

**TESTIMONY TO THE SUBCOMMITTEE ON
THE CONSTITUTION OF THE
UNITED STATES SENATE JUDICIARY COMMITTEE**

**S. 1782, THE ARBITRATION
FAIRNESS ACT OF 2007**

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INTRODUCTION AND SUMMARY

This testimony will make the following points:

- o A large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their rights to a trial by jury and to bring cases in the U.S. public civil justice system, and instead submit all of their legal claims to binding mandatory arbitration.²
- o Most consumers have little or no meaningful choice about submitting to arbitration. Few people notice or realize the importance of the fine print that strips them of rights; and because all the corporations in entire industries are adopting these clauses, people have no choice. They must give up their rights as a condition of buying a car, opening a bank account, or getting credit card, etc.
- o Private arbitration companies are under great pressure to devise systems that favor the corporate repeat players who draft the arbitration clauses (and thus decide which arbitration companies will receive their lucrative business). For example, arbitrators who rule against corporations and in favor of individuals are often blackballed from serving as arbitrators in future cases. Also, some arbitration companies have undertaken advertising campaigns aimed at prospective corporate clients which make a number of inappropriate promises of favorable treatment.
- o There is no meaningful judicial review of arbitrators' decisions. Under current law,

² The concerns addressed in this testimony all relate to “pre-dispute arbitration agreements,” meaning contract provisions agreed to in advance of any dispute or claim that require a party to take any claims that may later arise to arbitration instead of to court. The concerns discussed here do not relate to post-dispute arbitration, in which two parties to an existing dispute agree after the dispute arises to submit that dispute to arbitration.

arbitrators enjoy near complete freedom to ignore their own rules, the facts and even the law in any given case, without fear that their rulings will be seriously examined by any later court – and without fear of personal or professional consequences.

- o Many corporations tack on lots of unfair provisions to their arbitration clauses that are not inherent to the idea of arbitration, but that further rig the systems against individuals. For example, some corporations impose “loser pays rules” to discourage individuals from bringing claims; some corporations insert provisions into arbitration clauses that strip individuals of substantive statutory rights; some corporations require people to arbitrate their claims across the country (knowing that they’ll be forced to drop the cases); and some corporations use arbitration clauses to ban class actions even where it is clear for class actions are the only way for individuals to have any remedy. While some courts have been protective of individuals, striking down some of these unfair contract terms, too many other courts have either left the issue of whether the arbitration clauses violate the law to be decided by arbitrators rather than courts or uphold even egregiously unfair clauses. This is particularly disturbing because arbitrators have a significant financial incentive to rule that the clauses are legal, so they can continue to bill the file on the case.
- o A number of corporations are using arbitration for debt collection, but abusing the process so that the arbitration process just becomes a “mill” that nearly always rules for the lender regardless of the underlying facts.

**CAN THE PROBLEMS AND ABUSES OF MANDATORY
ARBITRATION BE FIXED BY MAKING THE SYSTEM A
LITTLE MORE FAIR THROUGH STANDARDS?**

As some corporations have imposed increasingly draconian and outrageous contract terms on their customers and employees, and tried to slip these provisions past courts by including them in a paragraph of the contract labeled “arbitration” and then argued that even if the terms would otherwise be illegal that a corporation can do anything it wants without limits in a contract if the term is in an arbitration clause, some “reform” efforts have focused on the idea that all that is needed is to make arbitration somewhat more fair. “The system is really o.k. at its core,” the argument runs, “we just need to eliminate some of the worst abuses.” The premise behind this kind of reform is that so long as some of the most egregious abuses are banned – corporations can’t make Florida residents arbitrate small claims in Alaska, for example, or there is a vague promise to make sure that arbitrators are neutral – that the rest of the system can be left alone.

In our view, this kind of palliative does not address the real problem. The real problem with mandatory pre-dispute arbitration between parties of vastly differing bargaining power stems from the nature of incentives and power. So long as the stronger party to a contract is designing a system that will resolve disputes between both parties (and, in particular, is picking which company will decide those disputes), so long as it is predictable and certain that the vast majority of consumers and employees do not and will not read through the fine print legalese of standard form contracts, so long as courts will not meaningfully review the decisions made by the private judges picked by the corporation, the system will not work well. The arbitration companies can adopt vague and unenforceable “due process protocols,” or the Congress could pass some vague “rules” that arbitration must be “fair” and “neutral” and so forth, but clever

parties will find many ways to take advantage of the system. In our view, vague promises to reform the very worst abuses of mandatory arbitration will do very little to solve the very real problems that our clients have encountered and continue to encounter every day.

BACKGROUND ON PUBLIC JUSTICE.

Public Justice (formerly Trial Lawyers for Public Justice) is a national public interest law firm dedicated to using trial lawyers' skills and resources to advance the public good. We specialize in precedent-setting and socially significant litigation, carrying a wide-ranging docket of cases designed to advance the rights of consumers and injury victims, environmental protection and safety, civil rights and civil liberties, occupational health and employee rights, protection of the poor and the powerless, and overall preservation and improvement of the civil justice system.

Public Justice was founded in 1982 and is currently supported by more than 3,000 members around the country. More information on Public Justice and its activities is available on our web site at www.publicjustice.net. Public Justice does not lobby and generally takes no position in favor of or against specific proposed legislation. We do, however, respond to informational requests from legislators and persons interested in legislation, and have occasionally been invited to testify before legislative and administrative bodies on issues within our expertise. In keeping with that practice, we are grateful for the opportunity to share our experience with respect to the important issues this Committee is considering today. In this connection, we have extensive experience with respect to abuses of mandatory arbitration, having litigated (often successfully) a large number of challenges to abuses of mandatory arbitration in state and federal courts around the nation.

I. Many Corporations' Standard Form Contracts Require Customers And/Or Employees to Give Up Their Constitutional Rights to a Jury Trial, And Instead Submit Legal Disputes to Binding Arbitration As A Condition of Getting Services Or Having a Job.

In just the last generation, there has been a largely unnoticed but very important revolution in the way many corporations do business. Fifteen years ago, only a handful of corporations required consumers or non-unionized employees to submit their claims to binding arbitration. Now, these mandatory arbitration clauses are in tens of millions of form contracts.

Here are just a few examples:

- o All of the largest credit card companies in the U.S. have binding arbitration clauses, and it is very hard to find any credit card issuer that does not have such a clause. Similarly, it is very hard to get a checking account or most loans or other financial services products without submitting to an arbitration clause.³
- o The vast majority of cell phone and residential phone companies require their customers to accept binding arbitration clauses on a take-it-or-leave-it basis. Cingular, Sprint, T-Mobile, Verizon, Working Assets Long Distance, Qwest, and many other companies have such clauses. It would be hard for a customer to get a cell phone without giving up her or his right to a jury trial.
- o Millions of persons are required by their employers to submit all claims – wage and hour claims, civil rights claims, everything – to binding arbitration. Employers such as

³ There is one important exception. Last fall, Congress made it a misdemeanor for a lender to put an arbitration clause into many loan agreements with members of the military or their dependent family members. 10 U.S.C. § 987 (e)(2)-(4); (f)(1). There is a serious policy question as to how mandatory arbitration could be so unfair when it is imposed upon a member of the military that it is a crime, yet it is supposed fair and proper to impose it on other citizens.

Anheuser-Busch, Cheesecake Factory, Circuit City, Ford Motor Co., Hooters, Hughes Electronics, Kentucky Fried Chicken, Lenscrafters, Marriott International, Pfizer, Rockwell, Ralph's Grocery/Albertsons, Waffle House and General Electric (among thousands of others) all require their employees to agree to mandatory arbitration clauses as a condition of getting or keeping a job.⁴

- o From talking to hundreds of consumer lawyers and consumers, it appears that in the last four years the vast majority (if not nearly all) car dealers in the U.S. have inserted binding arbitration clauses into their car sales contracts. (Only a few car dealers in the entire nation had such clauses seven or eight years ago.)⁵
- o It is hard to buy a computer without submitting to a binding arbitration clause. Dell, Gateway, and other major companies insist upon them.
- o Mandatory arbitration is growing rapidly as a requirement for patients to receive necessary medical services. Many HMOs have arbitration clauses; more and more doctors have such clauses; most nursing homes require patients (or family members) to

⁴ As one example of how courts often do not protect employees from mandatory arbitration, see *Garrett v. Circuit City Stores*, 449 F.3d 672 (5th Cir. 2006). In that case, a company allegedly did not preserve the job of a military reservist who was sent to Iraq. When he sued under the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. § 4302(b), the Court held that he had lost his right to bring this claim in court and had to bring his claim to a private arbitrator. There is no little irony that someone who has risked his life protecting our freedoms would be forced to lose a number of his own constitutional freedoms as a result of a fine print contract. In upholding the arbitration agreement, the court expressly ignored language in the House Committee Report that stated that arbitration of a USERRA claim would not be required or binding. *Id.* at 679.

⁵ By contrast, back in 2002, automobile dealerships lobbied strenuously for and won a federal statute that bars car manufacturers from insisting that car dealers arbitrate disputes. 15 U.S.C. § 1226 (a)(2). The Congress has only protected car dealers, however, and not car buying consumers.

sign such clauses; I have seen such a clause in a contract providing for an organ transplant.

- o Mandatory arbitration clauses are in contracts for a wide range of other consumer goods and services – home sales contracts, insurance companies, rental car companies, mortuaries, pest control companies, securities broker services, pet boarding companies, etc., all regularly require customers to sign them as a condition of service.

II. Consumers and Employees Have Little Choice But to Agree to Mandatory Arbitration Clauses.

Literally millions of Americans have unknowingly received mandatory arbitration clauses in a manner that ensures that the clauses would not be read or understood by all but a very few of their recipients. We have seen dozens of arbitration clauses, including clauses used by some of the largest and richest corporations in the United States, that are (a) cast in dense and cryptic legalese incomprehensible to lay persons (and even many lawyers); (b) set forth in minuscule print, often on the back side of a document; and (c) buried in the center of a mailing that contained a variety of other pieces, most of which were solicitations and advertisements unlikely to be read by most recipients. Many on-line contracts bury the arbitration clauses hundreds of lines deep in the fine print; the corporations know that most normal people will just click “agree” rather than scroll down so far. Even when consumers are asked to sign or initial below or at the arbitration clause, it is often in the context of a transaction where the consumer is asked to quickly flip through a large body of “standard” documents or contract provisions, which rarely include an explanation of the arbitration clause.⁶

⁶ In one case in which we were counsel, the first sentence of a lender’s arbitration clause was 256 words long!

In light of these sorts of common practices, it should not be surprising that most people first learn that a company says that they have lost the right to sue – and have “waived” their constitutional right to trial by jury – only after a dispute rises. In most cases, an individual’s first awareness of an arbitration clause comes as a bitter surprise. We have spoken to literally hundreds of persons on this topic over the past few years, including homeowners, farm operators, consumer and civil rights attorney’s, consumers, employees, journalists and arbitrators. Again and again in those conversations, we have heard from people – often very angry and very dissatisfied people – who were utterly unaware that they had been sent an arbitration clause, and who believed that they had never agreed to such a clause. *See also* Fannie Mae Announcement 04-06, Sept. 28, 2004 (“We also recognize, however, that borrowers who would prefer to present their grievances in court may unknowingly agree to mandatory arbitration at the time they sign their mortgage documents.”); Linda J. Demain and Deborah Hensler, “*Volunteering*” to *Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience*, 67 *Law & contemp. Problems* 55, 73-74 (Winter/Spring 2004) (“Given the lack of information available to consumers in predispute arbitration clauses, and the difficulty of obtaining and deciphering these clauses, it is likely that most consumers only become aware of what rights they retain and what rights they have waived after disputes arise.”); Christine Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 *Cal. L. Rev.* 1203, 1225 (2002) (empirical research demonstrates that employees “do not understand the remedial and procedural consequences of consenting to arbitration” and that “[v]ery few are aware of what they are waiving.”).

Unfortunately, many courts do little to require that individuals actually receive

meaningful notice that they are supposedly “agreeing” to give up their constitutional rights and submit to arbitration.

- o In one case, where a consumer bought a computer over the phone, the arbitration clause was sent to consumers inside the box with a computer. For a consumer to reject the clause, she would have to pack up and send back the computer in the box (at her own expense) within 30 days. While anyone familiar with human nature and consumer behavior can predict that few consumers would take such a step, courts have upheld such clauses. *E.g., Hill v. Gateway 2000 Inc.*, 105 F.3d 1147 (7th Cir. 1997).
- o Alabama’s highest court upheld an arbitration agreement that was not even in the contract that the consumers signed. Public Justice represented a husband and wife who purchased title insurance when they bought a farm. When they later found out that there were serious defects in the title, the title insurance company attempted to force them to arbitrate their claim despite the fact that the original contract they signed had not contained the arbitration clause. Instead of including the arbitration agreement in the contract, the insurance company had sent it to the consumers in the mail weeks later, arriving after the parties were already enmeshed in their legal dispute. Yet the court held it was enforceable. *McDougle v. Silvernell*, 738 So. 2d 806 (1999).
- o And in an unusual case where one of our clients did know her employer gave her an arbitration clause and refused to sign it, the U.S. Court of Appeals for the Eleventh Circuit held that she was still bound by it because she failed to quit her job as a nurse at Baptist Medical Center-Princeton in Alabama, after having worked there as a nurse for almost 30 years. *Luke v. Baptist Medical Center-Princeton*, No. 03-14342 (11th Cir.

March 11, 2004).

- o In another case, a court compelled arbitration against the estate of a woman who died in a nursing home. Although the woman was legally blind and could not understand the contents of the papers she signed, the court said that no one can defend against the enforcement of a contract just because they signed it without reading it. *Estate of Etting v. Regent's Park at Aventura, Inc.*, 891 So.2d 558 (Fla. Dist. Ct. App. 2004).

III. Private Arbitration Companies Have Powerful Incentives to Favor the Corporations that Select Them Through Their Standard Form Contracts.

There are a number of different private arbitration companies who compete to be selected by corporations in their standard form contracts with consumers and employees. Arbitration work is often very lucrative, and arbitrators know that if they rule against a corporate defendant too frequently or too generously (from the standpoint of that corporation), they will lose the work. Companies imposing arbitration clauses on their employees and consumers through standard form contracts of adhesion sometimes justify their actions with rhetoric about arbitration being cheaper and faster and fairer than litigation in court. From numerous conversations with lawyers both for corporations and advocates for individuals generally, and participation in multiple mediations and settlement negotiations, I can unequivocally testify that the nearly universal perception among both plaintiff-side and defense-side lawyers is that arbitrators are more likely to have a pro-defense attitude than are judges or juries. As one indication of the truth of this point, for each of the past five years, state and federal courts around the country have published more than 200 reported cases a year involving challenges to mandatory arbitration clauses where individual consumers or employees were attempting to

maintain their rights to pursue their cases in court while the corporations were attempting to force the cases into arbitration. One by product of this widespread (and rational) perception is that arbitration clauses deter attorneys from agreeing to present individuals, and deter individuals from exercising their rights.

There is some empirical evidence and a good deal of academic analysis showing that arbitrators have a tendency to favor "repeat player" clients.⁷ In the consumer law context, the repeat player will generally be the corporate defendant. *See* James L. Guill & Edward A. Slavin, Jr., *Rush Unfairness: The Downside of ADR*, Judges' J., Summer 1989, at 8, 11 (1989)("[A]n arbitrator's decision might be influenced by the desire for future employment by the parties.... Some arbitrators openly solicit work. They write to parties noting their availability, sometimes enclosing samples of their awards.") (citations omitted); Kirby Behre, *Arbitration: A Permissible Or Desirable Method for Resolving Disputes Involving Federal Acquisition and Assistance Contracts?*, 16 Pub. Cont. L.J. 66 (1986) (discussing possibility "that an arbitrator will make a decision with an eye toward his role in future disputes involving one or both of the parties—that is, an arbitrator's decision might be influenced by the desire for future employment by the parties.").

A. Corporations Often Blackball Arbitrators Who Rule In Favor of Individuals, and the Rosters of Potential Arbitrators Tend to Be Heavily Tilted In Favor of Corporate Defendants.

One particularly troubling aspect of the repeat-player syndrome is the tendency of

⁷ *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1476 (D.C. Cir. 1997); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Emp. Pol'y J. 189 (1997) (study finding that employees recover a lower percentage of their claims in repeat player cases than in non-repeat player cases); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 684-85 (1996).

corporate repeat-players to blackball arbitrators who might rule against them. This tendency was revealed by a study of mandatory arbitration in managed care cases in California, which found a small number of cases in which an arbitrator awarded a plaintiff more than one million dollars against a health maintenance organization (HMO). Marcus Nieto & Margaret Hosel, *Arbitration in California Managed Health Care Systems* 22-23 (2000). In each instance, that was the only HMO case that the arbitrator ever handled, *id.*, suggesting that every time an arbitrator entered a substantial verdict against an HMO, the arbitrator was unable to get any further work from an HMO in the state. That same study also found that arbitrators were far more likely than judges to enter summary judgment for defendant HMOs.

In the last few months, there have also been two publicly disclosed episodes of arbitrators who were handling cases for the National Arbitration Forum (“NAF”) being blackballed after ruling for consumers against NAF’s most prominent client, MBNA Bank. The first episode of an NAF arbitrator being blackballed is described in the deposition of Harvard Law Professor Elizabeth Bartholet, taken on September 26, 2006, by a lawyer challenging NAF as being biased in a consumer case against Gateway Computers.⁸ Professor Bartholet had also served as an independent contractor arbitrator for NAF, until she resigned. Her deposition describes how she was also blackballed by a credit card company after she ruled against it in a single arbitration. At the time that the credit card company decided to block her from hearing any more cases involving itself, she was scheduled to hear a number of other consumer cases. NAF sent out

⁸ This deposition transcript is well over 100 pages in length. If any member of the Subcommittee or her or his staff would like, Public Justice would be happy to provide the Subcommittee with a copy of this deposition transcript. Similarly, this testimony will describe a number of other documents that we have encountered in our work, and we would be happy to supply the Subcommittee with those documents as well.

letters to the consumers falsely stating that she would no longer be the arbitrator in their cases, because she had a scheduling conflict. The professor, however, did not have a scheduling conflict; instead, NAF had sent out this explanation to conceal the fact that in reality she had been blackballed by a lender who did not like how she ruled in a past case.

The second recent disclosure came in an article written by Richard Neely, a former justice of the West Virginia Supreme Court in the 2006 September/October issue of *The West Virginia Lawyer*. After retiring from the bench, Justice Neely was approached by NAF to serve as one of its independent-contractor arbitrators, and he agreed to do so. He reported that when he did not award a bank the full amount of attorneys' fees it asked for, that he found himself barred from handling anymore cases involving that bank. He explained that banks, as "professional litigants," can make use of their superior knowledge of arbitrators past decisions to help ensure that their cases are heard by NAF arbitrators who will rule for them.

In addition to the possibility that individual arbitrators may be blackballed, there are many indications that private arbitration companies are subject to financial pressures if they irritate corporate defendants. See Eric Berkowitz, *Is Justice Served*, *LA Times Magazine*, October 22, 2006:

Declaring that contractual restrictions on class suits are 'inappropriate,' JAMS announced in 2004 that it would start to 'ensure fairness' by ignoring such prohibitions and letting class arbitrations go forward. But then Citibank, Discover Card and American Express fought back, writing JAMS out of their arbitration accords. Within months, JAMS reversed itself. . . .

See also Justin Scheck, *JAMS reverses class action policy; Under corporate pressure, it agrees to enforce exclusion clauses*, *The Recorder* 1 (March 11, 2005).

While many arbitration service providers are very secretive about the identity and

background of their arbitrators, a good deal of anecdotal evidence indicates that they are heavily disproportionately drawn from lawyers who specialize in representing corporate defendants.

Consider the following illustrations, which Public Justice respectfully suggests are illustrative of much broader patterns:

- o We recently received an exemplar of a medical group’s mandatory arbitration clause that provides that all patients of this medical group must submit to arbitration before an organization entitled “The National Insurance Arbitration Promotion Association.” This organization, which was selected by the doctors’ insurance company, explicitly has the goal of “help[ing] the company stay in business,” stresses to patients that most lawsuits against doctors are allegedly baseless, and pledges that patients’ recoveries will be limited (without respect to the law in a state), and that limitations periods will be shortened, as well as providing other terms that favor doctors.
- o In a number of cases, parties in insurance cases being handled by the American Arbitration Association (“AAA”), have received a short list of potential arbitrators, where every name on the list is someone who works directly or indirectly for the insurance industry. We have a “strike sheet” in one case, for example, where the plaintiff’s lawyer went through and annotated how each prospective arbitrator was connected to the insurance industry.
- o Public Justice was involved in a case in Alabama, involving a lawsuit against a title insurance company for fraud and breach of contract. Our client was offered a list of potential arbitrators from AAA, and every potential arbitrator on the list either worked directly for a title insurance company or was an attorney at a law firm that did substantial

work defending insurance companies.

- o One NAF advertisement labeled “Professionals and the National Arbitration Forum,” consists of a list of favorable quotes, all of which come from attorneys or officials affiliated with corporations, and none of whom principally represents individual plaintiffs. Another NAF News Release includes a list of persons who endorse its work, and every one of those 21 persons specializes in representing financial institutions and banks. It is clear that the NAF targets its advertising at lenders.
- o In one case filed by a consumer against ITT Capital Finance Corp., NAF chose as an arbitrator a lawyer whose law firm represented a host of other ITT entities.
- o From material taken from NAF’s website disclosures pursuant to California’s disclosure requirement, the results from a single quarter’s worth of decisions by just one NAF arbitrator reveal that the person handled 80 cases brought by banks against individuals, and ruled for the bank in all 80 cases. In 78 of the 80 cases, she gave the bank 100% of the amount it claimed, in two cases, she gave slightly less. She also ruled on one claim brought by a consumer against a bank, and dismissed it.
- o Several consumer attorneys have told Public Justice that they sought to become AAA arbitrators, only to be told that the AAA lists in their state are filled. They later learned that more corporate defense lawyers were subsequently been added to the list.

There is also evidence that even when arbitrators do find for plaintiffs, they tend to make smaller awards to individuals with employment and civil rights claims, *Armendariz v. Foundation Health Psychare Servs.*, 6 P.3d 669 (Cal. 2000), or to individual medical malpractice plaintiffs, Marcus Nieto and Margaret Hosel, *Arbitration in California Managed Health Care*

System, 21 (2000), than do courts or juries.

Corporate supporters of mandatory arbitration routinely point to “studies” claiming that consumers and employees do well in mandatory arbitration. Some of these studies, like the American Bankers Association-funded Ernst & Young report praising the National Arbitration Forum, suffer from grave methodological flaws. (That study, for example, literally ignores 1,000 consumer cases handled by NAF for every case it considers, and considers a \$1 award to a consumer claiming losses of \$100,000 to be a victory.”) Other studies compare apples and oranges, cherry-picking limited data that show that high-ranking corporate employees who have individually-negotiated contracts do well in arbitration, and then projecting that equally positive results would apply to cases involving far less powerful employees with no control over the arbitrator. This flaw is evident in the work of Lew Maltby, a member of the American Arbitration Association’s Board of Directors and Executive Committee, who regularly works as a paid arbitrator in AAA cases, and who relies at least in part on help from the AAA to raise money for his small “National Workrights Institute.” In fact, the best and most recent data reflects that the corporate funded studies paint an overly rosy picture. See Alexander J.S. Colvin, Assoc. Prof., Penn. State, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury*, presented at the National Academy of Arbitrators 26 (April 14, 2007) (“the most recent data on cases deriving from employer-promulgated agreements in the [AAA California disclosures] suggest that employee win rates and damage awards are lower than indicated by the earlier studies and lower than those in litigation.”)

Sometimes, arbitration company representatives appear to be not only aware of, but cavalier about, consumers’ perceptions of pro-corporate bias. I am familiar with a case where

West Virginia consumer lawyer Dan Hedges learned that an arbitrator proposed by the AAA previously served as defense counsel in cases similar to the one he was then handling. Mr. Hedges expressed to the arbitration company, AAA, that this was not fair to his client. Instead of taking the complaint seriously, the AAA representative laughed and said, “Yeah, I thought you would like that.”

B. Some Arbitrators’ Advertisements and Solicitations to Potential Corporate Clients Confirm the Dependency of Arbitrators Upon Corporate Goodwill.

Perhaps as the most blatant proof that some arbitration companies see their role as aiding corporate defendants against consumer plaintiffs comes in some of the advertising material aimed at potential corporate clients of NAF. (This is one of the largest arbitration firms in the U.S., handling hundreds of thousands of consumer cases each year.) NAF makes promises that sharply favor the interests of corporate defendants and place individual plaintiffs at an obvious disadvantage. Consider the following examples:

- o One NAF solicitation sent generically to multiple potential corporate clients states in huge print that NAF is “The alternative to the million dollar lawsuit.”
- o In a letter dated April 16, 1998, from NAF’s Director of Arbitration to Alan Kaplinsky, NAF warns Mr. Kaplinsky that the “class action bar” is threatening to bring lawsuits involving the Y2K issue, and states that the “*only* thing” that will “prevent” such suits is the adoption of an NAF arbitration clause “in every contract, note and security agreement.”⁹ The approach in this letter is not that of an even-handed neutral arbitration

⁹ Mr. Kaplinsky is a prominent corporate defense lawyer who represents banks. According to his firm’s website, its “Consumer Financial Services Group has developed one of the pre-eminent and largest consumer financial services litigation defense practices in the country, defending banks and other financial institutions throughout the United States in class

forum, but of an advocate advising defense counsel how to defeat a mutual adversary (“the class action bar”).

- o A January 14, 1999 letter from an NAF official to a prospective client states in the very first sentence that “A number of courts around the country have held that a properly-drafted arbitration clause in credit applications and agreements *eliminates class actions . . .*” (Emphasis in original.) This letter also promises that NAF arbitration “*will make a positive impact on the bottom line.*” (Emphasis in original.)¹⁰
- o Another advertisement distributed to corporate in-house counsel on NAF letterhead states that its rules provide for “[v]ery little, if any, discovery.”

NAF is not alone in its approach, AAA also actively solicits business from its corporate contacts. Paul Van Loon, a Regional Vice President of AAA, sent a memo to AAA’s Northern California panelists asking for their help. “Part of our marketing effort for 2000 will be to

actions and other complex litigation.” <http://www.ballardspahr.com/home.htm>. In an article entitled “Excuse me, but who’s the predator: Banks can use arbitration clauses as a defense,” *Bus. Law.* 24 (May/June 1998), Kaplinsky wrote that “Consumers have been ganging up on banks. But now the institutions have found a way to defend themselves.” *Id.* at 24. The article makes clear that mandatory arbitration is this “defense” for financial institutions against consumer claims, and notes that “Arbitration is a powerful deterrent to class action lawsuits. . . .” *Id.* 24-26.

¹⁰ Additional inappropriate remarks appear in NAF’s own newsletter. In addition to handling consumer disputes, NAF handles quite a few cases involving internet “Domain Name” disputes. In that connection, NAF produces a publication entitled “Domain News.” Many of these periodicals run chatty articles that actually boast of the decisions that NAF arbitrators issue in favor of famous persons in these domain name disputes. *E.g.*, *Johnny Unitas Wins Another One*, 2 *Domain News* Vol 4, at 2; *Master of Domains: metallica.org*, 1 *Domain News* Vol 7 at 1; *Hey You, Get Off of My Domain!: MickJagger.com*, 1 *Domain News* Vol. 6 at 2. While Public Justice takes no position on these particular domain disputes, this type of article surely places NAF in a very different position than any court in the United States. Imagine any state or federal court issuing a ruling in favor of one party over another, and then publishing an article – from the court – boasting of the fact and mocking the party who lost the case.

develop business contacts with corporations headquartered in Northern California,” wrote Loon, who wanted the panelist to “make the introduction for us” to any corporate contacts they might have.

These sort of solicitations and promises show what is inherently unfair and wrong with a system where companies can hand pick private judging services to replace publicly accountable courts. These arbitration companies wish to supplant the publicly accountable system of courts and juries, but they have not held themselves to the same ethical standards as those imposed on courts and juries. NAF is effectively promising corporate defendants that its procedures will insulate them from a broad category of potential liabilities by preventing consumers with small claims from having any meaningful means of relief. If a judge were to solicit business from a party that might come before it with strong *ex parte* hints that the solicited party would get a good deal in the judge’s courtroom, there is no doubt that this would be improper or sanctionable behavior.

C. Most Courts Do Little to Protect Individuals Against Biased Arbitrators.

Some courts have struck down arbitration clauses that required individuals to submit their claims to particularly extreme and egregious arbitration systems; perhaps a dozen courts have struck down arbitration systems such as ones where one party could pick the individual arbitrator. Unfortunately, many other courts have been reluctant to protect individuals against arbitrators biased towards industry.

First, the most common problem – that the arbitrator is a lawyer who principally represents parties just like the defendant in a case – is generally not grounds for challenging an arbitration clause or an arbitrators’ decision. This is a fairly well established and widely

recognized day-to-day reality, and courts accept generally such arrangements without question.

Even for more egregious illustrations of bias, however, a number of courts have said that they will only consider issues relating to whether an arbitrator is biased after the arbitration is complete. Consider what this would mean to an individual – you might have to go through a process with a decision maker who can charge you tens of thousands of dollars in fees, could order you to pay the other sides' attorneys' fees, might take years to decide the case, and only then could you go to court to argue that the arbitrator was unfairly biased towards the other side.

And for some courts, it seems as though nothing short of a videotape of an arbitrator stuffing wads of cash into their pockets would be grounds for challenging an arbitration clause on the basis of bias. In one particularly extreme case, an arbitration clause was enforced by a state's high court even though an employer required an employee to submit his claims to arbitration before an arbitration panel *composed of partners of the accounting firm he was suing*. See *Dean Hottle v. BDO Seidman, LLP*, 846 A.2d 862 (Conn. 2004). In another case, Judge Posner of the U.S. Court of Appeals for the Seventh Circuit stated, "the standard due process entitlement to an impartial tribunal is relaxed when the tribunal is an arbitral tribunal rather than a court." *United Transp. Union v. Gateway Western Railway Co.*, 284 F.3d 710, 712 (7th Cir. 2002) (citing to four other federal appellate decisions). Judge Posner made this comment in the course of holding that it was of no concern to the court that an arbitrator had been convicted of violating the criminal tax laws.

IV. Arbitrators Are Immune From Any Meaningful Judicial Review.

Judicial review of arbitration is less than minimal; it approaches non-existent. The general rule is that judicial review of arbitrators' decisions "is very narrow; one of the narrowest

standards of judicial review in all of American jurisprudence.” *Lattimer-Stevens Co. v. United Steelworkers of Am. Dis.* 27, 913 F.2d 1166, 1169 (6th Cir. 1990).¹¹ Consider a few illustrations:

- o The U.S. Court of Appeals for the Seventh Circuit remarked in a decision issued last year that courts should not review arbitrators’ interpretations of contracts even if they are “wacky,” so long as the arbitrator attempted to “interpret the contract at all.” *See Wise v. Wachovia Securities, Inc.*, 450 F.3d 265, 269 (7th Cir. 2006).
- o The U.S. Court of Appeals for the Third Circuit considered an arbitrator’s decision that “inexplicably” cited and relied upon language that was not included in a key document. The court held, though, that “such a mistake, while glaring, does not fatally taint the balance of the arbitrator’s decision in this case. . . .” *Brentwood Medical Associates v. United Mine Workers of America*, 396 F.3d 237, 238 (3d Cir. 2005). This vividly demonstrates how narrow the review of arbitration decisions is – they are upheld even when they are based upon “glaring mistakes” of law.
- o In a case involving baseball player Steve Garvey, the U.S. Supreme Court held that

¹¹ *See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (“the court will set aside [an arbitrator’s] decision only in very unusual circumstances.”); *Baravati v. Josephthal, Lyon & Ross*, 28 F.3d 704, 706 (7th Cir. 1994) (“[J]udicial review of arbitration awards is tightly limited.”); *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 543 (7th Cir. 1998) (“judges follow the law . . . , while arbitrators, who often . . . are not lawyers and cannot be compelled to follow the law and their errors cannot be corrected on appeal (there are no appeals in arbitration), although there are some limitations on the power of arbitrators to flout the law.”); *Di Russa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997) (to modify or vacate an arbitration award, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case), *cert. denied*, 118 S. Ct. 695 (1998); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998) (arbitrator’s decision may only be overturned for manifest disregard of the law in “severely limited” circumstances, where a court finds that “the arbitrators knew of a governing legal principle yet refused to apply it . . .”).

“courts are not authorized to review the arbitrator’s decision on the merits” even if the arbitrator’s fact finding was “silly.” *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2002).

- o In another case, the California Supreme Court held that even when an arbitrator’s decision would “cause substantial injustice” on its face, that it was not subject to judicial review. *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992).
- o In a case decided a few months ago by the U.S. Court of Appeals for the Eleventh Circuit, the court angrily decried persons who try to “convert arbitration losses into court victories,” and noted that the only basis for challenging an incorrect arbitration decision is where a party can prove with “clear evidence” that the arbitrator was conscious of the law and deliberately ignored it; “showing that the arbitrator merely misinterpreted, misstated or misapplied the law is insufficient.” *B.L. Harbert International, LLC v. Hercules Steel Co.*, 441 F.3d 905, 910 (11th Cir. 2006). The court went on to state that parties who challenge arbitration awards should be sanctioned more often for asking for judicial review, and that this would be “an idea worth considering” in order to discourage future challenges to arbitration.

The law governing judicial review of arbitration also encourages arbitrators not to give any reasons for their decisions because then it is entirely impossible to attack their decisions. *See Fellus v. AB Whatley, Inc.*, 2005 WL 9756090 (N.Y. Sup. Ct. Apr. 15, 2005) (in the absence of a reasoned decision supporting an arbitration award, there was no basis for court to decide whether arbitrator manifestly disregarded the law.); *H&S Homes v. McDonald*, 2004 WL 291491 (Ala. Dec.17, 2004) (in the absence of an explanation of damages awarded by arbitrator, the court had

no basis to determine whether arbitrator manifestly disregarded the law; arbitrator's failure to give reasons for the award did not itself constitute manifest disregard of the law). As a result, many arbitrators have told me that they are discouraged by the major arbitration firms from producing written decisions in most cases because doing so basically gives arbitrators a means of putting themselves beyond any scrutiny. The upshot of all this is clear – arbitration is largely a system above and beyond the law.

This lack of judicial review undermines the public function of litigation. “By closing off access to proceedings, eliminating judicial precedent, and allowing parties to write their own laws, we compromise society's role in setting the terms of justice.” *See* Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 695 (citations omitted). *See also* Mike Ward, *Texas' chief justice calls for overhaul of state courts*, American-Statesman, February 21, 2007 (“A privately litigated matter may well affect public rights,’ [Chief Justice Wallace] Jefferson said. ‘Its resolution may ultimately harm the public good or, because those decisions are secret, impede an innovation to a recurring problem, much to the detriment of Texas citizens.’”)

V. Many Companies Add Other Unfair Terms to Mandatory Arbitration Clauses

It is remarkably common for corporations to draft standard form contracts that not only require individuals to take their claims to arbitration instead of court, but also strip individuals of substantive rights that they would have under civil rights or consumer protection statutes. Many courts have struck down such provisions, or sometimes entire arbitration clauses containing several such provisions, as being so unfair as to be unenforceable. In other words, the rule in those courts is that while corporations may insist that individuals submit their claims to

arbitration, they cannot add on extraneous terms that are not inherent to arbitration and that would otherwise be illegal.

Unfortunately, a number of other courts have not taken such a tack. Some courts have concluded that current federal law favors arbitration so much that even if a contract term would otherwise be illegal, it should be enforced if it is embedded in an arbitration clause. Other courts have concluded that arbitrators (rather than courts) should decide all challenges to terms stripping individuals of basic legal rights included in an arbitration clause. (The arbitrator has a strong financial incentive not to find that such terms, contained in the contract that gives the arbitrator power to hear a case – and bill for her or his time on a case – are illegal.)

One court has gone so far as to say that even a challenge to the unconscionability under normal state contract law of the arbitration provision itself is for the arbitrator to decide. *See Hawkins v. Aid Association for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003). Under this approach, a challenge that an arbitrator was biased or charged excessive fees for arbitration would be decided by the arbitrator!

A. Arbitration Is Often Cloaked In Secrecy, Which Disadvantages Consumers and Employees Against Corporations Who Are “Repeat Players” in Arbitration.

Arbitration is all-too-often secretive, with strict confidentiality rules sometimes limiting what can be publicly revealed either about the underlying facts of a dispute or about the arbitrators’ rulings. Reporters are generally not allowed to be present in arbitrations, and proceedings are closed to the public. These characteristics are not inherent to arbitration, but too often become part of the process.

In addition, some arbitration clauses and the rules of some arbitration providers require

that all parties to a dispute keep all facts about both the dispute and the arbitrator's resolution of the dispute “confidential.” Furthermore, “[a]rbitrators have no obligation to the court to give their reasons for an award,” *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 976 n.8 (1960), and it is common for arbitrators to provide no written explanation for their decisions. See Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331, 397-98 (1996). Even when arbitrators do produce written decisions, “arbitrators' decisions are not intended to have precedential effect even in arbitration (unless given that effect by contract), let alone in the courts.” *IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 543 (7th Cir. 1998). Professor Richard Reuben, a proponent of alternative dispute resolution, has cautioned that arbitration can sacrifice important public values of transparency and accountability. Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 *Law & contemp. Probs.* 279, 298-302 (Winter/Spring 2004).

This secrecy tends to reduce the ability of consumer attorneys to effectively represent their clients. See Marcus Nieto & Margaret Hosel, *Arbitration in California Managed Health Care Systems* 22 (2000) (“[P]laintiffs in California health care claims generally do not have information about arbitrators' decision records before selecting a neutral arbitrator. In contrast, health care plans do have information about the win-lose decisions of arbitrators. This information gap may favor health care plans.”); Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 *Wash. U. L.Q.* 637, 683-84 (1996) (“[A] consumer's attorney often relies on public information gained from other lawsuits to build her own claims of negligent or intentional misconduct. Repeat-player companies can gain similar information through private channels. Thus, by requiring private

arbitration the company may again deprive the consumer of certain relief she might have obtained through litigation." (citations omitted)).

A federal court has acknowledged that a non-transparent system of arbitration may be unfair to consumers because it perpetuates a disparity in knowledge between consumers and business. If a business repeatedly has cases before a particular set of arbitrators, it will know much more than consumers about which arbitrators to select. This knowledge is important. When a situation is created where only corporate repeat players have ready access to information about arbitration decisions, consumers are disadvantaged. Such a system puts the corporate repeat player "in a vastly superior legal posture since as a party to every arbitration it will know every result and be able to guide itself and take legal positions accordingly, while each [consumer] will have to operate in isolation and largely in the dark." *Ting v. AT&T*, 182 F.Supp.2d 902, 933 (N.D. Cal. 2002) (footnote omitted), *aff'd in relevant part and reversed in part on other grounds*, 319 F.3d 1126 (9th Cir. 2003), *cert. denied*, 319 S.Ct. 53 (2003).

B. Arbitration Is Often Extremely Expensive for Individuals.

In paying taxes, American citizens cover the costs of operating the court system, so they are only required to pay a nominal filing fee to initiate a lawsuit. People forced into arbitration frequently pay far greater fees to file their case, and to have the decision maker hear their case and to hear various motions that go with the case, than the fees consumers must pay to file a case in court. We have seen a number of arbitration clauses that require individual consumers to pay fees that exceed the amount of money they would stand to gain if they won their cases. A number of consumers and consumer attorneys have told us that they (or their clients) would abandon their cases if forced into arbitration, because they could not afford the fees likely to be

charged by the arbitrators. This problem is exacerbated by the widespread practice of hidden or uncertain fees, where an arbitration service provider loudly touts a small “filing fee,” but then adds on a variety of subsequent fees for handling disputes over discovery, motions and the like. In one recent employment case, a person was required to pay arbitration fees of more than \$60,000 to pursue civil rights claims.

While many courts have refused to enforce arbitration clauses that require individuals to pay significant fees to have their claims heard, some courts seem unconcerned with the possibility that a consumer or employee would be saddled with enormous fees to have their claims heard. In one case, for example, the Supreme Court of Alabama upheld an arbitration agreement despite the consumers having to pay between \$12,000 to \$14,000 to arbitrate claims that were likely worth between \$20,000 and \$30,000. *Leeman v. Cook’s Pest Control, Inc.*, 902 So. 2d 641 (2004). In another case, a federal court of appeals enforced an arbitration clause even though it (a) imposed arbitration costs upon an impoverished individual of between \$27,500 and \$29,000 in order for her to vindicate her claims; and (b) expressly waived all of the individuals claims for exemplary, punitive and consequential damages (even though they otherwise would have been available under the law). *Overstreet v. Contigroup Co.*, 462 F.3d 409 (5th Cir. 2006).

C. Arbitration Clauses Are Often Used As A Means to Avoid Class Action Suits.

Many corporations add to their arbitration clauses terms that ban individuals from bringing or participating in class action cases, either in court or in arbitration. While many courts have struck down these types of contract terms as being unconscionable and unenforceable, other courts have upheld them, citing in several cases that there is a strong presumption in favor of enforcing arbitration clauses. (From a legal perspective, this argument is puzzling, because the

U.S. Supreme Court has held that parties can bring class actions in arbitration, so a federal policy favoring arbitration should say nothing about bans on class actions. Nonetheless, these provisions are often enforced.)

These class action bans often insulate corporations from legal accountability, since many Americans cannot feasibly pursue certain types of claims, particularly cases where individual claims are too small and complex to be litigated by a private attorney. Class action suits allow consumers to pool their individual resources, which is crucial when going up against well-funded corporations. As Congress stated, “Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.” Class Action Fairness Act of 2005, 28 U.S.C. §1711 (2005). Stopping individuals from bringing class action suits effectively immunizes corporations from any legal accountability for certain categories of illegal acts they might commit, even when it is very clear that they have broken the law.

Some courts have recognized the importance of preserving consumers’ access to class action proceedings. In *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002), *aff’d in relevant part*, 319 F.3d 1126 (9th Cir. 2003), the federal district court held that AT&T’s arbitration clause for long distance telephone customers was unconscionable in part because it deprived consumers of the right to bring or participate in class action proceedings. The *Ting* court held that the ban on class actions amounted to an exculpatory clause because it would have been economically infeasible to prosecute each claim on an individual basis. *Id.* at 918. *See also West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265 (W. Va. 2002) (“[P]ermitt[ing] the proponent of such a

contract to include a provision that prevents an aggrieved party from pursuing class action relief would go a long way toward allowing those who commit illegal activity to go unpunished, undeterred, and unaccountable.”); *Powertel, Inc. v. Bexley*, 743 So. 2d 570 (Fla. Dist. Ct. App. 1999) (“Class litigation provides the most economically feasible remedy for the kind of claim asserted here. The potential claims are too small to litigate individually, but collectively they might amount to a large sum of money. . . . By requiring arbitration of all claims Powertel has precluded the possibility that a group of its customers might join together to seek relief that would be impractical for any of them to obtain alone.”) Many other courts have refused to protect consumers from such provisions, however. *See, e.g., Snowden v. CheckPoint Check Cashing*, 290 F.3d 631 (4th Cir. 2002); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249 (Del. Super. Ct. 2001) (“The surrender of that class action right was clearly articulated in the arbitration amendment. The court finds nothing unconscionable about it and finds the bar on class actions enforceable.”).

In my experience, arbitration clauses that ban class action proceedings prevent many consumers who have been harmed by corporate wrongdoings from seeking relief. These class action bans also shield corporations from liability for these illegal activities. This shield not only hurts the consumers who have already been harmed and are being stopped from vindicate their rights, but also hurts future consumers because the prospect of an expensive class litigation normally operates as an important deterrent that makes abusing consumer rights too expensive to be profitable. At its core, allowing corporations to use arbitration clauses to ban class action proceedings injures consumers.

D. Many Arbitration Clauses Include “Loser Pays Rules” to Discourage Individuals from Bringing Claims; Plaintiff’s Fear Being Bankrupted By Huge Defense Fees If They Do Not Win Their Case.

For many consumers and employees pursuing their claim through arbitration is too risky because of the Loser Pays Rule that arbitration companies impose. In one case, for example, an AAA arbitrator entered a loser pays award of more than \$200,000 against a woman who brought a sexual harassment suit against her employer. If this kind of award is made more frequently, few if any women will ever be willing to pursue their civil rights claims in court.

NAF’s advertisements and solicitations aimed at businesses stress that it has a Loser Pays Rule. In an interview with a glossy magazine targeted to in-house corporate counsel, NAF’s Executive Director openly explained that this Loser Pays Rule extends to attorneys’ fees and is aimed at making it more risky for individuals to bring claims against businesses, as a means of achieving tort reform:

Editor: Another goal of Civil Justice Reform is to impose a penalty on commencing litigation as a way to extort a settlement of a frivolous claim. Civil Justice Reform advocates have proposed a "loser pays" rule to counter such tactics.

Anderson: The rules of the National Arbitration Forum allow the arbitrator to award the prevailing party the cost of the arbitration including attorneys' fees. The rules of the other major arbitration administrators have similar provisions. The economics of dispute resolution by arbitration are entirely different from the economics of bringing lawsuits. There is no such thing as a "no risk" arbitration for either side.

Do an LRA: Implement Your Own Civil Justice Reform Program NOW, Metropolitan Corp.

Couns., Aug. 2001. Given that most individual consumer claims are relatively modest in size, the prospect of potentially paying enormous fees to a corporate defendant’s high priced law firm (fees that could easily exceed \$400 per hour for a partner in a D.C. firm) will discourage most consumers from going forward with even the strongest claim.

It should be noted that Loser Pays Rules in civil rights and consumer cases are contrary to the substantive law in many jurisdictions, as the U.S. Supreme Court noted in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). One state Supreme Court has held that a similar Loser Pays Rule in an arbitration agreement rendered the agreement substantively unconscionable. *See Sosa v. Paulos*, 924 P.2d 357, 362 (Utah 1996) (an arbitration provision requiring a medical malpractice plaintiff to pay the litigation costs of the doctor if the patient "wins less than half the amount of damages sought in arbitration" was unconscionable). Nonetheless, other courts have enforced Loser Pays Rules when they were imposed in arbitration clauses, so this problem has not been solved by judicial oversight of arbitration abuses.

VIII. There Is A Growing Trend Towards the Abuse of Mandatory Arbitration by Debt Collectors.

A rapidly growing number of debts are being collected through mandatory arbitration – nearly all with the National Arbitration Forum (“NAF”) – rather than through the court system. While it is difficult to determine the exact magnitude of this secretive organization’s debt collection activity, a number of bits of information (such as some discovery documents that have emerged in litigation and reports from consumer lawyers in a number of states about skyrocketing numbers of cases filed to confirm arbitration awards for creditors on court dockets) indicate that the NAF is resolving hundreds of thousands of debt collection cases each year.

This is a troubling trend for consumer advocates. The NAF is a notoriously lender-friendly organization who openly advertises its services as being favorable to and more profitable for lenders and debt collectors than other arbitration companies, and a very large body of anecdotal data indicates that the NAF’s arbitrators nearly always rule for lenders in the full

amount that they demand in cases. I recommend to the Subcommittee a report issued by Public Citizen in September 2007 entitled “How Credit Card Companies Ensnare Consumers.” From communicating with literally hundreds of consumers and lawyers representing consumers who are caught up in NAF debt collection cases, I can unequivocally state that I have seen a very large number of cases that support the core conclusions reached by Public Citizen in its report.

As evidence supporting (and sometimes in addition to) these obvious and overarching concerns, there are a number of extremely troubling facts and concerns about the manner in which the NAF conducts debt collection arbitrations:

- o NAF appears to funnel a very large number of cases to a few carefully picked arbitrators who nearly always rule for lenders. As one illustration, one NAF arbitrator in California has decided more than 500 cases where MBNA bank sued customers, ruling for the bank in all but a handful of cases. NAF likes to boast that it has a huge roster of arbitrators, consisting of more than 1,500 lawyers and former judges. Public Citizen found that almost 90% of more than 34,000 cases decided by NAF in California were handled by only 28 arbitrators. This is consistent with other studies that have concluded that NAF funnels the vast majority of cases to a small number of “reliable” arbitrators.
- o In 1998 First USA Bank gave sworn interrogatory answers in an Alabama case where consumers were challenging an arbitration clause. The court required the defendant to produce statistics about its experience in arbitration. The statistics showed that where the credit card issuer had sued its customers more than 50,000 times in arbitration, only four customers had brought cases against the company in arbitration! The statistics also showed that out of almost 20,000 arbitration cases that were completed, the bank had won

all but 87, for a win/loss rate of 99.6%.

- o Instead of filing normal complaints with supporting documents to start a case, certain debt collectors file claims with the NAF in the form of pure digital data streams, that the NAF then formats into documents that are sent to the NAF arbitrators with pre-printed orders. The arbitrators are not sent any original documents establishing that the consumers actually agreed to either the arbitration clauses or the credit contracts, but simply receive digital information with a blanket assertion from the lenders that all consumers agreed to arbitration and owed the asserted amounts listed for the accounts.
- o Many NAF arbitrators decide very large numbers of cases, often 40 or more, in a single day. In the overwhelming majority of cases, NAF arbitrators simply sign the pre-printed orders generated by the home office, that award the lender the full sums that the lender has requested for the loans, any fees related to the loans, attorneys' fees and arbitration fees.
- o A large number of cases have been documented establishing that the NAF has entered awards in favor of MBNA and other lenders against persons who were identity theft victims who did not, in fact, owe any debts. Our office regularly receives calls and letters from consumers who report that this has happened to them.
- o It appears that there are thousands, if not tens or hundreds of thousands, of cases where NAF arbitrators have awarded sums to lenders (and particularly MBNA) for debts that were past (and sometimes quite far past) the relevant statute of limitations.
- o MBNA Bank and its attorneys boast publicly about a provision of MBNA's contract that purportedly permits consumers to "opt out" of MBNA's arbitration provision if they

choose, and argue that this provision means that MBNA's arbitration provision is not mandatory. Nonetheless, there are several documented cases where the NAF entered awards against consumers in favor of MBNA even though particular consumers opted out of MBNA's arbitration system – who have registered mail receipts to prove this fact, and who notified NAF of this fact.

- o NAF regularly awards large sums for attorneys' fees to lenders against consumers in cases, but it is not evident from the records in these cases that the creditors' attorneys did anything other than forward information from the lender's records to NAF in an e-mail with digital data.
- o We have received a substantial number of allegations from consumers who report that NAF officials failed to send notices of debt collection arbitrations to consumers at their actual address, and it appears that NAF makes little effort to ascertain the correct addresses for consumers. Nonetheless, my office has had conversations with literally hundreds of consumers and consumer attorneys that suggests that NAF rarely (if ever) overturns default awards against consumers who report to it that they did not receive timely notices of claims.
- o Under the laws of many states, attorneys appearing in arbitrations that take place in those states must either be admitted to practice in those states, or must receive permission to appear in those arbitrations on a pro hac vice basis. (Most states only permit out-of-state attorneys to appear in a small number of cases in a state on a pro hac vice basis, and require that fees be paid for pro hac vice admissions to state bar authorities.) In hundreds of cases, if not far more, NAF arbitrators have permitted attorneys for creditors to appear

in cases without requiring them to seek pro hac vice basis.

- o A substantial body of anecdotal experience from consumers and consumer lawyers across the U.S. indicates that NAF rarely if ever grants any kinds of extensions to consumer debtors, and regularly enters default awards against consumers who were as little as one day late in responding to arbitration notices.
- o By contrast, numerous consumers and consumer attorneys report that NAF regularly grants extensions to its lender clients, particularly MBNA Bank, when the lenders request extensions or miss deadlines.
- o Although documents from NAF cases in many states establish that NAF arbitrators regularly include significant sums in their awards for lenders for the lenders' attorneys' fees and both parties' arbitrators' fees, NAF consistently does not include sums for these items in the disclosures it makes on its website related to arbitrations that are conducted in California. It appears that in reporting on California arbitrations, NAF just rolls the attorneys' fees and arbitration fees into the lender's overall claim, so that consumers looking at NAF's website cannot determine the size of these fees in consumer cases.

In short, the NAF appears to be an extremely unfair and untrustworthy substitute for the civil justice system for debt collection cases. The NAF appears to operate as part of a debt collection mill, regularly generating substantial awards for lenders that greatly exceed the sums to which the lenders are legally entitled. The NAF system is geared towards quickly awarding lenders the full amount the lenders claim a consumer owes, without performing much scrutiny of the magnitude or appropriateness of these awards.

CONCLUSION

In all too many cases, the promise of fair and inexpensive arbitration is not kept for American consumers. The current system suffers from a lack of transparency, which permits and even encourages these abuses.