in both arbitration and small claims court does not indicate that they can afford to ''subsidize'' arbitration while paying class action defense costs (and therefore continue to maintain two tracks if the Bureau finalized the class rule). The commenter also disagreed that the Study showed that companies already maintain two tracks of litigation because they move to compel arbitration in only about 1 percent of individual cases filed in Federal court and about 5 percent of the 140 cases against companies known to have an arbitration agreement. The commenter asserted that the Bureau's sample size of 140 cases is too small to draw the conclusion that companies rarely invoke arbitration agreements in individual litigation, although no commenter cited any evidence to the contrary. The commenter also argued that companies' low rate of invocation is not evidence of companies' willingness to litigate in both arbitration and court, because there are many reasons why a provider may not move to compel arbitration despite its preference for litigating disputes in arbitration, such as the consumer opting out of the arbitration agreement, a provider's offer of settlement, or the consumer's failure to prosecute the case.

In response to the Bureau's skepticism in the proposal as to whether the costs of individual arbitration will cause providers to remove arbitration agreements if the class rule is finalized, other industry commenters noted that many arbitration agreements include ''anti-severability provisions,'' which state that if the agreement's no-class provision is held unenforceable, the entire arbitration agreement is unenforceable as well.[656] The commenters stated that through these anti-severability provisions, providers have already effectively chosen to eliminate their arbitration agreements if the no-class provision is not available and thus the Bureau's skepticism is unfounded.

Whether loss of individual arbitration harms consumers. Numerous Congressional, industry, and research center commenters, as well as a group of State attorneys general asserted that arbitration is a superior form of dispute resolution for consumers relative to individual litigation and that consumers would therefore be harmed if the class rule causes providers to remove arbitration agreements from their consumer contracts. These commenters cited several factors in support of their argument. Many stated that arbitration is a superior forum for resolving individual disputes because filing fees are less expensive for consumers than comparable fees in court. For example, these commenters noted that the AAA's consumer arbitration rules require consumers to pay no more than $200 in costs for arbitration, and that many providers use arbitration agreements that require the provider to pay the consumer's entire filing fees in certain circumstances. In contrast, commenters noted that filing fees for individual suits in Federal court are $400, and that State court filing fees vary but are often more than $200. A research center noted that arbitration saves money for both consumers and businesses.

Many of these same industry, research center, and State attorneys general commenters noted that individual disputes filed in arbitration are, on average, resolved more quickly than those filed in individual litigation. One industry commenter noted that arbitrations analyzed in the Study were resolved in a median of four to seven months, depending on whether the consumer appeared at the hearing and whether that hearing was in person or by telephone. By contrast, the commenter noted that the average time to reach trial for an individual suit filed in Federal court was 26.7 months.[657] Several of these industry commenters further stated that many State courts have significant backlogs, thus increasing the time to resolution in those courts.

Many industry and research center commenters also stated their belief that arbitration is a better forum for consumers to resolve their disputes with consumer finance companies than individual litigation in court because consumers may proceed without an attorney in arbitration. These commenters believe that arbitration's streamlined process, which does not typically include motions or discovery practice common to litigation and has simpler pleading requirements, allows consumers to pursue their own claims without an attorney and are far lower than what one industry commenter asserted is the astronomical cost of litigation. Indeed, these commenters noted that the Study showed that unrepresented consumers more often received favorable decisions from arbitrators than did consumers represented by attorneys. On the other hand, one industry commenter asserted that when consumers do have an attorney in an arbitration, that attorney is likely to have prior arbitration experience. Some industry commenters and a group of State attorneys general noted that arbitration hearings were typically held in locations that were convenient for consumers and often occurred via telephone, Skype or email without the consumer having to appear in person. In contrast, these commenters noted that litigation typically requires consumers to appear in person and often during the day, requiring them to miss work. An industry and research center commenter and a group of State attorneys general noted that the arbitration process is simpler than litigation and therefore easier for consumers to navigate. Relatedly, an industry commenter noted that fees are modest and disclosed in arbitrations and that arbitrators may waive or reduce them further. An industry commenter asserted that arbitration is better than litigation because consumers can play a role in choosing their arbitrator, while they cannot choose a judge. An industry commenter and several State attorneys general asserted that arbitration benefits consumers because they are more likely to receive a decision on the merits as compared to class actions, where the Study showed no trials occurred in class actions.

Many of the industry and research center commenters noted that the Study showed that consumers prevailed on their claims in arbitration at least as much as they did in litigation. They noted, for example, that the Study showed that consumers received a favorable decision from an arbitrator 6 percent of the time and settled with companies 57 percent of the time in arbitration (appearing to reflect data from the Study that identified known and likely settlements), while consumers received a favorable judgment in 7 percent of their claims in individual litigation and settled 48 percent of claims filed in court (appearing to reflect data from the Study that identified known settlements only). Many industry commenters and a group of State attorneys general further contended that successful consumers won significant amounts in arbitration; according to the Study, the average consumer who received a favorable award received more than $5,000 and a group of State attorneys general noted that arbitration agreements rarely limit consumers' recovery.

Several of these same commenters also asserted that arbitration is at least as fair for consumers as litigation because the major arbitration administrators, AAA and JAMS, each have due process standards that require arbitrators to handle claims fairly. An industry commenter and a research

[656] Study, *supra* note 3, section 2 at 46–47.

[657] U.S. Courts, ''Federal Judicial Caseload Statistics 2016,'' (June 2016) *available at http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016.*