal in urging the adoption of a "fundamentally fair" arbitration process. Meanwhile, sidebar conversations continued among the lawyers. There was discussion, for example, of potential opt-outs and penalties for such opt-outs.¹⁰⁷

After Providian began considering the addition of an arbitration clause to its contracts, MacDonald put Providian and NAF in contact with each other as part of his desire "to help move things along."¹⁰⁸ Later that year, Providian became the next credit card issuer to announce that it was implementing class action-barring arbitration clauses.

During 2001, the ABA Dispute Resolution Section's Task Force met several times and produced ten drafts of a potential resolution and report for the ABA House of Delegates. The final draft required all consumer arbitration agreements to conform to minimum standards outlined in an attached draft "ABA Due Process Protocol for the Arbitration of Consumer Disputes."¹⁰⁹ This draft Protocol did not bar class action waivers, but it required "a clear explanation of the basic distinctions between arbitration and court proceedings, including disclosure that with arbitration. . . the consumer may be denied the opportunity to participate in class action proceedings."¹¹⁰ Ultimately however, the Task Force concluded that it could produce neither a resolution and report nor a set of due process protocols. Thus, this attempt by the ABA Dispute Resolution Section to lead, or at least influence, the development of mandatory pre-dispute consumer arbitration came to an end.¹¹¹

105. *Id.* at 438, 446–447.

106. *Id.* at 426.

107. *Id.*

108. *Id.* at 447.

109. See Revised Draft, AM. BAR ASS'N SECTION OF DISPUTE RESOLUTION, REPORT TO THE HOUSE OF DELEGATES, RECOMMENDATION (June 6, 2001) (on file with author).

110. *Id.*

111. See generally Letter from Thomas Susman, Dir., ABA Governmental Affairs Office, R. Larson Frisby, Senior Legislative Counsel, ABA Governmental Affairs Office, to Lela P. Love, Chair, ABA Section of Dispute Resolution, Homer La Rue, Chair-Elect, ABA Section of Dispute Resolution (Oct. 13, 2008) (on file with author). Interestingly, according to minutes from the last meeting of the Task Force, Alan Kaplinsky reported that the Business Law Section's Ad Hoc Committee on Consumer Arbitration had concluded there was "no need to redo the work of the AAA" and had agreed to urge the ABA House of Delegates to adopt a resolution supporting the AAA Consumer Due Process Protocol "and/or other protocols." Conference Call with Consumer Arbitration Due Process Protocol Task Force (Apr. 5, 2001) (minutes on file with author). The ABA House of Delegates has never adopted a resolution supporting the general consumer due process protocols.

6. 2002

The Arbitration Coalition held another two meetings in 2002, while the In-House Counsel Working Group held its last conference call that year. A few of the credit card issuers exchanged emails regarding cardholders' attempts to amend their agreements unilaterally by inserting additional dispute resolution forums.¹¹² The credit card issuers also discussed consumers' infrequent use of the arbitration provisions. Judge Pauley's opinion does not indicate that any of these communications involved representatives of dispute resolution organizations.

Chase notified its customers that it was implementing a class action-barring arbitration clause.

7. 2003

In 2003, members of the Arbitration Coalition traveled to Washington D.C. to hear arguments before the Supreme Court in *Green Tree Financial*. The group also held its last meeting and teleconference.¹¹³

Discover notified its cardholders that it was adopting a new opt out provision that would allow consumers, for the first time, to reject the arbitration clause. If cardholders failed to provide notice of their rejection within two months, however, the provision became final.¹¹⁴

By the end of 2003, class action-barring arbitration clauses had been adopted by all of the defendant banks in *Ross*—which meant that approximately 87% of all general-purpose credit card transactions were then subject to both mandatory pre-dispute arbitration and a class action waiver.¹¹⁵

C. Coda—and Identifying the Dispute System Designers

There is no doubt that by 2003, the major credit card issuers in the general-purpose credit card market had implemented a new system for resolving the majority of disputes between the credit card issuers and consumers. This essay will soon return to the structural framework introduced by Amsler, Martinez, and Smith to consider whether the creation of this new system merits categorization as “DSD” and whether the “designers” considered the issues and questions that are now recommended by DSD experts. The essay will then turn to the principles that Amsler, Martinez, Smith, and others urge should guide DSD.

Before turning to these questions, however, this essay will consider briefly whether there are any “dispute system designers” in the events described *supra*. Clearly, some individuals played leading roles. In-house

112. *Ross*, 35 F. Supp. 3d at 429. The additional forums referenced here likely were competing providers of dispute resolution or arbitration services.

113. *Id.* at 429–30.

114. *Id.* at 430.

115. *Id.* at 456.

lawyers MacDonald (First USA) and Heine (American Express) were early and strong advocates for a new dispute system. Outside counsel Kaplinsky (Ballard Spahr) and Lipsett (WilmerHale) also were leading advocates for the use of mandatory pre-dispute arbitration clauses and class action waivers. To greater and lesser degrees, these four individuals were involved in: organizing opportunities to educate credit card issuers regarding both arbitration and class action waivers; encouraging them to adopt class action-barring arbitration clauses; facilitating information exchanges regarding such clauses; funding litigation to support judicial enforcement of such clauses; and thinking “outside the box” to find means to undermine the viability of class actions and the class action bar.

The representatives of some dispute resolution organizations, particularly NAF, also played roles in the rise of class action-barring mandatory pre-dispute arbitration clauses, but Judge Pauley’s opinion suggests that they were more involved in cross-fertilization and the marketing of their services than in designing a dispute system.¹¹⁶ Indeed, the only dispute resolution organizations that appeared to step back and consider issues of overall design were the AAA and the ABA Section of Dispute Resolution, as they brought together representative groups of stakeholders. Only the AAA succeeded in developing something concrete—the Consumer Due Process Protocol.¹¹⁷ Meanwhile, Judge Pauley never identifies the AAA as a participant in or contributor to any of the meetings or communications that led to all of the defendants’ adoption of class action-barring mandatory pre-dispute arbitration clauses.¹¹⁸

It must be noted that the Consumer Due Process Protocol did *not* address the issue of class action waiver, probably because the first adoption of such a waiver occurred only after publication of the Protocol. Long after the series of events detailed *supra*, both the ABA Section of Dispute Resolution and the AAA repeated their efforts to bring together stakeholders to address *both* mandatory pre-dispute consumer arbitration *and* class action waivers. The precipitating event was a 2009 lawsuit brought by Minnesota Attorney General Lori Swanson against NAF—then the largest provider of

116. *Id.* at 423 (describing conversation between Chase and NAF regarding how other credit card-issuing banks were dealing with arbitration); *Id.* at 447 (describing MacDonald’s facilitation of communication between NAF and Providian “to help move things along” and credit card-issuing banks’ other contacts with NAF to try to learn about their competitors’ plans).

117. See Bingham, *Control over Dispute-System Design*, *supra* note 16, at 239–43 (examining how the AAA’s Consumer Due Process Protocol attempts to minimize the unfairness that can result from one party’s control over system design and concluding that “[w]hat is apparent is that justice systems designed by one party will often look very different from those designed mutually by the parties or those designed by third parties”).

118. It is interesting to note, however, that the CFPB has gathered substantial evidence that the AAA now dominates this particular arbitration market. Specifically, the CFPB reported that “the AAA is specified as at least one potential choice of contractually-specified arbitration administrators in 98.5% of the credit card market we studied.” ARBITRATION STUDY, *infra* note 136, § 5-1, at 4, n.5.

consumer debt arbitration services in the U.S.—that alleged NAF’s violation of the state’s consumer protection statutes. In response, NAF quickly agreed to end its substantial consumer debt arbitration business.¹¹⁹ That same year, the AAA convened a “National Task Force on the Arbitration of Consumer Debt Collection Disputes.”¹²⁰ Soon thereafter, in early 2010, the ABA Section of Dispute Resolution convened a separate effort, the “Consumer Arbitration Study Group.”¹²¹ The single meeting of the Section’s Study Group included Alan Kaplinsky and several of the members of the AAA’s National Task Force.¹²² The Section’s Study Group also recommended a series of next steps, including the value of continuing such meetings and discussions.¹²³ But once again, it was the AAA that managed to produce something concrete. In October, 2010, the AAA’s National Task Force released its Consumer Debt Collection Due Process Protocol and Statement of Principles. This protocol does not include a principle regarding class action waivers, but it provides an extensive summary of the Task Force members’ views on class actions. The summary concludes:

In light of the strong but opposing views by various members of the Task Force on the subject of class actions, the Task Force was unable to come to a consensus on the issue except to “agree to disagree.” Therefore, these Principles take no position on the issue of class actions, either within the context of debt collection arbitration, litigation or otherwise.¹²⁴

119. The lawsuit, its allegations and NAF’s response are described in detail in Nancy A. Welsh, *What is “(Im)partial Enough” in a World of Embedded Neutrals*, 52 ARIZ. L. REV. 395, 427–31 (2010).

120. Am. Arbitration Ass’n., *Consumer Debt Collection Due Process Protocol, Statement of Principles of the National Task Force on the Arbitration of Consumer Debt Collection Disputes 1* (October, 2010), https://www.adr.org/aaa/faces/aoe/gc/consumer?_afzLoop=8834822784271&_afzWindowMode=0&_afzWindowId=null#%40%3F_afzWindowId%3Dnull%26_afzLoop%3D8834822784271%26_afzWindowMode%3D0%26_adf.ctrl-state%3D13xbmc9pi2_4.

121. See AMERICAN BAR ASSOCIATION, SECTION OF DISPUTE RESOLUTION, REPORT OF THE DISCUSSION OF THE CONSUMER ARBITRATION STUDY GROUP (JANUARY 15–16, 2010), http://www.americanbar.org/content/dam/aba/uncategorized/dispute_resolution/consumerarbitrationreport.authcheckdam.pdf.

122. The author was one of the organizers of the Section’s Study Group, but was entirely unaware at the time of the other initiatives described in this essay.

123. See, e.g., the following:

- Consumer, business, government and other stakeholders should meet [to] try and agree on basic contract provisions on certain terms.
- Consumers need a place to resolve disputes; the Section and other entities should work to improve the handling of consumer disputes in court and related access to justice issues, including funding of courts, legal services, and dispute resolution services.
- Thanks to its broad base of support and credibility the ABA is in a unique position to assist in developing and disseminating information and educating stakeholders.
 - The ABA may study the operation of different choices.
 - The ABA can be an education resource and source of information.

Id. at 18.

124. Am. Arbitration Ass’n, *supra* note 120, at 13.

Many of the stakeholders who were involved in these 2009–2010 efforts by the ABA Section of Dispute Resolution and the AAA gathered again a few years later, for a National Roundtable on Consumer Arbitration, in 2012. They were joined by representatives of the then-newly-created CFPB. The organizers of this event ultimately produced a summary report that included a variety of useful resources for those interested in empirical research and policy-making in this area.¹²⁵ The report also summarized the participants' discussions, including their general agreement that it would be worthwhile to identify "difficult" consumer-initiated claims that could be converted into "easy" consumer-initiated claims, that it might be possible to aggregate individual consumers' online claims and identify appropriate triggers for regulatory action, and that there was interest in "find[ing] reasonable ways to assure that class actions are used only when necessary, [that] companies provide consumers with real redress, and [that] consumers with valid claims get access to legal representation."¹²⁶

Returning to the question of whether any individuals or organizations served as "dispute system designers" during the period from 1997 to 2003, it is important to recall that the credit card issuers' in-house counsel ultimately broke away from everyone else to form their own exclusive and more focused group. *This* group did not include *any* of the four individuals identified *supra* as leading players, although it did include a lawyer from American Express—Julia MacDermott, the group counsel who had joined Heine in 1998 to "pitch" arbitration.

Ultimately, therefore, it is unclear that any individual, organization, or group of individuals or organizations could be identified as particularly responsible for "designing" this dispute system. *Should* someone have taken that responsibility? The essay will return to that question after applying the structural framework proposed by Amsler, Martinez, and Smith to the events described in Judge Pauley's opinion, followed by application of the dispute system design principles that they and others advocate.

125. See THOMAS J. STIPANOWICH, NANCY WELSH, LISA BINGHAM [now Amsler] & LARRY MILLS, NATIONAL ROUNDTABLE ON CONSUMER AND EMPLOYMENT DISPUTE RESOLUTION: CONSUMER ARBITRATION ROUNDTABLE SUMMARY REPORT (2012); Nancy A. Welsh & David B. Lipsky, "Moving the Ball Forward" in *Consumer and Employment Dispute Resolution: What Can Planning, Talking, Listening and Breaking Bread Together Accomplish?*, 19 DISP. RESOL. MAG. 14 (2013).

126. STIPANOWICH ET AL., *supra* note 125, at 26.

IV. THE SPREAD OF CLASS ACTION-BARRING MANDATORY PRE-DISPUTE CONSUMER ARBITRATION CLAUSES: AN EXAMPLE OF DISPUTE SYSTEM DESIGN?

A. *Considering the Amsler, Martinez and Smith Structural Framework*

1. *Goals (“What do the system’s decision-makers seek to accomplish?” “Which types of conflicts does the system seek to address?”)*

From 1997 to 2003, the banks and consumer companies that issued credit cards had a few clear goals: reduce the expense of litigation generally; reduce the incidence of expensive class actions; and reduce plaintiffs’ lawyers’ ability to pursue class actions. In pursuing these goals, the credit card issuers focused on preventing the aggregation of small claims into class actions. It is also abundantly clear that they sought to avoid paying plaintiffs’ class action lawyers’ fees.

It is less clear that the credit card issuers affirmatively sought to deprive deserving consumers of the right or ability to seek individual redress. Early on, some of the participants in the events described *supra* specifically referenced the need to be “fair” and provide a “fundamentally fair” process.¹²⁷ At the same time, it is difficult to avoid noticing that these calls for fairness were relatively infrequent, and they tended to be paired with discussion of the importance of public relations.¹²⁸ In addition, it appears that by 2002, the credit card issuers were aware that consumers were making little use of the arbitration provisions to seek individual redress. There is no indication that they were concerned about this development, or took responsive action to reverse the trend and encourage consumers’ pursuit of individual redress.¹²⁹

127. *See Ross*, 35 F. Supp. 3d at 417 (regarding “drafting fair, enforceable arbitration provisions”). *See also id.* at 420 (regarding the circulation of draft fairness guidelines and the need to demonstrate that arbitration was being used in a fundamentally fair way).

128. *Id.* at 417, 422.

129. Recently, David Horton and Andrea Cann Chandrasekher reported that during this period other consumer companies took action to encourage consumers to bring concerns or complaints directly to the companies’ attention. *See Horton & Chandrasekher, supra* note 44 (discussing dispute resolution clauses that preceded the Supreme Court’s decision in *Concepcion*). Horton and Chandrasekher also reported that the American Bankers Association funded a study by Ernst & Young that examined consumers’ arbitration filings with NAF between 2000 and 2004 against financial services companies. According to Horton and Chandrasekher:

E&Y noted that most plaintiffs sought relatively small amounts of damages: 73% asked for less than \$15,000, 20% demanded between \$15,001 and \$75,000, and 7% requested \$75,001 or more. E&Y determined that consumers “won”—defined as recovering \$1 or more—in fifty-three of the ninety-seven awards (55%). Accordingly, E&Y cited the fact that “consumers are not losing a disproportionate number of cases” as proof that they “are [not] harmed by the arbitration process.”

Id. at 80 (quoting ERNST & YOUNG, *OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES*, 2–10 (2005)).

2. *Stakeholders* (“Who are the stakeholders?” “What is their relative power?” “What are their interests and how are their interests represented in the system?”)

The stakeholders in this context clearly included consumers, consumer organizations, consumers’ lawyers (including class action lawyers), governmental/regulatory entities, general purpose credit card issuers, lawyers representing the credit card issuers, lawyers who wanted to represent the issuers, and dispute resolution organizations and professionals. Importantly however, the only stakeholders included in the meetings and discussions described *supra* were the credit card-issuing banks and consumer companies, the lawyers who represented them (or wanted to represent them) and, to a lesser degree, dispute resolution organizations, and public relations firms. Individual consumers, consumer groups, consumers’ lawyers (including class action lawyers), and governmental/regulatory entities were not in attendance.

It can be difficult to assess relative power in any precise manner. In contests between individual consumers and credit-card issuing banks, however, the banks (or consumer companies) likely wielded more power than the consumers.¹³⁰ The banks and consumer companies also likely wielded more power than outside counsel, the dispute resolution organizations, or consumer organizations. It is less clear that the credit card-issuing banks and consumer companies had more power when compared with the plaintiffs’ class action bar or governmental/regulatory entities.

Hopefully, while the credit card-issuing banks and consumer companies (and their in-house counsel) had financial and business interests as described *supra*, they also had interests in operating in a manner consistent with federal and state statutes and regulations, retaining their customers, and sustaining their own reputations as responsible and trustworthy corporate citizens. Consumers and governmental/regulatory agencies would share many of these interests, although their interests in consumer protection and the ability to access effective redress might receive more emphasis.¹³¹ But *only* the financial and business interests of the credit card-issuing banks and consumer companies clearly are represented in the new dispute system established between 1998 and 2003, at least as described in Judge Pauley’s opinion.¹³² If the credit card issuers had emphasized the need to specify the AAA as their provider of consumer arbitration—or if they had required compliance with the AAA’s Consumer Due Process Pro-

130. This may be somewhat less true today if tech-savvy consumers access and contribute to online reviews of all sorts of products and services.

131. See, e.g., FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT LITIGATION AND ARBITRATION 41–43 (2010), <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-bureau-consumer-protection-staff-report-repairing-broken-system-protecting/debtcollectionreport.pdf>.

132. See *supra* text accompanying notes 6–15.

tocol—their interests in consumer protection and access to effective redress might be more apparent.

Turning to outside counsel, Judge Pauley's opinion strongly suggests that their primary interest was in business development.¹³³ The firms most involved in organizing the meetings described *supra* were responsible for writing the *amicus* briefs that were part of satellite litigation. Their involvement in the development of the consumer arbitration system apparently expanded their business and their reputations in this area. The development of the new dispute system also may have met the business development interests of law firms specializing in debt collection.¹³⁴ It is unclear, however, that any other law firms' or outside counsel's financial or business interests were met by the new system of mandatory pre-dispute consumer arbitration.

One would hope that outside counsel's interests also included providing consumers with access to effective redress and ensuring operations consistent with relevant statutes and regulations—particularly if these lawyers understood themselves to be serving as “civic professionals” as well as agents of their clients.¹³⁵ As mentioned *supra*, commitment to these interests is less apparent in the new system unless the credit card issuers' contracts specified use of the AAA or its Consumer Due Process Protocol.¹³⁶

133. See *Ross*, 35 F. Supp. 3d at 444.

134. See Nancy A. Welsh, *What is “(Im)partial Enough” in a World of Embedded Neutrals*, 52 ARIZ. L. REV. 395, 429–30 (2010) (describing the Mann Bracken firm). See also Horton & Chandrasekher, *supra* note 44, at 83–87 (reporting that companies in consumer arbitration tend to be represented by lawyers who have become extreme repeat players, and extreme repeat players are much more likely to win).

135. See Nancy A. Welsh, *Looking Down the Road Less Traveled: Challenges to Persuading the Legal Profession to Define Problems More Humanistically*, 2008 J. DISP. RESOL. 45, 56–57 (2008); Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Binding Arbitration Is Unjust: Ethical Implications for Dispute System Design in the Time of Vanishing Trials*, FORDHAM L. REV. (forthcoming, 2017) (reporting empirical research showing that as members of the public learn more about mandatory pre-dispute arbitration, the more they believe it to be unjust and illegitimate and urging the adoption of a more inclusive, more virtuous ethical ideal for transactional attorneys to encourage them to “craft and design adhesion contracts [that] balance both the interests of their client with the needs and perspective of the public”).

136. It must be acknowledged that at this point, no rigorous empirical research has established the effect of the AAA's Consumer Due Process Protocol. Instead, we have fragments of information. Public Citizen reported in 2007, for example, that data available from California indicated that NAF's arbitrators found for credit card companies 94.7% of the time; thus, consumers won 5.3% of the time. See Public Citizen, *How Credit Card Companies Ensnare Consumers* (Sept. 2007) (<http://www.citizen.org/publications/release.cfm?ID=7545>). The Searle Justice Institute's Task Force on Consumer Arbitration, meanwhile, reported in 2009 that for consumer arbitrations administered by the AAA (presumably pursuant to the Protocol), consumers fared somewhat better. As claimants, consumers won some relief 53.3% of the time; business claimants—likely not limited to credit card companies—won some relief 83.6% of the time. See SEARLE CIVIL JUSTICE INST., *CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION: PRELIMINARY REPORT* xiii (2009) (http://www.searlearbitration.org/p/full_report.pdf). See also Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, 15 DISP. RESOL. MAG., Fall 2008, at 30, 31 (citing Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357 (1990)) (observing that in

Obviously, dispute resolution organizations would have interests in business development. They would want to be named as the providers of arbitration services in the credit card issuing banks' agreements with their customers. The new dispute system responded primarily to the business development interests of those dispute resolution organizations that were included in the credit card issuers' contracts. Hopefully, dispute resolution organizations also would have strong interests in providing consumers with access to effective redress, ensuring operations consistent with relevant statutes and regulations, and providing processes that were fair. The AAA's commitment to the latter three interests is most apparent due to its development of the Consumer Due Process Protocol—which, as discussed *supra*, called for a fundamentally fair process, independent and impartial neutrals and administration, consumers' access to small claims court, reasonable costs for consumers, arbitrator-supervised exchange of information, consumers' access to all remedies available in courts of law and equity, consumers' access to written explanations of arbitral awards, and access to the consensual option of mediation. Admittedly, the AAA's commitment to the interests of effective redress, lawful operations and fair procedures would be even more apparent if the Protocol dealt directly with the issue of class action waiver—but the first adoption of a class action waiver occurred approximately one year after the AAA produced the Protocol. It is also significant that the AAA chose to enforce the Protocol even when such action

collection cases, the consumer almost certainly owes the debt and that this explains credit-card companies' high win rates in both arbitrations and traditionally litigated cases).

There is much better evidence of the effect of due process protocols in the context of mandatory pre-dispute employment arbitration. See Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 *LAW & CONTEMP. PROBS.* 105, 105, 128 (2004) (citing Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in *ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53D ANNUAL CONFERENCE ON LABOR* 303 (Samuel Estreicher & David Sherwyn eds., 2004) (noting that the Bingham and Sarraf study compared outcomes before and after an Employment Due Process Protocol was implemented and found that employers arbitrating based on personnel handbook violations were less successful after the protocol was used than they were before the protocol); PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 145–56, 163–68 (Cambridge Univ. Press 2013) (citing Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 *OHIO ST. J. DISP. RESOL.* 369 (2004); Richard J. Bales, *The Employment Due Process Protocols at Ten: Twenty Unresolved Issues and a Focus on Conflicts of Interest*, 21 *OHIO ST. J. DISP. RESOL.* 165 (2005); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 *OHIO ST. J. DISP. RESOL.* 777 (2003) (examining the history and effectiveness of the employment due process protocols and urging that fair procedures can be in employers' interests because they promote employees' use of the procedures, increase the likelihood of the enforcement of arbitration clauses and arbitral awards, and reduce the risk that plaintiffs' lawyers will be able to disrupt the stability of arbitration proceedings).

As Professor Margaret Harding has noted, effective protocols also require provisions “to monitor individual firms' compliance with the protocols and to sanction noncompliance when discovered. Such monitoring and enforcement provisions are absent in each of the protocols.” See Harding, *supra* note 136, at 372.

sometimes led to the organization's removal from contracts and loss of business. Importantly, the new dispute system described by Judge Pauley did not require the use of either the AAA or its Protocol.

As noted *supra*, individual consumers, consumers' lawyers (including class action lawyers), governmental/regulatory entities, and consumer groups were not in attendance and their interests tended not to be reflected in the dispute system described in Judge Pauley's opinion. The exception, of course, would be when credit card issuers used the AAA or its Due Process Protocol which was the product of a different process that included consumer representatives.

3. *Context and Culture* (“How does the context of the dispute system affect its viability and success?” “What aspects of culture (organizational, social, national, or other) affect the workings of the system?” “What are the norms for communication and conflict management?”)

In order to answer questions regarding the effects of this particular context's structure, culture, and norms, it is necessary to identify the context within which mandatory pre-dispute consumer arbitration sits. That is not as easy as it seems because arbitration does not sit within a single context. As Professor Lisa Amsler has noted (and as Professor Elinor Ostrom noted before her), contexts may be “nested,” one within another.¹³⁷ Perhaps the first context to consider then is the fractious political and economic culture that characterizes the United States. Recent empirical research indicates that American consumers assume that their birthright includes access to their nation's courts to resolve disputes with businesses, regardless of whether their agreements provide for arbitration.¹³⁸ Nested within that context, however, are others. The arbitration system established by the credit card issuers between 1997 and 2003 was entirely private, with contractually-determined arbitral rules and panels. As such, the system also fits within a commercial, market-based context. American consumers could choose whether or not to do business with the credit card issuers that required the use of arbitration and the waiver of class actions. Credit card issuers could differentiate themselves from their competitors, highlighting

137. See Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs That Use Arbitration: Transparency, the Universal Sanitizer*, 6 Y.B. ON ARB. & MEDIATION 32, 33–34 (2014) (citing ELINOR OSTROM, *UNDERSTANDING INSTITUTIONAL DIVERSITY* (Princeton University Press 2005); Lisa Blomgren Bingham (now Amsler), *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 5–6 (2008).

138. See Jeff Sovern et al., “Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 41–47 (2015) (reporting results of empirical study, including finding that arbitration clauses and class action bars are not among the more important terms to consumers and that “consumers failed to understand that they had surrendered their right to sue in court by a margin of more than six to one”).

for consumers the mandatory or voluntary nature of their arbitration clauses, their inclusion or exclusion of class action waivers, and the potential effect of such clauses and waivers on the risks undertaken by consumers.¹³⁹

Judge Pauley's opinion reveals, however, that the credit card issuers did *not* choose to distinguish themselves from each other in a competitive marketplace.¹⁴⁰ They instead chose to confer, observe, and follow each other's lead in adopting arbitration clauses and class action waivers. Their consequent failure to bring class action-barring arbitration clauses to consumers' attention—i.e., their failure to compete and thus make the clauses “salient” to consumers—increased the viability and likely success of their preferred dispute system. The fact that class action-barring mandatory arbitration clauses then became dominant in the general purpose credit card market in the U.S. means that American consumers had substantially less ability to choose not to do business with a particular credit card issuer—and this further increased the viability and likely success of the dispute system.¹⁴¹

The dispute system established by the credit card issuers also fit within another context—our public justice system—since consumers might use arbitration to assert public rights and businesses might use the courts to enforce arbitration clauses and arbitral awards. This involvement of public law and reliance upon the public courts suggest that the viability and success of the dispute system should also depend upon compliance with relevant substantive and procedural law. Concerns regarding such compliance likely motivated the AAA, at least in part, to convene its panel of stakeholders to develop the Consumer Due Process Protocol.

However, in a string of decisions, the United States Supreme Court has proclaimed a federal policy of supporting the enforcement of arbitration clauses and has refused to see any threat to substantive or procedural law unless the opponents of arbitration clauses can point to concrete evidence demonstrating that there has been or will be a failure to comply with such law.¹⁴²

139. See Welsh, *I Could Have Been A Contender*, *supra* note 6, at 1154–55 (describing dispute resolution procedures as part of risk management).

140. See *Ross*, 35 F. Supp. 3d at 431–32.

141. I thank Timothy Hoy for reminding me that in contrast to the larger banks, credit unions and small banks are much less likely to include these clauses.

142. This is described as the “effective vindication” doctrine. See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver, Co.*, 417 U.S. 506 (1974). In a famous footnote in *Mitsubishi*, a case involving international commercial arbitration and application of the New York Convention, the Supreme Court observed that if an arbitration agreement makes it impossible for a party to pursue federal statutory remedies, either explicitly or through the combination of clauses regarding choice of arbitral forum, choice of law and limitation upon judicial review, an American court would “have little hesitation in condemning the agreement as against public policy.” *Mitsubishi*, 473 U.S. at 637 n.19. In a series of cases involving claims by

Judge Pauley's opinion also demonstrates how the participants in the meetings of the Arbitration Coalition, the Consumer Companies Class Action Working Group and the In-House Counsel Working Group worked to change the context of our public justice system, in order to make it ever more hospitable to mandatory pre-dispute consumer arbitration and class action waivers. These groups' funding and filing of *amicus* briefs in *Green Tree Financial* and other cases represent particularly striking—and successful—examples of such efforts. Ultimately and somewhat counter-intuitively, then, the context of our public justice system also played a powerful role in helping to ensure the viability and success of the system established by the credit card issuers.

4. *Processes and Structure* (“Which processes are used to prevent, manage, and resolve disputes?” “If there is more than one process, are they linked or integrated?” “What are the incentives and disincentives for using the system?” “What is the system’s interaction with the formal legal system?”)

The only processes that appear to have been discussed by the various groups described in Judge Pauley's opinion were binding arbitration and class actions, both of which fit into the category of “imposed” dispute resolution processes. The goal of the class action waiver, of course, was to remove the class action as an option—thus reducing, not expanding, the number of available process options.

For those contracts that required use of the AAA or its Consumer Due Process Protocol, small claims court represented an additional procedural choice, but it was also just one more option in the “imposed” category. And while the Consumer Due Process Protocol encouraged the use of mediation, it does not appear that any of the meetings or conversations detailed

seamen against cruise and cargo shipping companies under the federal Seaman's Wage Act and Jones Act, lower courts have repeatedly cited to this footnote, observing more specifically that if an arbitration agreement provides no opportunity for judicial review of an arbitral award and an American court is persuaded that choice-of-forum and choice-of-law clauses will “operate[] in tandem as a prospective waiver of a party's right to pursue statutory remedies,” the court will “have little hesitation in condemning the agreement as against public policy.” *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1121 (11th Cir. 2009) (per curiam) (holding that because the arbitration clause specified that the arbitrator had to apply Panamanian law, the clause effectively waived and foreclosed on the plaintiff's rights under the Seaman's Wage Act); *Krstic v. Princess Cruise Lines, Ltd.*, 706 F. Supp. 2d 1271, 1281 n.5 (S.D. Fla. 2010); *Bulgakova v. Carnival Corp.*, No. 09-20023, 2010 U.S. Dist. LEXIS 39231, at *8 n.3 (S.D. Fla. Feb. 26, 2010). All of these cases involved challenges to judicial enforcement of arbitration agreements, rather than arbitral awards. In *Italian Colors*, the Supreme Court held that a class action waiver in an arbitration clause did not violate the effective vindication doctrine, observing first that “the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the *right to pursue* that remedy” and later: “The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938.” 133 S. Ct. 2304, at 2311.

in Judge Pauley's opinion included the discussion of processes that could prevent, manage, or resolve disputes through facilitated means.

Avoidance of the expenses associated with class actions represented the incentive for credit card issuers to insert arbitration clauses in their contracts. Judge Pauley's opinion does not reveal the development of any particular incentives to encourage consumers to use the dispute system. Instead, for them, the use of arbitration was a non-discretionary part of their decision to enter into a credit card agreement that would allow them to purchase consumer goods or services. Later, as detailed in *AT&T Mobility LLC v. Concepcion*,¹⁴³ a consumer company introduced a tiered dispute resolution clause that provided opportunities to engage in negotiated processes (implemented through customer relations) before moving to binding arbitration. The clause at issue in *Concepcion* also included financial incentives (inserted only after the class action had been commenced) to encourage consumers to provide AT&T with online notice of their complaints and pursue redress.¹⁴⁴ The system's interaction with the formal legal system, however, continued to be limited to actions to enforce the arbitration clause and class action waiver or, after the arbitration, petitions to enforce arbitral awards.¹⁴⁵

5. *Resources ("What financial resources support the system?"
"What human resources support the system?")*

Judge Pauley's opinion does not reveal discussion of the financial or human resources required to support the arbitration clauses' operation. It would be natural to assume that the credit card issuers imposing arbitration and barring class actions paid for the arbitration process. It would also be natural to assume that the dispute resolution organizations preferred receiving payment from the credit card issuers rather than individual consumers. Today, meanwhile, some arbitration clauses provide for the shifting of attorney's fees.¹⁴⁶ Pursuant to these provisions, a consumer who loses her

143. 131 S. Ct. 1740 (2011). See Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 Sw. L. REV. 187, 201–05 (2012) (examining the clause at issue).

144. See *id.*; *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852–53 (9th Cir. 2009) (observing that the *Concepcions* commenced their class action in March 2006 while AT&T revised its arbitration agreement to add a new premium payment clause in December 2006).

145. See Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012); Welsh, *supra* note 143, at 205–09 (describing and critiquing the grounds and level of judicial review currently available).

146. See Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 288 (2015); see also Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U.L. REV. 1939, 1958 (2014) (observing that "*Concepcion* and cases like it from the lower courts have emboldened drafters of adhesion contracts to embellish arbitration clauses with increasingly sophisticated procedural bells and whistles" and specifically identifying provisions that "restrict the availability of interim and final remedies, limit discovery, shorten statutes of limitations, select distant venues, and alter statutory fee shifting rules."). In its August 22, 2016 submission to the

arbitration may be made responsible for the attorney's fees incurred by the winning corporation.

In terms of human resources, a consumer seeking individual redress may be required to pursue arbitration alone, without a lawyer. Research indicates that as few as 14% of consumers in some contexts and as many as 60% of consumers in other contexts are represented by lawyers in arbitration.¹⁴⁷ Meanwhile, research also indicates that the corporations involved in mandatory pre-dispute arbitration tend to be represented, and their lawyers are likely to be repeat players in consumer arbitration.¹⁴⁸

6. *Success, Accountability, and Learning* (“How transparent is the system?” “Does the system include monitoring, learning, and evaluation components?” “Is the system successful?”)

As revealed by Judge Pauley's opinion, from 1997 to 2003, in-house counsel and representatives of dispute resolution organizations met and engaged in sidebar conversations in order to provide each other with information about their experience in adopting and implementing class action barring arbitration clauses.¹⁴⁹ In a sense then, there was transparency—but only among the credit card issuers and some dispute resolution organizations. There also may have been some monitoring, learning, and evaluation

CFPB, the National Consumer Law Center identified the following as “especially unfair practices in individual arbitrations” that required CFPB regulatory action:

- Loser pays” provisions;
- Cost-splitting provisions or other provisions that require the consumer to bear excessive costs (including lack of *in forma pauperis* fee waivers);
- “Inconvenient venue” provisions;
- Limitations on substantive rights including shorter statutes of limitations and caps on damages;
- Inherently biased or unavailable arbitrators;
- Procedural hurdles;
- Secrecy provisions;
- Discovery limitations;
- Initiating collection actions in arbitration;
- Delay in paying arbitration fees, affecting commencement of arbitration proceedings; and
- Severance, savings, and delegation clauses.

Lauren Saunders et al., *Comment to the Consumer Financial Protection Bureau Regarding 12 CFR Part 1040*, NAT'L CONSUMER L. CTR. 4 (Aug. 22, 2016), <https://www.nclc.org/images/pdf/arbitration/comments-arbitration-agreements-2016.pdf>.

147. See CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT SEC. 1028(A) § 1.4.3 (March 2015) [hereinafter ARBITRATION STUDY] (reporting that “[o]verall, consumers were represented by counsel in roughly 60% of the cases, though there were some variations by product” and that “[c]ompanies almost always had counsel.”); Horton & Chandrasekher, *supra* note 44, at 82 (referencing Ernst & Young and Searle reports that indicated that 86% and 43% of consumer-plaintiffs, respectively, were not represented by lawyers in arbitration).

148. See ARBITRATION STUDY, *supra* note 147, at § 1.4.3; Horton & Chandrasekher, *supra* note 44, at 83–87 (reporting that companies in consumer arbitration tend to be represented by lawyers who have become extreme repeat players, and extreme repeat players are much more likely to win).

149. See *Ross*, 35 F. Supp. 3d at 414–32.

built into some dispute resolution organizations' arbitration programs. For example, there is some indication that NAF disclosed information about its arbitrators' credentials and judgment trends to Agora, a company associated with the debt collection industry (by way of its relationship with the private equity firm Accretive LLC).¹⁵⁰ In 2005, meanwhile, the American Bankers Association funded a study by Ernst and Young of consumers' arbitration filings with NAF against financial services companies between 2000 and 2004.¹⁵¹ Presumably, this was to evaluate use of arbitration in this context.

But there was no transparency, monitoring, learning, or evaluation built into the system of class action-barring arbitration clauses for consumers, consumer protection organizations, or the federal and state agencies responsible for consumer protection and regulation.

Regarding "success," it is important to recognize that there is no single definition of the term. Rather, assessing "success" requires recalling the context into which this dispute system fits and the goals of the decision-makers, as described *supra*. The credit card issuers sought, more than anything else, to reduce their litigation expenses, especially the expenses associated with class actions. It is not entirely clear that they achieved this goal. Some of the most significant expenses simply moved to another battlefield as mandatory pre-dispute consumer arbitration clauses and class action waivers became very frequent subjects of litigation, with some cases going all the way to the Supreme Court.¹⁵² The parties and those interested in encouraging *amicus* briefs continued to bear the expense of paying defense lawyers. As Judge Pauley observed, these were very good and very expensive lawyers.¹⁵³ Meanwhile, there were costs associated with arbitration.

150. See Complaint at 18–19, *State v. Nat'l Arbitration Forum*, 27-CV-09-18550 (Minn. Dist. Ct. July 14, 2009) (alleging that Agora personnel had access to such highly confidential information). The complex (and apparently profitable) relationships among NAF, Accretive, Agora and Forthright are described in more detail in Welsh, *What Is "(Im)partial Enough," supra* note 119, at 427–30, 433–35. For purposes of considering whether any monitoring, evaluation, or learning was built into NAF's program and shared with "repeat players," it is enough to note that: 1) Accretive was a private equity firm that was the sole owner of Agora; 2) Accretive and NAF jointly owned another company, Forthright, which was responsible for most of the tasks involved in administering arbitrations and mediations; 3) NAF was responsible for retaining the neutrals but it is unclear whether NAF or Forthright was responsible for selecting neutrals for cases and paying them; 4) Accretive and a large debt-collection firm, Mann Bracken, jointly owned another company, Axiant LLC; and 5) Axiant was responsible for collecting on court judgments enforcing awards issued by NAF's arbitrators.

151. See David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 *Geo. L. J.* 57, 80, n.142 (2015) (citing and describing ERNST & YOUNG, *OUTCOMES OF ARBITRATION: AN EMPIRICAL STUDY OF CONSUMER LENDING CASES* (2005)).

152. See, e.g., *DIRECTTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 559 U.S. 662 (2010); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

153. See *Ross*, 35 F. Supp. 3d at 452.

The filing fees charged by arbitration providers, for example, often were much higher than those charged by courts. If credit card issuers used arbitration to pursue debt collections, they had to pay these higher filing fees as well as their lawyers. If the credit card issuers then were required to go to court to enforce arbitral awards, they would face more filing fees and litigation-related expenses.

It is important to note, however, that one particular expense was reduced. The campaign to win judicial enforcement of mandatory pre-dispute arbitration clauses and class action waivers was generally successful in reducing the likelihood that credit card issuers would be required to pay damages to members of a class or pay the fees of their lawyers.

Based on information gathered by the CFPB, it also appears that the campaign was successful in reducing the likelihood that credit card issuers would be required to compensate consumers. This is because very few consumers take advantage of arbitration clauses to initiate individual claims against companies.¹⁵⁴

7. *Interim Conclusion Based on the Amsler, Martinez and Smith Structural Framework*

There is not a perfect fit between the issues and questions that should have been addressed in the course of designing a new system for the resolution of disputes and the events and decisions described in Judge Pauley's opinion. The most important deficits are these: (1) the credit card issuers' failure to include consumers, representatives of consumer organizations, and representatives of governmental/regulatory agencies as essential stakeholders with legitimate interests that required recognition in the development of the system and (2) courts' failure (and particularly the failure of the Supreme Court) to require this new dispute system to demonstrate its adherence to substantive and procedural safeguards sufficient to protect consumers' and the general public's interests in reasonable adherence to the rule of law and a trustworthy justice system.¹⁵⁵

154. See ARBITRATION STUDY, *supra* note 147, at § 1.4.3 (reporting that “[f]rom 2010 through 2012, an average of 616 individual AAA cases were filed per year for six product markets combined: credit card; checking account/debit cards; payday loans; prepaid cards; private student loans; and auto loans” and that “[o]f the 1,847 disputes filed between 2010 and 2012 concerning the six product markets, the standard AAA ‘claim forms’ identify consumers alone as filing an average of 411 cases each year” with “[t]he remaining filings. . . recorded as made by companies or as mutually submitted by both the consumer and the company”). See also Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, The Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2812–13 (2015) (reporting that AT&T wireless customers filed a total of 134 arbitration claims with the AAA between 2009 and 2014 while AT&T's wireless customers increased from 85 million to 120 million during the same time period); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. L. REV. 87, 98–100 (2012).

155. See Welsh, *Mandatory Predispute Consumer Arbitration*, *supra* note 143, at 216–28.

As I have explained elsewhere,¹⁵⁶ these deficits matter particularly in the context of arbitration because arbitral awards have no coercive power without the guarantee of enforcement provided by our public courts. Meanwhile, the FAA provides few and narrow grounds for our courts to refuse to enforce (or vacate) arbitral awards, and our courts generally demonstrate substantial deference to arbitrators' decision-making (even when—or perhaps because—in many contexts, there is no requirement that arbitrators provide an opinion to explain the reasoning underlying their arbitral awards). Thus, the justice delivered by arbitration affects the justice delivered by our courts. Sustaining (or regaining) public trust in our courts and in the reality of statutorily-granted civil rights depends, at least in part, upon our courts demanding that arbitration, arbitrators, and institutional arbitral providers demonstrate their quality and fairness.

Now the essay will turn to the principles that should guide DSD in order to determine their incorporation into the development of the system of class action-barring mandatory pre-dispute arbitration described in Judge Pauley's opinion.

B. Considering the Principles That Should Guide Dispute System Design

1. Determination of Whether ADR Is Appropriate

There are many ways in which arbitration appears to be a very appropriate means to resolve disputes between consumers and credit card issuers. Most of these disputes likely involve small amounts of money and relatively straightforward factual determinations regarding purchases, delivery, quality of the products or services, payments, and written disclosures. These disputes likely would benefit from a process that permits prompt and inexpensive factual determinations and judgments. Arbitrators, meanwhile, may be able to devote more time to each case than judges can afford. Arbitrators with specialized expertise may even be better equipped than generalist judges to require parties to submit all necessary documentation and determine whether claims are barred by statutes of limitations, regardless of whether these defenses are raised by consumers.

156. See *id.* at 197 (“Authorizing corporations to shape and fund a national small claims court through which consumers must navigate before they may access public courts, and then limiting such access to deferential judicial review, invites both the perception and the reality of a system that is beset by structural bias. Such perceptions then endanger the public’s perception of the courts as a place where they can trust that they will experience justice.”); Welsh, *I Could Have Been a Contender*, *supra* note 6, at 1153–57 (describing the overlap between, and mutual effects upon, the private risk management system and the public justice system); Welsh, *What Is “(Im)Partial Enough”*, *supra* note 119, at 401–05, 433–41, 465–67 (applying *Caperton*’s analysis of the constitutional due process limits on an adjudicator’s potential for bias to NAF’s individual arbitrators and NAF as an institution); Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 *CARDOZO J. CONFLICT RESOL.* 117, 129–32 (2004) (focusing on arbitration and referring to arbitrators as “adjuncts of the judicial system”).

Other disputes between consumers and credit card issuers, however, might not be appropriate for this sort of expedited and individualized factual determination and judgment. As Jean Sternlight has written, consumers might not even realize that they have certain statutory claims or claims for hidden charges—and thus would be unlikely to bring them individually.¹⁵⁷ In addition, some claims may be too small even to justify the expense of individual arbitration.¹⁵⁸ These sorts of claims will require an aggregated process rather than an individualized one. One such aggregated process, of course, is the class action.

2. *Development of a System that is Fair and Just*

Judge Pauley's opinion reveals that some participants in the meetings of the Arbitration Coalition advocated for ensuring the fairness of any mandatory pre-dispute arbitration system.¹⁵⁹ In addition, the Consumer Due Process Protocol included several provisions designed to enhance both substantive and procedural fairness.

It is not at all clear, however, that all of the lawyers, dispute resolution professionals, or representatives of the credit card issuers involved in developing the arbitration system were focused on fairness or were aware of the Protocol and committed to incorporating its principles into the new system. Indeed, it is striking that in-house counsel at Discover, who appears to have been one of the strongest proponents for developing a fair dispute system, apparently was not invited to participate in the teleconferences of the In-House Counsel Working Group. In addition, even though the Protocol includes many provisions designed to enhance fairness, it does not make any specific reference to the fairness or unfairness of depriving consumers of their right to participate in class actions.

3. *Providing Multiple Process Options for Parties, Including Rights-Based and Interest-Based Processes*

The focus of the new dispute system described in Judge Pauley's opinion was arbitration, and only arbitration. There were not multiple process options. Rather, the goal was to limit consumers to this single process option, and it was rights-based—just like the class actions and individual legal actions it was designed to replace. Even if the credit card issuers' contracts permitted consumers to bring actions in small claims court pursuant to the Consumer Due Process Protocol, this just represented another adjudicative, rights-based option.

157. See Sternlight, *supra* note 125, at 87, 111–19 (discussing “procedurally difficult” claims).

158. See *id.* at 114.

159. See *Ross*, 35 F. Supp. 3d at 439.

As noted *supra*, the Due Process Protocol also encourages the use of mediation. However, Judge Pauley's opinion suggests that there was never any discussion of this lone interest-based process.

4. *Providing Parties with the Ability to "Loop Back" and "Loop Forward" Among Options*

Because the primary aim of the arbitration system was to remove the class action option and replace it with arbitration, this new dispute system did not provide parties with the ability to "loop back" or "loop forward" among options.

5. *Providing Substantial Stakeholder Involvement in System's Design*

Because there were no consumers, no representatives of consumer organizations, and no representatives of responsible regulatory or governmental agencies involved in this system's development, very important interests were missing entirely. Meanwhile, of course, the credit card issuers had very substantial involvement in the development of the system.

6. *Participation that is Voluntary, Confidential, and Assisted by Impartial Third Party Neutrals*

Because the new dispute system was imposed upon consumers as a condition of entering into contracts with the credit card issuers, there was no opportunity for voluntary participation. Meanwhile, because the credit card issuers chose the particular dispute resolution organizations included in their contracts, consumers could reasonably fear that the pool of arbitrators might not be entirely impartial.¹⁶⁰

7. *System Transparency and Accountability*

There was no provision for system transparency and accountability.

8. *Education and Training of Stakeholders on the Use of Available Process Options*

There is no indication that the credit card issuers provided education and training of consumers, consumer organizations, or any others on the use of the new arbitration system.

160. See generally, Welsh, *What is "(Im)partial Enough," supra* note 119.

9. *Interim Conclusion Regarding the Principles That Should Guide Dispute System Design*

Even if the mandatory arbitration system developed by the credit card issuers represents a DSD, it fulfills very few of the principles now identified as essential by system design experts. If the lawyers or the dispute resolution professionals truly had played a design role, they might have proceeded in a manner more likely to yield a DSD that would be fair, would be perceived as fair, and would be sustainable on its own. There would be much less need for frequent resort to the courts for assistance with the enforcement of agreements and awards.

V. THE ROLE OF DISPUTE RESOLUTION ORGANIZATIONS AND PROFESSIONALS IN THE NEXT PHASE OF DISPUTE SYSTEM DESIGN

In the years since 2003, the use of mandatory pre-dispute consumer arbitration clauses has expanded dramatically. According to the CFPB, “[t]ens of millions of consumers [now] use consumer financial products or services that are subject to pre-dispute arbitration clauses.”¹⁶¹ Seventy-five percent of the largest credit card-issuing banks include arbitration agreements in their contracts with consumers; the same is true for 42% of the smaller and mid-sized credit card-issuing banks.¹⁶² As a result, 53% of the consumer contracts in the credit card market include arbitration clauses (and that percentage would be 94% but for a settlement that the plaintiffs reached with some of the defendant banks in *Ross*).¹⁶³ The percentages of market penetration are even higher in many other consumer product markets. The CFPB sampled prepaid card agreements, for example, and found that 92% of them required the use of arbitration. For a sample of storefront payday loan agreements (from California and Texas), 99% included an arbitration clause.¹⁶⁴ The same was true for 99% of the consumer contracts in the mobile wireless market.¹⁶⁵ All of the large providers of payday loans include arbitration clauses in their consumer contracts; 84% of a sample of smaller lenders also do so.¹⁶⁶

Much also remains the same. Courts generally enforce the arbitration provisions, as well as class action waivers. Credit card issuers continue to select the dispute resolution organizations that will provide the arbitrations.

161. ARBITRATION STUDY, *supra* note 147, at § 1.4.1.

162. *Id.* at § 2.3.1.

163. *Id.*

164. *Id.* at § 2.3.4. *See, e.g.*, *James v. Nat'l Fin., LLC*, 132 A.3d 799 (Del. Ch. 2016) (holding that a payday loan of \$200.00 with an APR of 838.45% was unconscionable; also noting that the court had granted Rule 11 sanctions because the company had attempted to compel arbitration even though it knew the consumer had opted out of the arbitration provision).

165. ARBITRATION STUDY, *supra* note 147, at § 2.3.6.

166. *Id.* at § 2.5.2.

There is no transparency or accountability to consumers, except as required by the Financial Industry Regulatory Authority (“FINRA”) for the arbitration of securities disputes between and among investors, brokerage firms and individual brokers, and in California, Maine, Maryland and the District of Columbia.¹⁶⁷

But change may be in the air. General Mills experimented with the imposition of mandatory pre-dispute arbitration upon consumers accessing the company’s online services.¹⁶⁸ The severity of the consumer backlash led to General Mills’ withdrawal of its provision.¹⁶⁹ As noted in the introduction *supra*, the opponents of class action-barring arbitration clauses have mounted a significant offensive that appears designed to make arbitration salient to consumers. The Alliance for Justice produced a video, *Lost in the Fine Print*, that is available online.¹⁷⁰ The *New York Times* published a series of articles that focused on individual horror stories as employees, consumers, and parents of patients dealt with the adverse effects of mandatory pre-dispute arbitration.¹⁷¹ The *New York Times* editorial board¹⁷² and *Consumer Reports*¹⁷³ have both warned about the perils of class action-barring mandatory pre-dispute arbitration clauses.

Some dispute resolution professionals have responded with criticisms of the emotional and one-sided character of these attacks on arbitration. They point out the many potential advantages of arbitration for consumers,

167. See, e.g., CAL. CIV. PROC. CODE § 1281.96 (West 2015); D.C. CODE § 16-4430 (2008); ME. REV. STAT. tit. 10, § 1394 (2010); MD. CODE ANN., COM. LAW § 14-3903 (West 2011). See also Resnik, *supra* note 125, at 2896–900 (describing various disclosure requirements); Letter of Nancy A. Welsh, Chair-Elect, ABA Section of Dispute Resolution, to Monica Jackson (July 29, 2016) (on file with author) (regarding Bureau of Consumer Financial Protection Proposed Rule on Arbitration Agreements) (examining and contrasting the disclosure requirements of, and searchability of public information for, FINRA, California, Maine, Maryland and the District of Columbia in some detail).

168. See Gregory Wallace, *General Mills Reverses Course on Right to Sue After Backlash*, CNN (Apr. 20, 2014, 1:48 PM), <http://money.cnn.com/2014/04/20/news/companies/general-mills-backlash/>; Kirstie Foster, *We’ve Listened – and We’re Changing Our Legal Terms Back*, GENERALMILLS.COM (Apr. 19, 2014), <http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were/>.

169. *Id.*

170. *Lost in the Fine Print 2014*, *supra* note 2.

171. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>; Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>.

172. The Editorial Board, *Arbitrating Disputes, Denying Justice*, N.Y. TIMES (Nov. 7, 2015), <http://www.nytimes.com/2015/11/08/opinion/sunday/arbitrating-disputes-denying-justice.html>.

173. Mandy Walker, *The Arbitration Clause Hidden in Many Consumer Contracts*, CONSUMER REPORTS (last updated Sept. 29, 2015), <http://www.consumerreports.org/cro/shopping/the-arbitration-clause-hidden-in-many-consumer-contracts>.

including the expertise and professionalism of the arbitrators, the speed and reduced cost of the process, and the benefits of certainty.¹⁷⁴ Notably, some of these commentators have also acknowledged the need for reforms to arbitration.¹⁷⁵

Other dispute resolution professionals and entrepreneurs have focused their attention on creating alternatives to consumer arbitration—generally online methods of dispute resolution (“ODR”) that are suited to the handling of small claims and likely to be more easily accessible than in-person courts or other tribunals.¹⁷⁶ Indeed, the European Union is now requiring businesses to inform consumers about the availability of these sorts of online options with the hope that both businesses and consumers will elect to use them.¹⁷⁷ Canadian and Dutch courts are beginning to use ODR and are introducing their innovations to other courts.¹⁷⁸ The UK’s courts have announced their intention to adopt ODR.¹⁷⁹ New York’s state courts, in partnership with the American Bar Association, are exploring the use of court-connected online dispute resolution to resolve debt collection matters.¹⁸⁰ This essay will return to the intriguing potential of ODR *infra*.

174. See, e.g., David B. Lipsky, *The New York Times’ Attack on Arbitration*, DISP. RESOL. MAG., Summer 2016, at 6; Lisa Renee Pomerantz, *Consumer Arbitration: Pre-Dispute Resolution Clauses and Class Action Waivers*, ACRESOLUTION, Fall 2015, at 16.

175. See Lipsky, *supra* note 174, at 10 (recalling proposal to amend the FAA to require fundamental due process protections similar to those contained in the Consumer Due Process Protocol).

176. See generally Louis F. Del Duca, Colin Rule & Brian Cressman, *Lessons and Best Practices for Designers of Fast Track, Low Value, High Volume Global E-Commerce ODR Systems*, 4 PENN ST. J. L. & INT’L AFF. 242 (2015); Louis F. Del Duca, Colin Rule & Kathryn Rimpfel, *Ebay’s De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 Y.B. ON ARB. & MEDIATION 204 (2014); Louis Del Duca, Colin Rule & Zbynek Loebel, *Facilitating Expansion of Cross-Border E-Commerce—Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems—Work of the United Nations Commission on International Trade Law)*, 1 PENN ST. J. L. & INT’L AFF. 59 (2012).

177. See Pablo Cortes, *The Brave New World of Consumer Redress in the EU and the UK*, 22 No. 3 DISP. RESOL. MAG. 41. (2016) (describing the effects of Directive 2013/11/EU on Alternative Dispute Resolution (ADR) for Consumer Disputes and Regulation 524/2013 on Online Dispute Resolution (ODR) for Consumer Disputes, effective July 2015 and January 2016 respectively). The EU, unlike the U.S., does not enforce mandatory pre-dispute arbitration clauses against consumers.

178. See HIIL, HIIL TREND REPORT IV: ODR AND THE COURTS: THE PROMISE OF 100% ACCESS TO JUSTICE?, 35,39 (Hiil 2016), <http://www.onlineresolution.com/hiil.pdf>.

179. See LORD JUSTICE BRIGGS, JUDICIARY ENG. & WALES, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT 36–64 (July 2016), <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf> (regarding online court); LORD CHANCELLOR, MINISTRY OF JUSTICE, TRANSFORMING OUR JUSTICE SYSTEM 6 (Sept. 2016) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/553261/joint-vision-statement.pdf; LORD CHANCELLOR & SECRETARY OF STATE FOR JUSTICE, MINISTRY OF J., TRANSFORMING OUR JUSTICE SYSTEM: SUMMARY OF REFORMS AND CONSULTATION 13–17 (Sept. 2016), https://consult.justice.gov.uk/digital-communications/transforming-our-courts-and-tribunals/supporting_documents/consultationpaper.pdf.

180. See SECTION OF DISPUTE RESOLUTION, JUDICIAL DIVISION, YOUNG LAWYERS DIVISION, FUND FOR JUSTICE & EDUCATION, SECTION OF SCIENCE & TECHNOLOGY LAW, COMMISSION IN THE FUTURE OF LEGAL SERVICES, EXPANDING ACCESS TO LEGAL SERVICES THROUGH THE ADVANCE-

Probably the most significant development, though, was passage of the Dodd-Frank Act in 2010, giving authority to the CFPB to issue regulations that would “prohibit or impose conditions or limitations” on mandatory pre-dispute consumer arbitration clauses in contracts for financial products or services as long as the CFPB found that doing so was “in the public interest and for the protection of consumers.”¹⁸¹ The Act also required the CFPB to conduct a study of mandatory arbitration and its regulatory findings had to be consistent with the study.¹⁸² The CFPB has conducted this empirical study and has issued its report. Among other things, the CFPB looked for evidence that the inclusion of arbitration agreements led to lower prices for consumers (or, conversely, that the elimination of arbitration agreements led to higher prices for consumers). The CFPB concluded that there was no evidence of any such effect.¹⁸³ The CFPB also found that class actions were more likely to precede government enforcement actions¹⁸⁴ and benefitted consumer members of the class.¹⁸⁵

The agency proposed new regulations in May, 2016.¹⁸⁶ The CFPB’s first proposed rule would bar providers of consumer financial products and services (in the markets of lending money, storing money, and moving or exchanging money) from including class action waivers in their pre-dispute arbitration clauses and would require the providers to disclose in their arbitration clauses that consumers may participate in class actions.¹⁸⁷ The

MENT OF COURT-ANNEXED ONLINE DISPUTE RESOLUTION: AN ENTERPRISE FUND APPLICATION (FEBRUARY 19, 2016).

181. 12 U.S.C. § 5518 (2012).

182. *Id.*

183. ARBITRATION STUDY, *supra* note 147, at § 10.3.

184. *Id.* at § 9.1 (“When we did find overlapping activity by government entities and private class action lawyers, public enforcement activity was preceded by private activity 71% of the time. In contrast, private class action complaints were preceded by public enforcement activity 36% of the time.”).

185. *Id.* at § 1.4.7 (describing monetary relief provided to class members and noting that “a number of settlements also required companies to change business practices”).

186. Bureau of Consumer Financial Protection Proposed Rule on Arbitration Agreements, 81 Fed. Reg. 32830 (proposed May 24, 2016) (to be codified at 12 C.R.F. pt. 1040) [hereinafter *Arbitration Agreements*]. The CFPB first submitted tentative proposed rules to a Small Business Review Panel. See CONSUMER FIN. PROT. BUREAU, SMALL BUS. ADVISORY REV. PANEL FOR POTENTIAL RULEMAKING ON ARBITRATION AGREEMENTS: OUTLINE OF PROPOSALS UNDER CONSIDERATION AND ALTERNATIVES CONSIDERED 17 (2015), http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf.

187. *Id.* at 32888. Specifically, proposed §1040.4(a) would provide:

(1) General rule. A provider shall not seek to rely in any way on a pre-dispute arbitration agreement entered into after the date set forth in § 1040.5(a) with respect to any aspect of a class action that is related to any of the consumer financial products or services covered by § 1040.3 including to seek a stay or dismissal of particular claims or the entire action, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or the review has been resolved.

(2) Provision required in covered pre-dispute arbitration agreements. Upon entering into a pre-dispute arbitration agreement for a product or service covered by § 1040.3 after the date set forth in § 1040.5(a):

CFPB's second proposed rule would require the providers of consumer financial products and services to report to the CFPB regarding both their use of arbitration conducted pursuant to mandatory pre-dispute consumer arbitration clauses and the outcomes of such arbitrations.¹⁸⁸ The CFPB explains that it "intends to use the information it collects to continue monitoring arbitral proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further Bureau action."¹⁸⁹ The CFPB also proposes to publish these materials on its

(i) Except as provided in paragraphs (a)(2)(ii) or (iii) of this section or in § 1040.5(a), a provider shall ensure that the agreement contains the following provision: "We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it."

(ii) When the pre-dispute arbitration agreement is for multiple products or services, only some of which are covered by § 1040.3, the provider may include the following alternative provision in place of the one otherwise required by paragraph 4(a)(2)(i) of this section: "We are providing you with more than one product or service, only some of which are covered by the Arbitration Agreements Rule issued by the Consumer Financial Protection Bureau. We agree that neither we nor anyone else will use this agreement to stop you from being part of a class 362 action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it. This provision applies only to class action claims concerning the products or services covered by that Rule."

(iii) When the pre-dispute arbitration agreement existed previously between other parties and does not contain either the provision required by paragraph (a)(2)(i) of this section or the alternative permitted by paragraph (a)(2)(ii) of this section, the provider shall either ensure the agreement is amended to contain the provision specified in paragraph (a)(2)(iii)(A) of this section or provide any consumer to whom the agreement applies with the written notice specified in paragraph (a)(2)(iii)(B) of this section. The provider shall ensure the agreement is amended or provide the notice to consumers within 60 days of entering into the pre-dispute arbitration agreement.

(A) Agreement provision. "We agree that neither we nor anyone else who later becomes a party to this pre-dispute arbitration agreement will use it to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it."

(B) Notice. "We agree not to use any pre-dispute arbitration agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it."

See also CONSUMER FIN. PROT. BUREAU, SMALL BUS. ADVISORY REV. PANEL, *supra* note 168, at 17 (tentatively proposing that "any arbitration agreement included in a contract for a consumer financial product or service . . . [be] inapplicable to cases filed in court on behalf of a class . . ."); ARBITRATION STUDY, *supra* note 129, at § 1.4.4 (specifically referencing class action in court).

188. More specifically, the rule requires submission of five types of documents, with redaction of individual names and other specified information: (1) the initial claim (whether filed by a consumer or by the provider) and any counterclaim; (2) the pre-dispute arbitration agreement filed with the arbitrator or arbitration administrator; (3) the award, if any, issued by the arbitrator or arbitration administrator; (4) any communications from the arbitrator or arbitration administrator with whom the claim was filed relating to a refusal to administer or dismissal of a claim due to the provider's failure to pay required fees; and (5) any communications related to a determination that an arbitration agreement does not comply with the administrator's fairness principles. *See Arbitration Agreements*, *supra* note, 186, at 32868; *see also* CONSUMER FIN. PROT. BUREAU, SMALL BUS. ADVISORY REV. PANEL, *supra* note 186, at 13–14, 20 (tentatively proposing a very similar reporting requirement).

189. *Arbitration Agreements*, *supra* note 186, at 32888.

website in some form, with appropriate redaction or aggregation.¹⁹⁰ With this second proposed rule, the CFPB would dramatically increase the transparency of the consumer arbitration process in the context of financial services and products.

Since the CFPB began its research and release of tentative and then final proposed rules, some dispute resolution professionals have become willing to acknowledge that class action waivers make them uneasy and that they are concerned that arbitration's association with class action waivers is undermining arbitration's legitimacy with the general public.¹⁹¹ Indeed, after the CFPB released its tentative proposals, the ABA Section of Dispute Resolution again weighed the possibility of adding its voice and expertise to the public debate. The Section's Council charged a "CFPB Review Task Force" to provide its recommendations regarding whether and how to respond to the CFPB's tentative proposals.

That Task Force, consisting of both dispute resolution professionals and academics,¹⁹² advised the Section to support the CFPB's proposals. Importantly, the Task Force explained that its endorsement of the proposal to bar class action waivers did not represent "a statement that class action litigation is a preferred, or even adequate, method of vindicating individual consumers' financial interests" and noted instead that "the Task Force members hold mixed views on the efficacy of consumer class actions."¹⁹³ Despite the Task Force members' diverging views on class actions, however, they all agreed on the value of the bar on class action waivers in order to "protect the integrity of the arbitration process." The Task Force also concluded that "a financial consumer's agreement to privately arbitrate, rather than publicly litigate, consumer claims should not be entwined with a separate agreement to waive the protections provided by F.C.R.P. 23, or by class-wide procedures of private providers of arbitration servicers."¹⁹⁴ Interestingly, the Task Force even referenced ODR, noting: "Moreover, the Task Force is unanimously supportive of the development of technologies – some of which already exist—that might allow the resolution of small-value, large-volume consumer claims using more just, more consensual and more efficient processes than individual or class-wide litigation or arbitration may provide."¹⁹⁵ Regarding the CFPB's second proposal to require reporting of (and make public) arbitral filings and awards, the Task Force

190. *Id.*; CONSUMER FIN. PROT. BUREAU, SMALL BUS. ADVISORY REV. PANEL, *supra* note 186, at 20.

191. *See, e.g.*, CFPB REVIEW TASK FORCE REPORT to the Council of the Dispute Resolution Section (on file with author).

192. The CFPB Review Task Force consisted of: Nancy Welsh (Chair), Lisa Amsler, Louis Burke, Ben Davis, Homer Larue, Bruce Meyerson, Lawrence Mills, Peter Phillips, Colin Rule, Jean Sternlight, Thomas Stipanowich, and Beth Trent. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

found it to be “generally uncontroversial” and although “a few Task Force members raised potential concerns about confidentiality, generally all felt that more data in this area is welcome.”¹⁹⁶ Thus, focusing on the integrity of the arbitration process led the Task Force to recommend that the Dispute Resolution Section support the ban on class action waivers and the requirement of increased transparency.¹⁹⁷

The Section’s Council subsequently engaged in extensive and thoughtful deliberation. Ultimately, and pursuant to Council direction, the Section sought and won permission from the ABA (through its “blanket authority” procedure) to submit comments to the CFPB. In these comments, the Section expressed strong support for the CFPB’s second proposal requiring providers to report arbitration claim filings, pre-dispute arbitration agreements, awards, and communications regarding compliance with fairness principles and payment requirements, and to make such information public after appropriate aggregation or redaction. The Section reviewed the experience of quasi-public dispute resolution organizations, private organizations, states and the District of Columbia with the collection and publication of arbitration-related information, concluding that such experience revealed the need for disclosure of specific information and that the resulting transparency was valuable. The Section observed that:

. . .the reporting and publication proposed by the CFPB—and the consequent availability of the information for those participating in consumer arbitration, those researching consumer arbitration, and those overseeing consumer arbitration—will help to protect the integrity of arbitration and, by extension, the integrity of the strong federal policy in favor of arbitration that has been expressed by the Supreme Court.¹⁹⁸

Regarding the CFPB’s first proposal, barring class action waivers, the Section consulted with other dispute resolution organizations and ABA sections, ultimately concluding that: 1) it was unlikely that the Section could win blanket authority to submit comments on this topic and 2) it was preferable to work with stakeholders to explore the development of a “third way”—i.e., a dispute resolution option that would improve upon the current state of both mandatory pre-dispute arbitration and class actions for consumers of financial products and services.¹⁹⁹

196. *Id.*

197. *Id.*

198. Letter from Nancy A. Welsh, Chair-Elect, ABA Section of Dispute Resolution, to Monica Jackson, Office of the Executive Secretary, Consumer Financial Protection Bureau (July 29, 2016) (on file with author) (regarding Bureau of Consumer Financial Protection Proposed Rule on Arbitration Agreements).

199. See *Draft Minutes of the ABA Section of Dispute Resolution Council Meeting of April 6, 2016 in New York*, ABA SEC. DISP. RESOL., http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/leadership/Council_Book_Annual_2016.authcheckdam.pdf (discussing whether or not to support CFPB proposed rules); *Minutes of the ABA Section of Dispute*

Thus, the announcement of the CFPB's proposed rules created another opportunity to engage in DSD—but intentionally, thoughtfully, with full stakeholder representation, and in a manner consistent with the principles outlined by Amsler, Martinez, and Smith. The CFPB Review Task Force's report and recommendation seeded suggestions regarding an expanded set of dispute resolution options when it referenced “technologies – some of which already exist – that might allow the resolution of small-value, large-volume consumer claims using more just, more consensual and more efficient processes than individual or class-wide litigation or arbitration may provide.”²⁰⁰ The Section's Council similarly identified ODR as a potentially fruitful “third way.” Such online options could be interest-based, rather than rights-based. They could offer opportunities for “looping back” and “looping forward.” They could ensure that consumers have access to information about their rights and defenses²⁰¹ and that such information could be delivered in a manner that is both respectful and engagingly interactive.²⁰² These ODR procedures could be made transparent and accountable, with required reporting regarding: the number of consumers who use them; the number of consumers who proceed to mediation, arbitration, small claims court, or other procedural options; consumers' perceptions of the options' procedural fairness; and their substantive results.²⁰³

Imagine that a healthy majority of a company's consumers use such online processes, and they report that they find the processes effective and

Resolution Council Meeting, August 6, 2016, San Francisco, ABA SEC. DISP. RESOL.(2016), http://www.americanbar.org/content/dam/aba/administrative/environment_energy_resources/council_meetings/2016_summer_council_agenda_materials.authcheckdam.pdf (approval of April 6, 2016 minutes).

200. CFPB REVIEW TASK FORCE, *supra* note 191.

201. Such information could alert consumers who are confronting frivolous lawsuits for the collection of time-barred (or “zombie”) debt. See David Luban, *Optimism, Skepticism, and Access to Justice*, 3 TEX. A&M L. REV. 495, 497 (2016).

202. Such interactions could be structured to be consistent with the socio-psychological literature regarding procedural justice. Designers also will need to be mindful of the need for substantive and procedural safeguards. See Nancy A. Welsh, Professor of Law, Penn State University, Dickinson School of Law, ODR: A time for celebration and the embrace of procedural safeguards at the 2016 International Forum for Online Dispute Resolution (May 2016), The Hague (transcript available at www.adrhub.com/profiles/blogs/procedural-justice-in-odr).

203. See *id.* (also calling for algorithmic audits and alternative forums for those who do not have access to, or facility with, online options); see generally Noam Ebner & John Zeleznikow, *No Sheriff in Town: Governance for Online Dispute Resolution*, 32 NEG. J. (forthcoming 2016); Noam Ebner & John Zeleznikow, *Fairness, Trust and Security in Online Dispute Resolution*, 36 HAMLINE J. PUB. L. & POL'Y 143 (2015); Orna Rabinovich-Einy & Ethan Katsh, *Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment*, 1 INT'L J. OF ONLINE DISP. RESOL. 5, 28 (2014); Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT'L L. 485 (2014); Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating “Haves” from “Have-Nots,”* 2014 MICH. ST. L. REV. 1411 (2014); Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 HARV. NEGOT. L. REV. 107, 128–29 (2015); Carrie Menkel-Meadow & Robert Dingwall, *Negotiating with Scripts and Playbooks: What to Do When Big Bad Companies Won't Negotiate* (unpublished manuscript) (on file with author).

fair. Imagine that regulators put into place substantive and procedural safeguards and find that the processes produce fair results, with impressive compliance by both companies and consumers. Consumers will then have the “practical ability” to “pursue their claims” individually (quoting from the 1996 proposed revisions to Rule 23 that were abandoned).²⁰⁴ They will not need class certification in order to gain redress. They will have the motivation and ability to bring their own individual claims. Class actions will remain available, certainly, but for the more limited set of claims that really require access to such a procedural device.²⁰⁵ If the CFPB promulgates its proposed rules (which admittedly appears increasingly unlikely in light of the November 2016 election and subsequent developments), the agency might even be willing to permit a regulated provider to overcome the bar on class action waivers, provided that the provider made a sufficiently persuasive initial showing and also met its obligation to continue to engage in rigorous monitoring and reporting.²⁰⁶

If such a dispute system is possible, who can and should serve as its designers? Recall that from 1997 to 2003, in-house counsel and outside counsel—and to a much lesser extent, representatives of dispute resolution organizations—jumpstarted an *ad hoc* DSD process. They failed to address many of the questions or principles that we now know should have been considered. It is difficult to avoid the conclusion that they (and their employers) acted in anticipation of the roles they could play in any system they designed. They were stakeholders, not impartial designers trying to create a system that would meet the most important interests of all of those involved in the system. Thus, they suffered from a conflict of interest—in much the same way that an accounting firm may suffer from a conflict of interest when it provides both business consulting and auditing services to the same client. There is no need to repeat that entirely predictable mistake. The ultimate decision-maker in the design of a new system should not be one of the stakeholders, but a neutral third party.

204. 167 F.R.D. 523, 559.

205. This analysis presumes that the CFPB will be successful in establishing a complete bar on class action waivers—which would then incentivize companies to explore alternative dispute resolution processes (e.g., online procedures, ombuds) that would help them avoid class certification. See Welsh, *Mandatory Predispute Consumer Arbitration*, *supra* note 143, at 203, 216–28 (regarding potential use of ombuds, as well as other means companies could use to demonstrate the fairness of their arbitration programs despite their potential to be subject to structural bias); Rick Bales, *Is Mandatory Arbitration Bad for Business*, LPB NETWORK (Feb. 20, 2016), http://lawprofessors.typepad.com/laborprof_blog/2016/02/is-mandatory-arbitration-bad-for-business.html (“I think a good case can be made that SCOTUS’s pro-arbitration line of cases—especially those that all but extinguish consumer class actions—have removed the incentive for American companies to invest in developing effective dispute-resolution programs. As a result, American companies risk falling yet farther behind their European competitors.”).

206. This suggests that the CFPB could make its bar on class action waivers strongly presumptive, permitting regulated parties to apply to overcome such presumption by making the necessary showings regarding the accessibility, extent of use and fairness (both procedural and substantive) of their alternative online systems. See also STIPANOWICH ET AL., *supra* note 72.

CONCLUSION

Based on Judge Pauley's opinion in *Ross v. Am. Express Co.*, it appears that a private, *ad hoc* DSD process *did* lead to the dominance of class action-barring mandatory pre-dispute arbitration clauses in the contracts between credit card issuers and consumers. In-house counsel and outside counsel played key roles in initiating this process, but it is unclear that any particular individuals could claim credit (or responsibility) as "designers." The representatives of dispute resolution organizations, meanwhile, played supporting roles—as providers of general information about their services, cross-fertilizers, and *amici*. Neither the lawyers nor the dispute resolution professionals addressed the issues or principles that DSD experts now recommend.

Dispute resolution professionals could—and perhaps should—have played a more significant design role. The AAA, for example, was remarkably successful in gathering together a diverse set of stakeholders and developing a responsive Consumer Due Process Protocol. It does not appear, however, that the AAA was invited into the DSD process that led to class action-barring arbitration clauses, at least not explicitly. One can only speculate why this was so. The ABA, meanwhile, appeared poised to play a role—but the Dispute Resolution Section's Task Force was unable to achieve the necessary consensus to move forward.²⁰⁷

Ultimately, it appears that the dispute resolution professionals who could have played a more significant design role viewed themselves primarily as vendors, or they were not invited to play a design role, or they were stymied by their identity as membership organizations and their commitment to consensus.

Through its research and proposed rulemaking, the CFPB has opened up another opportunity for dispute resolution professionals to play a role in designing a system for the resolution of disputes between consumers and providers of financial services and products. Before the November 2016 election, it appeared that this design effort had the potential to be quite different from what occurred between 1997 and 2003. *Only* stakeholders—and, frankly, only a subset of the stakeholders—were involved in that effort. The CFPB, in contrast, is a third party and was poised to be the ultimate decision-maker regarding dispute system design.²⁰⁸ The agency appeared to have a strong interest in creating a dispute system that was—in reality and in appearance—effective, fair, and worthy of trust for consum-

207. It is at least interesting that Alan Kaplinsky, a key player in the development of class action-barring arbitration clauses, was also an active participant in the Task Force's deliberations.

208. See Bingham et al., *Dispute System Design and Justice*, *supra* note 31, at 7 (pointing out the importance of design by a third party, rather than one of the disputing parties). I am aware that there are those who do not perceive the CFPB as a disinterested third party, but the history of administrative law suggests that the agency has achieved, or will achieve, a rough balance in response to its various constituents—or at the very least, a dynamic equilibrium.

ers, regulated providers and the public generally. Now, despite all of the efforts the CFPB directed to this effort, it is not at all clear that it will proceed with its rulemaking.

Dispute resolution organizations and professionals share the CFPB's interest in a dispute system that is effective, fair and worthy of trust by all. It is exciting to imagine the application of technologies and processes that were largely unknown in 2003. But which dispute resolution professionals can serve as designers of this system? Obviously, any dispute resolution organization or individual neutral hoping to receive referrals from repeat players will be a stakeholder with strong financial and business interests. Such an organization or neutral should not also be the designer. The likelihood of self-serving choices, whether made consciously or unconsciously, is too strong.

So now it is time for a respected dispute resolution organization to step up. Ideally, it should be an organization that does not need to rely on referrals or financial support from the repeat players involved in these disputes. Alternatively, it could be an organization that has demonstrated its trustworthiness *regardless* of its relationships with repeat players. In either case, this organization will need to care deeply about the integrity of the dispute resolution field and about developing a dispute system that is effective, fair and worthy of trust. That means the organization actually *will* have a stake in the system—but *this* is just the sort of stake that would make for the very best of designers.