

# PUBLIC SUBMISSION

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Agency Information Collection Activities; Comment Request

**Comment On:** CFPB-2013-0016-0001

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## Submitter Information

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## General Comment

We offer the following substantive comments from Professors Donna Shestowsky (University of California-Davis, School of Law) and Nancy Welsh (Penn State University, Dickinson School of Law):

1. We support your plan to ask participants whether their agreements contain arbitration clauses—and then determine whether their understanding was accurate. Such analyses could reveal important information regarding lay perceptions.
2. We are concerned that participants will not necessarily know what “arbitration” or “litigation” or “small claims court” involves—e.g., how much time and effort are required in each process; costs; the time to disposition; the likelihood of compliance with the outcome; the specifics regarding how they will be required to present their facts and through what medium; the form of any opinion and award; the opportunity for appeal; the presence of lawyers; etc. In fact, arbitration, litigation and small claims courts take many different forms, depending upon the company, state or county offering each process. For more on these variations and their significance, see Nancy A. Welsh and David Bruce 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 (Spring 2013); Nancy A. Welsh, *Mandatory Predispute Consumer Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187 (2012), and Tom Stipanowich, Nancy A. Welsh, Lisa Blomgren Bingham and Larry Mills, *NATIONAL ROUNDTABLE ON CONSUMER AND EMPLOYMENT DISPUTE RESOLUTION: CONSUMER ARBITRATION ROUNDTABLE SUMMARY REPORT* (April 17, 2012). All of these are available on ssrn.

On one hand, it could be valuable to survey consumers for their largely-uneducated impressions of what these procedures offer. On the other hand, you will get a more accurate sense of consumers’

procedural preferences if you offer descriptions of the arbitration, litigation and small claims processes you want them compare.

3. An alternative approach would be soliciting feedback regarding the most significant features of arbitration and litigation, in addition to asking about the procedures in a holistic way. For an example of such a feature-focused survey approach, see Donna Shestowsky & Jeanne Brett, Disputants' Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study, 41 CONN. L. REV. 63 (2008) The resources provided supra, as well as others we could furnish (some of which are "in press" and therefore not yet publicly available), provide examples of significant differentiating features.
4. Professor Shestowsky is the PI on a large-scale NSF-funded project assessing pre-experience litigant perceptions of legal procedures. Her first paper from the resulting dataset, now "in press," includes findings that are inconsistent with those of the study reported in the literature review (at: <http://www.instituteforlegalreform.com/issues/docload.cfm?docID=1092>.) The participants in this dataset had cases filed in state court, and were surveyed within three weeks of their filing. They were asked to think in terms of their own (concrete) case rather than a hypothetical one. Professor Shestowsky's study is worth contemplating and she is happy to share a copy of her preliminary results with you (but unable to post them online in a public forum at this time). Indeed, another approach to the CFPB study would be to solicit feedback from consumers who have brought their disputes to small claims court and/or arbitration to discover what factors led them to choose the process they did—and what would have led to a different choice. We can point you to others' research that has used this approach.
5. The script suggests some questions regarding the participants' litigation and arbitration experience. We suggest asking for further detail to determine the context of such experience and particularly whether it involved the participants' relationship with their credit card company or other financial service providers.
6. We support discovering the significance of the amount at issue to consumers' preferences. We suggest that other factors of particular significance may be: the cost of the forum, time to disposition, and whether the forum's use is compulsory or subject to opt-out.
7. We also encourage you to consider the preliminary results of a recent review of the CFPB's database, regarding consumer complaints. These results may suggest particular demographic categories that should be included in your survey pool and analyzed separately. See Ian Ayres, Jeff Lingwall & Sonia Steinway, *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints*. This report is available on SSRN.

Professor Donna Shestowsky and Professor Nancy Welsh