[Vol. 12: 503, 2012]

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

The Effect of the Dodd–Frank Act on Arbitration Agreements: A Proposal for Consumer Choice

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"[I]n today's regulatory environment, it's virtually impossible to violate rules. . . . But it's impossible for a violation to go undetected, certainly not for a considerable period of time."
~Bernie Madoff, October 20, 2007.[1]

I. INTRODUCTION

On September 3, 1929, the Dow Jones Industrial Average peaked at a historic 381.2 points, but by November 13, 1929, the market fell 199 points, creating a selling hemorrhage that would define the next decade of life in the United States.[2] When the market bottomed out in 1932, American stocks had lost 90% of their value, leaving President Franklin Roosevelt and Congress with the task of rebuilding both the trading capability of the nation's securities exchanges and the public's confidence in the market.[3]

Prior to the market crash of 1929, there was no need for extensive securities regulation due to the prosperous post-World War I economy.[4] It was not until approximately $25 billion in wealth had been lost that the need for oversight became a legislative priority.[5] Born out of the crisis of the

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1. Bernard Madoff, The Philoctetes Center Roundtable Discussion: The Future of the Stock Market 9 (Oct. 20, 2007) (transcript available at http://www.philoctetes.org/documents/Stock%20Market.pdf).

2. Harold Bierman, Jr., *The 1929 Stock Market Crash*, ECON. HIST. ASS'N (Feb. 5, 2010, 4:13 PM), http://eh.net/encyclopedia/article/bierman.crash.

3. *Id.*

4. *Id.* During the 1920s, an unprecedented 20 million shareholders invested in American securities. *Id.*

5. *Id.*

Great Depression, sweeping regulatory reforms were enacted with the Securities Act of 1933 and the Securities Exchange Act of 1934.[6]

In the fall of 2008, the American economy experienced a historic number of shockwaves: Lehman Brothers declared bankruptcy, the U.S. Federal Reserve System bailed out AIG, Bernie Madoff admitted to masterminding the greatest Ponzi scheme in history, and Congress passed what seemed to be an unending number of industry bailouts.[7] Much like the crash of 1929, the government was too late in curbing ineffective policies and regulations that ultimately contributed to the vast destruction of private and public wealth. As a result, the United States experienced its first true recession of the new century. It became clear to politicians, bankers, and investors that the United States was, once again, in need of a substantial reform to the financial system.

On July 21, 2010, President Barack Obama signed into law the Dodd–Frank[8] Wall Street Reform and Consumer Protection Act (Dodd–Frank or Act).[9] The Act addresses everything from eliminating future bailouts to excessive executive compensation and predatory lending, with the ultimate aim of protecting consumers and preventing future economic meltdowns like that of 2008.[10] President Obama said the reform legislation was meant to "empower consumers and investors, to bring the shadowy deals that caused this [2008 financial] crisis into the light of day, and to put a stop to taxpayer bailouts once and for all. . . . [T]hese reforms represent the strongest consumer financial protections in history."[11] The legislation ushered in the

6. *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCHANGE COMMISSION, http://sec.gov/about/whatwedo.shtml (last modified Apr. 11, 2012). The Acts of 1933 and 1934 were designed to give investors and the market accurate information, and to ensure fair business practices. *Id.* It was the 1934 Act that established the Securities and Exchange Commission. *Id.* President Franklin Roosevelt appointed Joseph Kennedy as the first Chairman of the Securities and Exchange Commission. *Id.*

7. *See 10 Weeks of Financial Turmoil*, N.Y. TIMES (Apr. 21, 2011), http://www.nytimes.com/interactive/2008/09/27/business/economy/20080927_WEEKS_TIMELINE.html.

8. Helene Cooper, *Obama Signs Overhaul of Financial System*, N.Y. TIMES, July 22, 2010, at B3, *available at* http://www.nytimes.com/2010/07/22/business/22regulate.html. The Act was named for Representative Barney Frank (D, MA) and Senator Chris Dodd (D, CT). *Id.* Frank served as Chairman of the House Financial Services Committee that helped create and pass the eight acts that became the Wall Street Reform and Consumer Protection Act. *Id.* Frank was also the chairman of crucial committees involved in passing the legislation. *Id.*

9. *Id.*

10. *Id.*

11. President Barack Obama, *Remarks by the President at Signing of Dodd–Frank Wall Street Reform and Consumer Protection Act*, (July 21, 2010) (transcript available at

most sweeping overhaul of the American financial system since the Great Depression.[12]

Dodd–Frank is set to change the landscape of arbitration agreements in the securities industry.[13] The Act signals a shift away from the past twenty years of federal policy and precedent favoring arbitration of securities disputes.[14] The reform measures address arbitration agreements generally, while specifically attacking the validity of mandatory arbitration agreements between financial professionals and consumers in a number of contexts including home loans, credit disputes, mortgage agreements, and securities fraud.[15] The measures are meant to be a common-sense remedy to the increasingly frequent problem of compelled arbitration of main street consumers by sophisticated and highly profitable Wall Street firms.[16] These measures are of particular importance given the rapidly growing number of securities dispute claims that have been brought in the past two years and the prevalence of mandatory arbitration agreements in retail financial products and services.[17]

Part I of this article will discuss the development of statutes and case law regarding arbitration of securities disputes and the precedent of the enforceability of arbitration agreements in the context of securities disputes. Part II will discuss the changes to arbitration law brought by the Dodd–Frank Act. Part III will discuss Congressional intent and analyze the likely results of Dodd–Frank arbitration reform. Part IV will make proposals about how the reforms of Dodd–Frank should be implemented to best protect the

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http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act).

12. Michelle Lodge, *Dodd–Frank Act Needs a 'Good Hearing': Chris Dodd*, CNBC (Feb. 1, 2011, 5:07 PM), http://www.cnbc.com/id/41374332/Dodd_Frank_Act_Needs_a_Good_Hearing_Chris_Dodd.

13. *See, e.g.*, Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd–Frank Act].

14. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).

15. Tamara Hoffbuhr-Seelman, *The Future of Mandatory Securities Arbitration Under the Dodd–Frank Act*, 13 BUS. SUIT, no. 9, 2010, *available at* http://www.fwlaw.com/Securities_Arbitration_Under_Dodd-Frank.pdf.

16. *Id.* In order to open an account with a securities broker, a customer usually has to agree to predispute arbitration before FINRA. *Id.* Agreements signed before 2007 most likely have a similar predispute arbitration clause, but the arbitration hearing is most likely agreed to be in front of the National Association of Securities Dealers (NASD) or the New York Stock Exchange (NYSE). *Id.*

17. *Id.* According to FINRA, arbitration filings increased 43% from 2008 (4,982 filings) to 2009 (7,137 filings). *Id.*

consumer and fulfill the intent of the legislation. Part V will conclude this article.

II. HISTORY AND STATUS QUO OF ARBITRATION AGREEMENTS BEFORE DODD–FRANK

A. History of Arbitration Agreements in Securities Disputes

1. The Federal Arbitration Act and the Early Preference for the Enforceability of Arbitration Agreements

The Federal Arbitration Act (FAA) of 1925 established a policy of favoring arbitration agreements[18] and required courts to enforce agreements to arbitrate securities disputes.[19] The FAA required the validity and enforcement of arbitration agreements in "a contract evidencing a transaction involving commerce."[20] The aim of the FAA was to avoid the litigation process in favor of a streamlined arbitration proceeding that decreased both the time and financial investment in the dispute.[21] The FAA

18. 9 U.S.C. § 1 (West 2012).

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. § 2.

19. Edward P. Boyle, Matthew T. McLaughlin & David N. Cinotti, Federal Arbitration Act Alert: *Dodd–Frank Act Gives SEC and New Consumer Agency Power to Invalidate Arbitration Agreements*, VENABLE (Aug. 2010), http://www.venable.com/files/Publication/4e664f50-268b-44b7-8d59-c2669678e352/Presentation/PublicationAttachment/e6505394-0977-4d0a-ba99-c88d5762a604/Federal_Arbitration_Act_Alert_8-9-10.pdf.

20. 9 U.S.C. § 2.

21. This was a decisive departure from previous judicial opinions toward arbitration proceedings. Jon O. Shimabukuro, *The Federal Arbitration Act: Background and Recent Developments*, CRS REP. CONGRESS 1 (Aug. 15, 2003), http://digital.library.unt.edu/ark:/67531/metacrs3879/m1/1/high_res_d/RL30934_2003Aug15.pdf. Scholars believe this hostility was a product of the English court's disfavor of arbitration agreements. *Id.* at 2. Because arbitration decreased a judge's caseload and judges were paid for each case they resolved, arbitration agreements cut into their livelihood. *Id.* Attitudes changed with the expanding post-war American economy and culminated with President Calvin Coolidge signing the FAA on February 12, 1925. *Id.* While one of the primary purposes of the FAA was to decrease

sought to enforce arbitration agreements with the same vigor as other contracts.[22] From 1925 to 1953, predispute arbitration agreements were regularly enforced in the securities industry.[23]

2. *Wilko v. Swan*: A First Step at Invalidating Arbitration Agreements

Turning against the precedent of the FAA, in *Wilko v. Swan*, the U.S. Supreme Court held that mandatory predispute clauses could not force investors to resolve their claims through arbitration.[24] In *Wilko*, petitioner, a customer of respondent's securities brokerage firm, sued to recover damages under section 12(2) of the Securities Act of 1933.[25] Petitioner sought damages claiming the firm's misrepresentations and omissions induced both his decision to invest in 1,600 shares of common stock in Air Associates, Inc. and subsequent sale of stock at a loss.[26] Respondent did not answer the complaint and instead moved to stay the trial until arbitration in accordance with the terms of the agreement could be conducted.[27] The Court held that the right to select a judicial forum cannot be validly waived and that an agreement to arbitrate future controversies between buyers and securities brokers is a stipulation that binds the buyer to waive compliance with the Securities Act;[28] thus, any such agreement is invalidated by the Act's

litigation and streamline the dispute process, the FAA remains a litigated topic. *Id.* at 1. Since 2000, the U.S. Supreme Court has heard six cases on the FAA. *Id.*

22. While the Federal Arbitration Act does not specifically mention the enforceability of predispute agreements to arbitrate, such agreements were upheld following the passage of the FAA. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (quoting H.R. 96, 68th Cong. (1st Sess. 1924)).

23. E-mail from Peter J. Mougey, President, Pub. Investors Arbitration Bar Ass'n, to Elizabeth M. Murphy, Sec'y, Sec. & Exch. Comm'n (Dec. 3, 2010) [hereinafter E-mail to SEC], *available at* http://www.sec.gov/comments/df-title-ix/pre-dispute-arbitration/predisputearbitration-11.pdf.

24. *Wilko v. Swan*, 346 U.S. 427, 437-38 (1953).

25. *Id.* at 428.

26. *Id.* at 428-29.

27. *Id.* at 429. An affidavit accompanied the motion stating that the parties' relationship was controlled by the terms of the agreements and that while the firm was willing to arbitrate, petitioner had failed to seek or proceed with any arbitration of the controversy. *Id.* at 429. The U.S. District Court for the Southern District of New York found that the agreement to arbitrate deprived petitioner of a judicial remedy guaranteed in the Securities Act and denied the stay. *Id*. at 430. The U.S. Court of Appeals for the Second Circuit reversed. *Id.*

28. Justice Reed states that section 14 and the other protective provisions of the Securities Act require "the exercise of judicial direction to fairly assure their effectiveness . . . Congress must have intended [section] 14 . . . to apply to waiver of judicial trial and review." *Id.* at 437. Section 14 of the Securities Act states: "Any condition, stipulation, or provision binding any person acquiring any

express provisions against waiver.[29] In the wake of *Wilko*, arbitration of securities disputes brought under the Securities Act of 1933 was voluntary.[30] Following this decision, courts interpreted the Supreme Court's holding to also apply to cases brought under the Securities Exchange Act of 1934.[31]

3. Added Protections for Consumers Against Mandatory Arbitration Agreements

In 1979, the Securities and Exchange Commission (SEC or Commission) advised brokerage firms that requiring arbitration agreements without adequate disclosure as to the effects of such agreements is a violation of fair dealing.[32] Further increasing the cause of customer disclosure, in 1983 the Exchange Act Rule 15c2-2 was adopted to address what had become the industry norm of including predispute arbitration agreements in customer brokerage agreements.[33] These measures meant that when arbitration agreements were included in a securities agreement, customers had to be made aware of this fact and potential consequences.[34]

In 1973, National Association of Securities Dealers (NASD)—now part of the Financial Industry Regulatory Authority (FINRA)—adopted the NASD Code of Arbitration Procedure (NASD code).[35] Section 12 of the

security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." *Id.* at 430 n.6.

29. *Id.* at 434-36. When the security buyer, prior to any violation of the Securities Act, waives his right to sue in court, he gives up more than a participant would in other business transactions. *Id.* at 435. The security buyer has a wider choice of courts and venue. *Id.* He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary. *Id.*

30. E-mail to SEC, *supra* note 23.

31. *Id.* (*Wilko* was decided in the context of the Securities Act of 1933). *See also* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823, 827-29 (10th Cir. 1978) (applying the same holding and rationale to cases arising under the 1934 Act).

32. Notice to Broker-Dealers Concerning Clauses in Customer Agreements Which Provide for Arbitration of Future Disputes, Exchange Act Release No. 15,984, 17 SEC Docket 1167, at *4 (July 2, 1979).

33. Rescission of Rule Governing Use of Predispute Arbitration Clauses in Broker-Dealer Customer Agreements, Exchange Act Release No. 25,034, 39 SEC Docket 527, at *1 (Oct. 15, 1987).

34. *Id.*

35. *NASD Code of Arbitration*, FINRA, *available at* http://www.finra.org/web/groups/arbitrationmediation/@arbmed/@arbrul/documents/arbmed/p018653.pdf (last visited Apr. 29, 2012). The NASD Code was effectively adopted in 1973 though notice was sent to members in 1968. *Id.*

NASD code requires that if desired by a customer, a member[36] must submit a dispute to arbitration.[37] This code section meant that while brokerage firms could not compel arbitration through predispute agreements, customers with claims under federal securities law could compel firms to arbitrate their claims. Since the adoption of the NASD code, in the absence of predispute arbitration agreements, customers can select to arbitrate or litigate.[38]

4. *McMahon* and the Revival of Arbitration Enforcement

In 1987, the Supreme Court reversed *Wilko*[39] and decades of case law concerning the enforceability of predispute arbitration clauses brought under the Securities Act of 1934 in *Shearson/American Express v. McMahon*.[40] The 5–4 decision held that claims under section 10(b) of the Securities Act were arbitrable under predispute arbitration agreements.[41] Between 1980 and 1982, respondents Eugene and Julia McMahon were customers of

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36. For a current list of FINRA members, see *FINRA List of Members*, FINRA, http://www.finra.org/AboutFINRA/MemberFirms/ListOfMembers/p012908 (last updated Apr. 4, 2012).

37. *NASD Code of Arbitration*, *supra* note 35. Today this provision exists as FINRA Rule 12200. Arbitration Under an Arbitration Agreement or the Rules of FINRA:

> Parties must arbitrate a dispute under the Code if:
>
> - Arbitration under the Code is either:
>   - (1) Required by a written agreement, or
>   - (2) Requested by the customer;
> - The dispute is between a customer and a member or associated person of a member; and
> - The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

Id. at 13.

38. *Id.*

39. The *Wilko* holding was officially overruled in *Rodriguez de Quijas v. Shearson/Am. Express Inc.*, 490 U.S. 477 (1989).

40. Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987).

41. *Id.*

Shearson, a brokerage firm.[42] Julia McMahon signed two customer agreements stating that any controversy relating to the accounts with Shearson would be resolved through arbitration.[43] In 1984, the McMahons filed a complaint alleging that defendant had violated section 10(b)(5) of the Exchange Act by engaging in fraudulent and excessive trading on respondents' accounts.[44] The defendant moved to compel arbitration under section 3 of the FAA.[45] The Court found that the FAA mandates enforcement of agreements to arbitrate statutory claims.[46] Concluding that Congress did not intend for section 29(a) of the Exchange Act to bar enforcement of all predispute arbitration agreements, the Court found that where the SEC has sufficient statutory authority to ensure that arbitration is adequate to preserve Exchange Act rights, enforcement does not constitute a waiver of provisions within the Exchange Act.[47] The result of *McMahon* is that brokerage firms have the ability to strong-arm consumers into arbitration through the use of predispute arbitration agreements.[48]

5. The Status Quo: FINRA and the Federal Preference for the Enforceability of Mandatory Arbitration Agreements

a. The Growing Numbers of American Investors and the Shrinking Number of Dispute Resolution Forums

Absent an agreement expressly prohibiting arbitration, consumers are typically compelled to FINRA arbitration should they have a dispute

42. *Id.* at 222-23.

43. *Id.* at 223.

44. *Id.*

45. *Id.*

46. *Id.* at 226. The Court found that "the burden is on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at 227.

47. *Id.* at 238. Crucial to this holding was the Court's discussion of the evolution of arbitration since the *Wilko* opinion. *Id.* When *Wilko* was decided, the SEC had limited authority over the rules of self-regulatory organizations (SROs), and the SEC's authority did not include authority over their arbitration rules. *Id.* In 1975, the SEC amended section 19 of the Exchange Act, giving the Commission expanded powers to ensure the adequacy of the arbitration procedures used by SROs. *Id.* For example, the SEC can add, delete, or change any rule promulgated by any SRO if it finds such changes are required by the Exchange Act. *Id.* The Court found that these expanded powers of the SEC ensure the rights of consumers and mark a significant change in the landscape of arbitration. *Id.*

48. At the time of the *McMahon* decision, a House of Representatives commission found that 98% of margin accounts, 95% of options accounts, and 39% of cash accounts carried predispute arbitration clauses. E-mail to SEC, *supra* note 23, at n.24.

regarding their security investments. The preference for enforceable predispute arbitration agreements is noteworthy given how the demographic of the average investor has changed in the last twenty years.[49] The number of American households investing has increased threefold since *McMahon*, with nearly half of all U.S. households owning stocks or mutual funds.[50] Investment in securities is no longer as restricted as it was when the Supreme Court affirmed the preference for arbitration enforceability.[51] Also, while the investment market has expanded, the number of arbitration forums has shrunk to one—FINRA.[52] Thus, there are more consumers signing predispute arbitration agreements and only one forum in which they can settle their disputes.

b. Inequity in Arbitration Proceedings and the Necessity for Reform

It is significant that FINRA is the only arbitration provider for consumer–broker disputes given the nature of FINRA arbitration and what some consumers feel is a biased system that favors the interests of industry defendants over the interests of consumers.[53] At the core of the allegations of bias is the fact that in three-member arbitration panels, one member is part of the securities industry because they are a FINRA member.[54]

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* At the time of *McMahon*, there were at least ten arbitration forums including forums in the major stock exchanges and the Chicago Board of Options Exchange. *Id.* Additionally, these different arbitration forums had varying rules, administrators, and policies, all of which increased consumer choice. *Id.*

53. On October 6, 2008, FINRA launched a two-year pilot program that allowed for public arbitration panels for securities disputes. *Public Arbitrator Pilot Program Frequently Asked Questions*, FINRA, http://www.finra.org/ArbitrationAndMediation/Arbitration/Rules/RuleGuidance/NoticestoParties/P124055 (last updated Jan. 31, 2011). The program allowed for investors using a three-member arbitration panel to have three, rather than two, arbitrators. *Id.* Normally, one seat is reserved for a FINRA member. *Id.* FINRA stopped accepting applications for the program on February 1, 2011. *Id.* This program represents a timely response from the securities industry to the growing issue of arbitration equality. *Id.*

54. Hoffbuhr-Seelman, *supra* note 15. The other two members are public arbitrators. *Id.* One study took into account not only a strict win–lose model, but also looked at the dollar figure recovered versus the size of the claim. *See* Edward S. O'Neal & Daniel R. Solin, *Mandatory Arbitration of Securities Disputes: A Statistical Analysis of How Claimants Fare*, SEC. LITIG. & CONSULTING GROUP (June 2007), *available at*

FINRA's membership is entirely comprised of securities traders and brokers.[55]

In 2009, the Arbitration Fairness Act[56] (AFA) was introduced in the House of Representatives.[57] The AFA[58] listed a number of findings to explain why Dodd–Frank, introduced after the AFA failed to pass, was necessary to amend dispute resolution practices in the securities industry and the court's recent interpretation of the FAA.[59] First, the AFA found that the FAA was meant to apply to disputes between commercial entities of similar sophistication and bargaining power.[60] Despite the intention of the AFA's designers, Supreme Court precedent has allowed the enforcement of arbitration agreements between dissimilar parties with unequal economic power.[61] Given this misinterpretation, millions of consumers surrender their

http://www.slcg.com/pdf/workingpapers/Mandatory%20Arbitration%20Study.pdf. The study found a few notable facts. First, the study found that a claimant is 39% likely to win against a top three brokerage firm, while they are 57% likely to win against a firm that is not a top twenty firm. *Id.* at 9-10. The study's data also suggest that the awards are going down, even in cases where a claimant prevails. In 1998, a successful claimant got an average of 68% of the requested amount. *Id.* at 11. Today that figure has fallen to 50%. *Id.* Additionally, the larger the request amount, the less likely a claimant is to get a high recovery. For example, if the successful claimant requests less than $10,000, they will get an average of 76% of their request. *Id.* at 12. However, if the request is between $100,000 and $250,000, they will average 52%; if the request is more than $250,000 they will average 37%. *Id.*

55. FINRA oversees nearly 4,430 brokerage firms and almost 630,000 securities representatives. *About the Financial Industry Regulatory Authority*, FINRA, http://www.finra.org/AboutFinra/ (last visited Apr. 30, 2012).

56. *Testimony of Congressman Henry C. "Hank" Johnson: Arbitration Hearing on "Mandatory Binding Arbitration: Is It Fair and Voluntary?"*, U.S. HOUSE REPRESENTATIVES (Sept. 15, 2009), *available at* http://judiciary.house.gov/hearings/pdf/Johnson090915.pdf. The Arbitration Fairness Act was introduced by Representative Henry C. "Hank" Johnson. *Id.* The bill was intended to prevent the enforceability of any mandatory predispute arbitration agreements. *Id.* The bill would give customers the choice to arbitrate if that was their wish. *Id.* In his September 15, 2009 testimony to the House Commercial and Administrative Law Committee, Representative Johnson cited the findings of the National Arbitration Forum and the American Arbitration Association, both of which had previously concluded that mandatory predispute arbitration is fundamentally unfair to consumers. *Id.* Representative Johnson's testimony also argued for the elimination of mandatory predispute arbitration in the context of employment and franchisee agreements. *Id.*

57. Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009), *available at* http://www.thomas.gov/cgi-bin/query/z?c111:H.R.1020:.

58. The AFA was designed to amend 9 U.S.C. § 1. *Id.*

59. *Id.* The AFA, introduced to the 111th Congress on February 12, 2009, was not passed by Congress.

60. *Id.* at § 2(1) (The Federal Arbitration Act was "intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power"). *Id.*

61. *Id.* at § 2(7).

right to litigation before a conflict has arisen between them and the well-funded financial institution they wish to sue. Additionally, the AFA found that *most* consumers and employees were not given any option whether to submit their claims to arbitration; the fine print in standard contracts like employment and brokerage agreements are not thoroughly investigated by signers who forfeit their rights leaving them with no choice but arbitration.[62] Further, given that the process of arbitration feeds claims through private arbitration companies, the AFA found that the providers of arbitration services may be pressured to favor companies who are repeat users of arbitration services.[63] Finally, the AFA found that, unlike the litigation system, arbitration is relatively nontransparent[64] and lacks judicial review.[65] While Dodd–Frank is not explicitly based on the language and findings of the AFA, it is fair to suggest that the AFA was an ideological precursor to arbitration provisions in Dodd–Frank.

> Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals.

Id.

62. *Id.* at § 2(3).

> Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.

Id.

63. *Id.* at § 2(4) ("Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.").

64. *Id.* at § 2(6) ("Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.").

65. *Id.* at § 2(5) ("[B]ecause there is no meaningful judicial review of arbitrators' decisions[,] . . . arbitrators enjoy near complete freedom to ignore the law and even their own rules.").

II. ARBITRATION REFORMS BROUGHT BY THE DODD–FRANK ACT: A REACTION TO THE FINANCIAL CRISIS OF 2008 AND THE PROBLEMS INHERENT TO THE ARBITRATION PROCESS

A. Expanded Powers of the SEC and the Attack on Mandatory Arbitration Agreements

Dodd–Frank affects federal arbitration law in a number of areas. Section 921 prohibits predispute arbitration agreements between customers and brokers, dealers, or investment advisors.[66] Sections 748 and 922 prohibit such agreements brought following whistleblower claims of commodities and securities fraud.[67] Section 1028 orders the Bureau of Consumer Financial Protection[68] to study the use of predispute arbitration provisions in consumer financial services and grants the power to prohibit such provisions.[69] Section 1414 prohibits such agreements in residential mortgages and home equity loans.[70]

Dodd–Frank recalibrates the use of arbitration in securities disputes, but also expands the reach and might of the SEC.[71] The vastly increased SEC budget has the potential to increase the number as well as the complexity of the cases the Commission reviews and litigates.[72] Given this capability, it is likely that Congress intended for more claims to be pursued and remedied in the court system.

66. Dodd–Frank Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376, 1841 (2010) ("Authority to restrict mandatory pre-dispute arbitration.").

67. Dodd–Frank Act § 922, 124 Stat. at 1841-49 ("Whistleblower protection."); Dodd–Frank Act § 748, 124 Stat. at 1739-46 ("Commodity whistleblower incentives and protection.").

68. Dodd–Frank Act § 1011, 124 Stat. at 1964-65 ("Establishment of the Bureau of Consumer Financial Protection.").

69. Dodd–Frank Act § 1028, 124 Stat. at 2003-04 ("Authority to restrict mandatory pre-dispute arbitration.").

70. Dodd–Frank Act § 1414, 124 Stat. at 2149-53 ("Additional standards and requirements.").

71. Scott Hirst, *Investor Protection Provisions of the Dodd–Frank Act*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 11, 2010, 12:11 PM), http://blogs.law.harvard.edu/corpgov/2010/07/11/investor-protection-provisions-of-the-Dodd-Frank-act/. The Dodd–Frank Act § 991 authorizes a series of increases that will double the SEC budget in the five years following the Act's passage. *Id.* The 2011 SEC budget is authorized to be $1.3 billion, and the 2015 budget is authorized to be $2.25 billion. *Id.* These increasing budget figures will not be drawn from tax dollars, but from already existing transaction and registration fees. *Id.* Under the Dodd–Frank Act, the SEC will also be able to use the SEC "Reserve Fund" to meet and supplement various costs. *Id.* This Fund will hold $100 million and will be replenished with $50 million annually. *Id.* This money will come out of SEC income from fees. *Id.*

72. *Id.*

1. Section 921

Section 921[73] amends both section 15 of the Securities Act of 1934 and section 205 of the Investment Advisors Act of 1940[74] by allowing the SEC to prohibit or limit the use of arbitration agreements used by brokers, dealers, or securities traders that arise under the federal securities laws or the rules of a self-regulatory organization—such as FINRA—if such conditions are in the public interest and for the protection of investors.[75] The practical result of section 921 is that the SEC will decide how mandatory arbitration claims will be resolved. Should the SEC limit the enforcement of arbitration agreements, investors will have greater access to the court system which, unlike arbitration, allows for robust discovery, use of juries, precedent, and judicial review.[76]

2. Section 922

Section 922 increases the protections awarded to securities fraud whistleblowers[77] and incentivizes whistleblowing activity with increased awards for the successful prosecution of securities violations.[78] Under this section, a whistleblower is entitled to 10%–30% of monies recovered by the SEC if the whistleblower's tip results in an enforcement action of more than $1 million.[79] For a whistleblower to recover a percentage of the sanction,

73. Hoffbuhr-Seelman, *supra* note 15. Section 921 gives the SEC authority to limit or prohibit predispute arbitration agreements, but until the SEC adopts a contrary rule, such agreements will remain valid. *Id.*

74. *Client Memorandum: Securities Litigation Implications of the Dodd–Frank Act*, PAULWEISS.COM, 2 (July 9, 2010), http://www.paulweiss.com/files/Publication/f5ecf56a-abc8-41ac-91ff-5ff45d8f999b/Presentation/PublicationAttachment/9ec05d67-8bd2-476e-93ee-670fe7dd0300/9-Jul-10FRB.pdf.

75. Dodd–Frank Act § 921, 124 Stat. at 1841.

76. Hirst, *supra* note 71.

77. Dodd–Frank Act § 922, 124 Stat. at 1841-49 (defining whistleblowers as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission").

78. Dodd–Frank Act § 922, 124 Stat. at 1841-49.

79. Dodd–Frank Act § 922(b)(1)-(2), 124 Stat. at 1842. The amount of the award or the denial of the award is left to the discretion of the Commission. Dodd–Frank Act § 922(c)(1), 124 Stat. at 1842-43. In determining the award the Commission will consider:

> (I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action; (II) the degree of assistance provided by the

the whistleblower must provide the SEC with information that it did not already have from another source.[80] The Act does not require whistleblowers to identify themselves at the time of reporting the violation to the SEC.[81] Section 922 precludes the waiver of any rights and remedies provided for by the Dodd–Frank reform by way of "any agreement, policy form, or condition of employment including by a pre-dispute arbitration agreement."[82] Paralleling the purpose of section 922 is section 748 which is a provision on whistleblower incentives and protections in the commodities markets.[83]

Interestingly, section 922 has been applied retroactively to whistleblower cases brought before the passage of the Dodd–Frank Act. In *Pezza v. Investors Capital Corp.*, the court held that section 922 of the Dodd–Frank Act should be applied to a Sarbanes-Oxley securities violation that occurred prior to the legislation's 2010 enactment.[84] The Dodd–Frank Act was enacted while the defendants in this case were moving to compel arbitration; plaintiff successfully argued that the Dodd–Frank Act controlled the defendant's ability to compel arbitration.[85]

> whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action; (III) the programmatic interest of the Commission in deterring violations of the securities law by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and (IV) such additional relevant factors as the Commission may establish by rule or regulation; and (ii) shall not take into consideration the balance of the Fund.

Id.

80. Richard Gallagher & Kenneth Herzinger, *Securities Litigation Risks for Public Companies Arising from the Dodd–Frank Wall Street Reform and Consumer Protection Act*, ORRICK (July 29, 2010), http://www.orrick.com/publications/item.asp?action=article&articleID=2863.

81. Dodd–Frank Act § 922(h)(2)(A), 124 Stat. at 1846-47 ("Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower . . . .").

82. Dodd–Frank Act § 922(j)(c)(2)(e)(1), 124 Stat. at 1848.

83. Dodd–Frank Act section 748 amends the Commodity Exchange Act (7 U.S.C. § 1 et seq.). "The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment including by a predispute arbitration agreement." Dodd–Frank Act § 748(n)(1), 124 Stat. at 1746. "No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." Dodd–Frank Act § 748(n)(2), 124 Stat. at 1746.

84. Ethan Mark, *Court Holds Dodd–Frank Ban on Arbitration of Whistleblower Claims Is Retroactive*, DODD-FRANK.COM (March 3, 2011), http://Dodd-Frank.com/court-holds-Dodd-Frank-ban-on-arbitration-of-whistleblower-claims-is-retroactive/.

85. *Id.*

3. Section 1028

Section 1028 gives the Bureau of Consumer Financial Protection (Bureau) powers similar to those granted the SEC in section 921.[86] The Bureau is to study the use of predispute arbitration agreements in the context of consumer financial products.[87] The Bureau will be able to enact legislation regarding the study's finding after reporting the results to Congress.[88] The Act specifies that the report will study the practices of the "covered person," meaning individuals or companies that offer consumer financial products.[89] "Consumer financial product or service" is defined to include: deposit-taking, extension of loans or credit, real estate settlement services, and financial advising outside of the securities industry.[90] Section 1028 does not prohibit a person from entering a voluntary arbitration agreement with a covered person *after* a dispute has begun.[91]

4. Section 1414

Section 1414 amends section 129C of the Truth in Lending Act by adding a number of subsections addressing arbitration of claims in residential mortgage loans or consumer credit actions.[92] This section flatly prohibits mandatory arbitration or other nonjudicial procedures for resolving

86. *See* Boyle, McLaughlin & Cinotti, *supra* note 19, at 1-2.

87. Dodd–Frank Act § 1028(a), 124 Stat. at 2003-04 ("The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products of services.").

88. Dodd–Frank Act § 1028(b), 124 Stat. at 2004.

> The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).

Id.

89. Dodd–Frank Act § 1002(6), 124 Stat. at 1956.

90. Dodd–Frank Act § 1002(5), (15), 124 Stat. at 1956, 1957-60.

91. Dodd–Frank Act § 1028(c), 124 Stat. at 2004 ("The authority described in subsection (b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen.").

92. Dodd–Frank Act § 1414(e), 124 Stat. at 2151.

claims involving residential mortgage loans and open-end consumer credit plans.[93] Like section 1028, section 1414 specifically states it does not limit the right of the consumer or creditor to agree to arbitration after a claim has been made.[94]

III. DODD–FRANK'S LIKELY CONSEQUENCES

From the above sections of the Dodd–Frank Act, it is clear that Congress unfavorably looks upon mandatory arbitration and predispute agreements. The Act can only lead one to see that Congress intends to curtail the enforceability of arbitration agreements in the securities industry while also notifying Wall Street to be on notice for increased accountability and litigation.[95]

A. Effect on Costs of Resolving Securities Cases

As Dodd–Frank invalidates or curbs arbitration agreements, thus providing for increased litigation over securities claims, it seems likely that resolving securities cases has the potential to become more expensive and time consuming.[96] As the purpose of the Act was to protect the interests of consumers, as opposed to those of financial institutions, it is crucial to ask if the Act will have a positive effect on individuals hoping to bring securities claims. As this article advocates, consumer choice must become the standard for dispute resolution in the securities industry. Recognizing the importance of the freedom to litigate, it is also crucial to recognize that even if investors and consumers choose to litigate their claims, they are not

93. Dodd–Frank Act § 1414(e)(1), 124 Stat. at 2151 ("No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.").

94. Dodd–Frank Act § 1414(e)(2), 124 Stat. at 2151 ("Subject to paragraph (3), paragraph (1) shall not be construed as limiting the right of the consumer and the creditor or any assignee to agree to arbitration or any other nonjudicial procedure as the method for resolving any controversy at any time after a dispute or claim under the transaction arises.").

95. Dodd–Frank requires the SEC to study the standard of care required by financial advisors and brokers to determine if regulatory gaps exist. Edward Pekarek & Christine Goodrich, *A (Dodd–)Frank Primer of Some Imminent Regulatory Reforms*, N.Y. ST. B.A. BLOG (Nov. 11, 2010, 10:35 PM),http://nysbar.com/blogs/SecuritiesLitigation/2010/11/a_doddfrank_primer_of_some_imm.html. The study should examine the financial literacy of average investors and determine an appropriate standard of care that financial professionals owe their customers. *Id.* After concluding the study, the SEC has the power to impose new fiduciary duties on brokers. *Id.* Presumably, the SEC's study will include a determination of investor awareness of mandatory arbitration clauses in financial services and products contracts.

96. *Id.*

assured of a more favorable outcome than what they would get in arbitration nor are they guaranteed of any financial savings.[97] Further, while consumers rightly argue that the arbitration process is imperfect, one can hardly argue that litigation is predictable or that litigation will be in the financial interests of the individual.[98] In most instances, it will be the financial institution, as opposed to the individual consumer, who has the greater litigation resources.[99] Should the language of Dodd–Frank be construed to allow financial institutions to force individuals into court, it would be more detrimental than the current status quo.[100]

B. Increased Number of Class Action Lawsuits for Securities Claims

Dodd–Frank might increase securities legislation generally but could also create class action securities suits for the first time in over two decades.[101] Class action litigation was eliminated under mandatory arbitration framework because only individuals could bring arbitration claims.[102] Given the potential for large classes of similarly situated plaintiffs, class action securities suits represent an effective method of relief for individuals who would otherwise be forced to arbitrate their claims individually.[103] It can be assumed that Congress was aware of this potential side effect to a change in arbitration law and intended such measures to encourage responsible corporate behavior under an increased threat of large-scale litigation.

C. Impact of Whistleblower Provisions

With section 922, Congress is signaling a shift in how the federal government wishes to enforce securities disputes. Whistleblower provisions were in the 2001 Seaboard Guidelines and then again in 2002 in Sarbanes Oxley.[104] These provisions were designed to encourage internal self-

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See 10 Weeks of Financial Turmoil*, *supra* note 7.

102. *Id.*

103. *Id.*

104. Pamela S. Palmer, Joseph B. Farrell, Lawrence A. West & Melanie M. Blunschi, *New Rewards for Whistleblowers, New Risks for Public Companies*, LATHAM & WATKINS, 2 (Aug. 10,

regulation where employees reported violations to their employers.[105] With incentivized whistleblowers, it will become less likely that corporations will internally resolve violations; instead, it is likely that corporations will be forced to resolve alleged violations after it has been reported to the SEC.[106] In fact, Dodd–Frank encourages exactly this behavior with the end goal of building cases against other parties through whistleblowing activities.[107] The whistleblowing legislation marks a new era of SEC enforcement and power, but for companies who are accused of wrongdoing, it signals a number of potential difficulties.[108] For example, because the SEC will be notified of the alleged violation before the company is notified, the company will have to play catch up and could be in the position of having to defend itself prior to fully investigating the accusations.[109] Further, because whistleblowers are financially encouraged to report companies, it is possible that some of these allegations will be proven false though the company will still be forced to defend itself.[110]

D. Impact of State Law Regarding Securities Arbitration

Dodd–Frank is aimed at reforming federal securities law, but because many securities claims are brought under state laws, the Dodd–Frank reforms will become the new model for state "Blue Sky" laws.[111] Blue Sky laws are state-specific securities laws that govern securities trading and the licensing of brokers, firms, and advisors.[112] New regulations ushered in by the Dodd–Frank reforms will serve as a model to both courts and legislatures.[113] Given the visibility of Dodd–Frank and its outward hostility to mandatory predispute arbitration and compulsive arbitration generally, it is likely that state laws will follow this lead and could begin to step away

2010), http://www.hrnsight.com/articles/tabid/66/docid/11045/Default.aspx. Sarbanes-Oxley required corporations to give employees access to hotlines where they could report fraud. *Id.* at 1. Any such reports were subject to review by the corporation's internal audit committee. *Id.*

105. *Id.*

106. *Id.* at 2.

107. *Id.* at 2-3.

108. *Id.*

109. *Id.* at 3.

110. *Id.*

111. *See* Richard I. Alvarez & Mark J. Astarita, *Introduction to the Blue Sky Laws: Yes, There Are 50 Other Securities Regulators Other Than the SEC*, SECLAW.COM, http://www.seclaw.com/bluesky.htm (last visited Apr. 30, 2012).

112. *Blue Sky Laws*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/answers/bluesky.htm (last modified Sep. 27, 2000).

113. Pekarek & Goodrich, *supra* note 95.

from strict enforcement of arbitration agreements in the context of securities law.

IV. PROPOSALS ON HOW TO BEST IMPLEMENT THE CHANGES OF DODD–FRANK AND WHY CONSUMER CHOICE MUST BE THE HALLMARK EMBRACED

A. Arbitration, While Imperfect, Can Be Time and Cost Effective, and Thus, Must Remain an Option to Consumers

The purpose of the Dodd–Frank Act is to protect the consumer, and as such, it would be unreasonable to absolutely take the choice of arbitration away from consumers bringing securities claims. The Dodd–Frank Act does not flatly remove arbitration as a means of resolving disputes; rather, it provides for the limitation of mandatory arbitration.[114] Such restrictions, as discussed above, are meant to protect the consumer.[115] Arbitration, as a form of dispute resolution, must be differentiated from mandatory arbitration, a compulsory practice that often does not benefit the interests of the individual.[116] This article briefly reviewed some of the shortcomings of arbitration proceedings; arbitration is an admittedly imperfect process, but given the cost of litigation, totally removing the option from consumers would only further restrict consumer choice.[117] Arbitration proceedings are limited when compared to litigation, and thus, are often an effective way to control costs and are therefore appealing to consumers wanting to bring a lawsuit, but without the financial backing to match the resources of a brokerage firm or corporation.[118]

The upsides of arbitration are especially apparent in the context of pro se claimants who are unable to afford the costs of hiring and retaining an attorney to see their claims through litigation.[119] Arbitration recoveries,

114. *See* Dodd–Frank Act § 921, 124 Stat. at 1841; Dodd–Frank Act § 1028, 124 Stat. at 2003-04.

115. *See* Stephen J. Nelson, *Commentary: Dodd–Frank Hits Wall Street and Main Street*, TRADERS MAG. (Aug. 3, 2010), http://www.tradersmagazine.com/news/wall-street-main-Dodd-Frank-consumer-protection-act-reform-106150-1.html.

116. E-mail to SEC, *supra* note 23.

117. *Id.*

118. *Id.* FINRA arbitrations are cost effective as discovery is truncated, motions are highly limited, prehearing motions to dismiss are discouraged, and depositions are not allowed absent a compelling reason. *Id.*

119. *Id.*

measured by a percentage of claims recovered, have also been found more favorable to smaller claims.[120] Further, depending on the amount of the claim, litigation may not be worth the potential recovery; thus, allowing for the continued use of arbitration provides an opportunity for smaller claims to be pursued more often.[121] Unlike litigation, arbitration can also represent a time savings—FINRA arbitration takes an average of twelve months, exhibiting a significant reduction in time invested in the average case.[122] Further, FINRA has enacted procedures for expediting cases for ill or elderly customers.[123]

While this article previously pointed out the fact that arbitration decisions are not subject to judicial review, this can be a positive aspect of the arbitration process for plaintiffs who feel that their case is exceptionally strong.[124] The finality of the decision means that strong cases can be heard and given a final judgment that will not be subject to an appeals process.[125] Also, FINRA's bylaws provide for failure to pay an arbitration agreement or written settlement agreement which further increases the efficacy of arbitration of securities claims.[126]

120. O'Neal, *supra* note 54.

121. *See* E-mail to SEC, *supra* note 23.

122. *Id.*

123. *Id.* NASD Dispute Resolution adopted these procedures beginning as a pilot program in NASD-DR's Southeast Region in July 2003. Press Release, FINRA, NASD Implements Expedited Dispute Resolution Proceedings for Elderly or Seriously Ill Parties (June 18, 2004), *available at* http://www.finra.org/Newsroom/NewsReleases/2004/P002820.

124. E-mail to SEC, *supra* note 23.

125. *Id.*

126. Regulatory Notice 10-31, FINRA, Change to Expedited Proceedings for Failure to Comply with an Arbitration Award or Related Settlement (July 2, 2010), *available at* http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p121647.pdf .

> Article XIII, Section 1(c) of FINRA's Corporate Bylaws provides that a member or associated person may be disciplined for failure to pay an arbitration award or written settlement agreement. Article VI, Section 3 permits summary suspension upon 15 days' written notice of a member or associated person who fails to pay. Recently, FINRA limited the defenses a firm or associated person may raise to prevent the suspension: (1) that the firm or person paid the award in full; (2) the customer has agreed to installment payments or has otherwise settled the matter; (3) the firm or person has filed a timely motion to vacate or modify the arbitration award and such motion has not been denied; and (4) the firm or person has filed a petition in bankruptcy and the bankruptcy proceeding is pending, or the bankruptcy court has discharged the award.

E-mail to SEC, *supra* note 23.

B. Allowing Arbitration in Tandem with Litigation Could Resolve the Inadequacies of the Arbitration Process

If consumers are given the choice between arbitration or litigation, this competition could have the effect of correcting some of what consumers feel are shortcomings in the arbitration process.[127] Although this article advocates for the availability of consumer choice, given the burdensome costs of litigation and the uncertainty of prevailing, there is little reason to assume that allowing customer choice will flood the court systems with cases that would have previously gone to FINRA.[128]

Arbitration is an imperfect process, but should the reforms of Dodd–Frank be interpreted to eliminate securities arbitration altogether, it may actually have a chilling effect on the number of claims individuals bring given that corporations and companies will almost always have the upper hand financially and will be able to outspend an individual in the litigation process.[129] For example, the cost and time savings offered by arbitration heavily sway the consumer to arbitration even if litigation is an option.[130]

C. Consumer Choice Is the Best Solution

This article advocates consumer choice rather than two-way choice wherein both the consumer and industry defendant have the right to determine the forum for resolution.[131] If two-way choice is adopted, industry defendants can deny the consumer's preference for arbitration knowing that litigation is beyond the financial abilities of the plaintiff.[132] Should parties from the securities industry have the ability to veto the consumer's election for arbitration, the average consumer will remain powerless. Given the language of sections 921, 922, 748, 1028, and 1414, it

127. E-mail to SEC, *supra* note 23.

128. *Id.*

129. Pekarek & Goodrich, *supra* note 95.

130. For example, the FINRA Code of Arbitration Procedure Rule 12510 does not allow for depositions except in exceptional circumstances. *NASD Code of Arbitration*, *supra* note 35, at 40. Similarly, interrogatories are limited under Rule 12507(a)(1). *Id.* at 38. Such eliminations streamline the legal fees associated with FINRA arbitration.

131. *See* E-mail to SEC, *supra* note 23. Two-way choice, which would be possible with the elimination of FINRA Rule 12200, would make court the default forum for securities arbitration. *Id.* Under two-way choice, a consumer could desire arbitration only to be forced into court by the defendant. *Id.*

132. *Id.*

becomes clear that Congress intended to ban mandatory predispute arbitration agreements, strongly discourage any mandatory arbitration agreements, and advocate for increased consumer choice.

V. CONCLUSION

The full and lasting impact of Dodd–Frank and its arbitration provisions has yet to be seen. Certain parts of the Act, like the Bureau of Consumer Financial Protection, have been put beyond the reach of congressional budgetary cuts.[133] Other reforms will be subject to conservative challenges.

The problems and inequities of mandatory arbitration in the securities industry have gone on too long. Dodd–Frank, drawing on decades of case precedent and the goals of the Arbitration Fairness Act, aims to overhaul the securities arbitration process by limiting the enforceability of arbitration agreements, incentivizing whistleblowers, banning certain predispute arbitration agreements, and creating the Bureau of Consumer Financial Protection.

This article acknowledges both the weakness and strengths of securities arbitration to conclude that if the Dodd–Frank Act is interpreted according to likely congressional intent, consumer choice will be the new standard of dispute resolution in the securities industry. Continued use of arbitration and the opening of American courts should increase investor confidence, encourage the industry to behave in a responsible and accountable manner, and ultimately be one step in restoring investments in the American markets.

133. Todd Wallack, *Limits to GOP Changes of Financial Reform Law*, BOSTON GLOBE (Nov. 4, 2010, 12:26PM), http://www.boston.com/business/ticker/2010/11/limits_to_gop_c.html.