STATEMENT OF G. ROGER KING[1]

"Justice Restored: Ending Forced Arbitration and Protecting Fundamental Rights"

HEARING BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW OF THE HOUSE COMMITTEE ON THE JUDICIARY

February 11, 2021

Mr. Chairman, and Ranking Member Buck, and Members of the Subcommittee:

Thank you for the invitation to testify this morning. I have been involved professionally in the field of arbitration my entire professional career. I have had considerable experience during this 50-year period in drafting arbitration agreements, serving as counsel in arbitration hearings, and analyzing arbitration issues from a policy perspective. I have also served as counsel to employers in class action litigation. Finally, I have closely followed the discussions and debates in this body and the United States Senate regarding the FAIR Act and related legislative proposals.

I have also included a number of supplemental materials in an appendix to my testimony that I would request be made part of the record for today's hearing.

A summary of my testimony regarding the issues before the Subcommittee today is perhaps best captured in part by a quote by U.S. Supreme Court Justice Stephen Breyer, where he stated as follows:

> [Arbitration] is usually cheaper and faster than litigation; it can have similar procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.[2]

[1] Mr. King is a graduate of Miami University (1968) and Cornell University Law School (1971). Mr. King is a member of the District of Columbia and Ohio Bar Associations, and his professional experience includes serving as a legislative staff assistant to Senator Robert Taft Jr. and professional staff counsel to the United States Senate Labor Committee (1971-1974), associate and partner with Bricker & Eckler (1974-1990), partner and of counsel at Jones Day (1990-2014), and Senior Labor & Employment Counsel at HR Policy Association (2014-Present). Mr. King acknowledges the assistance of Gregory Hoff, Associate Counsel, HR Policy Association in the preparation of his testimony. Mr. King's testimony is being presented on his own behalf and not on behalf of any other party.

[2] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

Justice Breyer's opinion[3] emphasizes certain of the numerous constructive features of arbitration. I hope that the Subcommittee would consider his thoughts and that of his fellow justices, and also carefully examine the important role that arbitration plays in our nation's jurisprudence and conflict resolution system. Arbitration from both a legal policy and practical administrative law perspective has tremendous merit and has served all stakeholders – except perhaps plaintiff class-action attorneys – exceedingly well. Unfortunately, there are a number of myths, misunderstandings, and erroneous assumptions associated with arbitration. Some of these involve the inappropriate intertwining of confidentiality and nondisclosure agreement issues in the discussion of the merits of arbitration. Confidentiality and nondisclosure agreement discussions present separate and distinct matters. Unfortunately, such discussions are being used as "weapons" to inappropriately undermine the numerous favorable aspects of arbitration. I will address confidentiality requirements, including review of the use of nondisclosure agreements, in my testimony.

In addition to the numerous positive aspects of arbitration, I endorse the inclusion of due process rights for claimants following the procedures that have been adopted by the American Arbitration Association, JAMS, and other arbitration service providers. Notably, contrary to what some have argued, current law permits public disclosure of discrimination, harassment, retaliation, and sexual abuse practices, and regulatory filings with the appropriate federal and state agencies. Many arbitration agreements expressly guarantee these rights. And this approach has been utilized for a considerable period of time in settlement agreement language between claimants and employers.

I would also urge the Subcommittee to review the increasingly important emergence of alternative dispute resolution procedures ("ADR") in addressing consumer, employee, and other claimants interests in dispute resolution. Finally, the Subcommittee should prioritize a review of the issues associated with class action litigation, which touch upon many of the issues associated with mandated arbitration being examined by the Subcommittee.

[3] Other Supreme Court Justices of the so-called "liberal wing" of the Court have similarly expressed support for arbitration and the wide scope of the FAA. For example, in *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017), the Court upheld arbitration agreements and invalidated state laws imposing restrictions on such agreements. The majority opinion for this case was written by Justice Kagan and joined by Justices Breyer, Kennedy, Ginsburg, Sotomayor, Alito, and Roberts. The majority of these justices have also written or joined majority opinions in other Supreme Court cases upholding arbitration agreements, including *DIRECTV, Inc., v. Imburgia* 136 S. Ct. 463 (2015).

- **Positive attributes of arbitration cannot objectively be dismissed.**

The evidence is overwhelming that there is merit in mandated arbitration. Even the harshest critics of arbitration appear to accept certain of its various virtues, including the ability of arbitration procedures to flexibly address individualized grievances and complaints, its ability to resolve disputes expeditiously, its cost-effective structure as compared to court litigation, and the equitable results that it provides to all stakeholders. These attributes have been recognized from a wide spectrum of sources. A limited sampling of support for arbitration includes the following quotes from Supreme Court justices and excerpts from research studies and scholarly sources:

  - "The point of affording discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute…and the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 344-45 (2011).
  - "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 686 (2010).
  - "Arbitration…does not require the 'time consuming procedures that must be adhered to in court proceedings,' instead allowing for a more customizable, abbreviated process that is more directly tailored to the type of dispute." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration,* 121 YALE L.J. 2346, 2353 (2012).
  - "[Banning mandatory arbitration] would…undermine the central efficiency advantage that such arbitration provides. Banning mandatory arbitration would also create an additional burden for federal courts…could disincentivize international commerce with the United States…and could create problems regarding the enforceability of current arbitration agreements." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration,* 121 YALE L.J. 2346, 2363 (2012).
  - A statistical analysis conducted in 2019 found that "employee-plaintiffs who brought cases and prevailed in arbitration won approximately double the monetary award that employees received in cases won in court." NAM

D. PHAM & MARY DONOVAN, FAIRER, BETTER, FASTER: AN EMPIRICAL ASSESSMENT OF EMPLOYMENT ARBITRATION 5 (2019).

- **Justice delayed – or eliminated – is justice denied.**

The increased burden that could be placed on our already strained court system by elimination of mandated arbitration should be considered. Any member of Congress favoring the elimination of mandated arbitration should visit, for at least a week, courthouses in their districts and states. Such visits would provide the unfortunate picture of overcrowded dockets, ongoing discovery disputes, delayed and continued hearings and trials, and mountains of electronic and paper filings. Judges, magistrates, court clerk officials, and other judicial representatives would readily attest in such visits to the constant and at times overwhelming pressures on our nation's judicial system. Examples of such conditions include the following:

- As of March 2020, the number of civil cases pending more than three years is nearly 30,000. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, MARCH 2020 CIVIL JUSTICE REFORM ACT REPORT (2020).
- Dating back to 2015, monthly case filings in federal district courts increased by the tens of thousands in four of the last five years, including an increase of 150,000 between 2019 and 2020 alone. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2020).
- As of September 30, 2020, more than 650,000 cases were pending in federal district courts. U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS (2020).
- Between 2019 and 2020, the total number of civil filings in federal district and circuit courts increased by more than 40 percent. U.S. COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY – JUNE 2020 (2020).
- "Delay is one of the largest problems in our legal system. In the last several decades, the state and federal courts have seen increasing caseloads and have resolved disputes at slower and slower rates…the median civil case no takes over seven months to be resolved, and many cases take more than three years to reach a resolution." Miles B. Farmer, *Mandatory and Fair? A Better System of Mandatory Arbitration*, 121 YALE L.J. 2346, 2352 (2012).

The elimination of mandated arbitration will certainly compound the problems faced by our court system, as the courts will have to deal with an increased number of disputes, particularly in the class action area. Time periods between filing of complaints and resolution of the same will be even greater than the delays already faced by litigants. Unfortunately, these types of delays of justice have only increased due to the current pandemic. Such delays of justice will increase litigation expenses and harm all stakeholders, including especially individuals who need to have their complaints expeditiously resolved.

Further, as a practical matter, elimination of mandated arbitration will deprive many individuals of any opportunity to have their complaints resolved. Numerous studies clearly establish that a vast majority of disputes are individualized grievances that do not fit into even liberally defined "commonality" and "numerosity" class certification standards. Further, many of such individualized disputes for low and middle income individuals will not attract qualified legal representation, and as noted by Professor Samuel Estreicher, such individuals will have little or no "consumer protections" and be the unfortunate victims of the so-called arbitration reform movement.[4]

- **The Supreme Court and other courts have consistently upheld mandated arbitration agreements.**

Arbitration issues have been thoroughly litigated and reviewed in numerous precedent-setting Supreme Court decisions. The Court has extensively examined the legislative history of the Federal Arbitration Act ("FAA" or "the Act") and the issues associated with the interpretation and enforcement of the Act. In virtually every case involving arbitration issues, the Court has not only upheld the enforcement of the arbitration agreement in question, but also broadly endorsed policies supporting the use of arbitration arrangements. A sampling of these court decisions includes the following:

  - *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (holding that under the FAA an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration).

[4] *See* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 563 (2001).

- *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that nothing in the NLRA overrides the FAA's protection of the enforceability of class waivers in arbitration agreements).
- *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (holding that a state law imposing more stringent requirements for a power of attorney to enter into an arbitration agreement than required for other contracts was preempted by the FAA).
- *DIRECTV, Inc., v. Imburgia* 136 S. Ct. 463 (2015) (holding that a state law interpretation of choice of law that invalidated an arbitration agreement was preempted by the FAA).
- *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (holding that the Sherman Act does not override the FAA's protection of the enforceability of class waivers in arbitration agreements).
- *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201 (2012) (holding that a state law rule invalidating arbitration agreements involving wrongful death and personal injury claims was preempted by the FAA).
- *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the FAA bars states from refusing to enforce arbitration agreements that contain class action waivers).
- *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010) (holding that an arbitrator cannot read a class arbitration requirement into an arbitration agreement absent an explicit agreement by the parties to such a requirement).
- *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991) (holding that nothing in the ADEA precluded an individual's termination-of-employment claim under the ADEA from being subjected to compulsory arbitration under the FAA).

It is thus clear from the above decisions that the Supreme Court not only supports an expansive interpretation of the FAA, but also the right of parties to retain the benefits of their bargain, including the often-required utilization of arbitration procedures. Indeed, these decisions of the Court reflect support from a wide spectrum of judicial philosophy, including support from Justices Breyer, Kagan, and Kennedy. The Subcommittee should not ignore the strong precedent established by such decisions and the positive public policy considerations in such decisions. Further, the Subcommittee should acknowledge the Congressional

endorsement of arbitration as evidenced in the enactment of the FAA and the substantial, decades-long precedent of leaving the Act intact – without amendment – since its passage in 1925.

- **Bad facts make bad laws, and emphasis on bad arbitration procedures lead to bad arbitration policy.**

Critics of mandated arbitration rely on procedures that have in the past, in certain situations, imposed onerous requirements on claimants. Such critics are correct to point out these deficiencies – consumers, employees, and others have, in certain instances, not been treated properly by the imposition of some mandated arbitration approaches. Such deficiencies in mandated arbitration can and should be addressed. Arbitration agreements should contain due process protections for claimants and should not contain limitation on public disclosure of issues being addressed. Specifically, as noted above, it may be best practice for arbitration agreements to provide language that reiterates existing law that claimants may report, communicate, and disclose disposition of Title VII discrimination claims, as well as harassment, retaliation, and sexual abuse claims. Further, best practices for drafters of arbitration claims should include language that is found in settlement agreements that reminds claimants of the existing legal right to communicate with appropriate federal and state agencies and file charges of discrimination and other violations of employee rights and protections with the same.

Leading arbitration dispute entities in the country have already proceeded in this direction. For example, the American Arbitration Association requires the following due process procedural safeguards in its proceedings, among others:

- Arbitrators must be neutral and disclose any conflict of interest
- Both parties have an equal say in selecting the arbitrator
- Employees and consumers' fees are limited to $300 and $200 respectively
- Arbitrators are empowered to order any necessary discovery
- Damages, punitive damages, and attorneys' fees are awardable to the claimant to the same extent that they would in traditional litigation
- Claimants have the right to choose their own representation

- Claimants have access to all information reasonably relevant to their claims[5]

JAMS and other arbitral providers have incorporated other similar due process requirements.[6] Thus, due process protections for claimants exist in the majority of arbitration proceedings, and should be applied to all such proceedings.

- **Federal and state courts provide protection from arbitration agreements that infringe upon claimants' rights.**

The text of the FAA itself provides protections for consumers and/or employees against enforcement of unfair arbitration agreements, with a "savings clause" that preserves common law defenses to contractual agreements such as fraud, duress, or unconscionability. Specifically, Section 2 of the FAA provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Thus, claimants have recourse in federal and state courts for inequitable arbitration agreements. Indeed, the courts have not hesitated to invalidate those arbitration agreements that unfairly impair the claimants' rights.[7] To the extent that certain arbitration agreements may unfairly impair the rights of consumers and employees, such rights are adequately protected by federal and state courts. Accordingly, there is not a proper legal premise upon which to proceed to justify the entire elimination of mandated arbitration procedures.

- **Confidentiality-related arguments to support the elimination of mandated arbitration are without merit.**

One of the most frequent criticisms of mandated arbitration pertains to the so-called secretive nature of arbitration and the perceived lack of public transparency in such proceedings. Such arguments are erroneous. While nonparties can be excluded from arbitration hearings and arbitrators and arbitration service providers cannot disclose information regarding such proceedings, there is nothing to prevent claimants from disclosing the issues addressed in the proceeding and the resolution of their claims. Claimants can also disclose to regulatory authorities, law

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[5] *Employment Arbitration under AAA Administration*, AMERICAN ARBITRATION ASSOCIATION, https://adr.org/employment (last visited Feb. 9, 2021).

[6] *See JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness*, JAMS, (https://www.jamsadr.com/employment-minimum-standards/) (last visited Feb. 9, 2021).

[7] *See, e.g. Ziglar v. Express Messenger Sys.* 2017 U.S. Dist. LEXIS 220460 (D. Ariz. 2019); *Ramos v. Superior Ct.*, 28 Cal. App. 5th 1042 (2018); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d (2006); *see also* Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic Systems, New Prime, and Lamps Plus* 56 Am. Bus. L.J. 815, 830-38 (2019).

enforcement officials, co-workers and friends, and the media the issues that were presented for resolution and the disposition of same. Indeed, in this internet/platform world we all now live in, dissemination of such information can occur quickly and receive wide attention. Further, California, for example, requires arbitration service providers to publish certain aspects of arbitration proceedings.[8] So-called "gag orders" attempting to prevent public disclosure of such information considered in an arbitration proceeding, including reporting relevant information to regulatory agencies and law enforcement officials, can be set aside in court.[9]

Another area in the arbitration discussion that merits attention is the utilization of nondisclosure agreements ("NDAs"). First, it needs to be understood that the utilization of NDAs and the use of same should not be confused with the question of whether mandated arbitration should be permitted to continue. These are two entirely different issues. NDAs are ancillary in nature to the underlying arbitration agreement. They are the result of negotiations between parties and are self-imposed by such parties. To the extent that such agreements raise confidentiality issues, such issues should be separately discussed. Further, such agreements are often secured between the parties with enhanced economic sums to claimants in return for confidentiality. Indeed, in certain instances, it may be the desire of all parties to have the issues in dispute be kept confidential.

Finally, as noted above, if criminal conduct, or egregious patterns of conduct such as widespread sexual harassment, are uncovered in arbitration proceedings, such NDAs can be set aside by the courts or safeguards can be incorporated into mandated arbitration agreement procedures that would permit the claimant, the arbitrator, or a court to void or disregard the NDA in question. Indeed, many states have already taken action on this issue, passing laws limiting the use of NDAs in employment agreements or otherwise providing protections against potentially problematic use of NDAs, making the discussion of NDAs as they relate to wider arbitration issues perhaps moot in these jurisdictions.[10]

[8] California Code of Civil Procedure 1281.96 requires arbitration service providers to publish quarterly reports containing information related to arbitration proceedings.

[9] *See, e.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007) (overruled on other grounds), *Longnecker v. Am. Express Co*., 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, No. c 12-02256 JSW, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

[10] California, New Jersey, Tennessee, Vermont, and Washington have all enacted legislation prohibiting or otherwise limiting the use of NDAs in certain contexts. There may, however, be federal preemption issues presented by such statutes, depending on their scope and whether they arguably conflict with the FAA.

- **Do not discard the positive experience of mandated arbitration in employment dispute settings.**

For the approximate 6% of the country's private sector employees that work under collective bargaining agreements, mandated arbitration has been in place for decades. These procedures have worked relatively well and have successfully served the interests of employees, unions, and employers. Lessons can be learned from this successful model and should be considered by the Subcommittee.[11]

Additionally, many employers that operate on a union-free basis have successfully implemented mandated arbitration procedures or similar protocols. Indeed, some of these approaches include peer review panels and various labor-management problem solving procedures that expeditiously and successfully resolve workplace conflict issues. The success of these types of approaches should also be studied by the Subcommittee as it analyzes arbitration and dispute resolution issues.

- **Increased development and use of ADR procedures is the desirable policy path to follow.**

Significant positive advancements have been made in the development and implementation of ADR procedures in the last ten years. These ADR concepts involve such procedures as implementation of user-friendly complaint filing systems, expedited fact finding, early case assessments, neutral case evaluation, utilization of ombudsmen, mediation, conciliation, mini-trials, and other options.[12] As noted in the comprehensive Harvard Negotiation Law Review article by Professor Thomas J. Stipanowich and Professor J. Ryan Lamare:

> Businesses were motivated [to move towards implementing these types of dispute resolution procedures] not only by the risk of excessive judgments or settlements, but also by significant transaction costs, including the expenses of legal counsel, supporting experts, preparation time and discovery – costs that were often a multiple of the settlement amount.[13]

[11] The previously proposed FAIR Act (H.R. 1423) exempted the restriction of use of mandated arbitration found in collective bargaining agreements. This approach appears to be inconsistent with the prohibition of mandated arbitration in any other setting. This inconsistent approach also appears to show that proponents of the FAIR Act clearly recognize, at least in part, the benefits of mandatory arbitration, but also unfortunately evinces an apparent bias towards increasing class action litigation in all disputes arising out of any area except collective bargaining situations.

[12] Thomas J Stipanowich & J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 100 Corporations*, 19 Harv. Negotiation L. Rev. 1 (2014).

[13] *Id*. at *9.

These types of ADR options are not mutually exclusive of the use of mandated arbitration models. Indeed, incorporation of such ADR approaches in a layered or integrated manner, with ADR options to be pursued in succeeding steps prior to the potential need for mandated arbitration, should be encouraged. Such an approach should provide significant opportunities for settlement without ever reaching the alleged negative aspects of mandated arbitration.

- **Reform of class action procedures is needed and elimination of mandated arbitration will impede such efforts.**

Misuse and abuse of the class action system in our courts in this country is well documented and troubling. For example, consider the following observations from research studies, scholarly articles, and statements from members of Congress:

  - "Class-action settlements are more effective in transferring money from the defendant to class counsel than in compensating class members…class action settlements may be at best problematic on deterrence grounds." Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions under Federal Consumer Protection Statutes*, 2017 COLUM. BUS. L. REV. 1, 7 (2017).
  - "A 2015 study by the Consumer Financial Protection Bureau found that only 13 percent of class actions resulted in a payout for consumers. And even then, the average award for consumers is about $32, while plaintiffs' attorneys got about $1 million." *The Mass Arbitration Racket: Unscrupulous Abuse of the Arbitration Ecosystem*, U.S. CHAMBER INST. FOR LEGAL REFORM (Dec. 18, 2020), https://instituteforlegalreform.com/the-mass-arbitration-racket-unscrupulous-abuse-of-the-arbitration-ecosystem/.
  - "Too many class actions are litigated today such that the victims of unlawful conduct often receive only pennies on the dollar, if anything at all, when their trial lawyer representatives amass millions of dollars in compensation. Many times, the damages in class action lawsuits are so tiny that it is impossible to even identify the victims. In many such cases, awards are given to entities that are not part of the lawsuit whatsoever." *Examination of Litigation Abuses: Hearing before the Subcomm. on Const. and Civil Just. of the H. Comm. on the Judiciary*, 113th Cong.

(2013) (statement of Rep. Trent Franks, Chairman, Subcomm. on Const. and Civil Just. of the H. Comm. on the Judiciary).

- "The unfortunate continuing irony, however, is that in many class actions, particularly those that go on in state courts, the plaintiffs are not the real winners in the case. A number of high-profile cases continue to result in class members 'winning' coupons worth maybe a few dollars while the lawyers walk away with millions." *Class Actions: A Distortion of Justice and Continued Threat to America's Prosperity*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 16, 2011), https://instituteforlegalreform.com/class-actions-a-distortion-of-justice-and-continued-threat-to-americas-prosperity/.
- In one study, the average time of class action litigation from filing to settlement was found to be three years. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUDIES 811, 820 (2010).
- "The data principally show that (i) only a small fraction of class members receive any monetary benefit at all from the settlements; (ii) class counsel are often given very large attorneys' fee awards even when class members receive little to no monetary recovery." *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, JONES DAY (2020).

The Subcommittee should examine these concerns and explore solutions to this unfortunate type of "procedural coercion" of employers in the country. The direction that the Subcommittee took in the last Congress, and the direction that the majority is apparently taking in this Congress to eliminate mandated arbitration is troubling, as it fails to focus on the connection between eliminating mandated arbitration and the expected corresponding increase in class action filings. This is a bad result for all stakeholders.

Even a cursory review of class action procedures by non-lawyers readily discloses the problems with our current system. For example, class members in a certified class often receive notification of the litigation issues being contested through documents that are written in "legalese" and that are difficult to understand and follow. If the class action is an "opt-in" proceeding, many class members simply discard the notice and never pursue the matter further. Even in "opt-out" situations, when class members receive notice of their "winnings," the procedures to follow to either receive such payments or procedures to follow to opt out of the settlement

are exceedingly difficult to understand or too onerous to follow. Presented with these obstacles, and given the frequent de minimis nature of the financial payment for class members, they often decide never to participate in the "settlement."[14] The only "winners" in this litigation lottery system, as noted above, are the trial lawyers bringing such class actions. While the "inside the beltway" political influence of such attorneys may be strong, they no doubt do not make up the majority of constituents in your districts or represent their best interests. Reform of the class action system in this country should be the priority of this Subcommittee, not the elimination of mandated arbitration.

Finally, the criticism directed at employers for including class action waivers in arbitration agreements is misguided. Such criticism misses the primary reason for inclusion of such waivers – the goal is to prevent the numerous deficiencies and inequities as outlined above in the class action litigation process from becoming integrated into the arbitration process. It simply is not rational to permit such a flawed system to be incorporated into the arbitration process. In addition to such flaws, the considerable expense involved in defending against such protracted litigation is also another valid reason for excluding class action options in arbitration procedures. Finally, as a practical and administrative matter, arbitrators and related arbitration procedures in general do not lend themselves well to the various administrative and procedural requirements of class action litigation. As Justice Scalia has noted, "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[15]

Concluding Thoughts

The Subcommittee should undertake a bipartisan policy approach to discuss and resolve mandated arbitration issues. This discussion should involve an emphasis on the inclusion of due process protections in arbitration agreements. Strict elimination, however, of mandated arbitration procedures, especially if done on a retroactive basis, will adversely and unnecessarily disrupt untold numbers of established and well-functioning dispute resolution systems, including contractual arrangements that provide for such procedures. This extreme approach does not protect claimants and should be rejected. Entities that desire to continue, at least in

[14] *See, e.g. Consumers and Class Actions: A Retrospective and Analysis of Settlement Campaigns*, FTC (2019); *An Empirical Analysis of Federal Consumer Fraud Class Action Settlements (2010-2018)*, JONES DAY (2020); *Securities Class Actions in the United States*, MORGAN LEWIS (2016).
[15] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011).

part, mandated, due process-oriented arbitration procedures, should be permitted to do so while concurrently encouraging the development of effective ADR programs. Finally, the Subcommittee should prioritize a thorough examination of the increasingly discredited class action litigation system in this country. As noted above, this system does not benefit class members, places unnecessary and excessive litigation costs on employers, and only unjustly enriches class action plaintiff-oriented law firms.

Mr. Chairman, thank you again for the opportunity to testify. I would be happy to answer any questions you or other members of the Subcommittee may have.

APPENDIX

Statement of Andrew J. Pincus
on behalf of the
U.S. Chamber Institute for Legal Reform

"Justice Denied: Forced Arbitration and the Erosion of Our Legal System"

Hearing before the Subcommittee on Antitrust, Commercial and Administrative Law of the House Committee on the Judiciary

May 16, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee:

It is an honor to appear before you today to present the views of the U.S. Chamber Institute for Legal Reform ("ILR"). ILR is an affiliate of the U.S. Chamber of Commerce and is dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.

The Chamber and ILR strongly support arbitration as a fair, less-complex, and lower-cost alternative to our overburdened court system.

The arbitral process is overseen by impartial decision-makers, and subject to strict fairness rules. Courts are obligated to consider claims that an arbitration agreement contains provisions that are unconscionable under generally-applicable contract law, and they can and do invalidate arbitration agreements that specify unfair procedures.

Empirical studies show that consumers and employees do ***as well or better*** in arbitration as in litigation: they prevail on their claims at the same rate or more frequently, and they recover as much or more when they do prevail.

Arbitration is much simpler and less costly than court litigation—in terms of the money, time, and effort required by the dispute-resolution process. All parties benefit from the reduced expense and complexity—but, most importantly, consumers and employees are able to seek redress for claims that could not practically be brought in court.

Critics of arbitration contend that it enables wrongdoers to conceal their offenses by barring public discussion of claims and arbitrators' decisions. In fact, arbitration does not inherently impose a "gag rule": employees and consumers are free to discuss their claims with law enforcement authorities, the public, and other employees and consumers. Importantly, arbitration agreements that provide otherwise are typically invalidated by the courts.

Critics also cite the fact that arbitrations typically decide claims on an individual basis and that there generally are no class actions. But, as Justice Kagan has recognized, "non-

class options abound" for vindicating small injuries through arbitration. And, class actions typically deliver little to anyone other than lawyers, who reap huge fees.

In sum, arbitration provides significant benefits to claimants as well as companies, and courts already have the tools needed to prevent abuses of the arbitration process. For that reason, ILR believes that legislation eliminating or restricting pre-dispute arbitration provisions is not necessary and would harm claimants and companies.

Claimants In Arbitration Do Better—Or At Least As Well—As Plaintiffs In Court

One common assertion by arbitration critics is that claimants do worse in arbitration than in court, but the facts point strongly in the opposite direction. Multiple empirical studies have concluded that "there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true."[1]

Most recently, NDP Analytics compared results of employment claims that were arbitrated and employment claims that were litigated in federal court. The study examined more than 100,000 cases, using data from the nation's leading arbitration providers and litigation data from the federal courts.

NDP Analytics found that employees won more often and won more money in arbitration than in court:

- The overwhelming majority (75%) of employment cases are settled in both arbitration and court litigation, but for the cases decided by the arbitrator or court, employee-plaintiffs won three times as often in arbitration compared to wins in court—32% compared to 11%.

- Employee-plaintiffs also recovered larger amounts in arbitration than in court: employees whose claims were arbitrated generally recovered approximately double the amount recovered by employees in court. The median award in arbitration was $113,818, compared to $51,866 in court, and the mean award was $520,630 in arbitration compared to $269,885 in court.[2]

Studies of consumer arbitration have reached similar conclusions. For example, a 2010 study found that consumers won relief 53.3% of the time in arbitration, compared with a success rate of roughly 50% in court.[3] And just as in court, plaintiffs who win in

[1] David Sherwyn et al., *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1578 (Apr. 2005); *see also, e.g.*, Theodore J. St. Antoine, *Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age?*, 32 Ohio St. J. on Disp. Resol. 1, 16 (2017).

[2] NDP Analytics, *Fairer, Faster, Better: An Empirical Assessment of Employment Arbitration* 5-10 (May 2019). These results are consistent with other empirical analyses of employment arbitration. *See* Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 Disp. Resol. J. 56, 58 (Nov. 2003-Jan. 2004).

[3] Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Resol. 843, 896-904 (2010); Theodore Eisenberg et al., *Litigation Outcomes in State and Federal*

arbitration are able to recover not only compensatory damages but also "other types of damages, including attorneys' fees, punitive damages, and interest."[4]

In the healthcare industry, the Kaiser Foundation Health Plan uses arbitration to resolve disputes with its more than eight million California members, and an independent review found that 96% of those who used the system said it was better than or the same as court. Awards to successful claimants ranged from $4,500 - $3,469,778.[5]

Moreover, these studies probably understate the effectiveness of arbitration, compared with litigation, as a means of vindicating plaintiffs' claims, because of "selection effects." Arbitration claims typically come from middle-income claimants with claims too small to attract the legal representation needed to proceed in the court system—thus, studies that compare the average amount obtained by prevailing parties in arbitration and litigation probably tilt in favor of litigation. And, because of arbitration's relatively streamlined procedures as compared with litigation, "relatively weaker claims . . . are more likely to go to an arbitration hearing on the merits than in litigation" given the additional procedural hurdles present in litigation.[6]

In short, the caricature of arbitration as a system rigged against plaintiffs simply isn't accurate. Most claimants in arbitration do as well, and likely better, than in court.

Arbitrations Employ Fair Procedures

The legal rules governing arbitration require fair procedures. The nation's largest arbitration providers accept cases for arbitration only when the governing arbitration agreement satisfies basic fairness standards. ***Most importantly, courts invalidate arbitration agreements that contain unfair provisions.***

The American Arbitration Association (AAA), the country's largest arbitration provider, developed fairness rules for employment and consumer arbitrations more than two decades ago. The AAA will not accept a case for arbitration unless the arbitration agreement complies with those due process standards.[7] Specifically, these rules:

Courts: A Statistical Portrait, 19 Seattle U. L. Rev. 433, 437 (1996); *see also* Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L.J. 77, 80 (2011); Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2005).

[4] Drahozal & Zyontz, *Empirical Study*, *supra* n.3 at 902.

[5] Office of the Independent Administrator, Annual Report of the Kaiser Foundation Health Plan, Inc. Mandatory Arbitration System (2018), https://www.oia-kaiserarb.com/2059/-reports/annual-reports/annual-report-for-2018.

[6] *See* Samuel Estreicher et al., *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 Rutgers U.L. Rev. 375, 389-93 (2018).

[7] Am. Arbitration Ass'n, *Employment Due Process Protocol* (May 9, 1995), perma.cc/93NR-TXQP; Am. Arbitration Ass'n, *Consumer Due Process Protocol Statement of Principles* (Apr. 17, 1998), perma.cc/VPW4-KXUV.

- require that arbitrators must be neutral and disclose any conflict of interest and that both parties have an equal say in selecting the arbitrator;
- limit the fees paid by employees and consumers to $200 for consumers and $300 for employees—amounts that are less than the filing fee in federal court;
- empower the arbitrator to order any necessary discovery; and
- require that damages, punitive damages, and attorneys' fees be awardable to the claimant to the same extent as they would be in court.

And the AAA rules require that consumers be given the option of resolving their dispute in small claims court. JAMS, another leading arbitration provider, requires similar protections—as do other arbitration providers.[8]

The courts provide another layer of oversight. If an arbitration provision is unfair, courts can and do step in and declare the arbitration agreement unconscionable and unenforceable. For example, courts invalidate limits on recovery of damages that would not be permissible if the claim were litigated in court[9]; excessive fees for accessing the arbitral forum[10]; requirements that the arbitration take place in inconvenient locations for claimants[11]; attempts to shorten the applicable statutes of limitations that would be

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[8] JAMS, *JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness* (July 15, 2009), perma.cc/WC48-KP8G; JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness* (July 15, 2009), perma.cc/HN4C-RN23; Nat'l Arbitration and Mediation, *Employment Rules and Procedures* (2017), perma.cc/F2XD-TCHJ.

[9] *See, e.g.*, *Ziglar v. Express Messenger Sys. Inc.*, No. CV-16-02726-PHX-SRB, 2017 WL 6539020, at *3 (D. Ariz. Aug. 31, 2017), *vacated on other grounds*, 739 F. App'x 444 (9th Cir. 2018) (arbitration agreement was unconscionable because it purported to prevent employees from recovering treble damages under state employment law); *Smith v. D.R. Horton, Inc.*, 790 S.E.2d 1, 5 (S.C. 2016) (arbitration agreement that prevented claimants from recovering damages was unconscionable); *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 263 (3d Cir. 2003) (arbitration agreement that barred punitive damages was unconscionable); *Woebse v. Health Care & Ret. Corp. of Am.*, 977 So. 2d 630 (Fla. Dist. Ct. App. 2008) (same).

[10] The Supreme Court has held that a party to an arbitration agreement may challenge enforcement of the agreement if the claimant would be required to pay excessive filing fees or arbitrator fees in order to arbitrate a claim. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-92 (2000). Since *Randolph*, courts have aggressively protected consumers and employees who show that they would be forced to bear excessive costs to access the arbitral forum. *See, e.g., Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-26 (9th Cir. 2013) (refusing to enforce an arbitration agreement that required the employee to pay an unrecoverable portion of the arbitrator's fees "regardless of the merits of the claim"); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 236 (2013) (reaffirming that a challenge to an arbitration agreement might be successful if "filing and administrative fees attached to arbitration . . . are so high as to make access to the forum impracticable" for a plaintiff). Courts also have reached the same conclusion under state unconscionability law.

[11] *See, e.g., Willis v. Nationwide Debt Settlement Grp.*, 878 F. Supp. 2d 1208 (D. Or. 2012) (travel from Oregon to California); *Coll. Park Pentecostal Holiness Church v. Gen. Steel Corp.*, 847 F. Supp. 2d 807 (D. Md. 2012) (travel from Maryland to Colorado); *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007) (travel from Nebraska to Texas); *Philyaw v. Platinum Enters., Inc.*, 54 Va. Cir. 364 (Va. Cir. Ct. 2001) (travel from Virginia to California).

invalid if the claim were litigated in court[12]; "loser pays" provisions under which a claimant might have to pay the full costs of the arbitration,[13] or must pay the drafting party's costs regardless of who wins;[14] unreasonable limits on discovery;[15] and unfair procedures for selecting arbitrators.[16]

This judicial oversight ensures that companies have an incentive to craft arbitration agreements that are fair to their customers and employees—and that arbitration agreements that are not fair to claimants will not be enforced.

Arbitration Is Quicker And Easier To Navigate Than Court Adjudication

Everyone recognizes that litigation in court is extremely expensive, immensely time-consuming, and highly complicated. By contrast, as the Supreme Court has explained in an opinion written by Justice Breyer, arbitration "is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearings and discovery devices."[17]

Flexibility is one of arbitration's greatest advantages. An arbitration plaintiff need not ever make a personal appearance to secure a judgment; claims often can be adjudicated based solely on written submissions or on the basis of a telephone conference.[18] In court, by contrast, a claimant is often obligated to appear, wait in line, and perhaps return another day if the court is unable to get through its docket. Even for those

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[12] *See, e.g.*, *Zaborowski v. MHN Gov't Servs., Inc.*, No. C 12–05109 SI, 2013 WL 1363568 (N.D. Cal. Apr. 3, 2013); *Adler v. Fred Lind Manor*, 103 P.3d 773 (Wash. 2004) (180 days); *see also Gandee v. LDL Freedom Enters., Inc.*, 293 P.3d 1197 (Wash. 2013) (refusing to enforce arbitration agreement in debt-collection contract that required debtor to present claim within 30 days after dispute arose); *Alexander*, 341 F.3d at 256 (same, for an employee); *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 138 (Cal. Ct. App. 1997) (rejecting provision that imposed shortened one-year statute of limitations).

[13] See *Gandee*, 293 P.3d at 1197; *Alexander*, 341 F.3d at 256; *Sosa v. Paulos*, 924 P.2d 357 (Utah 1996).

[14] *See, e.g., In re Checking Account Overdraft Litig.*, 485 F. App'x 403 (11th Cir. 2012); see also *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492 (Cal. Ct. App. 2012) (attorneys' fees).

[15] *See, e.g.*, *Narayan v. Ritz-Carlton Dev. Co.*, 400 P.3d 544, 555 (Haw. 2017).

[16] *See, e.g.*, *Chavarria*, 733 F.3d at 923-26 (arbitration agreement was unconscionable and unenforceable when it "would always produce an arbitrator proposed by [the company] in employee-initiated arbitration[s]"and barred selection of "institutional arbitration administrators"); *Ruiz v. Millennium Square Residential Ass'n*, 156 F. Supp. 3d 176, 182 (D.D.C. 2016) (refusing to enforce arbitrator selection provision that "gives [the claimant] no say in the arbitrator-selection process"); *Magno v. Coll. Network, Inc.*, 204 Cal. Rptr. 3d 829, 840 (Cal. Ct. App. 2016) (arbitration provision was unconscionable because, among other things, it allowed the defendant to select the arbitrator and "contain[ed] no assurances of neutrality").

[17] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)); *see also, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) ("[T]he informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.").

[18] *See, e.g.,* Am. Arbitration Ass'n, *Consumer Arbitration Rules* 22 (Sept. 1, 2014) ("A hearing may be by telephone or in person."), perma.cc/E8JN-FQE4.

litigants who can afford to take time off from work or family obligations—and many cannot—these inconveniences can erode the benefits of any possible recovery.

Arbitrations are also resolved quickly—which means that claimants receive relief faster. The recent NDP study found that arbitration cases in which the employee-plaintiff prevailed took, on average, 569 days to complete, while cases in court required an average of 665 days. Ten percent of the court cases took an average of 1,283 days—50% longer than the longest 10% of arbitration proceedings.[19] Another study found that awarded arbitrations took an average of just 11 months to decision, versus an average of 26.6 months to verdict in state court jury trial cases.[20]

Arbitration Expands Access To Justice By Enabling Consumers And Employees To Pursue Claims That They Would Be Unable To Litigate In Court

Arbitration's speed, efficiency, and flexibility make it a lower-cost means of resolving disputes—which, in turn, expands consumers' access to justice by providing a forum in which they can realistically prosecute low-dollar-value claims.

Most harms suffered by employees and consumers are relatively small in economic value and are individualized. A key obstacle to pursuing an individualized, small-value claim in court is the cost of hiring counsel. Unrepresented parties have little hope of navigating the complex procedures that apply to litigation in court, yet a lawyer's hourly billing rate may itself exceed the amount at issue in many claims. Many lawyers, especially those working on a contingency basis, are unlikely to take cases when the prospective of a substantial payout is slim. Studies indicate that a claim must exceed $60,000, and perhaps $200,000, in order to attract a contingent-fee lawyer.[21]

Arbitration thus empowers individuals because they can realistically bring a claim in arbitration without the help of a lawyer.[22] Although a party always has the choice to retain an attorney, arbitration procedures are sufficiently simple and streamlined that in many cases no attorney is necessary.[23] And even if a consumer or employee retains a lawyer, costs may well be lower because of the increased speed and efficiency of arbitration. As the Supreme Court put it: "[a]rbitration agreements allow parties to

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[19] NDP Analytics, *supra* n. 2, at 11-12.

[20] Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1, 51 (2019).

[21] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 783 (2003). In some markets, this threshold may be as high as $200,000. Minn. State Bar Ass'n, *Recommendations of the Minnesota Supreme Court Civil Justice Reform Task Force* 11 (Dec. 23, 2011), perma.cc/VJ8L-RPEY.

[22] While one study found that pro se plaintiffs "struggle" in arbitration, *see* Chandrasekher & Horton, *supra* n.20, at 2, 52, a *pro se* plaintiff who can afford a lawyer is nonetheless far better off in arbitration than litigation.

[23] St. Antoine, *supra* n.1, at 15 ("it is feasible for employees to represent themselves or use the help of a fellow layperson or a totally inexperienced young lawyer").

avoid the costs of litigation, . . . which often involves smaller sums of money than disputes concerning commercial contracts."[24]

Indeed, a study of 200 AAA employment awards concluded that low-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf.[25] These employees were often able to pursue their arbitrations without an attorney and won at the same rate as individuals with representation.[26]

Without arbitration, as Justice Breyer explained in a Supreme Court opinion, "the typical consumer who has only a small damage claim (who seeks, say, the value of only a defective refrigerator or television set) [would be left] without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[27]

In short, for a very large percentage of the harms suffered by consumers and employees, arbitration is the only realistic opportunity for obtaining relief. One law professor explained why:

> In a world without employment arbitration as an available option, we would essentially have a "cadillac" system for the few and a "rickshaw" system for the many. The unspoken (yet undeniable) truth is that most claims filed by employees do not attract the attention of private lawyers because the stakes are too small and outcomes too uncertain to warrant the investment of lawyer time and resources. These claims have only one place to go: filings with administrative agencies where they essentially languish, for the agencies themselves lack the staffing (and often even the inclination) to serve as lawyers for average claimants. The people who benefit under a litigation-based system are those whose salaries are high enough to warrant the costs and risks of a law suit undertaken by competent counsel; these are the folks who are likely to derive benefit from the considerable upside potential of unpredictable jury awards. Very few claimants, however, are able to obtain a position in this "litigation lottery."[28]

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[24] *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (emphasis added).

[25] Hill, *supra* n.21, at 794.

[26] *Id*.

[27] *Allied-Bruce Terminix Cos.*, 513 U.S. at 281.

[28] Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. 559, 563 (2001).

As another commentator puts it in the context of employment disputes, "a substantial number of nonunion employees, particularly those with small financial claims, have a realistic opportunity to pursue their rights through mandatory arbitration that otherwise would not exist."[29]

Arbitration Agreements Cannot Prevent Consumers Or Employees From Discussing Claims With Government Agencies Or The Public—And Arbitrators' Decisions Cannot Be Kept Secret

Critics of arbitration contend that arbitration imposes confidentiality obligations that allow wrongdoers to cover up their offenses. That is simply false. As a leading law professor has explained, "under U.S. law, the privacy of arbitration typically does ***not*** extend to precluding a party's disclosure of the existence of the arbitration or even its outcome. Instead, it means that non-parties can be excluded from the hearing and that the arbitrator and arbitration provider cannot disclose information about the proceeding."[30]

Thus, claimants in arbitration are free to discuss their claims publicly and to report alleged wrongdoing to law enforcement officials.[31] If an arbitration agreement purported to impose a "gag order," or to prevent a claimant from publicly disclosing misconduct or reporting that misconduct to law enforcement authorities, that restriction would be invalidated in court.[32]

The same is true of arbitrators' decisions. Indeed, state laws require disclosure of arbitration outcomes by arbitral forums such as the AAA,[33] and courts consistently hold that the results of arbitration proceedings may be disclosed by either party.[34]

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[29] St. Antoine, *supra* n.1, at 16.

[30] Christopher R. Drahozal, *FAA Preemption After* Concepcion, 35 Berkeley J. Emp. & Lab. L. 153, 167 (2014). The American Arbitration Association's rules provide that "[t]he arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." Am. Arbitration Ass'n, *Commercial Arbitration Rules and Mediation Procedures* 31 (Apr. 1, 1999), perma.cc/5U92-5PQF. This rule applies only to the hearings themselves; nothing in the rules requires that the outcome be kept confidential.

[31] *See, e.g.*, Christopher C. Murray, *No Longer Silent: How Accurate are Recent Criticisms of Employment Arbitration*, 36 Alternatives to the High Cost of Litigation 65, 78 (2018). The only even possible exception is one-off arbitration agreements individually negotiated with highly-paid, high-ranking executives or similar employees, which could bar public disclosure of confidential information. But even in that context, confidentiality obligations face a high bar.

[32] *See, e.g.*, *Davis v. O'Melveny & Myers*, 485 F.3d 1066, 1078 (9th Cir. 2007), *overruled on other grounds by Kilgore v. KeyBank, Nat'l Ass'n*, 673 F.3d 947 (9th Cir. 2012); *Longnecker v. Am. Express Co.*, 23 F. Supp. 3d 1099, 1110 (D. Ariz. 2014); *DeGraff v. Perkins Coie LLP*, No. c 12-02256 JSW, 2012 WL 3074982, at *4 (N.D. Cal. July 30, 2012).

[33] *E.g.*, Cal. Code Civ. Proc. § 1281.96.

[34] Courts have invalidated on unconscionability grounds arbitration agreement provisions requiring that outcomes be kept confidential. *See, e.g.*, *Larsen v. Citibank FSB*, 871 F.3d 1295, 1319 (11th Cir. 2017); *Davis*, 485 F.3d at 1079.

In sum, the claim that arbitration allows businesses to avoid public disclosure of disputes with employees or consumers is simply false; consumers and employees retain the ability to make these disputes public even if they are resolved in arbitration.

Banning Pre-dispute Arbitration Agreements Will Eliminate All Arbitration

Arbitration critics often assert that if arbitration is beneficial for both sides of a dispute, businesses and employees will agree to arbitrate after disputes arise and that a ban on pre-dispute arbitration agreements therefore will not eliminate all arbitration. In reality, post-dispute arbitration agreements are as rare as unicorns.

The reasons for this are simple. Once a particular dispute has arisen, the parties "often have an emotional investment in their respective positions," built up over the course of the events that led to the dispute.[35] And especially at the beginning of a dispute, parties are "reluctan[t] . . . to evaluate their cases pragmatically."[36] The emotional investment in a case thus tends to skew the preferences of one party or another in favor of "refus[ing] to arbitrate"[37] and instead opting to litigate in court.

The lawyers for one or both sides also have financial incentives to induce their clients to opt for litigation in court rather than arbitration. Litigation in court—which takes much longer than arbitration and involves many more procedural hurdles—offers lawyers the opportunity to earn much higher fees than they could earn in arbitration. Consciously or not, they may advise clients to choose a judicial forum that is really in the lawyers' own best interest rather than in the clients' interest.

As one law professor explained: "I know, from personal experience representing clients and in my work drafting postdispute arbitration rules for the Center for Public Resources (a consortium of companies and lawyers that promotes various forms of ADR), that postdispute arbitration agreements are almost never negotiated. It is a chimerical alternative to predispute arbitration agreements."[38] In reality, post-dispute arbitration agreements simply do not happen.

Finally, even if parties were willing to negotiate post-dispute arbitration agreements, it would not make economic sense for businesses to do so. Maintaining a top-quality arbitration system requires a business to shoulder virtually all of the costs of arbitration, including filing fees and arbitrator expenses. Companies willingly bear these costs because, on average, they pay less in legal fees to resolve disputes in arbitration than to litigate cases in court. But if companies could not ensure that most or all of their dispute resolution proceedings would take place in arbitration rather than litigation, they would simply relegate all disputes to the court system—rather than paying both the

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[35] Steven C. Bennett, *The Proposed Arbitration Fairness Act: Problems And Alternatives*, 67 Disp. Resol. J. 32, 37 (2012).

[36] Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 Wm. Mitchell L. Rev. 313, 326 (2003).

[37] *Id.* at 327.

[38] Samuel Estreicher, *Saturns for Rickshaws, supra* n.28, at 567.

high litigation costs for court proceedings ***and*** virtually all of the fees associated with arbitration. That result would be harmful to plaintiffs, who would lose the ability to access arbitration for low-value claims that cannot be brought in court.

Arbitration's Individualized Process And Lack Of Class Procedures Does Not Justify Banning Arbitration

Opponents of arbitration often complain that arbitration agreements require resolution of disputes on an individual basis and preclude class action lawsuits. But while the features of class actions—aggregation of claims and spreading of litigation costs over many class members—may sound appealing in theory, these benefits are very rarely, if ever, realized. Most class actions provide little or no benefit at all to class members. The indisputable beneficiaries of class actions, rather, are the plaintiffs' attorneys who file them and receive large fees if the cases are settled.

Importantly, most claims asserted by consumers and employees are individualized and cannot be brought as class actions. When an employee argues that his or her pay or benefits were wrongly calculated, or that he or she was unfairly denied a raise or promotion, or claims injury from harassment, those claims in the overwhelming majority of situations cannot be brought as class actions. And on the consumer side, a study of claims asserted by consumers—and not by lawyers—found that the overwhelming majority could not be litigated in a class action.[39]

Thus, while it is often claimed that class actions are necessary to allow certain low-value claims to be brought in court, the reality is that abandoning arbitration in order to allow for class actions would be the surest way to *prevent* many low-value claims from being prosecuted, because most low-value claims are not eligible for class treatment.

Moreover, the benefits of class actions are greatly overstated. Most class actions do not produce any recovery for absent class members. Class action studies consistently find that the overwhelming majority of these cases are resolved with no benefit to class members—87% in one study, 66% in another, and 60-80% in a third.[40]

Even in the small percentage of cases that settle, the benefits for class members are largely illusory:

- Most class action settlements do not involve automatic distribution of settlement payments and the vast majority of class members do not file claims for payment from these settlement funds.

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[39] Letter from David Hirschmann & Lisa Rickard to Monica Jackson, *Re: Notice of Proposed Rulemaking on Arbitration Agreements*, Dkt. No. CFPB-2016-0020-3941 at 3, Appendix A 13-14 (Aug. 22, 2016).

[40] Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress 2015* section 6, page 39 (Mar. 2015), perma.cc/8AX5-AYWN (hereinafter *CFPB Study*); Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (Dec. 11, 2013), goo.gl/3B27FQ (hereinafter *Mayer Brown Study*); Jason Scott Johnston, *High Cost, Little Compensation, No Harm to Deter: New Evidence on Class Actions Under Federal Consumer Protection Statutes*, 2017 Colum. Bus. L. Rev. 1 (2017).

- One study reported a "weighted average claims rate" in class actions of just 4% -- in other words, 96% of the class members got nothing.[41]

- That figure comports with academic studies, which regularly conclude that only "very small percentages of class members actually file and receive compensation from settlement funds."[42]

- A recent empirical study explains that "although 60 percent of the total monetary award may be available to class members, in reality, they typically receive less than 9 percent of the total." The author concluded that class actions "clearly do[] not achieve their compensatory goals . . . . Instead, the costs . . . are passed on to consumers in the form of higher prices, lower product quality, and reduced innovation."[43]

While class members get little benefit from class actions, the lawyers who file these cases profit handsomely. These payments to lawyers, of course, are subtracted from the funds available to class members, and therefore are highly relevant in assessing the benefit that class actions provide to class members. One study found that the average settlement payment was no better than $32.35 per class member,[44] but attorneys' fees averaged $1 million per case.[45] And the average fee paid to plaintiffs' lawyers—as a percentage of the announced settlement (not the smaller amount actually distributed to class members)—was 41%, with a median of 46%.[46]

Class actions also typically take significantly longer to resolve than arbitrations. That means employees must wait much longer to obtain relief. One study found that class actions that produced a class-wide settlement took an average of nearly two years to resolve.[47] And that two-year average duration, moreover, may not even include the time needed for class members to submit claims and receive payment *after* a settlement is reached. Another study found that 14% of the class actions were still pending *four years* after they were filed, with no end in sight.[48]

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[41] *CFPB Study* at section 8, page 30; *see also Mayer Brown Study* at 7 & n.20 (in the handful of cases where statistics were available, and excluding one outlier case involving individual claims worth, on average, over $2.5 million, the claims rates were minuscule: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%).

[42] Linda Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 Emory L.J. 399, 419 (2014).

[43] Joanna Shepherd, *An Empirical Study of No-Injury Class Actions* 2, 5, 21 (Emory Univ. Sch. of L., Legal Studies Research Paper Series No. 16-402, Feb. 1, 2016), perma.cc/TU9R-UDSM.

[44] *CFPB Study* at section 8, pages 27-28; *see also* Statement of the U.S. Chamber of Commerce to House Committee on Financial Services, Subcommittee on Financial Institutions and Consumer Credit (May 18, 2016) at Appendix, page 5 (explaining calculation), perma.cc/TJ92-CE9G.

[45] *CFPB Study* at section 8, page 33.

[46] *CFPB Study* at section 8, page 34.

[47] *CFPB Study* at section 8, page 37.

[48] *Mayer Brown Study* at 1.

Moreover, arbitration can provide an efficient means of effectively litigating small injuries shared by a large number of employees or consumers. Parties with related claims can use the same lawyer and (if needed) the same expert in order to share costs. Justice Kagan (in an opinion for herself and Justices Ginsburg and Breyer) has recognized that groups of claimants can vindicate their rights in arbitration without class procedures—through "informal coordination among individual claimants, or amelioration of arbitral expenses,"[49] both of which are features of virtually all arbitration agreements. And one study suggested that plaintiffs' lawyers may be able to "create a simulacrum of the class action by initiating dozens or even hundreds of two-party arbitrations against the same defendant" and thereby pursue class-action style cases in the employment arbitration arena.[50]

Thus, the notion that the only way for employees and consumers to band together to bring small claims is in class actions is incorrect—arbitration provides an effective way to act collectively, while also giving employees with individualized claims the opportunity to bring those claims (an opportunity that class actions do not provide).

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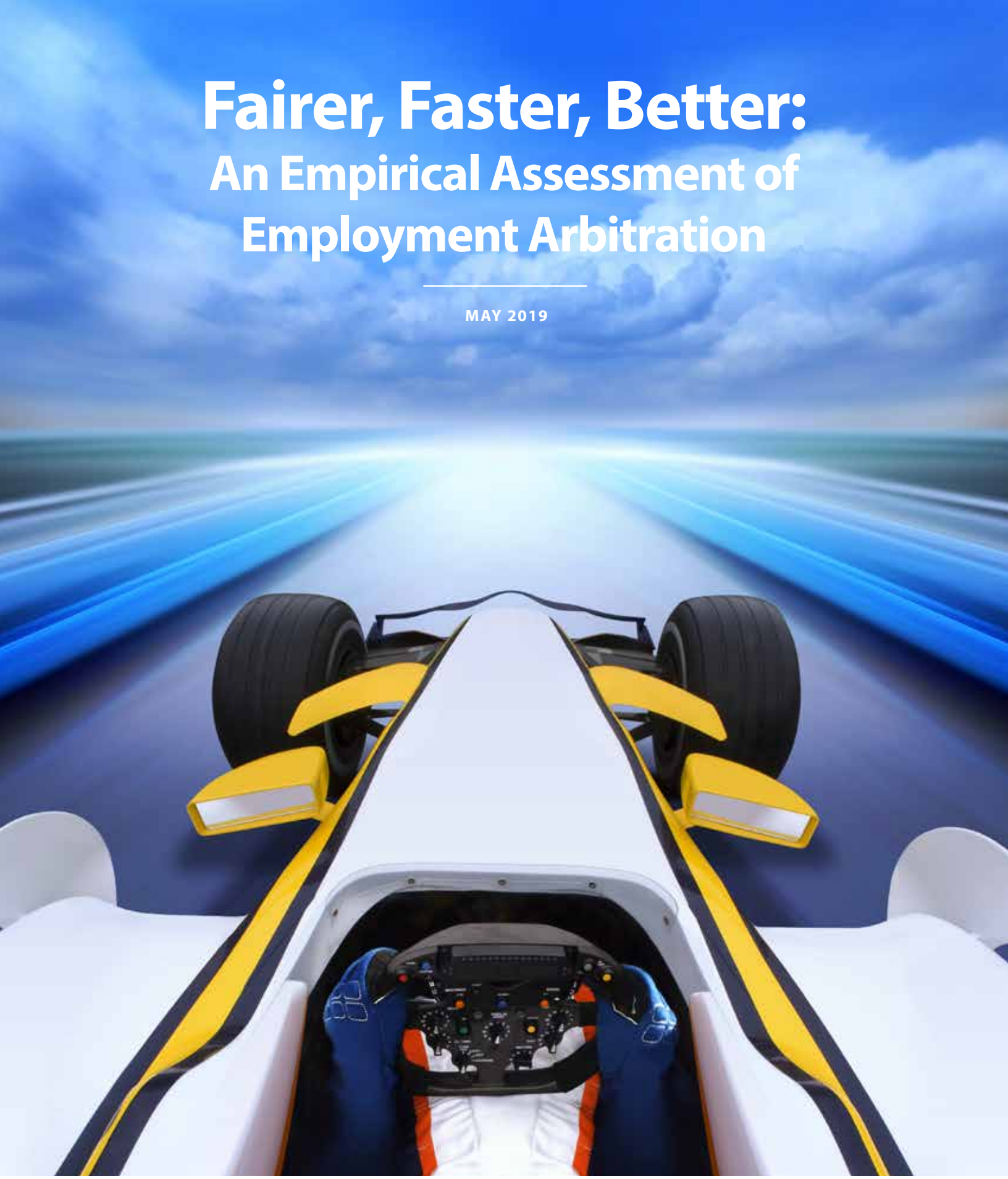
Thank you again for the opportunity to testify today. I look forward to answering your questions.

[49] *Italian Colors*, 570 U.S. at 249 (Kagan, J., dissenting).

[50] Chandrasekher & Horton, *supra* n.20, at 2, 9, 52-54.

Fairer, Faster, Better:
An Empirical Assessment of Employment Arbitration

MAY 2019



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Fairer, Better, Faster:
An Empirical Assessment of Employment Arbitration

Nam D. Pham, Ph.D. and Mary Donovan[1]

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1 Nam D. Pham is Managing Partner and Mary Donovan is a Principal at ndp | analytics. Lea Lassoued and Davide Sonzogni provided research assistance. The U.S. Chamber Institute for Legal Reform provided financial support to conduct this study. The opinions and views expressed in this report are solely those of the authors.

EXECUTIVE SUMMARY

Alternative dispute resolution (ADR) procedures have become more common over the last couple of decades as a means to resolve employment disputes in the workplace. One ADR method, employment arbitration, is an alternative to having a judge or jury decide an employment dispute through proceedings in court.

Arbitration has a long history as a method of resolving employment-related disputes. Arbitration has been recognized as a lawful method of dispute resolution at least since the Federal Arbitration Act was enacted in 1925. The Act requires federal and state courts to enforce and uphold arbitration agreements to the same extent as other types of contracts.

In 1995, the American Arbitration Association (AAA) developed the Employment Due Process Protocol, a new set of arbitration rules tailored for the employment context. Other ADR providers, such as Judicial Arbitration and Mediation Services, Inc. (JAMS), have followed suit and established their own employment arbitration procedures.

Employment arbitration is an adjudicative proceeding. Similar to the traditional litigation process, each party presents evidence and arguments to an arbitrator or a panel of arbitrators at a hearing. Unlike litigation, plaintiffs and defendants in arbitration typically are not limited to state or federal rules of evidence and the process can be more informal than traditional court-based litigation. After the evidence is presented, the arbitrator provides a written opinion. That decision, called an award, is final and is subject to deferential review in court.[2] The U.S. Supreme Court has noted that the arbitration process has many advantages compared to litigation, because it is faster, simpler, less expensive, less disruptive, and more flexible.[3] However, only a limited number of empirical studies have fully assessed and compared similar arbitrations and litigation.

Arbitration has a long history as a means of resolving employment-related issues, and it has gained popularity as a forum for resolving employment disputes since the mid-1990s. But there have been few empirical studies of the arbitration process. This report compiles, analyzes, and compares over 10,000 employment arbitrations with over 90,000 employment lawsuits in federal courts that terminated between 2014-18. These arbitrations and litigations exhibited a similar outcome pattern, in which three quarters were settled and only between 10%-14% ended with prevailing and losing parties. However, when cases proceeded to adjudication, plaintiffs, who almost always were employees, were more likely to prevail in arbitration than in litigation. During 2014-18, in decided cases, employee-plaintiffs prevailed in more than 32% of arbitrations but only 11% of litigations. Furthermore, prevailing employees typically won twice as much money in arbitration than in litigation. Employment arbitration also was faster than litigation.

2 See 9 U.S.C. §§ 10-11.

3 See, e.g., Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985); Circuit City Stores, Inc. v. Adams, 532 U. S. 105, 123 (2001); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018).

This study compiled a large dataset of over 100,000 employment disputes to undertake an empirical analysis of employment arbitration in comparison to court-based employment litigation. We first compared the outcome pattern of all employment arbitration and employment litigation cases, whether initiated by employees or employers, that were terminated between 2014 and 2018. Then we compared the win rate, award amount, and dispute processing time from initiation to termination for employment arbitration cases and employment litigation cases that were initiated by employees and were terminated with awards between 2014 and 2018. The employment arbitration data came directly from AAA and JAMS, and the employment litigation data indirectly came from Lex Machina, a data provider that compiles litigation data from Public Access to Court Electronic Records (PACER)—the federal courts' system for accessing information about federal court cases.

Key findings of the report are:

1. **In general, the way most employment disputes are ultimately resolved does not vary between arbitration and litigation.** Nearly three-quarters of all employment disputes, whether instituted by employees or employers, or in arbitration or litigation, were settled. About half of the remaining cases were either dismissed, abandoned, or withdrawn; and the remaining cases were terminated with monetary and/or non-monetary awards. Only a small fraction (1.5%) of employment litigation cases filed in court reached trial.

2. **Employees are three times more likely to win in arbitration than in court.** Employees initiated and prevailed in 32% of all employment arbitrations that were terminated with awards during 2014-18. In contrast, employees initiated and prevailed in only 11% of all employment litigations that were terminated with judgments during the same period.

3. **Employee-plaintiffs receive higher monetary awards in employment arbitration than in litigation.** Employee-plaintiffs who brought cases and prevailed in arbitration won approximately double the monetary award that employees received in cases won in court. The median award to employee-plaintiffs was $113,818 in arbitration compared to $51,866 in litigation. The average award to employee-plaintiffs was $520,630 in arbitration compared to $269,885 in litigation. Furthermore, the award of the top 90th percentile was $668,998 in employment arbitration compared to $539,574 in litigation.

4. **Employment arbitration is quicker than litigation.** Employee-plaintiff arbitration cases that were terminated with monetary awards averaged 569 days (523 days in median). In contrast, employee-plaintiff litigation cases that terminated with monetary awards required an average of 665 days (532 days in median).

In sum, employees have a better chance of winning in arbitration than in litigation. Employees initiated and prevailed in 32.3% of all arbitration cases that terminated with awards during 2014-18 compared to only 11.3% in litigation. Employee-plaintiffs in arbitration received monetary awards approximately two times the amounts received in litigation, both in average and median values. And employment arbitration cases were resolved faster than court cases, both in average and median number of days. (Table 1)

Table 1.
Employee-plaintiffs had better chances to win, had higher monetary award values, and spent less time in arbitration than in litigation

	Cases that employees initiated and prevailed as % of all winning cases	Amount awarded	Time spent from initiation to termination with monetary awards
Arbitration	32.3%	$520,630 (average) $113,818 (median)	569 days (average) 523 days (median)
Litigation	11.3%	$269,885 (average) $51,866 (median)	665 days (average) 532 days (median)

OUTCOMES OF EMPLOYMENT ARBITRATION AND LITIGATION

An employment dispute, resolved either by arbitration or litigation, has three potential outcomes: (1) the dispute is settled at some point during the process on terms that can include monetary payments and/or non-monetary promises (the settlement details may or may not be disclosed publicly); (2) the dispute is dismissed, abandoned, or withdrawn during the process; or (3) the dispute ends in a decision by the adjudicator in favor of one or both sides. We analyzed and compared the outcome pattern between employment arbitration and litigation cases that were initiated by employees or employers and were terminated during 2014-18.

Arbitration. Among 10,486 employment arbitration cases that were terminated during 2014-18, 7,664 cases (73%) were settled; 1,792 cases (17%) were dismissed, abandoned, or withdrawn; and 1,030 cases (10%) resulted in decisions with monetary and/or non-monetary elements. (Table 2)

Table 2.
More than 73% of employment arbitration cases were settled and 10% terminated with decisions

	Number of Cases	As % of Terminated Cases
Terminated cases	10,486	100.0%
Decision	1,030	9.8%
Settlement	7,664	73.1%
Dismissed/Withdrawn	1,792	17.1%

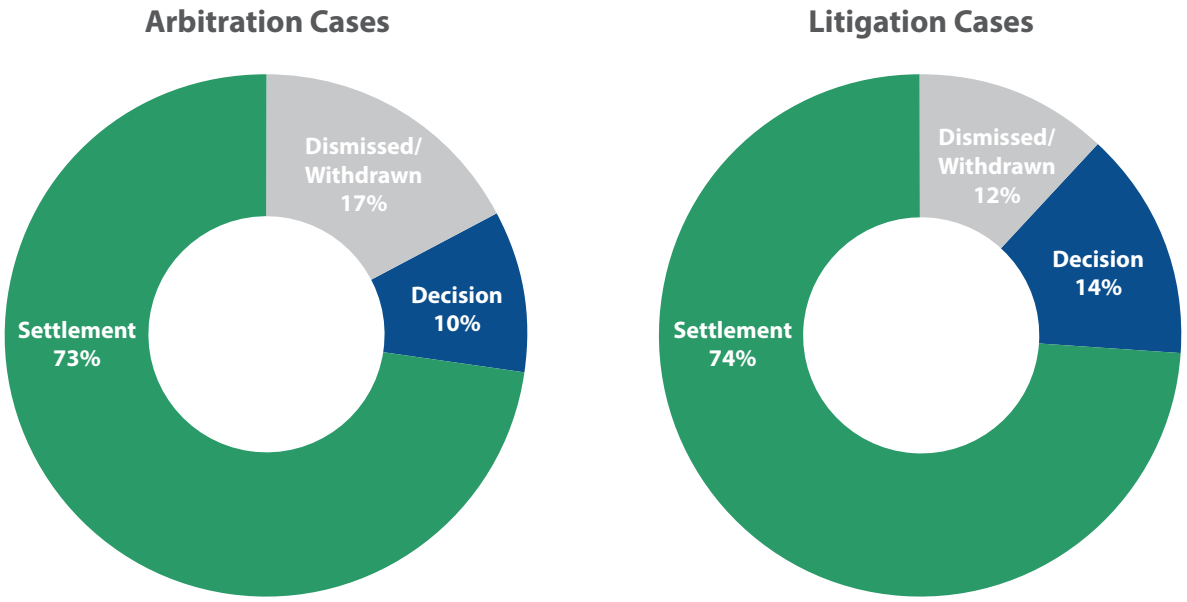
Litigation. During 2014-18, 90,758 employment cases were terminated in federal courts. Among these terminated cases, 66,927 (74%) cases were settled, 10,768 (12%) cases were dismissed, abandoned, or withdrawn, and 13,063 (14%) cases were terminated by court or jury determinations. (Table 3)

Table 3.
Similarly, nearly 74% of federal court employment litigation cases were settled and 14% resulted in decisions

	Number of Cases	As % of Terminated Cases
Terminated cases	90,758	100.0%
Decision	13,063	14.4%
Settlement	66,927	73.7%
Dismissed/Withdrawn	10,768	11.9%

Overall, the resolution pattern of employment disputes is similar between arbitration and litigation. Nearly three-quarters of all employment disputes (whether initiated by employees or employers) were settled regardless of the process (arbitration or litigation). Of the remaining cases, about half were either dismissed, abandoned, or withdrawn. About 10% of arbitration cases and 14% of litigation cases resulted in decisions, with monetary and/or non-monetary elements. (Figure 1)

Figure 1.
The general pattern of outcomes is similar between employment arbitration and litigation



DECIDED CASES

Employment disputes can be initiated by either the employee or employer and can be terminated with a decision in favor of the plaintiff, the defendant, or both. We reviewed all cases that terminated in a decision (in arbitration or in court) and calculated the share of employee-initiated cases in which the employee prevailed.

Arbitration. Among the 1,030 employment arbitration cases terminated by decisions during 2014-18, 776 cases identify a prevailing party. The information regarding the prevailing party in the remaining 254 cases was unknown or indicated that there were awards to both plaintiffs and defendants. Among these 776 cases identifying a single prevailing party, employees initiated and prevailed in 251 cases, accounting for 32.3%. (Table 4)

Table 4.
Employees initiated and won 32% of employment arbitration cases that terminated with decisions

	Number of Cases	As % of Awarded Cases
Decided cases with one prevailing party	776	100.0%
Employees initiated and prevailed	251	32.3%

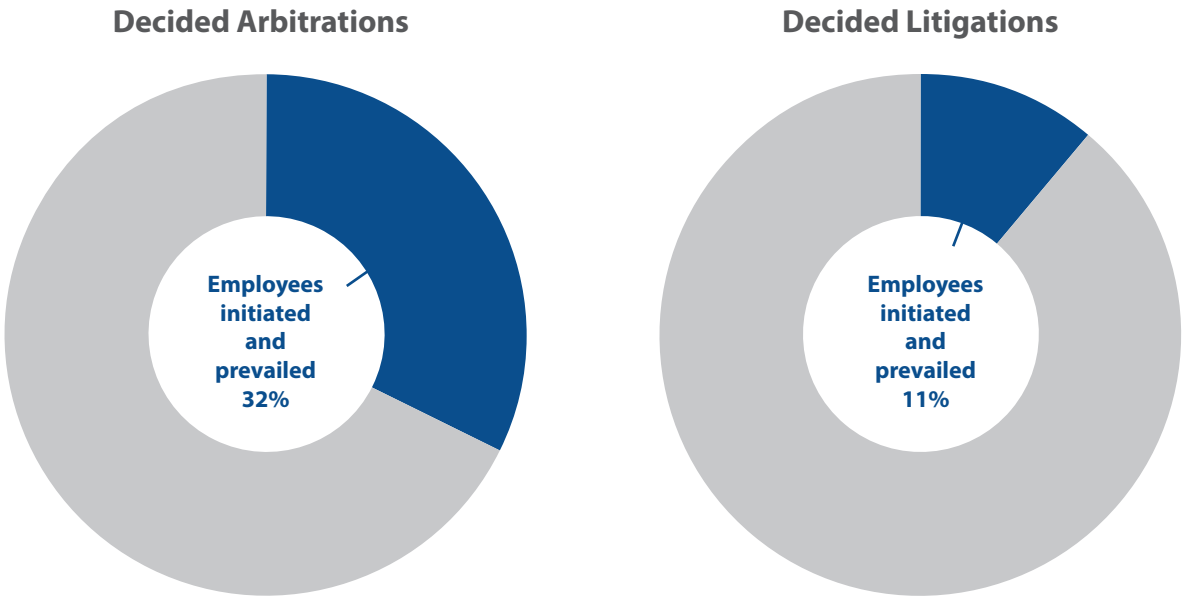
Litigation. All 13,063 federal court employment cases that terminated with decisions during 2014-18 have information regarding the prevailing party. Among these 13,063 cases, employees initiated and prevailed in 1,456 cases, accounting for 11.1%. (Table 5)

Table 5.
Employees initiated and won only 11% of employment litigation cases that terminated with decisions

	Number of Cases	As % of Awarded Cases
Decided cases with one prevailing party	13,063	100.0%
Employees initiated and prevailed	1,456	11.1%

Overall, both employment arbitration and litigation cases had a small chance of terminating with decisions: 10% for arbitration and 14% for litigation. However, an employee is much more likely to win in arbitration than in litigation. For employment disputes that terminated with awards to one party during 2014-18, employees initiated and prevailed 32% of the time in arbitration compared to only 11% in litigation. In other words, the chances for employees to win in employment arbitration were three times higher than in court. (Figure 2)

Figure 2.
The chances for employees to win in employment arbitration were three times higher than in litigation



AMOUNT AWARDED

Employment arbitration and litigation can be resolved with monetary and non-monetary awards to plaintiffs, defendants, or both. We calculated and compared the distribution of monetary award amounts to employees who prevailed in employee-initiated cases in arbitration and litigation.

In employee-plaintiff arbitration cases that terminated with monetary awards, prevailing employees received approximately two times the amount that employee-plaintiffs received in cases litigated in court. Among employment arbitration cases that terminated during 2014-18, the median and average awards to employee-plaintiffs were $113,818 and $520,630, respectively. The first and third quartile of award amounts were $23,118 and $295,936, respectively. The award amounts were at least $668,998 for the top 10% of employment arbitration cases awarded to employees who initiated the claims. During the same period, the median and average amounts awarded to employees who initiated employment litigation were $51,866 and $269,885, respectively. The first and third quartile of award amounts were $15,750 and $178,440, respectively. The award amounts were at least $539,574 for the top 10% of employment litigation cases awarded to employees who initiated the claims. (Table 6)

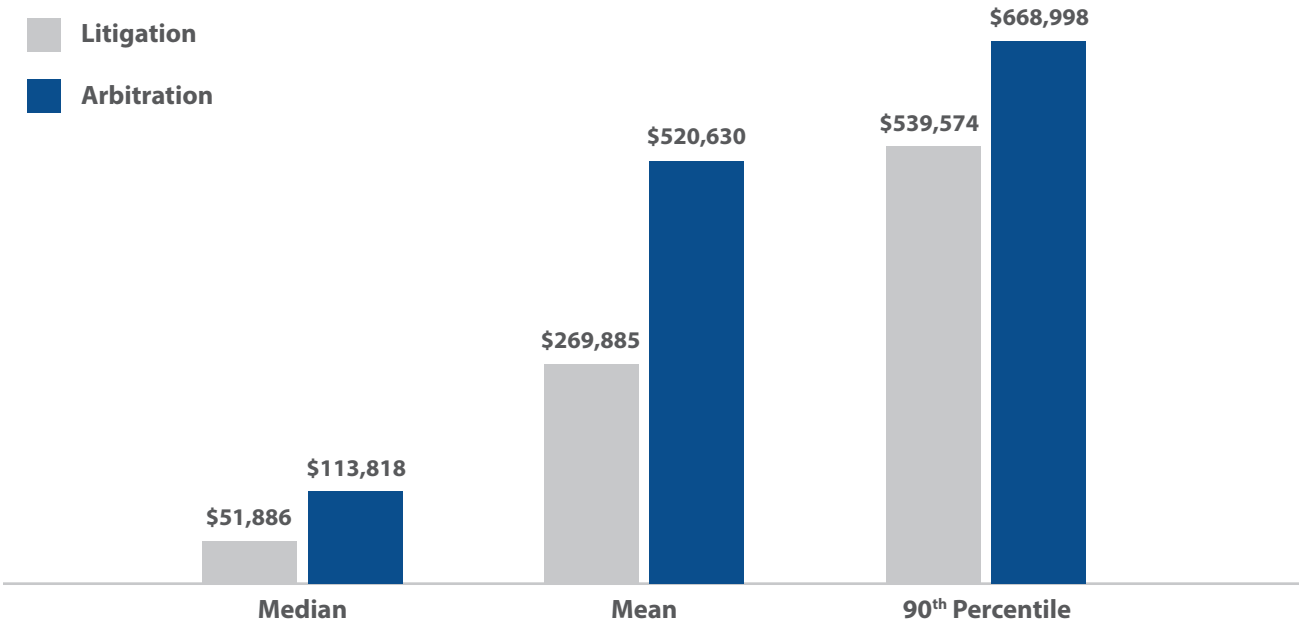
Table 6.
Award amounts to employee-plaintiffs were higher in arbitration than in litigation

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitration (247 cases)	$520,630	$23,118	$113,818	$295,936	$668,998
Litigation (1,446 cases)	$269,885	$15,750	$51,866	$178,440	$539,574

Overall, employee-plaintiffs received higher awards, both in median and mean values, in arbitration than in litigation: (Figure 3)

- The median award for employee-plaintiffs in employment arbitration was nearly 120% higher than litigation, $113,818 compared to $51,866.
- The average award for employee-plaintiffs in employment arbitration was 93% higher than litigation, $520,630 compared to $269,885.
- The top 10% of awards to employee-plaintiffs in employment arbitration was 24% higher than litigation, beginning at $668,998 compared to $539,574.

Figure 3.
Employees received higher awards in employment arbitration than in litigation



TIME TO RESOLUTION

Another important feature of arbitration is that it resolves cases faster than litigation. We calculated and compared the dispute-processing time from initiation to termination for disputes initiated by employees in arbitration and litigation. Time was measured by days from the filing date to the termination.

Arbitration. The median and average number of days from initiation to termination were 523 and 569, respectively, in cases where employees initiated and prevailed during 2014-18. The bottom quartile and the third quartile were 397 days and 686 days, respectively. 10% of arbitration cases that employees initiated and in which they prevailed with awards required at least 844 days. (Table 7)

Table 7.
The average employment arbitration case terminated with awards in 569 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitration cases where employees initiated and prevailed (251 cases)	569	397	523	686	844

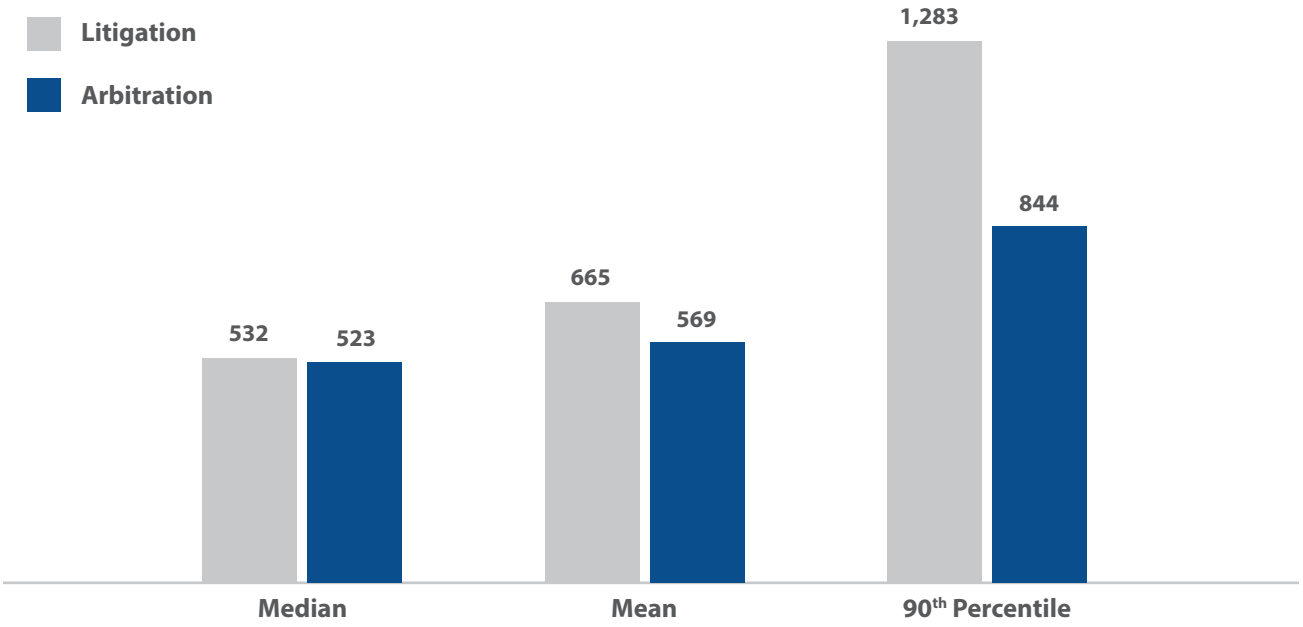
Litigation. The litigation process has many steps and therefore requires time. Half of cases that employees initiated in litigation in federal courts and prevailed during 2014-18 required at least 532 days, with an average of 665 days. 10% of litigation cases that employees initiated and terminated in courts with awards required at least 1,283 days. (Table 8)

Table 8.
The average time for litigation to terminate with monetary awards was 665 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Litigation cases where employees initiated and prevailed (1,453 cases)	665	274	532	867	1,283

Overall, the processing time for employees to win awards in arbitration is less than in litigation. The average processing time from initiation to completion was 569 days in employee-plaintiff arbitration cases compared to 665 days in employee-plaintiff litigation cases. The median processing time was 523 days in employee-plaintiff arbitration cases compared to 532 days in employee-plaintiff litigation cases. The processing time of the 90th percentile started from 844 days in arbitration compared to 1,283 days in litigation. (Figure 4)

Figure 4.
Employee-plaintiff employment disputes required fewer days in arbitration than in litigation

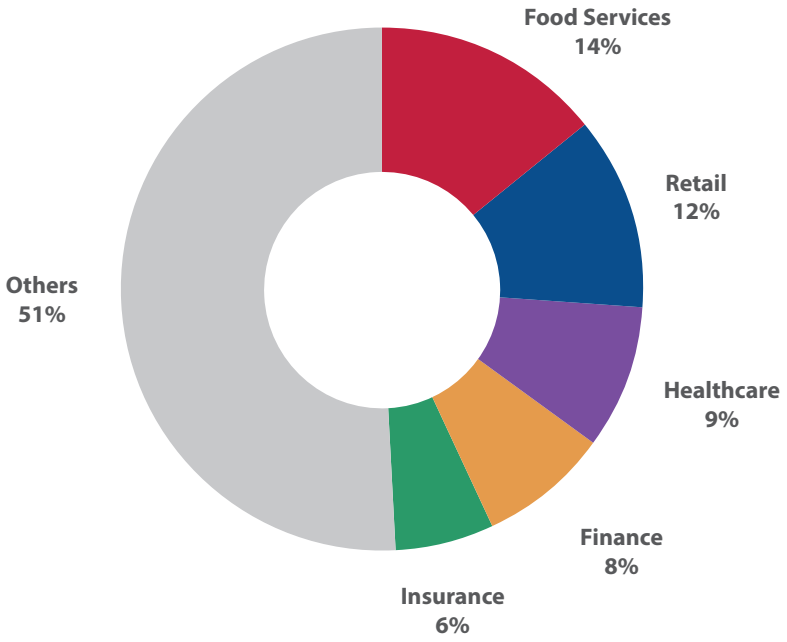


CHARACTERISTICS OF EMPLOYMENT ARBITRATION CASES

Half of the employment arbitration cases that were terminated during 2014-18 were concentrated in five industries: food services, retail, healthcare, finance, and insurance.

Both food services and retail industries have higher numbers of small businesses, part-time employees, and lower-income employees. (Figure 5)

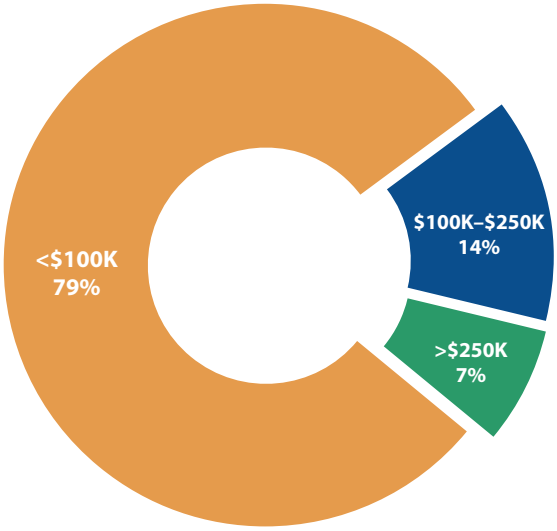
Figure 5.
Employment arbitration spans across industries, with more than 25% of arbitrations concentrated in food services and retail industries



Employees across salary levels use arbitration to resolve their employment disputes. Over 79% of employees who initiated employment arbitration had annual salaries under $100,000 at the time of the dispute. For comparison, over 70% of U.S. households earned less than $100,000 per year in 2017.[4] About 14% of employees involved in employment arbitration had annual salaries between $100,000 and $250,000 and 7% had annual salaries above $250,000. (Figure 6)

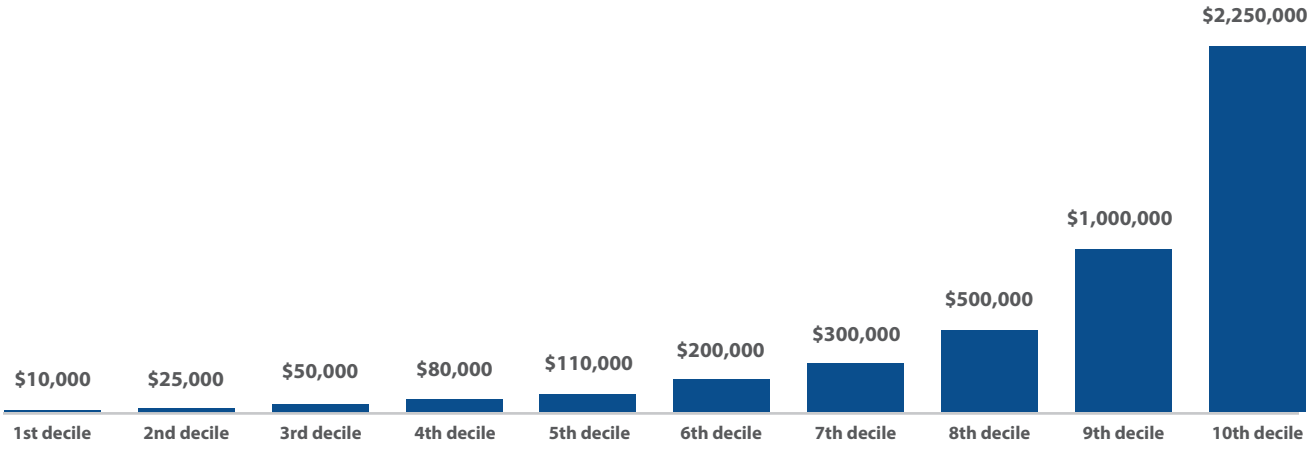
4 U.S. Census Bureau, Households by Total Money Income, Race, and Hispanic Origin of Household: 1967 to 2017.

Figure 6.
79% of employees who initiated employment arbitration earned less than $100,000 a year



Among those 10,486 employment arbitration cases terminated during 2014-18, AAA and JAMS reported the amount claimed for about one-third of all cases. The dollar amount claimed in these 3,550 cases ranges from several thousands of dollars to tens of millions of dollars. The median claim amount was $150,000 and the mean was $947,000. The median amount claimed of the lowest 10% was $10,000 and the top 10% was $2.25 million. (Figure 7)

Figure 7.
Employment arbitration claims ranged from several thousands to tens of millions of dollars



METHODOLOGY

This study compiled employment arbitration data from AAA and JAMS reports and employment litigation data in federal courts from PACER records to construct a large database to compare employment arbitration and employment litigation. Our dataset contains arbitration and litigation cases that were initiated by either employees or employers and were terminated during 2014-18. Using the data, we first compared the outcomes (decisions, settlement, or dismissed/withdrawn) of all employee-initiated and employer-initiated cases between arbitration and traditional employment litigation. We then compared the win rate, award amount, and dispute processing time from initiation to termination for employment arbitration cases and employment litigation cases that were initiated by employees and were terminated with awards between 2014 and 2018.

Arbitration Data. Our analysis of employment arbitration cases relies on two data sources – American Arbitration Association (AAA), the largest provider of employment arbitration services, and Judicial Arbitration and Mediation Services, Inc. (JAMS).[5]

We downloaded data directly from the AAA and JAMS websites in January 2019. We combined both AAA and JAMS employment arbitration data for our analysis. Both AAA and JAMS provide data for arbitration cases terminated during 2014-18. AAA does not provide data of employment arbitration terminated prior to 2014. JAMS employment arbitration data prior to 2014 are incomplete and we therefore did not include them in our analysis. AAA and JAMS do not provide data for on-going employment arbitration cases. We removed employment arbitration cases with missing data on the initiating party and/or outcome.

Our dataset contains 7,601 employment cases from AAA and 2,885 employment cases from JAMS, totaling 10,486 arbitration cases that terminated during 2014-18. The employer and employee in each case were assigned as plaintiff and defendant depending on the initiating party. 1,030 cases were recorded as terminating in awards, of which 776 had awards either only to the plaintiff or only to the defendant; the remaining cases had awards to both parties or failed to indicate which party prevailed. Of those 776 cases, 251 were initiated by employees. When analyzing award amounts, cases with the amount recorded as "0" are included and cases where the value is missing are excluded.

Litigation Data. Our analysis of litigation cases relies on 90,758 federal court cases that terminated during 2014-18. We downloaded litigation data from the Lex Machina portal in January 2019. Lex Machina is a database that collects and organizes federal court data from the federal courts' Public Access to Court Electronic Records (PACER) system.

Our analysis excludes class actions and cases where the plaintiff was a government agency, as these claims are not comparable to private party employment arbitration. Additionally, cases terminated with a consent judgment were classified as "settled cases" instead of "awarded cases" because they embody settlements between the parties. This reclassification was applied to 144 cases (1.1% of all awarded cases). After removing consent judgments, we identified 13,063 awarded cases (i.e., defendant or plaintiff wins). Of these,

5 AAA Consumer and Employment Arbitration Statistics, available at https://www.adr.org/consumer and JAMS Consumer Case Information, available at https://www.jamsadr.com/consumercases/

4,303 cases have monetary damage amounts. These damages are referred to as "monetary awards" throughout the report. Due to missing data, there is a negligible discrepancy between the total number of cases used to analyze the award amount and the total number of cases used to analyze the duration from initiation to award. Of the 13,063 awarded cases, plaintiffs won 1,711. To determine the number of employee-initiated cases, we manually classified cases won by the plaintiff based on the names of the plaintiff and defendant. Plaintiffs or defendants with companies or organizations in the name were labeled "company," individuals were labeled "employee."

CONCLUSION

The empirical evidence shows that employment arbitration is an effective process for resolving employment disputes. While litigation is a long and often burdensome process with many rules and requirements, arbitration is simpler and more flexible. We used a large dataset from the largest employment arbitration providers and a national litigation database to analyze and compare arbitration and litigation in recent years. Analysis of that evidence shows that arbitration yields better results for employee-plaintiffs. Arbitration is faster than litigation, taking 569 days, instead of 665 days, on average for employee-plaintiffs to obtain an award. Importantly, employee-plaintiffs fare better in arbitration, winning 32% compared to 11% of awarded cases for litigation. Moreover, monetary awards for employee-plaintiffs in arbitration were 93% higher than litigation on average. In sum, arbitration is faster and more favorable to employees than litigation.

ABOUT THE AUTHORS

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Nam D. Pham is Managing Partner of ndp | analytics, a strategic research firm that specializes in economic analysis of public policy and legal issues. Prior to founding ndp | analytics in 2000, Dr. Pham was Vice President at Scudder Kemper Investments in Boston. Before that he was Chief Economist of the Asia Region for Standard & Poor's DRI; an economist at the World Bank; and a consultant to both the Department of Commerce and the Federal Trade Commission. Dr. Pham is an adjunct professor at the George Washington University. Dr. Pham holds a Ph.D. in economics from the George Washington University, an M.A. from Georgetown University; and a B.A. from the University of Maryland. He is a former member of the board of advisors to the Dingman Center for Entrepreneurship at the University of Maryland, Smith School of Business and the Food Recovery Network.

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About ndp | analytics

Founded in 2000, ndp | analytics produces reports and products through the rigor of quantitative analyses. Our work is rooted in economic fundamentals that construct deliverables that appeal to a broad audience through clear messaging. Our firm has advised the business community on the economic impacts of a wide-range of public policies, developed comprehensive research-based advocacy programs, established benchmarks across industries, and assessed the costs and benefits of major legislation and regulations. The work our team has conducted has been prominently cited in numerous channels including the Economic Report of the President to Congress, national media outlets, reports from government agencies, Congressional testimonies, and by Members of Congress. We provide support to a diverse group of clients including trade associations, corporations, law firms, multilateral organizations, and government agencies.

Fairer, Faster, Better II:
An Empirical Assessment of Consumer Arbitration

NOVEMBER 2020

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Fairer, Faster, Better II: An Empirical Assessment of Consumer Arbitration

Nam D. Pham, Ph.D. and Mary Donovan[1]

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1 Nam D. Pham is Managing Partner and Mary Donovan is Principal at ndp | analytics. Davide Sonzogni provided research assistance. The U.S. Chamber Institute for Legal Reform provided financial support to conduct this study. The opinions and views expressed in this report are solely those of the authors.

EXECUTIVE SUMMARY

Arbitration has been recognized as a lawful and efficient method of dispute resolution at least as early as 1925 when the Federal Arbitration Act was enacted. The Act requires federal and state courts to enforce and uphold arbitration agreements to the same extent as other types of contracts. Arbitration has become more popular over the past couple of decades to resolve disagreements between consumers and businesses, as it is usually faster and cheaper for both parties than going to court.

This report is based on a dataset of 101,244 disputes involving consumers that terminated between January 1, 2014 and June 30, 2020, which we constructed to analyze the differences between consumer arbitration and litigation processes. We first compared the outcomes of arbitrations and litigation involving consumers. We then compared the win rate, award amount, and dispute processing time from initiation to termination for consumer arbitrations and consumer litigation cases that were initiated by consumers and were terminated with awards. Consumer arbitration data came directly from the two largest arbitration service providers—American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services, Inc. (JAMS). Consumer litigation cases came from Public Access to Court Electronic Records (PACER) and were compiled and provided by Lex Machina, a third-party data provider.

Key findings of the report are:

1. **Consumers are more likely to win in arbitration than in court.** Consumers initiated and prevailed in 44% of all consumer arbitrations that were terminated with awards during January 2014 – June 2020. During the same period, consumers initiated and prevailed in 30% of all consumer litigation cases that were terminated with judgments.

2. **Consumers receive higher awards in arbitration than in litigation.** The median award in arbitrations that consumers initiated and won was $20,019, compared to just $6,565 in litigation they initiated. The mean award to consumers was $68,198 in arbitration compared to $57,285 in litigation.

3. **Consumer arbitration is faster than litigation.** It took a mean time of 299 days for consumers to initiate and terminate a dispute with an award in arbitration compared to 429 days in litigation. The median number of days for consumers to initiate and complete a dispute with an award was 251 days in arbitration compared to 311 days in litigation.

4. **The majority of disputes involving consumers are settled.** In arbitration, 57% of disputes involving consumers were settled, 22% were dismissed or withdrawn, and 21% terminated with awards during January 2014 – June 2020. In litigation, 85% of cases involving consumers were settled, 9% were dismissed or withdrawn, and 6% terminated with awards during the same period.

In sum, consumers who initiated cases and prevailed during January 2014 – June 2020 had a better chance of winning in arbitration than in litigation. Consumers initiated and prevailed in 44% of all arbitrations that terminated with one prevailing party compared to 30% in litigation. Consumers who initiated and prevailed in arbitration also received higher monetary awards than in litigation. In addition to having better chances to win and higher monetary awards, consumers who initiated and prevailed had their cases resolved more quickly in arbitration than in litigation, both in mean and median number of days. (Table 1)

Table 1.
Consumers who initiated cases and prevailed had better chances to win, had higher award amounts, and required less time in arbitration than in litigation during January 2014 – June 2020

	Cases that consumers initiated and prevailed		
	As % of cases terminated with one prevailing party	Amount awarded to consumers	Time spent from initiation to completion
Arbitration	44.3%	$68,198 (mean) $20,019 (median)	299 days (mean) 251 days (median)
Litigation	30.2%	$57,285 (mean) $6,565 (median)	429 days (mean) 311 days (median)

OUTCOMES OF ALL ARBITRATIONS AND LITIGATION CASES INVOLVING CONSUMERS

A consumer dispute, resolved either through arbitration or litigation, has three potential outcomes: (1) the dispute is settled at some point during the process on terms that can include monetary payments and/or non-monetary relief (the settlement details may or may not be disclosed publicly); (2) the dispute is dismissed, abandoned, or withdrawn during the process; or (3) the dispute ends in a decision by the adjudicator in favor of one or both sides. We analyzed and compared the outcome pattern between consumer arbitration and litigation cases that were initiated by consumers or businesses and were terminated during January 2014 – June 2020.

Arbitration. Among 24,629 of all arbitrations involving consumers that were terminated during January 2014 – June 2020, 14,024 cases (56.9%) were settled; 5,476 cases (22.2%) were dismissed, abandoned, or withdrawn; and 5,129 cases (20.8%) resulted in decisions with monetary and/or non-monetary elements. (Table 2)

Table 2.
Nearly 57% of arbitrations involving consumers were settled and over 20% terminated with decisions during January 2014 – June 2020

	Number of Cases	As % of Terminated Cases*
Terminated cases	24,629	100.0%
Decision	5,129	20.8%
Settlement	14,024	56.9%
Dismissed/Withdrawn	5,476	22.2%

*Note: totals in this and other tables may not sum exactly due to rounding.

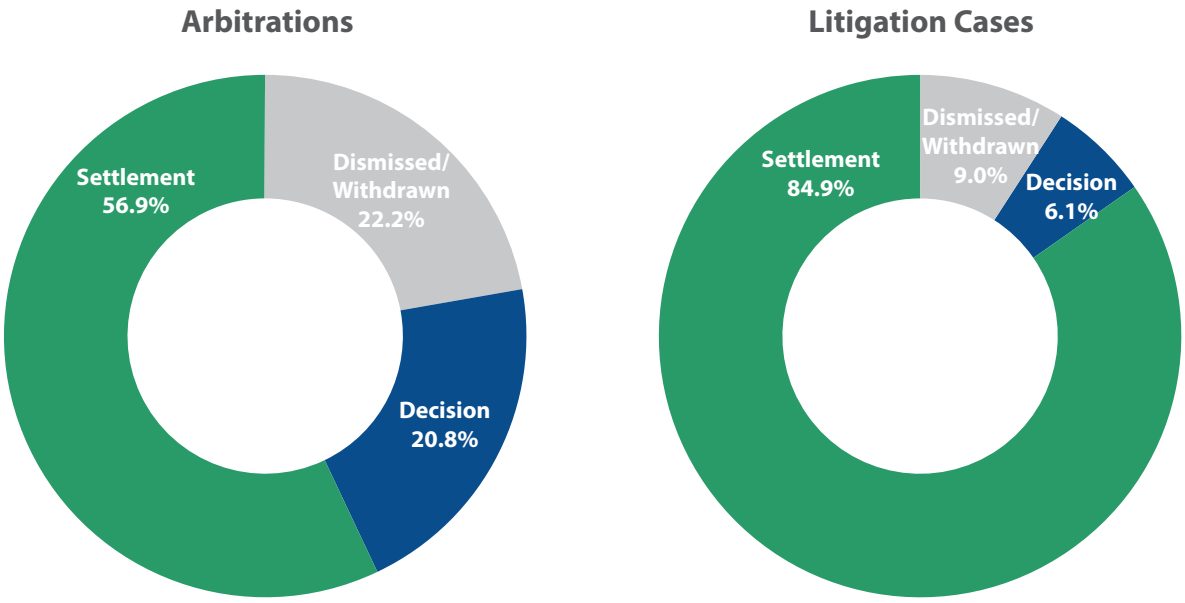
Litigation. During January 2014 – June 2020, 76,615 cases involving consumers were terminated in federal courts. Among these terminated cases, 65,038 cases (84.9%) were settled, 6,890 cases (9.0%) were dismissed or ended with other procedural resolutions, and 4,687 cases (6.1%) were terminated by court or jury determinations. (Table 3)

Table 3.
Nearly 85% of litigation cases involving consumers were settled and just over 6% terminated with decisions during January 2014 – June 2020

	Number of Cases	As % of Terminated Cases
Terminated cases	76,615	100.0%
Decision	4,687	6.1%
Settlement	65,038	84.9%
Dismissed/Withdrawn	6,890	9.0%

Overall, the majority of all consumer disputes, whether in arbitration or in litigation, end in settlement. However, the distribution is widely different between the arbitration process and the litigation process. While less than 60% of arbitrations were settled, almost 85% of litigation cases were settled (a 28-percentage-point difference). While only 9% of litigation cases were dismissed or withdrawn, over 22% of arbitrations were dismissed or withdrawn (a 13-percentage-point difference). Only 6% of all litigation cases involving consumers were terminated with a court decision, but nearly 21% of all arbitrations involving consumers were terminated with a decision. (Figure 1)

Figure 1.
Most arbitration and litigation cases involving consumers settle, but arbitrations were more likely to result in a decision on the merits during January 2014 – June 2020



DECIDED CASES

Consumer disputes can be initiated by either a consumer or a business and can be terminated with a decision in favor of the plaintiff, the defendant, or both. We reviewed all cases that terminated in a decision (in arbitration or in court) and calculated the share of consumer-claimant cases in which the consumer prevailed. In this report, we use the term "consumer-claimants" to refer to consumers who initiated claims in arbitration or litigation processes.

Arbitration. Among the 5,129 consumer arbitrations terminated by decisions during January 2014 – June 2020, 4,113 identified a prevailing party. The information regarding the prevailing party in the remaining 1,016 arbitrations was unknown or indicated that there were awards to both parties. Among these 4,113 arbitrations identifying a single prevailing party, consumers initiated and prevailed in 1,821 cases, accounting for 44.3% of decisions. (Table 4)

Table 4.
Consumers initiated and won 44% of all arbitrations that terminated with awards to one party during January 2014 – June 2020

	Number of Cases	As % of Decided Cases with One Prevailing Party
Decided arbitrations with one prevailing party	4,113	100.0%
Consumers initiated and prevailed	1,821	44.3%

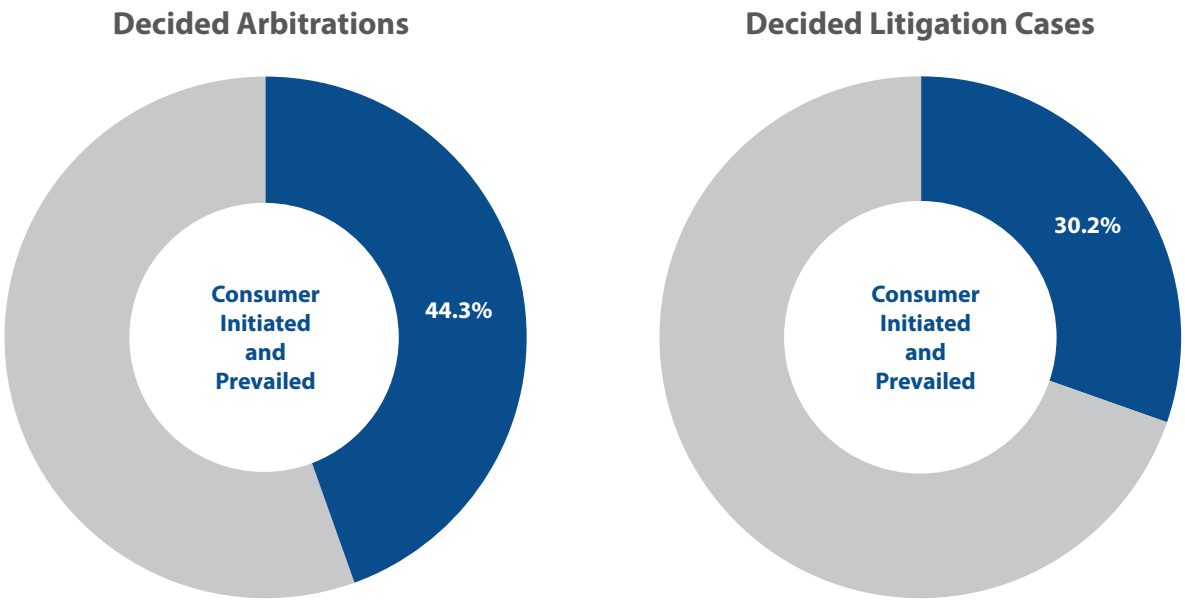
Litigation. All 4,687 federal court consumer cases that terminated with decisions during January 2014 – June 2020 have information regarding the prevailing party. Among these cases, consumers initiated and prevailed in 1,417 cases, accounting for 30.2% of decided cases. (Table 5)

Table 5.
Consumers initiated and won 30% of all litigation cases that terminated in federal court with decisions during January 2014 – June 2020

	Number of Cases	As % of Awarded Cases
Decided cases in federal courts with one prevailing party	4,687	100.0%
Consumers initiated and prevailed	1,417	30.2%

In sum, consumer-claimants were more likely to win in arbitration than in litigation. For consumer disputes that terminated with awards to one party during January 2014 – June 2020, consumers initiated and prevailed 44% of the time in arbitration compared to 30% in litigation. In other words, the chances for consumers to win in arbitration were almost 1.5 times higher than in court. (Figure 2)

Figure 2.
Consumer-claimants won more often in arbitration than in litigation during January 2014 – June 2020



AMOUNT AWARDED

Consumer arbitration and litigation can be resolved with monetary and non-monetary awards to consumers, businesses, or both. We calculated and compared the distribution of monetary award amounts to consumers who prevailed in consumer-claimant cases in arbitration and litigation.

In consumer-initiated claims that terminated with monetary awards, prevailing consumers received higher awards in arbitration than in litigation. Among consumer-claimant arbitrations that terminated during January 2014 – June 2020, the median and mean awards to consumers were $20,019 and $68,198, respectively. The first and third quartiles of award amounts were $6,740 and $58,582, respectively. The award amounts to consumers were at least $150,000 for the top 10% of consumer-claimant arbitrations in which consumers prevailed. During the same period, the median and mean amounts awarded to consumers who initiated litigation were $6,565 and $57,285, respectively. The first and third quartiles of award amounts were $4,108 and $17,555, respectively. The award amounts to consumers were at least $64,448 for the top 10% of consumer-claimant litigation cases. (Table 6 and Figure 3)

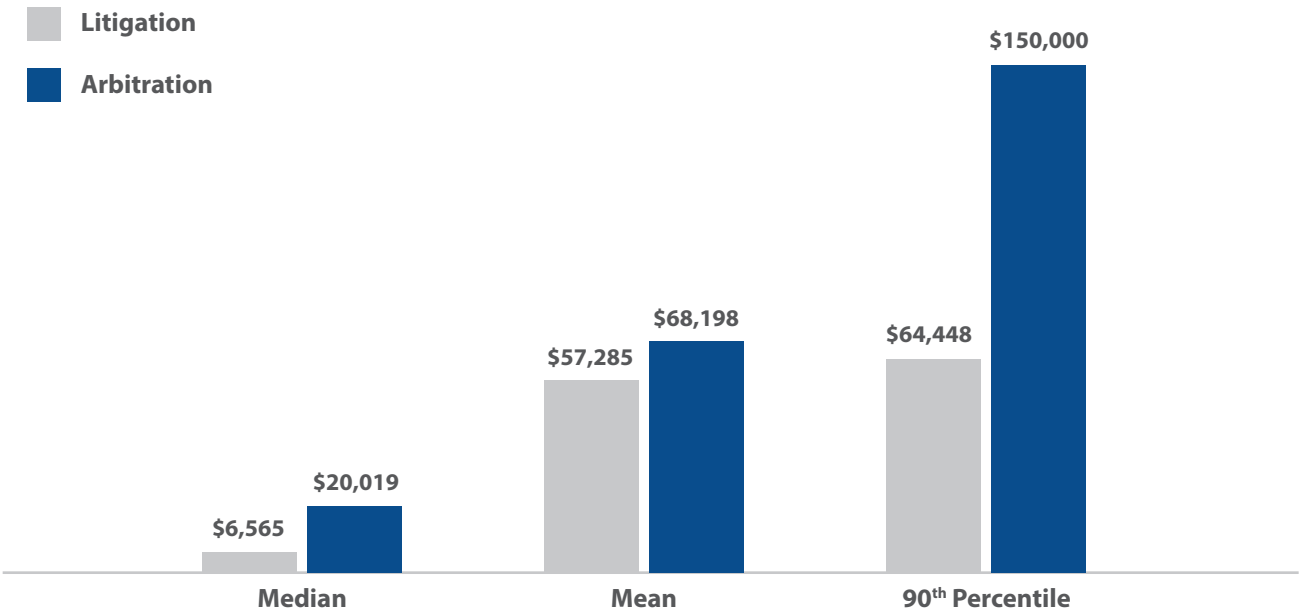
Table 6.
Award amounts to consumer-claimants in arbitrations and litigation cases during January 2014 – June 2020

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitration (1,688 cases)	$68,198	$6,740	$20,019	$58,582	$150,000
Litigation (1,263 cases)	$57,285	$4,108	$6,565	$17,555	$64,448

Overall, consumer-claimants received higher awards in arbitration than in litigation:

- The median award for consumer-claimants in arbitration was over three times the dollar amount in litigation, $20,019 compared to $6,565.
- The 90th percentile of awards to consumer-claimants in arbitration was over 2.3 times the dollar amount in litigation, $150,000 compared to $64,448.
- The mean award for consumer-claimants in arbitration was 19% higher than litigation, $68,198 compared to $57,285.

Figure 3.
Consumer-claimants received higher awards in arbitration during January 2014 – June 2020



TIME TO RESOLUTION

Another important feature of arbitration is that it resolves cases faster than litigation. We calculated and compared the dispute-processing time from initiation to termination for disputes initiated and won by consumers in arbitration and litigation. Time was measured by days from the filing date to the date of termination.

Arbitration. The mean and median number of days from initiation to termination were 299 and 251, respectively, where consumers initiated and prevailed in arbitration during January 2014 – June 2020. The first and third quartiles were 168 days and 368 days, respectively. The top 10% of arbitrations where consumers initiated and prevailed with awards required at least 515 days. (Table 7)

Table 7.
The mean consumer-claimant arbitration terminated with an award in 299 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Arbitrations where consumers initiated and prevailed (1,821 cases)	299	168	251	368	515

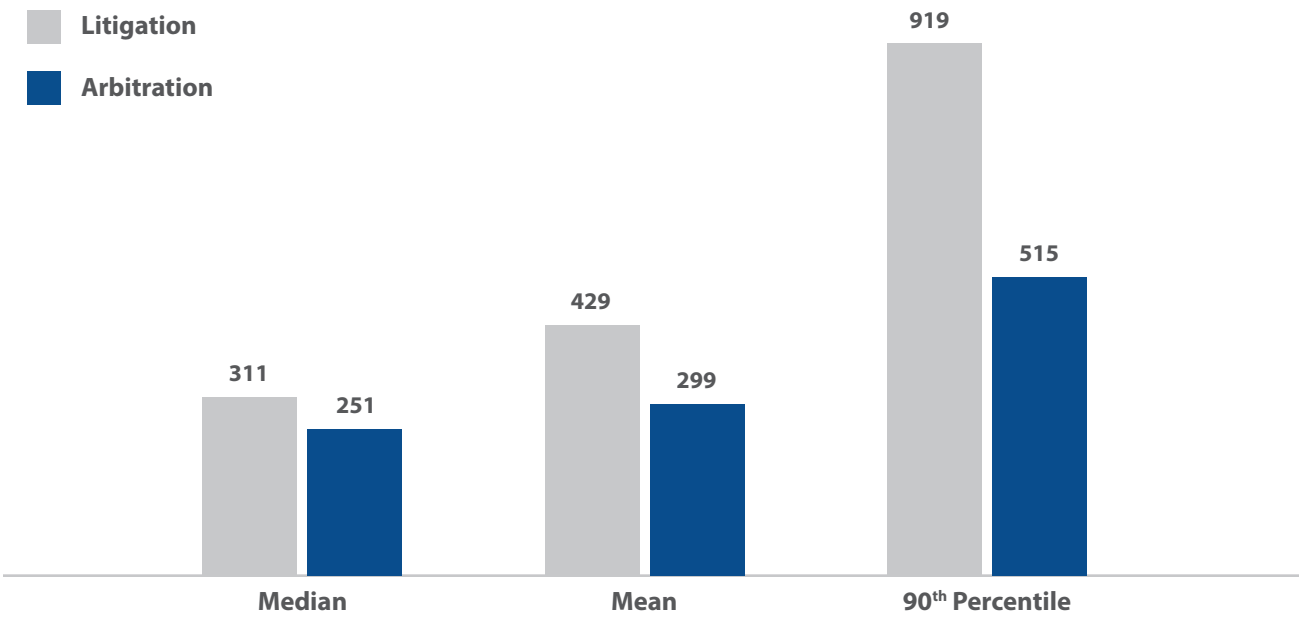
Litigation. The litigation process has many steps and therefore usually requires considerably more time than arbitration to resolve a dispute. Half of cases that consumers initiated in litigation in federal court and prevailed during January 2014 – June 2020 required at least 311 days, with a mean duration of 429 days. The top 10% of litigation cases that consumers initiated and terminated in courts with awards required at least 919 days. (Table 8)

Table 8.
The mean consumer-claimant litigation case terminated with an award in 429 days

	Mean	First Quartile	Median	Third Quartile	90th Percentile
Litigation cases where consumers initiated and prevailed (1,417 cases)	429	167	311	553	919

Overall, the processing time for consumer-claimants to win awards in arbitration is considerably less than in litigation. The mean processing time from initiation to completion was 299 days in consumer-claimant arbitrations compared to 429 days in consumer-claimant litigation cases. The median processing time was 251 days in consumer-claimant arbitrations compared to 311 days in consumer-claimant litigation cases. The processing time of the 90th percentile was at least 515 days in arbitration compared to 919 days in litigation. (Figure 4)

Figure 4.
Consumer-claimants received an award faster in arbitration than in litigation



METHODOLOGY

This report compiled consumer arbitrations from AAA and JAMS reports and consumer litigation cases in federal courts from PACER, through Lex Machina, to construct a database to assess consumer disputes in arbitration and litigation. Using this large dataset, we compared the outcomes between consumer arbitration and traditional consumer litigation during the same time period. We also compared the monetary award amount and time spent on consumer disputes in these fora where consumers initiated and prevailed in the dispute.

Arbitration Data. Our analysis of consumer arbitrations relies on two data sources—American Arbitration Association (AAA), the largest provider of consumer arbitration services, and Judicial Arbitration and Mediation Services, Inc. (JAMS).[2]

We downloaded data directly from the AAA and JAMS websites in August 2020 and in January 2018 to compile a database of arbitrations. Currently, AAA and JAMS provide data for arbitrations terminated through June 30, 2020. Our combined dataset contains arbitrations that terminated between January 1, 2014 and June 30, 2020. Data prior to 2014 are not available. AAA and JAMS do not provide data for ongoing consumer arbitrations. We removed consumer arbitrations with missing data on the initiating party and/or outcome.

Our dataset contains 21,562 consumer arbitrations from AAA and 3,067 consumer arbitrations from JAMS, totaling 24,629 arbitrations that terminated during January 2014 – June 2020. The business and consumer in each case were

2 AAA Consumer and Employment Arbitration Statistics, available at https://www.adr.org/consumer and JAMS Consumer Case Information, available at https://www.jamsadr.com/consumercases/.

assigned as plaintiff and defendant depending on the initiating party. 5,129 arbitrations were recorded with awards, of which 4,113 cases involved awards to only one party. The remaining arbitrations either involved awards to both parties or it was not apparent which party prevailed. Of the 4,113 arbitrations resulting in awards to only one party, consumers initiated and received awards in 1,812.

Litigation Data. Our analysis of litigation cases relies on 76,615 federal court cases that terminated between January 1, 2014 and June 30, 2020. We downloaded litigation data from the Lex Machina portal in September 2020. Lex Machina is a database that collects and organizes federal court data from the federal courts' PACER system.

Our analysis excludes class actions and cases where the plaintiff was a government agency, as these claims are not comparable to individualized consumer arbitrations involving private parties. Additionally, cases terminated with a consent judgment were classified as "settled cases" instead of "awarded cases" because they embody settlements between the parties. This reclassification was applied to 684 cases. After removing consent judgments, Lex Machina identified 4,687 awarded cases (defendant or plaintiff wins). Of the 4,687 awarded cases, plaintiffs won 1,465 cases. To determine the number of consumer-claimant cases, we manually classified cases won by the plaintiff based on the names of the plaintiff and defendant. Plaintiffs or defendants with companies or organizations in the name were labeled "company," individuals were labeled "consumer." We identified 1,417 cases where the consumer-claimant won. Of these, 1,263 cases have monetary damage amounts. These damages are referred to as "monetary awards" throughout the report. Due to missing data, there is a small discrepancy between the total number of cases used to analyze the award amount and the total number of cases used to analyze the duration of the case from initiation to award.

Our arbitration and litigation datasets exclude insurance cases, healthcare cases, and personal injury cases.

CONCLUSION

The empirical evidence shows that consumer arbitration is an effective process for consumers to resolve disputes. While litigation is a long and often burdensome process with many rules and requirements, arbitration is simpler and more flexible. Using publicly available data from two of the largest consumer arbitration providers and a national litigation database, we constructed a comprehensive dataset to analyze and compare arbitration and litigation matters involving consumers in recent years. Analysis of that evidence shows that arbitration yields better results for consumers who initiate claims. Arbitration is faster than litigation, taking 299 days instead of 429 days on average for consumers to obtain an award. Importantly, consumers fare better in arbitration, winning 44% compared to 30% of awarded cases for litigation. Moreover, the median monetary award for consumer-claimants in arbitration was over three times the award for consumers in litigation. All told, the arbitration process is faster and more favorable to consumers than the litigation process.

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Searle Civil Justice Institute

CONSUMER ARBITRATION
Before the American Arbitration Association

Preliminary Report

March 2009

Searle Center on Law, Regulation, and Economic Growth

Northwestern University School of Law

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Founded in early 2008 as a division of the Searle Center on Law, Regulation, and Economic Growth, the Searle Civil Justice Institute (SCJI) aims to become the preeminent national source of large scale, empirical studies on public policy issues related to our nation's civil justice system. An operating premise of the Searle Civil Justice Institute is that hard data is a powerful and necessary tool in public policy debates.

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Foreword

Arbitrations between businesses and consumers arising out of pre-dispute arbitration agreements have increasingly come under attack. Proposed federal legislation, the Arbitration Fairness Act of 2009, would make pre-dispute arbitration clauses unenforceable in consumer, employment, and franchise contracts. Critics assert that arbitration providers do not adequately enforce minimum procedural safeguards, or Due Process Protocols, to ensure the fairness of arbitration. Moreover, critics question the impact of cost on access to arbitration, the speed of the process, and how well consumers fare relative to businesses in such proceedings. In contrast, supporters of consumer arbitration maintain that such proceedings actually increase access to justice and are conducted in a fair, timely, and cost-effective manner.

An operating premise of the Searle Civil Justice Institute (SCJI) is that public policy debates should be informed by systematically collected and rigorously analyzed empirical data. Despite the importance of empirical evidence to discussions of the Arbitration Fairness Act, the record as it relates to consumer arbitration is limited in important respects. To begin with, arbitrations are privately managed procedures for which data are generally not available. In addition, while a number of studies have examined other types of arbitration, far fewer studies have examined consumer arbitration in any systematic way. Finally, there is no empirical evidence examining enforcement of Due Process Protocols by arbitration providers.

To better understand the issues surrounding consumer arbitration and to begin developing a factual record for policy discussion, SCJI commissioned a Task Force on Consumer Arbitration. Christopher R. Drahozal, John M. Rounds Professor of Law at the University of Kansas, was asked to chair this ongoing initiative for SCJI. SCJI approached the AAA requesting access to its case files and related data for research purposes. This request was conditioned on the requirement that SCJI be able to conduct its research and analysis in a manner that was independent and impartial. The results contained in this Preliminary Report fully and accurately reflect the results of SCJI's data collection and analysis.

This report is denoted as preliminary for two reasons. First, SCJI intends to continue its empirical work on consumer arbitration by developing a comparison with similar claims brought in traditional court proceedings. Second, SCJI is prepared to refine its work based on future studies, critiques, and ongoing debate.

Henry N. Butler, Executive Director
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Executive Summary

Issues and Background

Empirical evidence has become a central focus of the policy debate over consumer and employment arbitration. Both supporters and opponents of the proposed Arbitration Fairness Act, which would make pre-dispute arbitration clauses unenforceable in consumer and employment (and franchise) agreements, have recognized that empirical evidence on the fairness and integrity of consumer and employment arbitration proceedings is essential to making an informed decision on the bill. Yet the empirical record, particularly on consumer arbitration, has critical gaps.

One set of issues on which further empirical research would be helpful is the costs, speed, and outcomes of consumer arbitrations. How much do consumers pay to bring claims in arbitration? How long do consumer arbitrations take to resolve? How do consumers fare in arbitration, particularly against businesses that are repeat users of arbitrators and arbitration providers? While a number of important studies on employment arbitration have been provided, the empirical record on these issues in consumer arbitrations is sparse.

A second set of issues of interest involves the enforcement of arbitration due process protocols -- privately created standards setting out minimum requirements of procedural fairness for consumer and employment arbitrations. Due process protocols commonly require independent and impartial arbitrators, reasonable costs, convenient hearing locations, and remedies comparable to those available in court. Leading arbitration providers have pledged not to administer arbitrations arising out of arbitration clauses that violate the protocols. But empirical evidence on the effectiveness of these private enforcement efforts is lacking.

Searle Civil Justice Institute Task Force on Consumer Arbitration

To shed light on these issues, the Searle Civil Justice Institute (SCJI) undertook a large-scale study of consumer arbitrations administered by the American Arbitration Association (AAA). The AAA is a leading provider of arbitration services, including arbitrations between consumers and businesses. SCJI commissioned a Task Force to advise and lead this study of consumer arbitrations. Although the study will ultimately examine many aspects of AAA consumer arbitrations, the initial research inquiries were directed at two topics:

1. *Costs, Speed, and Outcomes of AAA Consumer Arbitrations.* This aspect of the Preliminary Report assesses key characteristics of the AAA consumer arbitration process. In particular, it examines the following research questions:

    - General characteristics of AAA consumer arbitration cases including claimant type (i.e., consumer or business), types of businesses involved, and amounts claimed.

- Costs of consumer arbitration (arbitrator fees plus AAA administrative fees), including the impact of the arbitrator's power to reallocate such fees in the award.
- Speed of the arbitration process from filing to award, in the aggregate and by claimant type (i.e., consumer or business).
- Various measures of outcomes such as win-rates, damages awarded, and evidence of as well as possible explanations for any repeat-player effects.

In addition to these broad research questions, SCJI also examined the extent to which consumer arbitrations are resolved ex parte; the frequency with which arbitrators award attorneys' fees, punitive damages, and interest; and results for consumers proceeding pro se.

2. *AAA Enforcement of the Consumer Due Process Protocol.* This aspect of the Preliminary Report provides an empirical analysis of how effectively the AAA enforces compliance with the Consumer Due Process Protocol. It considers a number of key research questions including:

    - To what extent do the consumer arbitration clauses comply, in their own right, with the Due Process Protocol?
    - How effective is AAA review of arbitration clauses for compliance with the Due Process Protocol?
    - To what extent does the AAA refuse to administer consumer cases because of the failure of businesses to comply with the Due Process Protocol?
    - How do businesses respond to AAA enforcement of the Protocol?

In addition to these research questions, SCJI examined several other issues that arise in connection with the Due Process Protocols.

Data and Methodology

SCJI reviewed a sample of AAA case files involving consumer arbitrations. The primary dataset consists of 301 AAA consumer arbitrations that were closed by an award between April and December of 2007. (The focus on cases closed by an award during this particular timeframe is based on the availability of the original case files.) This sample of cases was then coded for approximately 200 variables describing various aspects of the arbitration process, including a review of the arbitration clause in the file. In addition, when possible a broader AAA dataset comprising all consumer cases closed between 2005 and 2007 was utilized. The AAA maintains this dataset in the ordinary course of its business, collecting data for internal purposes but not recording all variables of interest to SCJI. The data were analyzed using standard statistical methods in order to describe and evaluate consumer arbitrations as administered by the AAA.

Key Findings – Costs, Speed, and Outcomes of AAA Consumer Arbitrations

The upfront cost of arbitration for consumer claimants in cases administered by the AAA appears to be quite low.

In cases with claims seeking less than $10,000, consumer claimants paid an average of $96 ($1 administrative fees + $95 arbitrator fees). This amount increases to $219 ($15 administrative fees + $204 arbitrator fees) for claims between $10,000 and $75,000. These amounts fall below levels specified in the AAA fee schedule for low-cost arbitrations, and are a result of arbitrators reallocating consumer costs to businesses.

AAA consumer arbitration seems to be an expeditious way to resolve disputes.

The average time from filing to final award for the consumer arbitrations studied was 6.9 months. Cases with business claimants were resolved on average in 6.6 months and cases with consumer claimants were resolved on average in 7.0 months.

Consumers won some relief in 53.3% of the cases they filed and recovered an average of $19,255; business claimants won some relief in 83.6% of their cases and recovered an average of $20,648.

The average award to a successful consumer claimant in the sample was 52.1% of the amount claimed and to a successful business claimant was 93.0% of the amount claimed. This result appears to be driven by differences in types of claims initiated by consumers and business. Business claims are almost exclusively for payment of goods and services while consumer claims are seeking recovery for non-delivery, breach of warranty, and consumer protection violations.

No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business.

Consumer claimants won some relief in 51.8% of cases against repeat businesses under a traditional definition (i.e., businesses who appear more than once in the AAA dataset) and 55.3% against non-repeat businesses – a difference that is not statistically significant.

Utilizing an alternative definition of repeat player, some evidence of a repeat-player effect was identified; the data suggests this result may be due to better case screening by repeat players.

Consumer claimants won some relief in 43.4% of cases against repeat businesses and 56.1% against non-repeat businesses under an alternative definition (based on the AAA's categorization of businesses in enforcing the Consumer Due Process Protocol) – a difference that is statistically significant at the 10% level. However, 71.1% of consumer claims against repeat businesses so defined were resolved prior to an award, while only 54.6% of claims against non-repeat businesses were resolved prior to an award. This suggests that such effect is attributable to better

case screening by repeat players (i.e., settling stronger consumer claims and arbitrating weaker claims).

Arbitrators awarded attorneys' fees to prevailing consumer claimants in 63.1% of cases in which the consumer sought such an award.

Consumer claimants sought to recover attorneys' fees in over 50% of the cases in which they were awarded damages and were awarded attorneys' fees in 63.1% of those cases. In those cases in which the award of attorneys' fees specified a dollar amount, the average attorneys' fee award was $14,574.

Key Findings – AAA Enforcement of the Due Process Protocol

A substantial majority of consumer arbitration clauses in the sample (76.6%) fully complied with the Due Process Protocol when the case was filed.

Most arbitration clauses in consumer contracts that come before the AAA are consistent with the Consumer Due Process Protocol as applied by the AAA. The same is true for cases in which protocol compliance was a matter for the arbitrator to enforce.

AAA's review of arbitration clauses for protocol compliance was effective at identifying and responding to clauses with protocol violations.

In 98.2% of cases in the sample subject to AAA protocol compliance review, the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.

The AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses.

In 2007, the AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its consumer case load), because the business failed to comply with the Consumer Due Process Protocol. The most common reason for refusing to administer a case (55 of 129 cases, or 42.6%) was the business's failure to pay its share of the costs of arbitration rather than any problematic provision in the arbitration clause.

As a result of AAA's protocol compliance review, some businesses modify their arbitration clauses to make them consistent with the Consumer Due Process Protocol.

In response to AAA review, more than 150 businesses have either waived problematic provisions on an ongoing basis or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol. This is in addition to the more than 1550 businesses identified by the AAA as having arbitration clauses that comply with the Protocol. By comparison, AAA has identified 647 businesses for which it will not administer arbitrations because of Protocol violations.

Policy Implications and Next Steps

The empirical findings in the SCJI Preliminary Report on AAA consumer arbitrations have important implications for those interested in discussing and formulating public policy regarding arbitration.

1. Not all consumer arbitrations, arbitration providers, or arbitration clauses are alike. Differing results from empirical studies of arbitration may reflect variations associated with case mix, type of claimant, or provider review processes. This suggests the need for a nuanced approach to pubic policy concerning arbitration.

2. Private regulation complements existing public regulation of the fairness of consumer arbitration clauses. Policy makers should not ignore the role that arbitration providers can play in promoting fairness on behalf of consumers.

3. Courts could usefully reinforce the AAA's enforcement of the Consumer Due Process Protocol by declining to enforce an arbitration clause when the AAA has refused to administer an arbitration arising out of the clause or by otherwise reinforcing the role of the Due Process Protocol.

4. Arbitration may be less expensive for consumers than sometimes believed. For many consumers, the AAA arbitration process costs less than the amount specified in the AAA rules because arbitrators often shift some portion of the costs to businesses. Moreover, arbitrators award attorneys' fees to a substantial proportion of prevailing consumers in AAA consumer arbitrations.

5. Empirical studies have tended to find that repeat players fare better in arbitration than non-repeat players. To the extent such a repeat-player effect exists in arbitration, the critical policy question is what causes it. Our findings are consistent with prior studies in suggesting that any repeat-player effect is likely caused by better case screening by repeat players rather than arbitrator (or other) bias in favor of repeat players. A further as yet unresolved question is whether a repeat-player effect exists in litigation, and, if so, how litigation compares to arbitration in this regard.

While the empirical results presented in the SCJI Preliminary Report on Consumer Arbitration may usefully inform the policy debate on consumer arbitration, the Report nonetheless has limitations. First, its findings are limited to AAA consumer arbitrations. Empirical results from studying AAA consumer arbitration do not necessarily apply to other arbitration providers. Second, its findings on the costs, speed, and outcomes of AAA consumer arbitrations are difficult to interpret without a baseline for comparison, such as the procedures and practices in traditional court proceedings. A future phase of this research project by the Searle Civil Justice Institute's Task Force on Consumer Arbitration will undertake that comparison. It will seek to compare the procedures in AAA consumer arbitration with procedures available for consumers in court as well as comparing empirically key process characteristics of courts and arbitration.

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CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION

Preliminary Report

Consumer Arbitration Task Force
Searle Civil Justice Institute

INTRODUCTION

Empirical research has become a central focus of the policy debate over consumer and employment arbitration. The congressional hearings on the proposed Arbitration Fairness Act[1] ("Act") are replete with empirical assertions about the conduct of consumer and employment arbitrations.[2] Both supporters and opponents of the proposed Act raised empirical issues and analyzed empirical studies in their testimony before Congress, on topics such as the cost of arbitration,[3] the speed of the process,[4] and the outcomes for consumers and employees.[5] Other issues involved in the debate, such as how effectively arbitration providers enforce due process protocols[6] – privately developed fairness standards for consumer and employment arbitrations[7] – likewise raise important empirical questions. Indeed, the disagreement over the state of the empirical record has continued outside of the congressional forum,[8] with both sides recognizing the importance of relying on sound empirical research rather than anecdotal evidence.[9]

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[1] Arbitration Fairness Act, H.R. 1020, 111th Cong. § 4 (2009) (making predispute arbitration agreements unenforceable if they require arbitration of any "employment, consumer, or franchise dispute," or "a dispute arising under any statute intended to protect civil rights"); *see also* Consumer Fairness Act of 2009, H.R. 991, 111th Cong. § 2 (2009) (making predispute arbitration agreements in consumer contracts unenforceable and "an unfair and deceptive trade act or practice").

[2] *See* S. 1782, The Arbitration Fairness Act of 2007: Hearing Before the Constitution Subcomm. of the Senate Comm. on the Judiciary, 110th Cong., 1st Sess. (Dec. 12, 2007) [hereinafter Senate Hearings]; H.R. 3010, the Arbitration Fairness Act of 2007, Hearing Before the Comm'l and Admin. Law Subcomm. of the House Comm. on the Judiciary, 110th Cong., 1st Sess. (Oct. 25, 2007) [hereinafter House Hearings], *available at* http://judiciary.house.gov/hearings/hear_102507.html.

[3] Senate Hearings, *supra* note 2, at 4 (Statement of Sen. Sam Brownback); Senate Hearings, *supra* note 2, at 2 (Statement of Sen. Russell Feingold).

[4] Senate Hearings, *supra* note 2, at 8 (Statement of Professor Peter B. Rutledge).

[5] Senate Hearings, *supra* note 2, at 17-18 (Statement of F. Paul Bland, Jr.); Senate Hearings, *supra* note 2, at 15 (Statement of Mark A. de Bernardo); Senate Hearings, *supra* note 2, at 4 (Statement of Sen. Sam Brownback); Senate Hearings, *supra* note 2, at 26 (Testimony of Tanya Solov); House Hearings, *supra* note 2, at __ (Testimony of Laura MacCleery) (ms. at 2-6).

[6] House Hearings, *supra* note 2, at __ (Testimony of Laura MacCleery) (ms. at 5).

[7] *E.g.*, National Consumer Disputes Advisory Committee, Consumer Due Process Protocol (April 17, 1998), *available at* www.adr.org/sp.asp?id=22019; *see* Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 985 (2005) ("The Consumer Due Process Protocol, for example, calls for a 'fundamentally fair process' in arbitration that stipulates adequate notice, an opportunity to be heard, and an independent decisionmaker. These procedural ingredients are comparable to those that would be provided pursuant to the informal due process requirements of the Constitution or under the fair procedure requirements of private associations like the NCAA or universities.").

[8] In particular, see the exchange between Public Citizen and Professor Peter B. Rutledge. *Compare* Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on

But despite the importance of systematic empirical evidence to Congress's (and other policymakers') consideration of consumer and employment arbitration, the available empirical evidence is limited in important respects. A number of studies have analyzed employment arbitration (particularly as administered by the American Arbitration Association ("AAA")) and securities arbitration.[10] But far fewer studies have examined consumer arbitration in any detail.[11] Moreover, data are wholly lacking on "how consistently the AAA or other providers enforce their due process protocols,"[12] which, as one scholar concludes, "is an area worthy of further study."[13]

This Report extends our knowledge of consumer arbitration by presenting results from the first detailed empirical study of consumer arbitration as administered by the AAA. It first looks at key characteristics of the AAA consumer arbitration process. Primarily using a sample of 301 AAA consumer arbitrations that resulted in an award between April and December 2007, it considers such issues as the costs incurred by consumers in arbitration, the speed of the arbitral process, and the outcomes of the cases – the very topics of most interest in the policy debate. It then examines in detail the AAA's enforcement of the Consumer Due Process Protocol, using the same sample of AAA consumer arbitrations and a variety of other data sources.

Our focus on AAA consumer arbitration is both a benefit of and a limitation on our study. The AAA is a well-known and widely-used provider of arbitration services, for consumers and others. Our findings thus provide insights into consumer arbitrations administered by an important provider of such services. Conversely, our findings necessarily are limited to consumer arbitrations administered by the AAA. Other arbitration providers may administer cases differently. They may attract different types of cases and different types of businesses. Accordingly, one cannot assume that our results are representative of all consumer arbitrations, just as one cannot assume that results from studies of other providers are representative of all

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Arbitration (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf [hereinafter Public Citizen, Arbitration Debate Trap] *and* Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf *with* Peter B. Rutledge, Arbitration -- A Good Deal for Consumers: A Response to Public Citizen (April 2008) (report prepared for and released by the U.S. Chamber Institute for Legal Reform), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091. *See also* Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. PUB. POL'Y 549 (2008) [hereinafter Rutledge, *Whither Arbitration?*]; Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267 (2008).

[9] *See* Rutledge, *Whither Arbitration?*, *supra* note 8, at 589 (concluding that "[i]ncreased congressional attention" to consumer and employment arbitration "can be valuable, for it promotes discussion and study about this valuable dispute resolution tool" but also "can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study"); Public Citizen, Arbitration Debate Trap, *supra* note 8, at 2 ("Rutledge concludes *Whither* with the warning that congressional scrutiny of arbitration 'can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study.' We agree.")

[10] *See infra* Appendix 2.

[11] *See infra* Appendix 1.

[12] W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 107 (2007); *see also id.* at 93 n.138.

[13] *Id.* at 107.

consumer arbitrations. To the extent policy makers are deciding whether and how to regulate consumer arbitration, however, additional empirical information on the consumer arbitration process will enable them to make more informed decisions.

Part I of this Report provides background on prior empirical studies of consumer arbitration and on the development and criticisms of arbitration due process protocols. Part II describes the AAA's consumer arbitration rules and its practices and procedures in administering the Consumer Due Process Protocol. Part III sets out the research questions we analyze and describes in detail our datasets and research methodologies. Finally, Part IV presents our research results on two topics: (1) the costs, speed, and outcomes of AAA consumer arbitrations; and (2) AAA enforcement of the Consumer Due Process Protocol. As this research project is ongoing, we hope to have additional results to report in the future.

I. BACKGROUND

This Part provides general background material on each of the empirical research topics addressed later in this Report. It first summarizes prior empirical research on consumer arbitration, focusing on the cost and speed of the process as well as the outcomes for consumers and businesses. It then provides an overview of arbitration due process protocols, private initiatives that regulate the terms of arbitration agreements and the procedures in arbitration.

A. Prior Empirical Research on Consumer Arbitration – Cost, Speed, and Outcomes

In this Part, we summarize the current empirical literature on consumer arbitration.[1] Because our focus in this Report is on consumer arbitration, we do not discuss empirical studies on securities arbitration or employment arbitration (with one exception).[2] We focus on studies of the arbitration process itself, which address issues such as the cost, speed, and outcome of the arbitration proceeding.[3] To the extent those studies seek to compare arbitration to litigation, we focus only on the arbitration portion of the study, deferring comparison to the litigation process for the future.[4]

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[1] For a more detailed description of the empirical studies of consumer arbitration discussed in this part, see Appendix 1.

[2] For surveys of empirical research on consumer and employment arbitration, see Sarah Rudolph Cole & Theodore H. Frank, *The Current State of Consumer Arbitration*, DISP. RESOL. MAG., Fall 2008, at 31; Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 405, 412-37 (2007); Kirk D. Jensen, *Summaries of Empirical Studies and Surveys Regarding How Individuals Fare in Arbitration*, 60 CONSUMER FIN. L.Q. REP. 631 (2006); Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. PUB. POL'Y 549, 556-86 (2008) [hereinafter Rutledge, *Whither Arbitration?*]; David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1563-78 (2005); *see also* Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REF. 813 (2008) (surveying empirical studies of arbitration costs). For a list of empirical studies of employment and securities arbitration, see Appendix 2. For an empirical study of franchise arbitration (and litigation) outcomes, based on disclosures in franchise disclosure documents, see Edward Wood Dunham & David Geronemus, *Lessons from the Resolution of Franchise Disputes*, JAMS DISP. RESOL. ALERT, Summer 2003, *available at* http://www.wiggin.com/db30/cgi-bin/pubs/JAMS%20article%20J%20Dunham.pdf.

[3] We do not consider studies of the provisions of consumer or employment arbitration clauses; *e.g.*, Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer Experience*, 67 LAW & CONTEMP. PROBS. 55, 73-74 (2004); Theodore Eisenberg, Geoffrey Miller, & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871 (2008); studies of outcomes of court cases involving challenges to arbitration agreements; *e.g.*, Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 752-59 (2006); or studies of outcomes of court cases involving challenges to arbitration awards, *e.g.*, Michael H. LeRoy, *Crowning the New King: The Statutory Arbitrator and the Demise of Judicial Review*, 29 J. DISP. RESOL. ___ (forthcoming 2009).

[4] A future phase of this research project will seek to compare the characteristics of the consumer arbitration cases described in this Report to characteristics of comparable court cases.

1. Cost

Commentators express conflicting views about the costs of arbitration. A commonly stated view is that arbitration is cheaper than litigation.[5] Arbitration often is less formal than litigation, with less discovery and less motions practice.[6] Awards are subject to limited court review, which may reduce the likelihood of a challenge to an award.[7] On this view, the costs of arbitrating a dispute may be lower than the costs of litigating a comparable dispute. If so, arbitration may be a more accessible forum for consumers to resolve disputes.[8]

An alternative view is that arbitration is too expensive – that the high costs of arbitration preclude consumers from bringing claims.[9] A report from Public Citizen issued in 2000 asserted that arbitration is substantially more expensive than litigation, citing the need to pay the arbitrator and any provider of administrative services for the arbitration.[10] By comparison, of course, parties do not pay judges (except through their tax dollars) and pay solely a flat, low filing fee to file suit in court.[11] Under this view, the high upfront costs make arbitration a less accessible forum for consumers.[12]

Most of the empirical evidence on arbitration costs addresses the upfront costs of arbitration and does not consider costs such as attorneys' fees, internal expenses, and opportunity costs associated with resolving the dispute itself.[13] The Public Citizen report on the *Costs of*

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[5] 153 CONG. REC. S4614 (daily ed. Apr. 17, 2007) (statement of Sen. Sessions) ("Arbitration is one of the most cost-effective means of resolving disputes."); Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, *in* HOW ADR WORKS 915, 926 (Norman Brand ed. 2002) ("The greatest strength of arbitration is that the average person can afford it.").

[6] Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90.

[7] *Id.*

[8] *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) ("arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation"); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.").

[9] Public Citizen, Arbitration More Expensive than Court (May 1, 2002), http://www.citizen.org/pressroom/print_release.cfm?ID=1098 (statement of Joan Claybrook) ("[F]or people who are victims of consumer rip-offs and workplace injustices, arbitration costs much more than litigation – so much more that it becomes impossible to vindicate your rights."); *see also* Reginald Alleyne, *Arbitrator's Fees: The Dagger in the Heart of Mandatory Arbitration for Statutory Discrimination Claims*, 6 U PA. J. LAB. & EMPL. L. 1, 30 (2003); Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133, 161 (2004); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 781 (2002).

[10] *E.g.*, Public Citizen, Costs of Arbitration 1 (2002) ("The cost to a plaintiff of initiating an arbitration is almost always higher than the cost of instituting a lawsuit. Our comparison of court fees to the fees charged by the three primary arbitration provider organizations demonstrates that *forum costs*—the costs charged by the tribunal that will decide the dispute—can be up to five thousand percent higher in arbitration than in court litigation.").

[11] Christopher R. *Drahozal, Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 736-37 (2006).

[12] For a reconciliation of these competing views about arbitration costs, see *id.* at 734-35.

[13] For empirical evidence on business cost savings from arbitration (including attorneys' fees in handling the

Arbitration presented a series of case studies together with an analysis of the costs of arbitrating and litigating four hypothetical cases, in reaching its conclusion that arbitration costs "have a deterrent effect, often preventing a claimant from even filing a case."[14]

By comparison, Mark Fellows reported that consumer claimants in National Arbitration Forum ("NAF") arbitrations in 2003-2004 paid arbitration fees averaging $46.63 while business claimants paid arbitration fees averaging $149.50.[15] Similarly, Navigant Consulting, relying on NAF data from January 2003 through March 2007, concluded that consumers paid no fee in 99.3% of the cases (presumably those brought by businesses) and a median fee of $75 in the remaining 246 cases.[16] Ernst & Young reported in 2004 that the average fee paid in consumer "banking" arbitrations administered by the American Arbitration Association ("AAA") was $1935, but the data were incomplete as to how the fees were allocated between consumers and businesses.[17] A study by the California Dispute Resolution Institute ("CDRI"), looking at data disclosed by six arbitration providers from January 2003 to February 2004, found a mean arbitrator's fee of $2256 and a median arbitration fee of $870.[18] But the data used by the CDRI were incomplete, did not separate out the fees paid by consumers from the fees paid by businesses,[19] and included both consumer and employment cases.[20]

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cases), see the studies discussed in Drahozal, *supra* note 2, at 829-30; *see also* Herbert M. Kritzer & Jill K. Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the American Arbitration Association and the Courts*, 8 JUSTICE SYS. J. 6, 17 (1983) (studying fees received by attorneys in sample of AAA commercial arbitrations and uninsured motorist arbitrations, state court cases, and federal court cases) ("The AAA is the least expensive for small cases, and most expensive for the remaining three categories.... At the same time, in a sense, one gets 'more' for the money in terms of the amount of institutional processing, with the AAA, because a much larger proportion of cases go through the 'complete process,' including a hearing and an award.").

[14] Public Citizen, *supra* note 10, at 1, 6-51.

[15] Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL, July 2006, at 32.

[16] Jeff Nielsen et al., Navigant Consulting, National Arbitration Forum: California Consumer Arbitration Data 3 (July 11, 2008), *available at* http://www.instituteforlegalreform.com/index.php?option=com_ilr_docs&issue_code=ADR&doc_type=STU.

[17] Ernst & Young, Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases 16-17, App. A (2004), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf.

[18] California Dispute Resolution Institute, Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure 21 (Aug. 2004), *available at* http://www.mediate.com/cdri/cdri_print_aug_6.pdf. The six providers were the AAA, ADR Services, Arbitration Works, ARC Consumer Arbitrations, JAMS, and Judicate West. *Id.* at 14.

[19] *Id.* at 18 ("In general, inconsistencies, ambiguities and the lack of reported data limit this study's utility for the purposes of informing policy."); *see also* Lisa Blomgren Bingham et al., Arbitration Data Disclosure in California: What We Have and What We Need 20 (Apr. 15, 2005) (concluding that "the private arbitration service providers in question are not providing the information that is critical to an analysis of how the consumer party fare[s] in commercial arbitration.").

[20] California Dispute Resolution Institute, *supra* note 18, at 17, 22 Figure 1.

2. Speed

Arbitration also is commonly perceived to be a faster dispute resolution process than litigation.[21] The reasons are at least twofold. First, again, arbitration is less formal than litigation, with less discovery and fewer motions, and appellate review of awards is limited.[22] Second, arbitration may have less of a queue than litigation – parties can choose an arbitrator who does not have a backlog of cases, and so they may not have to wait behind other parties to have their dispute resolved.[23]

The empirical evidence shows consumer arbitration to be an expeditious process.[24] In 2007, the AAA reported that on average its consumer cases took four months to resolve on the basis of documents and six months to resolve on the basis of in-person hearings.[25] For 2006, the numbers were similar: an average of 3.8 months for document only cases and 7.4 months for cases decided after in-person hearings.[26] Mark Fellows found that the NAF's average disposition time in 2003-2004 for consumer claimants was 4.35 months and for business claimants was 5.60 months.[27] The CDRI study of six arbitration providers from January 2003 to February 2004 found a mean disposition time of 116 days and a median disposition time of 104 days,[28] although as noted above the data are incomplete and problematic.[29]

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[21] H.R. Rep. No. 97-542, at 13 (1982) ("The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules ...."), *quoted in* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995).

[22] *Id.*

[23] Diane P. Wood, *Snapshots from the Seventh Circuit: Continuity and Change, 1966-2007*, 2008 WIS. L. REV. 1, 6 ("to the extent that litigants wish to avoid these queues, they are opting out of the judicial system altogether and turning to arbitration and mediation"); Richard A. Posner, *The Cost of Rights: Implications for Central and Eastern Europe – And for the United States*, 32 TULSA L.J. 1, 15 (1996) ("The longer the queue, the greater the incentive of the parties to a dispute to substitute arbitration or other nonjudicial methods of dispute resolution for the courts.").

[24] *See* Kritzer & Anderson, *supra* note 13, at 17 (finding that "the American Arbitration Association offers the possibility of *relatively* fast *adjudication* (compared to the relatively slow nonadjudication in the courts)").

[25] American Arbitration Association, Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007, *available at* http://www.adr.org/si.asp?id=5027 [hereinafter AAA, 2007 Caseload Analysis].

[26] Statement of the American Arbitration Association, Annex D, *in* S. 1782, The Arbitration Fairness Act of 2007: Hearing Before the Constitution Subcomm. of the Senate Comm. on the Judiciary, 110th Cong., 1st Sess., at 135 (Dec. 12, 2007) [hereinafter, AAA, 2006 Caseload Analysis].

[27] Fellows, *supra* note 15, at 32.

[28] California Dispute Resolution Institute, *supra* note 18, at 19. Actually, the CDRI data on time of disposition is more complete than on many other variables, covering 1559 of 2175 cases. *Id.*

[29] *See supra* text accompanying notes 19-20.

3. Outcomes

An important subject of empirical research is how consumers fare in arbitration. Several ways to measure outcomes have been used – the win-rate; the amount of damages recovered; and the amount of damages recovered as a percentage of the amount claimed. Two points of particular interest are how arbitration outcomes compare to outcomes in court, which is beyond the scope of this Report; and whether outcomes are biased in favor of repeat players.

Win-Rates. Studies have most commonly looked at the win-rate in arbitration – i.e., the percentage of cases won by the consumer or the business. But the absolute win-rate itself is not a particularly meaningful number. Instead, the absolute win-rate must be compared to some sort of baseline. Some commentators have focused on fifty percent as that baseline;[30] others have suggested that an extremely high business win-rate shows a process that is unfair to consumers.[31] Neither view necessarily is correct.

At least two possible approaches are available for coming up with a baseline for comparison. One possible approach is to use a theoretical model of case settlement, which generates predictions about expected outcomes.[32] Some models lead to predictions of a fifty percent win-rate, providing some support for using that figure as a baseline.[33] Other models, based on different assumptions, lead to predictions of extremely high (or low, depending on the perspective) win-rates.[34]

A second approach is to compare outcomes in arbitration to outcomes in litigation. A business win-rate of over ninety percent in arbitration does not show arbitration is unfair if the win-rate for comparable cases in court is similar.[35] But doing a proper comparison can be

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[30] Rutledge, *Whither Arbitration?*, *supra* note 2, at 559-60 ("the only reported data showing a win-rate of less than 50 percent is William Howard's study of securities arbitration"); Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration 16 (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf [hereinafter Public Citizen, Arbitration Debate Trap] ("In fact, at least five other studies have found win rates of less than 50 percent for individual claimants").

[31] Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers 13 (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf [hereinafter Public Citizen, Arbitration Trap] (referring to "truly staggering success rate" of businesses in NAF arbitrations).

[32] Joel Waldfogel, *Selection of Cases for Trial*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 419, 419 (Peter Newman ed., 1998) ("any model of the settlement decision is also at least implicitly a model of the selection of cases for trial").

[33] *E.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17-20 (1984).

[34] *Id.* at 24-29; *see also, e.g.*, Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187 (1993); Luke Froeb, *Adverse Selection of Cases for Trial*, 13 INT'L REV. L. & ECON. 317 (1993).

[35] *See* Peter B. Rutledge, Arbitration -- A Good Deal for Consumers: A Response to Public Citizen 11 (April 2008) (report prepared for and released by the U.S. Chamber Institute for Legal Reform), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091 ("Studies of debt collection actions in major cities reveal that the lender typically wins between 96% and 99% of the time, right in line with the lender win-rate data cited in the Public Citizen Report.").

difficult.[36] Certainly, care must be taken to ensure that the types of cases are reasonably comparable, as well as to control for other differences between arbitration and litigation, such as the much greater use of summary judgment and other dispositive motions in litigation.[37] (In this Report, we will be presenting the raw win-rate and other outcome numbers, reserving the comparison to litigation for a future Report.)

Studies of win-rates in consumer arbitrations show various degrees of consumer and business success. Two studies by the AAA of its consumer arbitration caseload in 2006 and 2007 found that consumer plaintiffs won 48% of awarded cases they brought.[38] The 2007 study found that business claimants won 74% of awarded cases they brought.[39]

Most of the data on outcomes in consumer arbitration have come from studies of the caseload of the NAF. Unusual among the leading arbitration providers,[40] NAF's consumer caseload consists almost exclusively of debt collection actions, the majority brought by a single credit card company.[41] Although there is some disagreement on how properly to treat cases dismissed before an award,[42] studies consistently show a high win-rate for business claimants in NAF arbitrations, ranging from 67.9% to over 99%.[43] By comparison, the win-rate for consumer claimants before the NAF is much higher than the win-rate for consumer respondents, although

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[36] *E.g.*, W. Mark C. Weidemaier, *From Court Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J.L. REF. 843, 852-56 (2008); Stephen J. Ware, *The Effects of* Gilmer*: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 755-56 (2001).

[37] Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, DISP. RESOL. MAG., Fall 1999, at 23, 24; Weidemaier, *supra* note 36, at 853.

[38] AAA, 2007 Caseload Analysis, *supra* note 25, at 1; AAA, 2006 Caseload Analysis, *supra* note 26, at 135.

[39] AAA, 2007 Caseload Analysis, *supra* note 25, at 1.

[40] By comparison, see the AAA consumer caseload described *infra* Part IV(1).A.1. *See also* W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 674 (2007) (reporting that 98.7% of JAMS consumer arbitrations from 2003-2006 were brought by the consumer as claimant, as compared to 0.4% of NAF consumer arbitrations during the same period).

[41] Public Citizen, Arbitration Trap, *supra* note 31, at 15 ("all but 15 of the 33,948 cases are labeled 'collection' cases"); *id*. at 17 ("MBNA's NAF arbitration cases, including those filed by debt buyers who purchased MBNA accounts, totaled 18,101 and represented 53.3 percent of the NAF California cases.").

[42] *Compare* Nielsen et al., *supra* note 16, at 1 (including dismissals with cases in which consumers prevailed outright) *with* Public Citizen, Arbitration Debate Trap, *supra* note 30, at 10 (arguing that dismissals before an arbitrator is appointed "can hardly be used as evidence of the fairness of NAF arbitration," and that dismissals after an arbitrator is appointed might have resulted from "any number of manipulative practices" and should not be counted as consumer wins).

[43] Fellows, *supra* note 15, at 32 (business claimants "prevail in 77.7% of the cases that reach a decision"); Nielsen et al., *supra* note 16, at 1 (businesses prevailed in 67.9% of NAF arbitrations either heard by an arbitrator or dismissed); Public Citizen, Arbitration Trap, *supra* note 31, at 15 ("In 19,294 cases in which an arbitrator was appointed, the business won in 18,091 (or 93.8%)"); Answers and Objections of First USA Bank, N.A. to Plaintiff's Second Set of Interrogatories, Ex. 1, Bownes v. First U.S.A. Bank, N.A. et al., Civ. Action No. 99-2479-PR (Ala. Circuit Ct. 2000), *available* at http://www.tlpj.org/briefs/McQuillan%20exhibits%2016-19%20(300dpi).pdf (last visited Dec. 10, 2008) [hereinafter First USA Interrogatory Answers] (bank prevailed in 19,618 NAF arbitrations, while credit cardholder prevailed in 87).

again there is disagreement over the actual win-rate (with reports ranging from 37.2% to 65.5%).[44] Moreover, consumers bring only a handful of NAF arbitrations each year.[45]

Monetary Recoveries. A frequent criticism of studies of win-rates in arbitration (and litigation) is that the usual measure of party wins is too simplistic. In many studies, a claimant "win" is defined to include any case in which the claimant was awarded some amount of money, while a respondent "win" is defined to include only cases in which the respondent is held liable for zero damages.[46] Such an approach may understate the number of respondent wins and overstate the number of claimant wins because a claimant with a strong claim for a large amount is treated as "winning" even when it is awarded an amount that is far less than its claim is worth.[47]

But it is difficult to value claims for purposes of empirical research. Ordinarily, researchers do not have complete information about the claims, and, even if they did, it would be extremely difficult to evaluate objectively how much a claim is worth at the time it is brought. As a result, some studies have used the amount sought by the claimant as a proxy for the value of the claim, calculating the amount recovered as a percentage of the amount claimed.[48]

Even that approach is difficult to implement. First, plaintiffs in court often do not demand a specific amount in any court filing; they may simply plead that the minimum jurisdictional amount is satisfied. Arbitration would seem to be less subject to this problem because arbitration fees typically are based on the amount of compensatory damages sought.[49] But even in arbitration, as discussed below, determining a single dollar amount claimed can be difficult.[50]

Second, in both settings, merely because a party claims an amount does not mean that the claim is worth that amount. Plaintiffs may seek amounts of damages that they have only a small likelihood of recovering.[51] The fact that they do not recover such amounts thus can mean the process is working properly, not that the process failed.

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[44] Ernst & Young, *supra* note 17, at 8 (win-rate for consumer claimants of 54.6%); Fellows, *supra* note 15, at 32 (win-rate for consumer claimants of 65.5%); Public Citizen, Arbitration Debate Trap, *supra* note 30, at 10 (win-rate for consumer claimants of 37.2%).

[45] Public Citizen, Arbitration Trap, *supra* note 31, at 15 (reporting that 0.35% of all NAF arbitrations involved consumer claimants).

[46] *E.g.*, AAA, 2006 Caseload Analysis, *supra* note 26, at 135.

[47] Rutledge, *Whither Arbitration?*, *supra* note 2, at 557. That said, as discussed *infra* text accompanying notes 49-56, the fact that the claimant recovered a small percentage of the amount claimed does not necessarily mean that the outcome was somehow incorrect. *See* Public Citizen, Arbitration Debate Trap, *supra* note 30, at 12 (asserting that definition of claimant "win" is "unreliable" when it classifies a "claimant who sought $50,000 and received only $5" as a win for claimant). Whether that is so depends not merely on the amount of the claim, but also on the strength of the claim.

[48] *E.g.*, Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998).

[49] *See infra* Part II.A.

[50] *See infra* Part IV(1).A.2.

[51] This is the case even if the plaintiff has a meritorious claim because some elements of the plaintiff's damages recovery may be highly uncertain.

Third, the incentives of the parties to claim damages differ between courts and arbitration. In court, subject to credibility constraints, the plaintiff's incentive is to claim higher rather than lower damages amounts. Court filing fees are a flat amount that do not increase with the amount claimed.[52] Meanwhile, claiming higher damages amounts may increase the amount the plaintiff recovers. Laboratory studies have found that the amount sought by a plaintiff – even if ridiculously large – can act as an anchor and increase the amount of damages awarded by a mock jury.[53] By comparison, because of the way arbitration fees are structured, the claimant in arbitration often has to pay more to claim more.[54] As a result, amounts claimed in arbitration may be more realistic than amounts claimed in court.[55] If so, this complicates comparisons between arbitration and litigation, because a higher percentage recovery in arbitration may be due to more realistic amounts claimed rather than any difference in the amount awarded.[56]

A few studies have examined amounts awarded in consumer arbitrations.[57] The CDRI found that the mean amount awarded in a sample of California cases administered by six different providers (including the AAA) was $33,112, while the median award was $7615.[58] But data were available on the amount awarded in only 540 of the 2175 cases in the sample, "limit[ing] this study's utility for purposes of informing policy."[59]

Navigant Consulting found that the arbitrator reduced the amount of the business's claim in 16.4% of the NAF arbitrations studied, with a median reduction of $636 and a median percentage reduction of 8.6%.[60] In the remaining 83.6% of the cases, presumably the business was awarded the full amount claimed. According to data presented by Public Citizen, NAF arbitrators who decided more than 100 cases in California awarded businesses 92.4% of the total amount they sought.[61] Note that Public Citizen apparently included amounts sought in cases in which the consumer prevailed outright in the total amount sought.[62]

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[52] Drahozal, *supra* note 11, at 736-37.

[53] *E.g.*, Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 526-27 (1996). *See generally* Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 110-11 & n.28 (2004) (describing studies).

[54] Drahozal, *supra* note 53, at 129.

[55] *Id*. In addition, parties may be subject to countervailing (or reinforcing) incentives to the extent the success rate in arbitration varies depending on the amount sought.

[56] *See* CHRISTOPHER R. DRAHOZAL, COMMERCIAL ARBITRATION: CASES AND PROBLEMS 7 (2d ed. 2006).

[57] By comparison, many more studies of employment arbitration report the amounts of awards, including some that report the amount awarded as a percentage of the amount claimed. *See infra* Appendix 2.

[58] California Dispute Resolution Institute, *supra* note 18, at 20.

[59] *Id.* at 18.

[60] Nielsen et al., *supra* note 16, at 3.

[61] Public Citizen, Arbitration Trap, *supra* note 31, at 16 (those arbitrators awarded businesses $185,479,341 of $200,736,495 sought).

[62] Navigant used the same dataset as Public Citizen, *see* Nielsen et al., *supra* note 16, at 1, and its reported reductions otherwise would be much too small relative to the amounts of the awards.

Repeat-Player Effect. Unlike judges, arbitrators get paid only when selected to serve on a case. This economic reality of arbitration has given rise to fears of "repeat-arbitrator bias" – that arbitrators will decide cases in favor of the repeat player in arbitration, which is the party more likely to be in a position to appoint the arbitrator to serve again.[63] In consumer arbitration, consumers are unlikely to be repeat players (although their attorneys may be).[64] Thus, the fear is that arbitrators will tend to favor businesses in the hopes of being appointed more often in future cases. More broadly, commentators have expressed concerns about what might be called "repeat-player bias" (rather than repeat-arbitrator bias) – that businesses, through their control of process of dispute system design, will structure the dispute resolution process in their favor.[65]

Several factors may reduce the likelihood or consequences of repeat-arbitrator or repeat-player bias. First, arbitration providers, as well as individual arbitrators, may seek to maintain a reputation for fair and unbiased decision making.[66] Such reputational constraints may reduce the risk that repeat-arbitrator or repeat-player bias will occur. Second, even if arbitrators (and arbitration providers) have an incentive to make decisions that businesses want, it is not necessarily the case that those decisions will be unfavorable to consumers. As Gordon Tullock explains, while "a bias toward the retailer might be the arbitrator's profit-maximizing course of action," it might not be. Instead, "the retailer might be interested in his general reputation and want an arbitrator who was either impartial or, for that matter, actually procustomer."[67] Tullock cites return desks at retailers, which seek to help resolve disputes between businesses and their customers, as an illustration. Even though the workers at return desks are employed by the business, "their usual reaction is not one of making a fair judicial decision between themselves and [the customer] but of giving [the customer] every benefit of the doubt."[68]

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[63] *E.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1256 (2001); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60-61; *see also* Public Citizen, Arbitration Debate Trap, *supra* note 30, at 24-26. In addition to concerns that arbitrators might be biased in favor of repeat businesses, the same argument is directed at arbitration providers. *E.g.*, Arbitration Fairness Act, H.R. 1020, 111th Cong. § 2(4) (2009) (finding that "[p]rivate 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] Budnitz, *supra* note 9, at 138 n.22; Carrie Menkel-Meadow, *Ethical Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 956 (2002). *Compare* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 566 (2001) ("[T]he real repeat players in arbitration are not the parties themselves but the lawyers involved.") *with* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189, 198-99 (1997) ("There is reason to believe that most individual members of the plaintiffs' bar may never successfully emerge as repeat players in employment arbitration.").

[65] Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221, 231-39 (2004); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 889-92 (2002) [hereinafter Bingham, *Self-Determination*].

[66] Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 769-70; *see also* Weidemaier, *supra* note 40, at 661-62 (arguing that arbitration providers may "confer legitimacy" by "adopt[ing] or enforc[ing] due process or 'fairness' rules").

[67] GORDON TULLOCK, TRIALS ON TRIAL: THE PURE THEORY OF LEGAL PROCEDURE 127-128 (1980).

[68] *Id.*

In the consumer context, Public Citizen has argued that debt collection arbitration before the NAF is affected by repeat-arbitrator bias. It cites both anecdotal reports[69] and evidence that the arbitrators most commonly appointed by the NAF are more likely to rule in favor of business claimants than other arbitrators.[70]

Other studies, examining outcomes of employment arbitration (the one exception where this Report discusses such studies), have not found evidence of repeat-player bias, although several have identified a "repeat-player effect": consumers win less often against repeat businesses – businesses that arbitrate on a repeat basis – than against non-repeat businesses. This repeat-player effect might be due to repeat-arbitrator or repeat-player bias, but it might also be due to better screening of cases by repeat businesses, who are more used to dealing with disputes than non-repeat businesses.

In a study of 270 AAA employment arbitration awards from 1993 and 1994, Lisa Bingham found that employees won in 63% of all awards but only 16% of awards against repeat employers.[71] Similarly, employees recovered 48% of their amount claimed against non-repeat employers but only 11% of their amount claimed against repeat employers.[72] Bingham's results from a subsequent study of 203 AAA employment awards from 1993 to 1995 were similar.[73] But Bingham's evidence indicated that the repeat-player effect was a result, not of repeat-arbitrator or repeat-player bias, but of differences in the cases arbitrated.[74] The same is true of yet another study by Bingham, this one co-authored with Shimon Sarraf, which examined AAA employment awards from 1996 and 1997.[75] Bingham and Sarraf found an employee win-rate of 29% against repeat employers as compared to an employee win-rate of 62% against non-repeat employers. But they found no evidence this was due to repeat-arbitrator or repeat-player bias; rather, the repeat-player effect was likely the result of case screening by employers with in-house dispute

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[69] Public Citizen, Arbitration Trap, *supra* note 31, at 30-32; Public Citizen, Arbitration Debate Trap, *supra* note 30, at 24-25.

[70] Public Citizen, Arbitration Trap, *supra* note 31, at 16.

[71] Bingham, *supra* note 64, at 189-90 (defining repeat employer as one involved in more than one case in her sample).

[72] *Id.* at 213. For discussions of methodological issues in Bingham's studies, see Sherwyn et al., *supra* note 2, at 1570.

[73] Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, IRRA 50TH ANN. PROC. 33, 38-39 (1998) [hereinafter Bingham, *Unequal Bargaining Power*]; Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards*, 29 MCGEORGE L. REV. 223, 223 (1998); *see also* Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, N.Z. J. INDUS. REL., June 1998, at 5, 15 (reporting an employee win-rate of 25.0% in cases with a repeat arbitrator as compared to an employee win-rate of 55.5% in cases with a non-repeat arbitrator).

[74] Bingham, *Unequal Bargaining Power*, *supra* note 73, at 39-40. Bingham found that "repeat player employers get to arbitration based on an implied contract stemming from a personnel manual or employee handbook," cases in which the employee "may have a substantively weaker legal claim." *Id.*

[75] Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Differenc*e, *in* ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 320-28 (Samuel Estreicher & David Sherwyn eds. 2004); *see also* Bingham, *Self-Determination*, *supra* note 65, at 899-901.

resolution programs.[76] Nonetheless, Bingham's studies continue (incorrectly) to be cited as evidence of repeat-arbitrator bias.[77]

Elizabeth Hill found what she described as an "appellate effect" in her study of 200 AAA employment awards from 1999 to 2000.[78] Of the 34 cases with repeat employers in her sample, 25 (or 74%) involved employers with an in-house dispute resolution program. The employee win-rate in those cases was substantially below the employee win-rate in the other cases in the sample, and, indeed, substantially below the win-rate in cases involving the other repeat employers.[79] (The differences were not statistically significant, but her sample size was too small for reliable statistical testing.[80]) Based on her data, Hill attributes the repeat-player effect to "the selection processes of larger employers' in-house dispute resolution programs," rather than "merely the by-product of larger employers' repeat appearances at arbitration."[81] Hill found no evidence of repeat-arbitrator bias, as there were only two cases in her sample involving the same arbitrator and employer.[82]

Most recently, Colvin examined a sample of 836 awards in employment arbitrations administered by the AAA from January 1, 2003 to September 30, 2006.[83] Because the data were from the AAA's disclosures as required by California law, the cases involved arbitrations "based

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[76] Bingham & Sarraf, *supra* note 75, at 323 tbl. 2; *see* Sherwyn et al., *supra* note 2, at 1571 (describing Bingham & Sarraf's results and concluding that "[t]hese results suggest that the availability of an internal review process and the employer's experience with employment cases likely explains the repeat player effect. Bingham found no support for arbitrator bias.").

[77] David S. Udell & Rebekah Diller, *Access to the Courts: An Essay for the Georgetown University Law Center Conference on the Independence of the Courts*, 95 GEO. L.J. 1127, 1152 (2007) ("in many contexts, arbitrators have been shown to develop a bias in favor of so-called repeat players") (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189 (1997)).

[78] Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 807-808 (2003) [hereinafter Hill, *Due Process*]; Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May/July 2003, at 9 [hereinafter Hill, *Fair Forum*].

[79] Hill, *Due Process*, *supra* note 78, at 817; Hill, *Fair Forum*, *supra* note 78, at 15. Rather than reporting an employee win-rate, Hill reports an employer win-loss ratio – dividing the number of employer wins by the number of employer losses. For repeat employers with an in-house dispute resolution program, the employer win-loss ratio was 3.2; for repeat employers without an in-house dispute resolution program, the employer win-loss ratio was 1.25. For all employers, the employer win-loss ratio was 1.3. Hill, *Due Process*, *supra* note 78, at 817; Hill, *Fair Forum*, *supra* note 78, at 15.

[80] Colvin, *supra* note 2, at 428-29 ("Hill did not provide any tests of the statistical significance of the difference between the in-house program and no in-house program groups; however a simple chi-squared test on the results presented indicates that the difference is not statistically significant."); *see also* Sherwyn et al., *supra* note 2, at 1572 ("Of course, samples of thirty-four, twenty-five, and nine are too small to yield reliable conclusions.").

[81] Hill, *Fair Forum*, *supra* note 78, at 15; *see also* Hill, *Due Process*, *supra* note 78, at 817 (same).

[82] Hill, *Due Process*, *supra* note 78, at 814-15; Hill, *Fair Forum*, *supra* note 78, at 15. Hill also argues that "the total number of arbitrators on the AAA panel in contrast to the annual number of arbitrations shows that it is unlikely that any individual arbitrator would have appeared with sufficient frequency to seek to reward 'repeat player' employers," pointing out that "[t]here were 560 arbitrators on the AAA's employment arbitration panel in 1999-2000" and "only 432 awards rendered in 1999 and 410 rendered in 2000." Hill, *Due Process*, *supra* note 78, at 815.

[83] Colvin, *supra* note 2, at 408.

on employer promulgated agreements," rather than "individually negotiated contracts."[84] Colvin found an employee win-rate of 13.9% in cases against repeat employers as compared to an employee win-rate of 32.0% in cases against non-repeat employers, a statistically significant difference.[85] The employee win-rate in cases involving a repeat employer appearing before the same arbitrator (a "repeat employer-arbitrator pair" was 11.3% as compared to an employee win-rate of 21.2% in cases not involving a repeat employer-arbitrator pair.[86] Colvin then limited the sample to cases with repeat employers. In those cases, the employee win-rate was 11.3% in cases with a repeat-employer arbitrator pair and 14.7% in the rest of the cases. But the difference was not statistically significant.[87]

Overall, then, the empirical evidence tends to support the existence of a repeat-player effect, but suggests that the effect may be due to case screening by repeat businesses rather than repeat-arbitrator or repeat-player bias.

B. Overview of Arbitration Due Process Protocols

Each of the major arbitration providers has its own due process protocol or protocols.[88] The AAA adheres to the Employment Due Process Protocol, the Consumer Due Process Protocol, and the Health Care Due Process Protocol. JAMS has set out Minimum Standards of Procedural Fairness for both employment arbitration and consumer arbitration. NAF has promulgated an Arbitration Bill of Rights. This Part describes the history of due process protocols, summarizes their contents, and discusses several criticisms of the protocols.

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84 *Id.* at 419.

85 *Id.* at 430.

86 *Id*.

87 *Id.* at 430-31.

88 National Consumer Disputes Advisory Committee, Consumer Due Process Protocol (April 17, 1998), *available at* www.adr.org/sp.asp?id=22019 [hereinafter Consumer Due Process Protocol]; *see also* Task Force on Alternative Dispute Resolution in Employment, Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (May 9, 1995), *available at* www.adr.org/sp.asp?id=28535 [hereinafter Employment Due Process Protocol]; Commission on Health Care Dispute Resolution, Health Care Due Process Protocol (July 27, 1998), *available at* www.adr.org/sp.asp?id=28633 [hereinafter Health Care Due Process Protocol]; JAMS, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness (revised Jan. 1, 2007), *available at* www.jamsadr.com/rules/consumer_min_std.asp [hereinafter JAMS Consumer Minimum Standards]; JAMS, JAMS Policy on Employment Arbitration, Minimum Standards of Procedural Fairness (revised Feb. 19, 2005), *available at* www.jamsadr.com/rules/employment_Arbitration_min_stds.asp [hereinafter JAMS Employment Minimum Standards]; National Arbitration Forum, Arbitration Bill of Rights (2007), *available at* www.adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf [hereinafter NAF Arbitration Bill of Rights].

1. History of Due Process Protocols

The origins of the due process protocols have been described in detail by other authors.[89] This Section summarizes those origins briefly, focusing on the Employment Due Process Protocol and the Consumer Due Process Protocol and their implementation by the AAA.

The due process protocols trace back to the work of the "Dunlop Commission," which was established in 1993 to "investigate the current state of worker-management relations in the United States."[90] Among the issues considered by the Commission was whether to enhance the ability of the parties themselves to resolve workplace disputes, rather than relying on the courts and regulators.[91] Accordingly, the Commission examined the use of employment arbitration, finding that while some employers adopted "serious and fair" arbitration programs,[92] others established programs that did not meet accepted standards of "fairness."[93]

Thereafter, the Chair of the Commission, John T. Dunlop, requested Arnold M. Zack, president of the National Academy of Arbitrators, to develop a list of private due process standards that would "extend the negotiated due process protections of union management arbitration to this expanding non-union setting."[94] Zack ended up as co-chair of the Task Force on Alternative Dispute Resolution in Employment, which drafted the Employment Due Process Protocol.[95] The members of the Task Force included representatives of an array of interest groups involved in employee-employer relations,[96] although the members made clear that "the protocol reflects their personal views and should not be construed as representing the policy of the designating organizations."[97] The Task Force issued the Employment Protocol in May 1995. Zack summarized the Task Force's view of its work as follows: "All the Task Force members will acknowledge that the Protocol does not contain all the protections and assurances that each of us as individuals would have liked to include, but the achievement of agreement on the components of the document did mark a substantial step forward in providing due process protections in procedures where many such protections had been lacking."[98]

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[89] In particular, see Margaret M. Harding, *The Limits of Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 373-416 (2004). For a personal account of the origins of the Employment Due Process Protocol, see Arnold M. Zack, *The Due Process Protocol: Getting There and Getting Over It*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 257, 257-59 (2007).

[90] COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT-FINDING REPORT xi (1994).

[91] *Id.*

[92] THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 51 (1995).

[93] *Id.* at 73.

[94] Zack, *supra* note 89, at 258.

[95] Employment Due Process Protocol, *supra* note 88.

[96] The Task Force included representatives of the AAA, several committees of the American Bar Association, the National Academy of Arbitrators, the Society of Professionals in Dispute Resolution, the National Employment Lawyers Association, Federal Mediation & Conciliation, and the Workplace Rights Project of the American Civil Liberties Union. *Id.*

[97] *Id.*

[98] Zack, *supra* note 89, at 260. For example, the Task Force members agreed to disagree on whether pre-

In July 1995, the AAA established a pilot program in California to administer arbitrations using new rules incorporating the Employment Due Process Protocol.[99] Based on its experience in California, and drawing on a national Employment Conclave it sponsored in September 1995,[100] the AAA promulgated new Employment Arbitration Rules (effective June 1996) reflecting the principles of the Employment Protocol.[101] The AAA later announced that it would refuse to administer employment arbitrations if the plan failed materially to comply with the Protocol; the AAA also established a process by which employers could obtain advance review of their dispute resolution programs for protocol compliance.[102]

The Employment Due Process Protocol in turn served as the "primary model" for the Consumer Due Process Protocol.[103] In 1997, the AAA established the National Consumer Disputes Advisory Committee, which like the Employment Task Force consisted of an array of individuals from interested groups.[104] In May 1998, the Committee issued the Consumer Due Process Protocol, which is described in more detail below.[105] Thomas J. Stipanowich, the Academic Reporter for the Protocol, explained that although the AAA established the Advisory Committee, its "representatives did not play an active role in the Committee's deliberations or drafting process."[106] The AAA thereafter incorporated the principles of the Consumer Protocol into its Consumer Arbitration Rules, as well as announcing (as with the Employment Protocol) that it would refuse to administer cases that materially failed to comply.[107]

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dispute arbitration clauses should be enforceable in employment contracts. *See infra* text accompanying note 120.

[99] American Arbitration Association, Fair Play: Perspectives from American Arbitration Association on Consumer and Employment Arbitration 12 (Jan. 2003) [hereinafter AAA, Fair Play].

[100] Zack, *supra* note 89, at 260-61 ("The critical first step in the effort toward recognition of the validity of the proposals inherent in the Protocol was the decision of William Slate, President of AAA, to convene a Conclave on Employment Arbitration in Washington, D.C., on September 22-23, 1995.").

[101] AAA, Fair Play, *supra* note 99, at 13. JAMS likewise adopted the Employment Protocol. *JAMS/Endispute Issues Minimum Standards for Employment Arbitration*, 6 WORLD ARB. & MED. REP. 50, 50 (1995).

Some have suggested that another factor playing a role in both providers' adoption of the Employment Due Process Protocol was a threatened boycott by the National Employment Lawyers Association. *E.g.*, Harding, *supra* note 89, at 403 n.193; Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, A.B.A. J., Aug. 1996, at 58, 58-59 ("[The Employment Protocol] largely languished until NELA issued an ultimatum to AAA and JAMS."); *see National Employment Lawyers Association Will Boycott ADR Providers*, 6 WORLD ARB. & MED. REP. 240, 240 (1995); *JAMS/Endispute Clarifies Position on Mandatory Employment Arbitration*, 7 WORLD ARB. & MED. REP. 512, 512 (1996).

[102] AAA, Fair Play, *supra* note 99, at 13; *see also infra* Part II.B.

[103] Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 907.

[104] The Task Force included representatives of the AAA, the Federal Trade Commission, Freddie Mac, Fannie Mae, the American Association of Retired Persons, Consumer Action, Consumers Union, the American Council on Consumer Interests, the National Association of Consumer Agency Administrators, the National Association of Attorneys General, Duke University, two lawyers in private practice who formerly were attorneys for large corporations, as well as academics and a retired judge. National Consumer Disputes Advisory Committee, *Introduction: Genesis of the Advisory Committee*, *in* Consumer Due Process Protocol, *supra* note 88, at 46.

[105] *Id.*; *see infra* Part I.B.2.

[106] Stipanowich, *supra* note 103, at 896 n.383.

[107] AAA, Fair Play, *supra* note 99, at 14. The protocols have influenced the arbitration of consumer and employee disputes in other ways as well. Businesses have incorporated the provisions of the Protocols into their

Shortly after the Consumer Due Process Protocol was issued, the Commission on Health Care Dispute Resolution issued a Health Care Due Process Protocol as well.[108] As discussed below, the Health Care Due Process Protocol differs from the Employment and Consumer Protocols because it requires a post-dispute agreement to arbitrate health care disputes involving patients.[109] The AAA likewise has announced that it will follow the Health Care Protocol and refuse to administer cases arising out of pre-dispute agreements to arbitrate disputes within its scope.[110]

2. Content of the Protocols

The due process protocols of the leading arbitration providers are broadly consistent in content. This Section describes key features the protocols have in common as well as highlighting some important differences.[111]

First, several of the protocols set out an overarching principle of "fundamental fairness."[112] The protocols do not make clear whether "fundamental fairness" is an independent requirement that must be satisfied or whether complying with the other requirements of the protocols constitutes fundamental fairness. The Commentary to the Consumer Due Process Protocol suggests the latter, explaining that the other principles in the Protocol "identify specific minimum due process standards which embody the concept of fundamental fairness."[113] Likewise, the Commentary to the NAF Arbitration Bill of Rights explains how the NAF's process and outcomes are fair to all parties.[114] Nonetheless, the requirement of fundamental

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arbitration clauses. *E.g.*, First Victoria, TIB – The Independent Bankersbank Visa Gift Card Terms and Conditions (Associate Program) (2005), *available at* www.firstvictoria.com/PDFs/VISAGiftCard Terms.pdf ("All disputes between you and the Bank in connection with your Gift Card and these Terms and Conditions will be resolved by BINDING ARBITRATION in accordance with the Consumer Due Process Protocol ...."); AT&T, BellSouth Service Agreement for Residential Services in Alabama (2006), *available at* http://cpr.bellsouth.com/pdf/al/al_res_sa.pdf ("[I]n the event that the AAA determines that any provision of this Agreement does not comply with applicable standards stated in the AAA's Consumer Due Process Protocol, the standards in the protocol shall control."). Courts have relied on the protocols in evaluating the fairness of an arbitration clause. *See* Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 178-84 (2005) (discussing cases). Proposed federal legislation (not the Arbitration Fairness Act) has been modeled on the protocols. Fair Arbitration Act, S.1135, 110th Cong. (2007).

[108] The Commission was comprised of representatives of the AAA, ABA, and the American Medical Association. Health Care Due Process Protocol, *supra* note 88, at 3-4.

[109] *Id.* princ. 3.

[110] *See infra* Part IV(2).E.3.

[111] Appendix 3 contains excerpts from the Employment Due Process Protocol, the Consumer Due Process Protocol, the Health Care Due Process Protocol, as well as the JAMS Minimum Standards of Procedural Fairness for employment arbitration and for consumer arbitration, and the Arbitration Bill of Rights of the National Arbitration Forum. *See infra* Appendix 3.

[112] *E.g.*, Consumer Due Process Protocol, *supra* note 88, princ. 1.

[113] *Id.* Reporter's Comments to princ. 1.

[114] Commentary to NAF Arbitration Bill of Rights, *supra* note 88, princ. 1 ("Fairness for various classes of

fairness might be construed to have independent force as a constraint on procedures in consumer arbitrations.[115]

Second, several of the protocols address the contract formation process. The Consumer Due Process Protocol and the JAMS Minimum Standards for consumer arbitrations require businesses to provide consumers with "full and accurate information" on the arbitration program.[116] The NAF Arbitration Bill of Rights provides that "[i]nformation about arbitration should be reasonably accessible" to consumers "before they commit to an arbitration contract."[117] It adds that arbitration agreements "should conform to the legal principles of contract and applicable statutory law."[118]

As noted above, one important difference between the Health Care Due Process Protocol and the other due process protocols is that the Health Care Protocol precludes enforcement of pre-dispute arbitration agreements.[119] By comparison, the drafters of the Employment Due Process Protocol agreed to disagree on whether pre-dispute arbitration clauses should be enforceable; the drafters of the Consumer Due Process Protocol did likewise.[120] The effect of the disagreement was that both of those protocols permit enforcement of predispute arbitration agreements. The same is true for the JAMS Minimum Standards and the NAF Arbitration Bill of Rights.[121]

Third, the Consumer Due Process Protocol and the JAMS Minimum Standards of Procedural Fairness for consumer arbitrations permit claimants to bring claims in small claims court rather than arbitration, even if the claims are subject to a pre-dispute arbitration agreement.[122] The NAF Arbitration Bill of Rights contains no comparable provision, even though it applies to consumer arbitrations.[123] Neither the Employment Due Process Protocol nor the JAMS Minimum Standards for employment arbitrations contain opt outs for small claims court,[124] presumably due to the sorts of claims that typically arise out of the employment relationship.

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litigants can be evaluated by the standards of the process, and examined by its results.").

[115] And, in fact, the AAA does so in examining arbitration clauses for protocol compliance. *See infra* Part II.C.

[116] Consumer Due Process Protocol, *supra* note 88, princs. 2 & 11; JAMS Consumer Minimum Standards, *supra* note 88.

[117] NAF Arbitration Bill of Rights, *supra* note 88, princ.2.

[118] *Id.* princ. 5.

[119] Health Care Due Process Protocol, *supra* note 88, princ. 3.

[120] Consumer Due Process Protocol, *supra* note 88, Scope ("As was the case with the task force which developed the *Employment Due Process Protocol*, opinions regarding the appropriateness of binding pre-dispute arbitration agreements in consumer contracts were never fully reconciled.").

[121] JAMS Employment Minimum Standards, *supra* note 88, Introduction ("JAMS does not take a position on the enforceability of condition-of-employment arbitration clauses").

[122] Consumer Due Process Protocol, *supra* note 88, princ. 5; JAMS Consumer Minimum Standards, *supra* note 88, Standard 1(B).

[123] NAF Arbitration Bill of Rights, *supra* note 88.

[124] Employment Due Process Protocol, *supra* note 88; JAMS Employment Minimum Standards, *supra* note 88.

The JAMS Minimum Standards (for both consumer arbitrations and employment arbitrations) contain an additional limitation on the scope of arbitration agreements -- that arbitration agreements must be "reciprocally binding."[125] Under the JAMS Minimum Standards, an arbitration clause is "reciprocally binding" when a business is bound to arbitrate to the same extent as the consumer or employee.[126] None of the other protocols has a similar requirement.[127]

Fourth, the bulk of protocol provisions address procedural aspects of arbitration. Here, the requirements of the protocols are broadly similar. The protocols typically require: (1) independent and impartial arbitrators; (2) reasonable arbitration costs; (3) a reasonably convenient hearing location; (4) reasonable time limits for the proceeding; (5) the right to representation; (6) adequate discovery; and (7) a fair hearing.[128] Not all of the provisions of the protocols on these topics are identical, but they are broadly consistent.

Fifth, the protocols all address the remedies available in arbitration and the arbitration award itself. Every protocol requires that all remedies available in court also be available in arbitration.[129] In addition, the protocols typically require the arbitrator to follow the law in making a decision and to issue a written award (with reasons on request).[130]

3. Criticisms of the Protocols

A common criticism of the due process protocols is that they lack a mechanism for ensuring compliance with their provisions.[131] While the protocols set out minimum standards for consumer and employment arbitrations, they do not specify how the standards are to be enforced. Arbitration providers like the AAA and JAMS state that they will refuse to administer a case when the arbitration clause materially fails to comply with the relevant protocol. But the private nature of arbitral dispute resolution makes it difficult to verify whether providers in fact refuse to administer such cases.

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[125] JAMS Consumer Minimum Standards, *supra* note 88, Standard 1(A); JAMS Employment Minimum Standards, *supra* note 88, Standard 7 ("Both the employer and the employee must have the same obligation (either to arbitrate or go to court) with respect to the same kinds of claims.").

[126] JAMS Consumer Minimum Standards, *supra* note 88, Standard 1(A) (defining an arbitration clause as "reciprocally binding" when if a consumer or employee is "required to arbitrate his or her claims or all claims of a certain type, the company is so bound" as well).

[127] Courts likewise are split on whether nonmutual arbitration clauses are enforceable. Christopher R. Drahozal, *Non-Mutual Arbitration Clauses*, 27 J. CORP. L. 537, 542-52 (2002).

[128] *See, e.g.*, Consumer Due Process Protocol, *supra* note 88, princs. 3, 6-9, 12 & 13.

[129] *See, e.g.*, *id.* princ. 14.

[130] *See, e.g.*, *id.* princ. 15.

[131] Harding, *supra* note 89, at 372 ("The lack of [monitoring and enforcement] provisions makes it impossible to determine if the due process protocols are in fact being followed by individual arbitrators and arbitration service providers in actual cases."); Jean R. Sternlight, *Consumer Arbitration*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 174 (Edward Brunet et al. eds. 2006) ("Because the protocols are simply policies adopted by arbitration providers, there is no clear enforcement mechanism.")

Some critics allege that the AAA fails to ensure compliance with the protocols. For example, Laura MacCleery, Director of Public Citizen's Congress Watch Division, testified before Congress that "[w]hile AAA touts its internal protocols, it does not pledge to always follow them."[132] The plaintiffs in *Ting v. AT&T* alleged in their complaint in California federal court that "despite its representations to the contrary, AAA regularly administers arbitrations or otherwise endorses the validity of mandatory pre-dispute arbitration clauses that do not comply with its Due Process Protocol."[133]

To evaluate the criticisms requires empirical evidence on AAA protocol compliance review. But no direct evidence of the nature and extent of protocol compliance review by the AAA is yet available.[134] As Mark Weidemaier states: "With respect to the AAA, for example, we do not know whether it routinely conducts an adequate, independent review of the governing agreement before accepting a case for arbitration."[135] Without systematic empirical study, the only evidence consists of occasional anecdotal reports of alleged violations of the protocols.[136]

An additional criticism of the protocols is that they are incomplete.[137] As Rick Bales puts it (in the context of the Employment Due Process Protocol), the protocols have "largely been left behind by ongoing legal developments" -- that is, they "no longer provide[] the kind of

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[132] H.R. 3010, the Arbitration Fairness Act of 2007, Hearing Before the Comm'l and Admin. Law Subcomm. of the House Comm. on the Judiciary, 110th Cong., 1st Sess. (Oct. 25, 2007) [hereinafter House Hearings], *available at* http://judiciary.house.gov/hearings/hear_102507.html (Testimony of Laura MacCleery) (ms. at 5) (*citing* Declaration of Robert E. Meade, senior vice president, American Arbitration Association *in* Stahle v. Blue Cross of California, Case No. BC 218082 (Cal. Super. Ct. Feb. 17, 2000) ("[Health Care Due Process Protocol] consists of recommended procedures and compliance with the procedures is voluntary.")).

[133] Class Action Complaint ¶ 59, Ting v. AT&T (Cal. Super. Ct. July 31, 2001), *available at* www.consumer-action.org/press/articles/ting_consumer_action_sues_atampt_over_binding_arbitration_clause/. Some of these criticisms are misdirected, however. For example, Public Citizen cites evidence that many franchise agreements include remedy limitations as showing the ineffectiveness of the Consumer Due Process Protocol. Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration 33 (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap(Final).
pdf. But the Consumer Protocol does not apply to franchise agreements, so the comparison misses the mark.

[134] There is indirect evidence of compliance with the Employment Due Process Protocol, in the form of a study by Lisa Bingham and Shimon Sarraf finding that employee win-rates in AAA employment arbitration increased after adoption of the Protocol. Bingham & Sarraf, *supra* note 75.

[135] W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 93 n.138 (2007); *see also* Weidemaier, *supra* note 40, at 659 ("Another possibility is that the company knows that JAMS and AAA often do not enforce their rules. This cannot be ruled out, in part because providers are reluctant to provide the data needed to evaluate this possibility. There have been allegations that actual practices sometimes conflict with providers' public stances. Providers, however, are under no small amount of scrutiny, and I am not aware of supported allegations of under- or non-enforcement of these providers' due process rules.").

[136] *See* Paul Bland, CL&P Blog, AAA Breaks Its Promise Not to Hear Pre-Dispute Arbitrations in Health Care Cases (Feb. 22, 2007), http://pubcit.typepad.com/clpblog/2007/02/aaa_breaks_its.html.

[137] Bales, *supra* note 107, at 185 (identifying "twenty unresolved issues" in the Employment Due Process Protocol, which "may be broadly divided into six major categories: contract formation issues, barriers to access, remedies issues, FAA issues, and conflicts of interest"). We do not address all the asserted substantive shortcomings of the protocols in this study.

prospective guidance that [they] did a decade ago."[138] The most frequently litigated provision that the protocols do not address is the class arbitration waiver.[139]

Arbitration clauses themselves prevent a case from proceeding as a class action in court.[140] Because the parties' contract includes an arbitration clause, the case instead goes to arbitration.[141] Following the Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*,[142] the AAA promulgated rules for the administration of class arbitrations -- cases that proceed on a class basis in arbitration.[143] In response to the availability of class arbitration, some or many businesses (depending on the type of business) now include "class arbitration waivers" -- clauses that preclude arbitration from proceeding on a class basis -- in their arbitration clause.[144] The combined effect of an arbitration clause and an enforceable class arbitration waiver -- precluding the availability of class relief altogether -- might prevent claimants with

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[138] *Id.* at 184.

[139] *Id.* at 188 ("[One] issue is the enforceability of arbitration clauses that forbid employees from bringing claims as an arbitral class action."); Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMPLOYEE RTS. & EMPL. POL'Y J. 363, 402 (2007) ("[T]he neutral community has failed to address the common practice in employer-imposed arbitration systems that prohibit not only class actions but also joinder of claims of even two individuals."); Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CINN. L. REV. 383, 424 (2008) ("A more substantive failing of the Employment Protocol and similar ventures is that they either do not address remedial issues such as the availability of class actions or expressly exclude standard litigation remedies from mass arbitration."); Sternlight, *supra* note 131, at 175 ("By contrast [to the Health Care Protocol], the Consumer Protocol neither bans mandatory arbitration nor clauses that would eliminate consumers' rights to proceed in class actions.").

[140] Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPRENEURIAL BUS. L.J. __, __ (forthcoming 2008).

[141] John F. Dienelt & Margaret E.K. Middleton, *Settling Franchise Class Actions*, 21 FRANCH. L.J. 113, 158-59 (2002) (describing series of cases that "illustrate how arbitration clauses may be used to diminish drastically the size of the class, and, in some instances, to block class litigation altogether"); Kevin M. Kennedy & Bethany Appleby, Green Tree Financial Corp. v. Bazzle*: A New Day for Class Actions?*, 23 FRANCH. L.J. 84, 84 (2003) ("[D]uring the past decade, arbitration clauses have repeatedly enabled franchisors to 'break up' attempts by franchisees to assert class or consolidated claims."); Robert S. Safi, Note, *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration*, 83 TEX. L. REV. 1715, 1724 (2005) ("The CAP [class arbitration preclusion clause] is an invention of fairly recent vintage, born of necessity. Historically, defendants could rest assured that a binding arbitration clause buried within the terms of a contract of adhesion would foreclose the possibility of classwide exposure, because courts perceived the class mechanism and arbitration as incompatible.")

[142] 539 U.S. 444 (2003) (plurality opinion) (deciding that arbitrator is to determine whether arbitration clause that is silent on class relief in arbitration permits class arbitration).

[143] American Arbitration Association, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), *available at* www.adr.org/sp.asp?id=21936. Under its current policy, the AAA will administer arbitrations on a class basis "if (1) the underlying agreement specifies that disputes arising out of the parties' agreement shall be resolved by arbitration in accordance with any of the Association's rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims." American Arbitration Association, AAA Policy on Class Arbitrations (July 14, 2005), *available at* www.adr.org/sp.asp?id= 28779. If, however, the arbitration agreement "prohibits class claims, consolidation or joinder," the AAA will not administer a class arbitration "unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association." *Id.*

[144] *See infra* Part IV(2).E.2.

small claims from bringing an action, and is frequently cited as a reason for making pre-dispute arbitration agreements unenforceable in consumer and employment contracts.[145]

Again, empirical evidence would be valuable in evaluating this criticism. While several empirical studies have examined the use of class arbitration waivers, most have focused on a narrow class or classes of consumer contracts.[146] Timely data on the use of class arbitration waivers in a range of consumer contracts could usefully inform consideration of this issue as well.

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[145] Drahozal & Wittrock, *supra* note 140, at __. For a discussion of the case law, see *id.* at ___-___.

[146] *See infra* Part IV(2).E.2.

II. AAA CONSUMER ARBITRATION PROCEDURES

For consumer arbitrations administered by the American Arbitration Association ("AAA"), the starting point for understanding the arbitration process is the AAA's Supplementary Procedures for Resolution of Consumer-Related Disputes.[1] Accordingly, this Part first describes briefly key features of those procedures. It then discusses in detail the AAA's review of consumer arbitration clauses for compliance with the Consumer Due Process Protocol, beginning with the review process and then addressing the substance of the AAA's review. Throughout this Part, we describe the AAA's procedures as set out in its rules and other publications, or as explained to us in discussions with knowledgeable AAA personnel. The extent to which the AAA's actual practices are consistent with this description is a subject of our empirical findings in Part IV.

A. AAA Procedures for Consumer Arbitration

Under the AAA's rules, a case is classified as a consumer case when it meets three requirements. First, it must arise out of "an agreement between a consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers."[2] Second, "the terms and conditions of the purchase of standardized, consumable goods or services [must be] non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices."[3] Third, "[t]he product or service must be for personal or household use."[4] The AAA makes the initial determination whether a case is a consumer case, subject to redetermination by the arbitrator.[5]

When a case is designated as a consumer case, the AAA's Supplementary Procedures for Resolution of Consumer-Related Disputes generally will apply.[6] A central feature of those procedures is their discounted fee schedule, designed to satisfy the requirement of the Consumer Due Process Protocol that arbitration be available to consumers at a reasonable cost.[7] For consumer claims administered by the AAA, fees are based on a three-tiered structure. For claims

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[1] American Arbitration Association, Supplementary Procedures for the Resolution of Consumer-Related Disputes (effective Sept. 15, 2005), *available at* http://www.adr.org/sp.asp?id=22014 [hereinafter AAA, Consumer Rules].

[2] *Id.*

[3] *Id.*

[4] *Id.*; *see also* JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness n.1 (revised Jan. 1, 2007) [hereinafter JAMS Consumer Minimum Standards] ("These standards are applicable where a company systematically places an arbitration clause in its agreements with individual consumers and there is minimal, if any, negotiation between the parties as to the procedures or other terms of the arbitration clause. A consumer is defined as an individual who seeks or acquires any goods or services, including financial services, primarily for personal family or household purposes.").

[5] AAA, Consumer Rules, *supra* note 1, Rule C-1(a) ("The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator.").

[6] *Id.*

[7] National Consumer Disputes Advisory Committee, Consumer Due Process Protocol, princ. 6 (April 17, 1998) [hereinafter Consumer Due Process Protocol].

seeking less than $10,000, the consumer must pay $125.[8] The full amount is applied toward the arbitrator's fees and none to the AAA's administrative fees. For claims seeking between $10,000 and $75,000, the consumer must pay $375.[9] Again, the AAA pays the full amount toward the arbitrator's fees and none to its administrative fees. For claims over $75,000, the consumer pays administrative fees based on the regular fee schedule in the AAA Commercial Rules, and arbitrator's fees based on the arbitrator's usual rates (with a deposit of one-half the arbitrator's fee due on filing).[10] The consumer may seek a deferral or waiver of the administrative fees on a showing of financial hardship and request an arbitrator willing to serve pro bono.[11]

Under the AAA's rules, the business respondent pays all the administrative fees and the remaining arbitrator's fees for small consumer claims, both for claims brought by the consumer as well as claims brought by the business. For claims of $10,000 or less, the business pays $750 in administrative fees and an additional $200 if a hearing is held.[12] In addition, the business is responsible for the remaining $125 in arbitrator's fees.[13] For claims seeking between $10,000 and $75,000, the business pays $950 in administrative fees and $300 if a hearing is held.[14] In addition, the business is responsible for the remaining $375 in arbitrator's fees.[15] For business claims seeking over $75,000, the business pays administrative fees based on the regular fee schedule in the AAA Commercial Rules, and arbitrator's fees based on the arbitrator's usual rates.[16]

Beyond the fee structure, a number of other features of the AAA Consumer Rules also are worth noting. Even though the parties have agreed to arbitrate, a party retains the right to seek relief in small claims court instead.[17] In most cases, the entire proceeding is to be conducted on an expedited basis.[18] The AAA appoints the arbitrator from its consumer panel, subject to the

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[8] AAA, Consumer Rules, *supra* note 1, Rule C-8 ("Fees and Deposits to be Paid by the Consumer").

[9] *Id.*

[10] *Id.* If, however, the arbitration agreement provides for the consumer to pay a lower share of the costs than otherwise would be applicable, the lower contractual amount controls.

[11] American Arbitration Association, Administrative Fee Waivers and Pro Bono Arbitrators ("Pro Bono Service by Arbitrators"), *available at* www.adr.org/si.asp?id=22040 ("A number of arbitrators on the AAA panel have volunteered to serve pro bono for one hearing day on cases where an individual might otherwise be financially unable to pursue his or her rights in the arbitral forum.").

[12] AAA, Consumer Rules, *supra* note 1, Rule C-8 ("Fees and Deposits to be Paid by the Business: *Administrative Fees*").

[13] *Id.* Rule C-8 ("Fees and Deposits to be Paid by the Business: *Arbitrator Fees*").

[14] *Id.* Rule C-8 ("Fees and Deposits to be Paid by the Business: *Administrative Fees*").

[15] *Id.* Rule C-8 ("Fees and Deposits to be Paid by the Business: *Arbitrator Fees*").

[16] *Id.* Rule C-8 ("Fees and Deposits to be Paid by the Business: *Administrative Fees*"); *see* American Arbitration Association, Commercial Arbitration Rules, Rules R-49 and R-51 (amended and effective Sept. 1, 2007) [hereinafter AAA, Commercial Rules].

[17] AAA, Consumer Rules, *supra* note 1, Rule C-1(d); *see* Consumer Due Process Protocol, *supra* note 7, princ. 5.

[18] *E.g.*, AAA, Consumer Rules, *supra* note 1, Rules C-1(b) ("The Expedited Procedures will be used unless there are three arbitrators."), C-2(b), C-4, C-6, & C-7(a); *see* Consumer Due Process Protocol, *supra* note 7, princ. 8 ("Reasonable Time Limits").

parties' right "to submit any factual objections to that arbitrator's service."[19] For claims seeking $10,000 or less, the default rule is that the case will be resolved on the basis of documents only.[20] Either party may request a telephone or in-person hearing, however.[21] Likewise, the arbitrator may hold a telephone or in-person hearing if he or she decides one is necessary. For claims seeking over $10,000, the default rule is that the arbitrator will hold either a telephone or in-person hearing unless the parties agree otherwise.[22] The arbitrator's award "shall be in writing,"[23] and in making the award "[t]he arbitrator may grant any remedy, relief or outcome that the parties could have received in court."[24]

B. Process of AAA Protocol Compliance Review

If a consumer case involves a claim for compensatory damages of $75,000 or less, the AAA's procedure is for the AAA itself to review the arbitration clause for compliance with the Consumer Due Process Protocol.[25] After undertaking this review, "[i]f the Association determines that ... a dispute resolution clause on its face, substantially and materially deviates from the minimum due process standards of this Protocol, the Association may decline to administer cases arising under this clause."[26] If the claim is seeking over $75,000, issues of protocol compliance are for the arbitrator.[27]

AAA review of consumer arbitration clauses for protocol compliance can take place both before and after a dispute arises. Before a dispute arises, the AAA has set up an "advance review" procedure similar to the procedure under its Employment Arbitration Rules.[28]

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[19] AAA, Consumer Rules, *supra* note 1, Rule C-4; *see* Consumer Due Process Protocol, *supra* note 7, princ. 3 ("Independent and Impartial Neutral") and princ. 4 ("Quality and Competence of Neutrals").

[20] AAA, Consumer Rules, *supra* note 1, Rule C-5.

[21] Consumer Due Process Protocol, *supra* note 7, princ. 12 ("Arbitration Hearings").

[22] AAA, Consumer Rules, *supra* note 1, Rule C-6.

[23] *Id.* Rule C-7(b); *see* Consumer Due Process Protocol, *supra* note 7, princ. 15 ("Arbitration Awards").

[24] AAA, Consumer Rules, *supra* note 1, Rule C-7(c); *see* Consumer Due Process Protocol, *supra* note 7, princ. 14 ("Arbitral Remedies").

[25] American Arbitration Association, Rules Updates, Consumer Arbitrations: Notice to Consumers and Businesses, *available at* http://www.adr.org/sp.asp?id=24714&printable=true (last visited Aug. 13, 2008) [hereinafter AAA Rules Updates].

[26] *Id.*

[27] American Arbitration Association, Fair Play: Perspectives from American Arbitration Association on Consumer and Employment Arbitration 33 (Jan. 2003) [hereinafter AAA, Fair Play]. Likewise, "issues that are not clearly substantial and material deviations will be presented to the arbitrator for determination." AAA Rules Updates, *supra* note 25.

[28] AAA, Fair Play, *supra* note 27, at 33 ("[B]usinesses] are asked to obtain advance review by AAA of the program to determine compliance with the protocols."); AAA Rules Updates, *supra* note 25 (describing advance review process); *see* American Arbitration Association, Employment Arbitration Rules, Rule 2 (amended and effective July 1, 2006), *available at* http://www.adr.org/sp.asp?id=32904 [hereinafter AAA, Employment Rules] ("An employer intending to incorporate these rules or to refer to the dispute resolution services of the AAA in an employment ADR plan, shall, at least 30 days prior to the planned effective date of the program: (i) notify the Association of its intention to do so and, (ii) provide the Association with a copy of the employment dispute resolution plan.").

According to the AAA, "[i]f a business intends to use the arbitration services of the Association in a predispute arbitration clause that involves consumers, it shall, at least thirty (30) days before the planned effective date of the clause (1) notify the Association of its intention to do so; and (2) provide the Association with a copy of the clause."[29] If the business does not do so, the AAA "reserves the right to decline its administrative services."[30] The description of the AAA's process for advance review of consumer arbitration clauses, while available on the AAA web site,[31] is not included in either the AAA's Commercial Arbitration Rules[32] or its Supplementary Procedures for Resolution of Consumer-Related Disputes.[33] By comparison, the provision providing for advance review of employment arbitration clauses is set out in the AAA's Employment Arbitration Rules.[34]

The potential benefits of advance review are at least twofold. First, advance review permits the business and the AAA to resolve any issues of protocol compliance before a dispute arises, so that the compliance review process does not interfere with resolution of the dispute between the business and a consumer. Second, advance review extends the benefits of the Protocol to all consumers who agree to a form contract with the business, not just those who are party to an arbitration before the AAA.

Post-dispute protocol review is to occur once a claimant files a demand for arbitration with the AAA. Under the AAA's arbitration rules, the demand must include a copy of the arbitration clause.[35] The parties need not attach the entire contract. Accordingly, in conducting its review for protocol compliance, the "AAA reviews the parties' arbitration clause only, and not the entire contract."[36]

Before undertaking administration of the case, the AAA case intake staff is to review the arbitration clause for compliance with the Consumer Due Process Protocol[37] (the substance of that review is described in the next section).[38] The case intake staff also is to check the name of the business against the AAA "business list" ("AAA business list") – a list of all businesses of

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[29] AAA, Rules Updates, *supra* note 25.

[30] *Id.*

[31] *Id.*

[32] AAA, Commercial Arbitration Rules, *supra* note 16.

[33] AAA, Consumer Rules, *supra* note 1.

[34] AAA, Employment Rules, *supra* note 28, Rule 2.

[35] AAA, Consumer Rules, *supra* note 1, Rule C-2(a).

[36] American Arbitration Association, AAA Review of Consumer Clauses 1, *available at* http://www.adr.org/si.asp?id=4453 (last visited Sept. 9, 2008); *see also* JAMS, JAMS Policy on Employment Arbitration, Minimum Standards of Procedural Fairness (revised Feb. 19, 2005), *available at* www.jamsadr.com/rules/employment_Arbitration_min_stds.asp [hereinafter JAMS Employment Minimum Standards] ("In assessing whether the standards are met and whether to accept the arbitration agreement, JAMS, as the ADR Provider, will limit its inquiry to a facial review of the clause or procedure. If a factual inquiry is required, for example, to determine compliance with the Minimum Standards, it must be conducted by an arbitrator or court.").

[37] AAA Fair Play, *supra* note 27, at 33-34 ("[S]pecially designated AAA staff members review clauses submitted in consumer cases ... to check protocol compliance.").

[38] *See infra* Part II.C.

which the AAA is aware that mention (or at least at some point mentioned) the AAA in their consumer arbitration clauses. If the business is one that has refused either to waive an objectionable provision or to pay its share of arbitration costs in a prior consumer case, it should be classified as "unacceptable" on the AAA business list so that the AAA will refuse to administer future cases involving the business.[39] Otherwise, the business should be classified as "acceptable."

If the clause complies with the Protocol, the business is to be classified as "acceptable" on the AAA business list. Provided that the business pays its share of the arbitration fees, the case will proceed to arbitration.[40] If the clause does not comply, the AAA's procedure is to contact the business to determine whether the business will waive the offending provision or provisions -- not only for this dispute, but for future disputes.[41] Moreover, the AAA will advise the business regarding the changes that can be made to bring the clause into compliance with the Protocol. If the business does not waive the provision, AAA policy is to refuse to administer the case.[42] If the company is listed as "unacceptable" on the AAA business list, or if the business fails to pay the required fees, the AAA likewise should refuse to administer the case.

If questions arise, the case intake staff can consult with a designated AAA employee who maintains the AAA business list. Note that protocol review in consumer cases differs from protocol review in employment cases, in which review is handled centrally by a single AAA employee.[43] In the consumer setting, by comparison, the case intake staff conduct the review,

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[39] The list is described in more detail *infra* Part III.B. Note that review of the AAA business list is not to replace reviewing the arbitration clause itself, as the clause may have changed since the most recent entry on the AAA business list.

[40] Assuming, of course, that the other requirements for AAA administration are met, such as that the consumer paid his or her share of the arbitrator's fees.

[41] *See* Ragan v. AT&T Corp., 824 N.E. 2d 1183, 1194 (Ill. Ct. App. 2005) (quoting letter from AAA employee to AT&T dated Oct. 29, 2002) ("The AAA's willingness to administer disputes under AT&T's arbitration agreement is contingent upon AT&T's continued willingness to have all past, present[,] and future consumer-related disputes administered in accordance with the Consumer Rules and the Protocol."). For a sample letter that is in the public domain, see Letter from Molly A. Bargenquest to Melissa Hoag Sherman & Kevin Mason dated Dec. 19, 2003, included in CD-ROM Appendix to NATIONAL CONSUMER LAW CENTER, CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS (5th ed. 2007).

[42] AAA, Rules Updates, *supra* note 25; *see also* JAMS Employment Minimum Standards, *supra* note 36 ("If JAMS becomes aware that an arbitration clause or procedure does not comply with the Minimum Standards, it will notify the employer of the Minimum Standards and inform the employer that the arbitration demand will not be accepted unless there is full compliance with those standards."); JAMS Consumer Minimum Standards, *supra* note 4 ("JAMS will administer arbitrations pursuant to mandatory pre-dispute arbitration clauses between companies and consumers only if the contract arbitration clause and specified applicable rules comply with the following minimum standards of fairness.").

[43] Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, *in* ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 321 (Samuel Estreicher & David Sherwyn eds. 2004) ("The internal mechanism the AAA uses to enforce the Protocol is for a single employee to review each and every employer arbitration plan in which the AAA is named as third-party administrator. If the plan does not comport with the Protocol, the AAA advises the employer to revise it, and the AAA refuses to administer any arbitration under the plan until it comports with the Protocol. The fact that a single employee centrally reviews

with the employee who maintains the AAA business list available for consultation in individual cases.

C. Substance of AAA Protocol Compliance Review

The Consumer Due Process Protocol sets out fifteen principles it describes as "embodiments of fundamental fairness" in dispute resolution.[44] In deciding whether to administer a consumer case, the AAA reviews the arbitration clause submitted with the arbitration demand for compliance with the Due Process Protocol. This review is subject to several important constraints.

First, as noted above, the AAA reviews the text of the arbitration clause, not the entire contract, to determine protocol compliance.[45] To the extent a problematic provision is not located in the arbitration clause but rather is located elsewhere in the contract, the provision is not subject to the AAA's review.[46]

Second, evaluating compliance with some principles of the Due Process Protocol may require factual determinations rather than simply a review of the text of the arbitration clause. To the extent factual inquiries are necessary in a particular case, the matter becomes one for the arbitrator rather than for the AAA's review process.[47]

Third, it has been the longstanding policy of the AAA to comply with any court order directing that the administration of an arbitration proceed in a particular manner.[48] Typically, the AAA is not a party to such a court proceeding; rather, only the parties to the arbitration clause are parties to the court order. Nonetheless, the AAA's policy is to defer to the court order compelling arbitration and to administer the case, even if the clause includes provisions that are inconsistent with the Consumer Due Process Protocol. However, AAA policy is to administer the case consistently with the Protocol, unless the court order directs otherwise.

Fourth, administrative review is limited to cases seeking $75,000 or less – the same cutoff the AAA uses for the reduced fee schedule in its Consumer Arbitration Rules.[49] In determining the amount of the claim, the AAA's rules provide for it to consider only compensatory damages.[50] Amounts sought as punitive damages, interest, or attorneys' fees are

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all plans ensures a certain consistency in internal administration.").

[44] Consumer Due Process Protocol, *supra* note 7, princ. 1.

[45] *See supra* Part II.B.

[46] Presumably challenges to such a provision could still be made to the arbitrator.

[47] *Cf.* JAMS, Employment Minimum Standards, *supra* note 36.

[48] The description in this paragraph is based on discussions with AAA personnel knowledgeable of its policies and practices in administering consumer cases.

[49] *See supra* Part II.A.

[50] AAA, Consumer Rules, *supra* note 1, Rule C-8 ("Administrative Fees").

not to be considered. The Protocol still applies in cases in which the claimant seeks more than $75,000, but in those cases decisions on application of the Protocol are for the arbitrator.[51]

In our empirical analysis below,[52] we evaluate the effectiveness of the AAA's review for protocol compliance. To do so, we examine the arbitration clauses in the cases in the case file sample under the same standards the AAA seeks to apply in its review. The rest of this Section describes our understanding of those standards.[53]

- Principle 1. Fundamentally-Fair Process: As discussed above, the text of the Protocol is not clear whether Principle 1 states a separate requirement of fundamental fairness or whether it merely indicates that the remaining principles of the Protocol protect fundamental fairness.[54] Nonetheless, in reviewing clauses, the AAA is to consider whether the procedures set out in the arbitration clause are unduly one-sided – that is, whether they unduly favor the business in ways not addressed in other principles of the Protocol.

- Principle 2. Access to Information: The AAA's review is limited to the arbitration clause itself; it does not examine the surrounding circumstances to evaluate whether the consumer was able to obtain "full and accurate information" regarding the ADR program.[55] As a result, the AAA's protocol compliance review does not consider this Principle. Presumably, the consumer could raise the issue of compliance before the arbitrator.

- Principle 3. Independent and Impartial Neutral: Various contract provisions might violate the requirement that the arbitrator be independent and impartial. Certainly a provision permitting the business to select the arbitrator unilaterally, or to control the list of prospective arbitrators, would violate this Principle.[56] In addition, provisions setting out required qualifications for arbitrators likewise might be problematic. For example, a requirement that the arbitrator work at a company that sells the good or service at issue would be objectionable under this Principle.[57]

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[51] *See supra* Part II.B.

[52] *See infra* Part IV(2).B.

[53] The description below is based on discussions with AAA personnel knowledgeable about its protocol compliance review and on guidance given to case intake staff who conduct that review.

[54] *See supra* Part I.B.2.

[55] Consumer Due Process Protocol, *supra* note 7, princ. 2.

[56] *E.g.* Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938-39 (4th Cir. 1999) ("The Hooters rules also provide a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters.").

[57] *Cf.* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 733 (provision in franchise agreement).

- Principle 4. Quality and Competence of Neutrals: This Principle focuses on the quality of the arbitrators named by the AAA. The AAA views it as directed at the AAA's screening and training of potential arbitrators (so that the AAA's policy is to appoint only attorney arbitrators for consumer arbitrations, for example), rather than at the parties' arbitration clause. On this view, there is nothing for the AAA to review in the arbitration clause with respect to this Principle.

- Principle 5. Small Claims: This Principle requires that the arbitration agreement "should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction."[58] The AAA's Supplementary Procedures for Resolution of Consumer-Related Disputes provide that "[p]arties can still take their claims to a small claims court."[59] As such, unless the arbitration clause expressly precludes the consumer from going to small claims court, the AAA treats this Principle as satisfied.

- Principle 6. Reasonable Cost: The AAA addresses the Principle in part through its arbitration rules, which provide for the business to pay all administrative costs for claims of $75,000 or less, and the parties to share equally the arbitrator's fees, capped at $125 or $375 for consumers.[60] In addition, the AAA reviews clauses for provisions that would increase arbitration costs above the amounts provided under its rules. Thus, a clause that requires the parties to share equally all arbitration costs (not just the arbitrator's fees) would be objectionable under this Principle. Similarly, a clause that requires three arbitrators rather than one likewise would be objectionable because it would increase (potentially triple) the consumer's costs.

- Principle 7. Reasonably Convenient Location: This Principle addresses clauses that would require the consumer to travel unreasonably long distances to attend an in-person arbitration hearing.[61] A clause that requires arbitration to take place at the business's location would be problematic for a business that provides goods or services nationally. For businesses that typically sell locally, however, the AAA will not find such a clause to violate the Protocol because the location of the business would be convenient for most consumers, although the arbitrator may find a violation in a particular case, based on the particular circumstances of that case.

- Principle 8. Reasonable Time Limits: This Principle requires that arbitration take place "without undue delay."[62] The AAA interprets this Principle as primarily applicable to its rules and procedures, which set out the time limits for the arbitration process. Only if the

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[58] Consumer Due Process Protocol, *supra* note 7, princ. 5.

[59] AAA, Consumer Rules, *supra* note 1, Rule C-1(d).

[60] *See supra* Part II.A.

[61] *See also* American Arbitration Association, Locale Determinations: AAA (2007), *available at* www.adr.org/sp.asp?id=22025 ("For consumer disputes, if the claim is under $75,000 then AAA will require the business to waive the locale if the locale is not reasonably convenient for the consumer.").

[62] Consumer Due Process Protocol, *supra* note 7, princ. 8.

arbitration clause unduly lengthens those time limits so as to unreasonably delay the arbitration proceeding would there be an issue for the AAA's review.[63]

- Principle 9. Right to Representation: This Principle provides that the consumer has the right to the representative of his or her choice. An arbitration clause that precluded the consumer from being represented by counsel (or other representative) would violate this Principle.

- Principle 10. Mediation: This Principle encourages but does not require the use of mediation. As a result, in the AAA's view there is nothing for it to review.

- Principle 11. Agreements to Arbitrate: See discussion above of Principle 2.[64]

- Principle 12. Arbitration Hearings: The sorts of provisions that would violate this Principle include a provision that requires the arbitrator to decide on the basis of documents only (i.e., bars an in-person hearing) or otherwise restricts the arbitrator's discretion as to how to resolve the case.

- Principle 13. Access to Information: By "Access to Information," the Protocol means discovery. Thus, contract provisions that unduly restrict the amount of discovery in the arbitration would violate this Principle.

- Principle 14. Arbitral Remedies: This Principle requires that the same remedies be available in arbitration as are available in court. This Principle can be interpreted in two ways. The broader interpretation is that the remedies generally available in court -- such as punitive damages and injunctive relief -- also must be available in arbitration. Under that interpretation, contractual limitations on remedies would not be permitted. The narrower interpretation is that a contractual limitations on remedies would be permissible in a particular case so long as the limitation was enforceable under the applicable state law. In applying this principle, the AAA has adopted the broader interpretation.[65] As

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[63] Interestingly, in Martinez v. Master Protection Corp., 12 Cal. Rptr. 3d 663 (Cal. Ct. App. 2004) (alternate holding), the AAA evidently applied the comparable principle of the Employment Due Process Protocol in refusing to enforce a provision that shortened the statute of limitations for bringing a claim. *Id.* at 667 ("AAA's policy was against conducting arbitrations on employment plans such as [the employer's], which gave parties less time to assert claims than would otherwise be available by statute."); *see* Task Force on Alternative Dispute Resolution in Employment, Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (May 9, 1995), *available at* www.adr.org/sp.asp?id=28535. By contrast, Principle 8 of the Consumer Due Process Protocol focuses solely on eliminating delays in the arbitration process, rather than on provisions that reduce the time for bringing a claim. Consumer Due Process Protocol, *supra* note 7, Reporter's Comments to princ. 8 ("[I]t is not enough that the agreement places strict time limitations on procedural steps if these limitations are not effectively enforced.").

[64] *See supra* text accompanying note 55.

[65] W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 90 (2007) ("[O]n one occasion, the AAA asserted that an agreement violated the Consumer Protocol by allowing only recovery of direct damages in most cases and barring recovery of punitive and other damages in all cases, without suggesting

interpreted by the AAA, clauses that preclude the recovery of punitive damages or consequential damages violate this Principle. In addition, clauses that cap the amount of damages to something less than full compensatory damages or preclude any award of attorneys' fees would be objectionable.

- Principle 15. Arbitration Awards: The AAA interprets this Principle as generally addressing (and dealt with by) its rules on the making of an award, although a provision that bars written awards, for example, presumably would violate this Principle.[66]

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that its decision depended on whether a court would enforce a similar limitation.") (*citing* Affidavit of Neil B. Currie on Behalf of the American Arbitration Association in Response and Objection to a Subpoena for Documents Issued by Plaintiff, Ragan v. AT&T Corp., No. 92-L-168 (Ill. Cir. Ct. July 15, 2002)); *see also* Ragan v. AT&T Corp., 824 N.E. 2d 1183, 1194 (Ill. Ct. App. 2005) (quoting Currie affidavit).

[66] Weidemaier, *supra* note 65, at 89 ("To be sure, businesses might forbid reasoned, written awards in the arbitration agreement itself; it is unclear whether providers like the AAA would view such contract terms as consistent with the due process protocols").

III. RESEARCH METHODOLOGY

This Part describes our research methodology in this study. It begins by outlining the research questions of interest, and then describes the case file sample and other data sources.

A. Research Questions

1. Costs, Speed, and Outcomes of AAA Consumer Arbitrations

We examine a variety of aspects of the American Arbitration Association's ("AAA's") consumer arbitration caseload in this Report. Our focus is on the AAA arbitration process itself, rather than on comparing arbitration to litigation.

First, we describe the general characteristics of AAA consumer arbitration cases, as reflected in the case file sample. Which are more common, cases brought by consumers or cases brought by businesses? How much do claimants seek? What types of businesses are claimants or respondents in consumer arbitrations? To what extent are cases resolved ex parte – i.e., without one party (presumably the consumer) participating? What proportion of arbitration cases are resolved by an award?

Second, we consider the costs of consumer arbitration, in particular the arbitrator's fees and the AAA's administrative fees. The AAA's arbitration rules set out the basic framework, subject to the arbitrator's power to reallocate fees in the award.[1] To what extent do arbitrators use that power, and how does it affect the amount of arbitrator's fees and administrative costs assessed to consumers? Moreover, how does the amount of arbitration fees compare to the amounts sought in arbitration?

Third, we look at the speed of the arbitration process – how long does a case take to resolve from filing to award? How does the speed of the process compare for consumer claimants and business claimants? For cases resolved on the basis of documents as opposed to telephone and in-person hearings?

Fourth, we examine various measures of outcomes in arbitration – in particular, consumer and business win-rates, compensatory damage awards, and compensatory damage awards as a percentage of the amount claimed. How do consumers and businesses fare in arbitration under each of these measures? To what extent do arbitrators also award attorneys' fees, punitive damages, and interest to prevailing parties? Do outcomes differ in cases in which consumers are represented by an attorney as compared to cases in which they proceed pro se? Is there any evidence of a repeat-player effect, with repeat businesses faring better in arbitration than non-repeat businesses? If so, is the repeat-player effect due to arbitrator (or other) bias in favor of repeat businesses or is it due to case screening by repeat businesses?

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[1] *See supra* Part II.A.

2. AAA Enforcement of the Due Process Protocol

We also are interested in how effectively the AAA enforces compliance with the Consumer Due Process Protocol. In answering that question, we consider a series of subsidiary questions.

First, to what extent do arbitration clauses giving rise to AAA consumer arbitrations comply with the Due Process Protocol of their own right? The greater the extent to which clauses comply on their own, the less need for the AAA to enforce compliance.[2] Conversely, if many arbitration clauses are problematic under the Protocol, effective AAA compliance review becomes even more important.

Second, how effective is AAA review of arbitration clauses for compliance with the Consumer Due Process Protocol? Does the AAA identify and respond appropriately to problematic provisions? Or are there systematic gaps in the AAA's review efforts?

Third, to what extent does the AAA refuse to administer consumer cases because of Protocol issues? The AAA has indicated that when it identifies an issue of protocol compliance, it will refuse to administer the case unless the business waives the objectionable provision.[3] How often does the AAA refuse to administer a case and under what circumstances?

Fourth, how do businesses respond to AAA enforcement of protocol compliance? A business might respond in several ways. First, the business might waive the objectionable provision and/or change its arbitration clause to remove the objectionable provision. Second, the business might refuse to waive or change the provision, resulting in the AAA declining to administer the case and future cases involving the business. Third, the business might obtain a court order compelling arbitration of the dispute. Fourth, the business might modify its arbitration clause for future disputes, either by switching to another arbitration provider (that perhaps will administer cases under the objectionable provision) or by removing the pre-dispute arbitration clause altogether.[4]

These varying responses have different implications for the need for public (rather than private) regulation of consumer arbitration. To the extent businesses respond to AAA compliance review by removing objectionable provisions, AAA review benefits not only the parties to the immediate dispute but also future consumers who deal with the business under the revised clause. Conversely, to the extent businesses respond to AAA protocol review by

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[2] Of course, the fact that a clause currently complies with the Protocol does not mean that it always did so. Its current compliance may be due to prior AAA enforcement actions. Thus, an additional question we consider is the extent to which the AAA's protocol compliance efforts have resulted in changes to the terms of consumer arbitration agreements.

[3] *See supra* Part II.B.

[4] *See* W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 670 (2007) ("I have heard anecdotally from provider employees that businesses and employers often waive terms that conflict with the due process protocols. I know of no other evidence to support this assertion.").

switching to other arbitration providers, or by avoiding the AAA altogether, the Consumer Due Process Protocol becomes less effective as a means of private regulation.[5]

In addition to these research questions, we examine several other issues that arise in connection with the due process protocols. In particular, we look at how frequently parties arbitrate their disputes based on post-dispute (rather than pre-dispute) arbitration agreements; how often businesses include class arbitration waivers in their consumer arbitration clauses; and how the AAA administers disputes arising out of the health care industry in its consumer caseload.

B. Data & Methodology

1. Our primary data set consists of 301 AAA consumer arbitration cases closed by an award between April 2007 and December 2007 ("the case file sample"). The cases in the case file sample were drawn from a broader AAA dataset consisting of all consumer arbitration cases coded as closed from 2005 through 2007. We reviewed all 313 consumer cases that were awarded from April through December 2007,[6] the period for which files were still available under AAA file retention policies.[7] We excluded from the case file sample two cases from April 2007 for which the files had by accident been destroyed prematurely, one case for which the case file could not be located, two cases that had been reopened, and seven cases that were improperly labeled as closed, awarded consumer cases in the original AAA dataset. The case file sample consists of the remaining 301 cases.

We then coded those cases for approximately 200 variables that describe various aspects of the arbitration process, including: the identity and characteristics of the parties; the identity of

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[5] This possibility has been described as a "race to the bottom" in consumer and employment arbitration. Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 842-43 (2002) ("Moreover, not all arbitrators and arbitral organizations have signed on to the Due Process Protocols, so there is some risk that arbitrators will engage in a race to the bottom in order to secure large numbers of arbitration contracts."); Jean R. Sternlight, *Consumer Arbitration*, *in* ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT 174 (Edward Brunet et al. eds. 2006) ("[M]any have raised concerns that if major and reputable arbitration providers all choose to adopt fairness protocols, other less reputable providers may enter the field, offering companies an alternative that is beneficial to the company, but not its opponents. That is, the Protocols could prompt a classic 'race to the bottom.'").

[6] In addition to these 313 consumer case files, the AAA included in its broader dataset thirty-two cases in which students challenged the cancellation of test scores. Because those cases were different in kind from the other consumer cases in the case file sample, in that they revolved around the cancellation of test scores and involved no claim for damages, we excluded those cases from the case file sample.

[7] Under AAA file retention policies, awarded case files are retained for fifteen months after the date the filed is closed, and all other case files (e.g., files for settled cases and cases dismissed by the parties) are retained for six months after the closed date. The AAA informs parties of these document retention policies in its correspondence notifying them of the closing of the case file. *See*, *e.g.*, Letter from Elizabeth Cominole to Richard E. Molan & Mark T. Broth dated May 20, 2008, *available at* http://www.aaup-unh.org/docs/AAA_AAUP.pdf ("[I]t is the AAA's policy to retain awarded cases for a maximum period of fifteen (15) months from the date of the transmittal letter. Therefore, please take note that the above referenced case file will be destroyed 15 months from the date of this letter.").

the parties' representatives, if any; the AAA office and case manager that administered the case; the type of case and amounts claimed; key dates in the arbitration process; information on arbitrator selection; hearing information (including the type and location of the hearing); amounts awarded, if any; and fees paid to the AAA and the arbitrator. We also examined the arbitration clause giving rise to the case as part of a review of the AAA's enforcement of the Consumer Due Process Protocol, as discussed in more detail below.[8] The variables coded and the coding instructions can be found in Appendix 4.

The Task Force members double checked each other's work using the original case files. Finally, we corrected any inconsistencies across and within variables. Once the data was cleaned, we aggregated variables for multiple parties into single claimant and respondent variables to use in the data analysis below.

2. The case file sample is subject to several possible selection biases. First, the case file sample is limited to consumer arbitrations administered by the AAA. Arbitrations arising out of clauses that specify other arbitration providers are not included in the case file sample. To the extent providers differ in how they administer cases, or in the types of cases or businesses they attract, the case file sample will not be representative of all consumer arbitrations. In particular, businesses that seek to avoid application of the Consumer Due Process Protocol would presumably be less likely to provide for AAA arbitration. Arbitrations arising out of clauses drafted by such businesses will accordingly be less likely to be included in the case file sample.

Second, the case file sample is limited to AAA consumer arbitrations giving rise to an award in the last nine months of 2007. For much of our data analysis, we do not include cases that were closed without an award, such as by settlement or otherwise.[9] Moreover, due to constraints on the availability of original case files and time constraints in collecting the data,[10] the time period covered by the cases is not a full calendar year. We know of no reason why awards from the nine months studied would differ from other periods of similar length, and no reason why awards from 2007 would differ from awards in nearby years. One consequence of the time period studied, of course, is that it necessarily limits the number of cases in the case file sample.

3. In addition to the case file sample, when possible we also use a larger dataset ("AAA consumer dataset") comprising all 3220 AAA consumer cases closed between 2005 and 2007.[11] The AAA maintains this dataset in the ordinary course of its business, collecting data for its internal purposes on some but not all of the variables in which we are interested. Case managers collect and enter the information in the AAA consumer dataset to track case progress and to

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[8] *See infra* text accompanying notes 14-18.

[9] For an exception, see, *e.g.*, Part IV(2).A.

[10] Our ability to examine older case files was limited by the AAA's document retention policy, described *supra* note 7. Our ability to examine newer case files was limited by time and resource constraints in completing data collection for this study.

[11] Before using the AAA consumer dataset in this study, we excluded the cases identified in the file review that were not consumer arbitrations or not currently closed, as well as the cases in which students challenged the cancellation of test scores.

make sure the parties are charged the correct fees. Because the AAA consumer dataset is used on an ongoing basis, the AAA makes updates as case information changes.[12] Moreover, case managers tend to focus on the information they need to monitor the case. As a result, data central to the AAA's operations, such as the names of the parties, the key dates in the case, and the total fees charged to all parties are more likely to be entered consistently than other data on the case.

Because the AAA consumer dataset was updated by many different case managers at different times, we expected the coding of certain variables to be somewhat inconsistent. To determine the degree of that inconsistency, we compared the data we collected for the 301 cases in the case file sample to the data the AAA maintained for those same 301 cases in the AAA consumer dataset.

Certain information was almost completely consistent between the AAA consumer dataset and the case file sample. For example, distinguishing between businesses and consumers is always possible, which made it reasonably straightforward to identify the type of business involved. Further, cases were consistently coded as either awarded or non-awarded, although it was not possible to verify whether the non-awarded cases were properly coded as settled or withdrawn.

Other information is less accurate, but is still reasonably reliable. Because of the way information was entered into the AAA consumer dataset, it was not always possible to distinguish claimants from respondents easily. However, in 295 out of the 301 cases (98.0%), the claimant was the first listed party and could be reliably identified. In 6 of 301 cases (2.0%) could we not correctly categorize the parties as claimants or respondents by using the order of appearance. Further, the key dates seem reasonably accurate as well. The AAA did not enter the date a case was filed, instead using the date the case was assigned in its system. We could not determine the assignment date in our review of the files, but instead recorded the filing dates. The differences between the filing and assignment dates averaged 5.2 days with a median of 1 day. Although we could not verify the date the AAA administratively closed a case, we were able to determine the award dates. For the cases in the case file sample, the award date entered by the AAA was different from the closed date in fourteen cases (4.7%). The differences for these fourteen cases had a mean of 17.5 days and a median of 1 day. The differences were likely due to minor typos and the fact that on occasion a case manager recorded the date of a partial award rather than the date of the final award.

We also find similar accuracy in the identification of claims $75,000 or less and claims of more than $75,000. Of the 301 cases, 13 (4.3%) differed in their categorization. Less consistent is the association of exact AAA administrative fee amounts with each party. For the first party, the AAA administrative fees recorded were different 33 out of 301 times (11.0%) and for the second party they were different 40 out of 301 times (13.3%). As mentioned above, the sums of the AAA administrative fees were consistent, however.

[12] For example, the recorded information on the case manager responsible for the case was changed whenever a new case manager was assigned to the case. Thus, the name of the case manager recorded in the dataset is the name of the case manager with responsibility for the case at the time the case was closed.

Finally, the amount claimed and the amount awarded were much less consistent than the other data we compared.[13] Specifically, the amount sought by the first party listed in the AAA consumer dataset differed in 59 out of 301 cases (19.6%) between the AAA consumer dataset and the case file sample. In many of these cases, it appeared that the parties or the AAA case managers included attorneys' fees, interest, punitive damages, or other damages together with the compensatory damages sought in a single amount claimed. Or else the case managers entered the amount claimed by a different party. The amount sought by the second party listed (the majority of which were counterclaims) was entered differently in 39 out of 301 cases (13.0%). In most of the 301 cases, however, the second party did not assert a claim. In those cases in which the second party did assert a claim, the data was entered differently in 34 out of 48 cases (70.8%).

The inconsistencies in award amounts are similar. The amount of compensatory damages awarded to the first party listed differed in 88 out of the 301 cases (29.2%) between the AAA consumer dataset and the case file sample. In many of these cases, the parties or the AAA case managers combined the compensatory damages awarded with the amount of attorneys' fees, interest, punitive damages, or other damages awarded. In other cases, the case managers entered the amount awarded to a different party or did not enter the amount awarded at all. The amounts of compensatory damages awarded to the second party listed (the majority of which were from counterclaims) were entered differently in 31 out of 301 cases (10.3%). Again, however, in most of the 301 cases the second party did not assert a claim. In those cases in which the second party did assert a claim, the data was entered differently in 30 out of 48 cases (62.5%).

4. The AAA consumer dataset does not include information on the arbitration clause or on the details of AAA protocol compliance review. To obtain that information, we reviewed the original case files for the cases in the case file sample. For each of the cases, we examined the arbitration clause attached to the arbitration demand for compliance with the Consumer Due Process Protocol.[14] In evaluating compliance, we applied the standards used by the AAA as described above. We also determined from the file whether the AAA case intake staff identified any protocol violation and, if so, whether the AAA obtained a waiver of the violation from the business.

One file was missing the arbitration clause.[15] The business in the case appeared in at least one other case in the case file sample; the clause in that case contained no provisions violating the protocol. Because we could not be certain that same clause was involved in the two cases, however, we treated the clause as missing. For another file, the arbitration clause appeared to be

[13] Since most of the cases in the case file sample only had claims from the first two parties listed, we discuss the results as they relate to the first two parties.

[14] Thus, we examined all arbitration clauses that gave rise to a consumer arbitration before the AAA that was resolved by an award from April to December 2007. The arbitration clauses in the case file sample are not a random sample of all consumer arbitration clauses, nor are they even a random sample of all consumer arbitration clauses specifying the AAA as arbitration provider.

[15] The file clearly had included the arbitration clause at one point, but by the time we obtained the case file for review the clause was no longer included.

incomplete. While the file included a lengthy portion of the arbitration clause, it appeared that the claimant may not have provided a copy of the entire clause. Although the clause had no problematic provisions in the portion we were able to review, we excluded it from the case file sample because we could not be certain what provisions were included in the rest of the clause. Accordingly, the case file sample as used to evaluate AAA protocol enforcement consists of 299 AAA consumer arbitration clauses.[16]

We used the case file sample to evaluate the extent to which arbitration clauses in the case file sample complied with the Consumer Due Process Protocol and how well the AAA applied its standards in reviewing arbitration clauses for protocol compliance. We also used it to obtain information on the relative frequency of pre-dispute and post-dispute arbitration agreements and on the use of class arbitration waivers in the clauses.[17] Finally, we looked at those cases in the case file sample involving the health care industry to evaluate AAA compliance with the Health Care Due Process Protocol.[18]

5. The case files contained no indication of whether the business had sought advance review (i.e., pre-dispute review) of its arbitration clause for protocol compliance. To obtain information on business use of advance review, we examined the AAA business list,[19] which included a notation when the business sought advance review of its arbitration clause. We verified those notations against AAA files documenting the request for advance review. We also examined a sample of other entries on the AAA business list to ensure that requests for advance review had not been misclassified.[20]

6. The AAA does not maintain a list of the cases it refuses to administer for failure to comply with the Consumer Due Process Protocol. To estimate the number of cases the AAA refused to administer during 2007, we started with a list of "pre-filing" cases provided by the AAA ("AAA pre-filing cases"). "Pre-filing" cases are cases submitted to the AAA that do not satisfy the filing requirements of the AAA Consumer Rules. Such requirements include a completed demand for arbitration, a copy of the arbitration clause, and payment of the appropriate fee,[21] as well as the business's payment of its share of the fees and waiver of any protocol violations.[22]

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[16] Because the rest of the file that was missing the arbitration clause was complete, we are able to use this case in examining other aspects of AAA consumer arbitrations.

[17] We did not review all of the provisions in the consumer arbitration clauses in the case file sample, and thus do not have comprehensive data on those provisions. But because of the high visibility of the issue of class arbitration, we did collect data on the use of class arbitration waivers in the consumer arbitration agreements in the case file sample.

[18] Commission on Health Care Dispute Resolution, Health Care Due Process Protocol (July 27, 1998), *available at* www.adr.org/sp.asp?id=28633.

[19] *See supra* Part II.B. We used the AAA business list as of April 25, 2008.

[20] We found one additional case in which the business had sought advance review.

[21] American Arbitration Association, Supplementary Procedures for the Resolution of Consumer-Related Disputes, Rule C-8 (effective Sept. 15, 2005), *available at* http://www.adr.org/sp.asp?id=22014.

[22] *See supra* Parts II.A & II.B.

Cases the AAA refused to administer because of protocol violations should be included in the AAA pre-filing cases. But also included would be cases brought by a consumer (or business, for that matter) that did not meet the requirements for filing the claim.[23] To distinguish between these types of cases, we cross-checked the AAA pre-filing cases against the AAA business list. If the business was listed as "unacceptable" on the AAA business list, we presumptively treated the case as one that the AAA refused to administer because of a protocol violation. In such cases, we further examined the AAA files documenting the business's status on the AAA business list. In a number of cases, we were able to confirm from those files that the AAA refused to administer a particular case because of protocol noncompliance.[24]

7. Finally, we obtained data on how businesses respond to AAA enforcement of the Consumer Due Process Protocol. As described above, a business might respond to AAA enforcement actions in several ways.[25] We again used the AAA business list (and supporting files) as the best available source of data on such actions.

As discussed above, the AAA classifies the businesses on the AAA business list either as "acceptable" – i.e., the AAA will administer consumer arbitrations involving the business – or "unacceptable – i.e., the AAA will not administer consumer arbitrations involving the business.[26] For each entry, the AAA business list also includes a short explanation of the businesses' current status as acceptable or unacceptable.[27] We used those explanations to provide an initial characterization of how the business responded to AAA protocol compliance review. We then sought to verify that characterization by reviewing the AAA's files supporting the AAA business list entry. For some types of entries, we examined all available supporting files. For others, time constraints limited us to examining a random sample of the supporting files.[28] We also collected data on the underlying protocol issue, if any, involved.

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[23] This may occur because the claimant decides not to pursue the case, or because the parties settle before the filing requirements are met.

[24] If the business's status on the AAA business list changed because of some action during the case we were examining, the correspondence relating to that case would be in the files. For example, if the AAA added the business to the AAA business list because it refused to waive a problematic provision or failed to pay its share of arbitration fees, that correspondence would be in the AAA business list file. If, however, the AAA declined to administer the case because the business was already listed as unacceptable because of prior events, we would find no evidence of the later refusal (only the prior one) in the AAA business list file.

[25] *See supra* Part III.A.

[26] The AAA also includes a sub-category of "acceptable businesses" on the AAA business list – typically large entities for which in the past there had been some confusion over the appropriate contact person when a consumer brought a claim against the business. For those businesses, the AAA business list typically identifies the appropriate contact person to receive the demand for arbitration.

[27] If the business's arbitration clause complied with the protocol at the time it was first reviewed, and if the business had always paid its share of the arbitration fees, the business would be listed but only with the date of the first review.

[28] For AAA business list entries indicating that the business did not respond to the initial case filing, we originally examined a random sample of supporting files. When that examination revealed that in some of the cases businesses failed to pay their share of the arbitration fees while in others they failed to waive protocol violations or update their arbitration clauses to remove protocol violations, we expanded our examination to include supporting files for all of those entries. For AAA business list entries indicating that the business did not respond to a follow-up contact by the AAA to update its arbitration clause or to waive protocol violations in all future cases, we examined a

Using this data, we sought to estimate how frequently businesses responded to AAA protocol review by: (1) waiving the objectionable provision for future cases and/or updating their clauses to eliminate problematic provisions; (2) refusing to update their clauses or simply not responding to the AAA; or (3) updating their clauses to replace the AAA with a different arbitration provider (or to remove the arbitration clause altogether).[29]

8. Our access to all of the sources of data from the AAA is subject to a non-disclosure agreement entered into with the AAA. The non-disclosure agreement protects the parties' expectation to privacy in their contractually specified dispute resolution process. As required by the non-disclosure agreement, we report aggregate results about the arbitration process; we do not include any information in this Report that might identify a particular case or party.

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random sample of supporting files. Because those files confirmed that the business failed to waive a protocol violation or update its arbitration clause, we did not expand our review. We examined a handful of files in which the AAA listed the business as acceptable with no further comment. (Our examination of the cases in the case file sample provides a more satisfactory test of the effectiveness of AAA protocol compliance review because it includes cases that might not be listed on the AAA business list.) For all other types of AAA business list entries, we examined all the supporting files.

[29] The AAA business list files contain no information on how frequently businesses seek court orders compelling arbitration of cases the AAA refuses to administer.

IV. EMPIRICAL RESULTS

TOPIC 1. COSTS, SPEED, AND OUTCOMES OF AAA CONSUMER ARBITRATIONS

This Part sets out our empirical findings, which are based on American Arbitration Association ("AAA") data from the 301 cases in the case file sample, supplemented when possible with data from the 3220 cases in the AAA consumer dataset. Our findings address the following: (1) general characteristics of the cases in the case file sample; (2) the costs incurred by the parties in arbitrating their case; (3) the speed of the arbitration process; and (4) outcomes of AAA consumer arbitrations, including data on outcomes in cases with pro se consumer claimants and repeat-player businesses.

A. General Case Characteristics

Because our purpose is to describe comprehensively the AAA's consumer arbitration caseload, this Section gives a general overview of case characteristics for the 301 cases in the case file sample, supplemented when possible with data from the AAA consumer dataset.

1. Business Claimants v. Consumer Claimants

In the substantial majority of AAA consumer arbitrations, the consumer is the claimant in the arbitration proceeding.[1] Of the cases in the case file sample, consumers were claimants in 240 of 301 (or 79.7%) of the cases, while businesses were claimants in 61 of 301 (or 20.3%) of the cases. Because we can reasonably rely on the coding accuracy of the AAA consumer dataset for business and consumer claimants, we used this dataset as a check on the case file sample for this variable. The results from the AAA consumer dataset are similar. Assuming, based on our data consistency analysis,[2] that the first named party in that dataset is the claimant, consumers were claimants in 2765 of the 3220 (or 85.9%) of the cases, while businesses were claimants in 455 of 3220 (or 14.1%) of the cases. Figure 1 shows the similarity between the two data sources.

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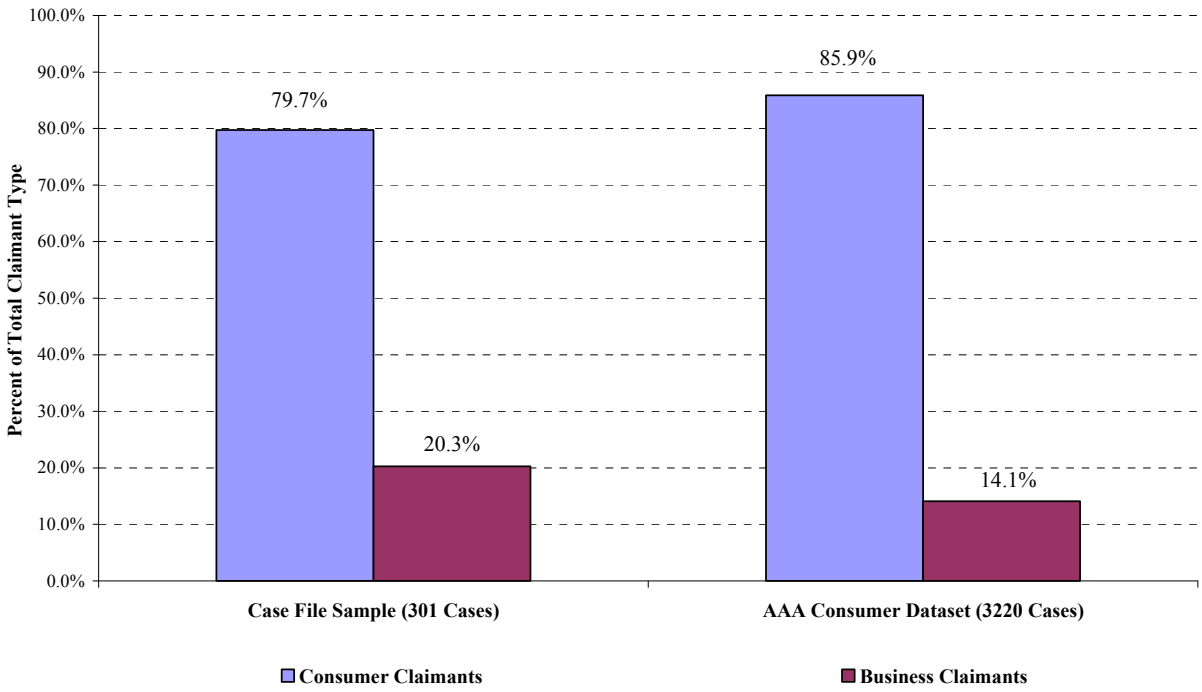
[1] Thus, the AAA's consumer caseload more closely resembles the JAMS consumer caseload than the NAF's caseload, which consists almost exclusively of arbitrations brought by businesses against consumers to collect debts. *See supra* Part I.A.3.

[2] *See supra* Part III.B.

Figure 1:
Comparison of Claimant Types



As a general matter, the types of cases brought by businesses in the case file sample differed from the types of cases brought by consumers. In most cases brought by businesses, the business claimants sought payment for goods delivered or services rendered but usually little else. In contrast, the issues raised in cases brought by consumer claimants were much more diverse, with consumers asserting claims for nondelivery of goods or services, claims for breach of warranty for defective goods or services, claims under state consumer protection acts, claims under federal consumer protection statutes, and the like. Because of these sorts of differences between the cases, we examine cases with business claimants separately from cases with consumer claimants in the rest of our data analysis.

2. Amounts Claimed

The amount sought by the claimant is an important variable for several reasons. First, arbitration fees vary depending on the amount claimed, with low-cost arbitration available under the AAA's consumer rules for claims seeking $75,000 or less. (Accordingly, in the rest of this analysis we examine cases seeking $75,000 or less separately from cases seeking more than $75,000.) Second, as discussed above,[3] the extent of the AAA's review of arbitration clauses for

[3] *See supra* Part II.B.

compliance with the Due Process Protocol depends on the amount claimed. Third, empirical studies of arbitration outcomes use the amount claimed as a rough proxy for the value of the claim.[4]

But determining the amount claimed turns out to be more difficult than sometimes assumed.[5] First, claimants sometimes combine various elements of damages into a single claim amount, which includes not only compensatory damages, but also interest, punitive damages, and attorneys' fees. Because the AAA bases its fees only on the amount of compensatory damages claimed, excluding interest, punitive damages, and attorneys' fees, we treat those individual items of damages separately as well. In this Section, we discuss only amounts of compensatory damages sought as the amount claimed.[6] Moreover, when we categorize results in this Report by the amount claimed (usually in two categories, $75,000 or less and more than $75,000), we likewise use the amount of compensatory damages sought in calculating the amount claimed.

Second, although claimants must specify a claim amount in their demand for arbitration,[7] some claimants specify the claim amount not as a single number but as a range of numbers.[8] Other claimants specify the amount claimed as an inequality, seeking less than or more than a specified amount. For example, a demand for arbitration might claim damages of between $10,000 and $75,000, or damages greater than $10,000. Specifying the amount claimed as a range or inequality ordinarily does not cause problems for the AAA in determining arbitration fees or in its enforcement of the Due Process Protocol because the ranges or inequalities typically are tied to the relevant threshold amounts.[9] For purposes of using claim amounts in our empirical analysis, however, demands specifying damages as a range or an inequality are much more problematic.

For business claimants, one case out of 61 (1.6% of cases) presented the claim amount as an inequality. Consumer claimants, however, were much more likely to use inequalities or ranges in their arbitration demand. In 22 cases out of 235[10] (9.4% of cases seeking a monetary amount), consumer claimants presented the claim amount as an inequality (16 of 22) or bounded range (6 of 22).

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[4] *See supra* Part I.A.3.

[5] *E.g.*, Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration 12 (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap (Final).

[6] While claimants often assert a claim for interest, punitive damages, and attorneys' fees in their demand, rarely do they quantify those claims. For further discussion, see *infra* Part IV(1).D.2.

[7] American Arbitration Association, Supplementary Procedures for the Resolution of Consumer-Related Disputes, Rule C-2(a) (effective Sept. 15, 2005), *available at* http://www.adr.org/sp.asp?id=22014 [hereinafter AAA, Consumer Rules]; American Arbitration Association, Commercial Arbitration Rules, Rule R-4(a)(i) (amended and effective Sept. 1, 2007) [hereinafter AAA, Commercial Rules].

[8] We discuss here initial claims only, not counterclaims.

[9] In consumer cases, arbitration fees are a flat amount within certain ranges (less than $10,000 and between $10,000 and $75,000), and the threshold for the AAA's administrative review of clauses for protocol compliance is $75,000.

[10] We exclude the five cases seeking non-monetary remedies from these calculations.

We considered several options for dealing with demands specifying the claim amount as an inequality or a range: (1) dropping all cases specifying a claim amount as a range or inequality from the case file sample; (2) taking the mid-point of all ranges (treating inequalities as one end of a range bounded on the other end by the claim threshold); or (3) using the base number of claim amounts specified as inequalities and the mid-point for all claim amounts specified as bounded ranges.

To enhance comparability to the AAA consumer dataset, we use the third option.[11] For claim amounts given as inequalities, we simply ignore the inequality and use the base amount as the amount of the claim. For example, if the claim amount was written "greater than $10,000," we used $10,000 as the claim amount; if the claim amount was written "less than $75,000," we used $75,000 as the claim amount.[12] For claim amounts given as bounded ranges, we used the mid-point of the range as the claim amount. For example, if the claim amount was written as "$10,000 to $75,000," we used $42,500 as the claim amount. Because only sixteen cases with consumer claimants have claim amounts specified as inequalities and only six cases have claim amounts specified as bounded ranges, the choice among the options for measuring claim amount rarely affects the results.[13]

Overall, the vast majority of cases in the case file sample involved claims for $75,000 or less. For business claimants, 95.5% of cases (58 of 61) involved claims for $75,000 or less. For consumer claimants, 91.5% of cases (215 of 235) involved claims for $75,000 or less. Indeed, 39.1% of cases (92 of 235) brought by consumer claimants involved claims for less than $10,000.

Because the coding of claims as greater than $75,000 and less than or equal to $75,000 in the AAA consumer dataset is reasonably reliable, we use that dataset to check this variable in the case file sample. Again, the results are similar. In the AAA consumer dataset, excluding non-monetary and unspecified claims, 94.5% of business claimants brought claims of $75,000 or less (359 of 380 cases). By comparison, 88.5% of consumer claimants brought claims of $75,000 or less (2190 of 2475 cases).

Consumers tend to seek larger amounts than businesses in AAA consumer arbitrations. The average claim for business claimants in the case file sample was $22,037 and for consumer claimants was $46,131, a statistically significant difference.[14] There also is a statistically

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[11] The AAA uses the base amount of the inequality in its consumer dataset.

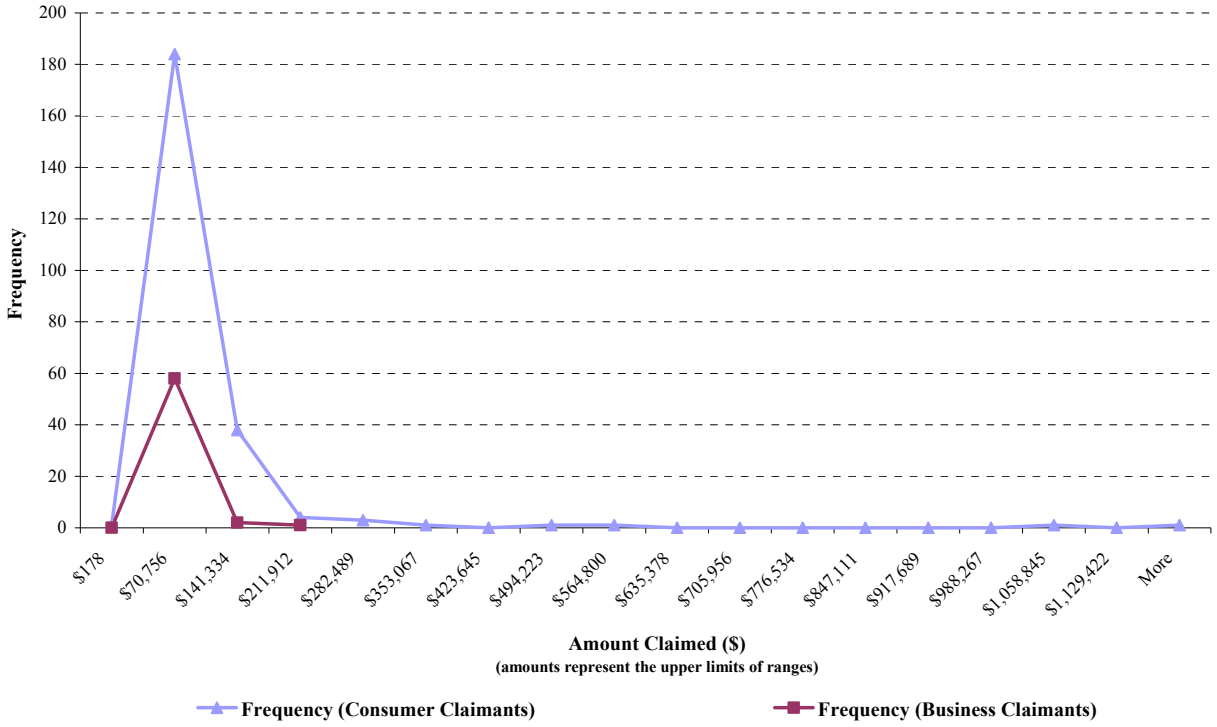
[12] Selecting the lower end of the range in cases not specifying the claim amount will increase the recovery rate discussed below, but the effect should be minimal due to the small number of cases affected by this choice.

[13] Option 1 resulted in higher average claim amounts than either option 2 or option 3. Further, using option 2 rather than option 3 resulted in an average difference of less than $100 for both business and consumer claimants. The claim amount changes for one case with a business claimant and sixteen cases with consumer claimants between options 2 and 3.

[14] We used a two-group t-test for averages in claims made by business claimants and consumer claimants excluding non-monetary claims and adjusting for unequal variances. The t-statistic was -2.9338 (DF = 290.932 and $p = 0.0036$), allowing us to reject the null hypothesis that the averages between the two groups were the same.

significant difference in the variance of claim amounts between the two groups.[15] Figure 2, a frequency distribution with equally distributed bins, shows that almost all business claims fall between $178 and $70,756, with a short tail. Almost all consumer claims also fall between $178 and $70,756. However, at least 12 cases fell outside that range, including one claim of $1,200,000. Thus, consumer claims have a longer tail than business claims.

Figure 2:
Frequency of Amounts Claimed by Consumer and Business Claimants
(Cases = 296)



Because the case file sample includes only awarded cases, it is possible that there are differences in claim amounts between awarded cases and other types of closed cases. In order to test whether case resolution was related to claim amounts, we truncated the AAA consumer dataset to all cases with specified monetary claims and closed in the same time frame as the case file sample, namely April 2007 through December 2007, which added 46 business cases and 345 consumer cases.[16] Because the case file sample comprised almost all of the awarded cases in this time period, the added cases were mostly settled, withdrawn, or closed in some other way.

For business claimants, the average claim was $22,037 for the awarded cases in the case file sample and $18,313 for all other cases; the means are not significantly different from one

[15] We used a two-group F-test for variances in claims made by business claimants and consumer claimants excluding non-monetary claims. The f-statistic was 0.0504 (DF = 60, 234 and p = 0.0000), allowing us to reject the null hypothesis that the variances between the two groups were the same.

[16] We note that the individual claim amounts coded in the AAA consumer dataset are less reliable than the binary coding for claims of $75,000 or less and claims greater than $75,000. *See supra* Part III.B.

another.[17] Claim amounts for consumer claimants are similar. The average claim was $46,131 for the awarded cases in the case file sample and $66,367 for all other closed cases. Although the other closed cases had a slightly higher average claim, the difference between the two groups is not statistically significant.[18]

Counterclaims were somewhat rare in the case file sample – only 57 out of 301 cases (or 18.9% of cases) involved a counterclaim at all. Eleven consumer respondents brought counterclaims: five sought compensatory damages of $75,000 or less, two sought more than $75,000, and the remaining four sought non-monetary relief or the remedy sought was unspecified. Business respondents were more likely to bring a counterclaim. The remaining forty-six counterclaims were brought by business respondents: thirty-three sought compensatory damages of $75,000 or less, one sought more than $75,000, and the remaining twelve sought non-monetary relief or the remedy sought was unspecified. Counterclaims were not recorded consistently in the AAA consumer dataset so a comparison is not possible.

3. Types of Businesses

The types of businesses involved in the cases in the case file sample included motor vehicle dealerships, credit card issuers, insurance companies, home builders, finance companies, mobile home dealers, and real estate brokers. As shown in Figure 3, different types of companies were claimants than respondents. Business claimants were mostly service providers: home builders (13 or 61, or 21.3% of the cases), real estate brokers (12 of 61, or 19.7% of the cases), and other service providers such as law and accounting firms (20 of 61, or 32.8% of the cases). In contrast, the most common business respondents were motor vehicle dealerships (66 of 240, or 27.5% of the cases) and insurance/warranty companies (44 of 240, or 18.3% of the cases). The differing types of businesses reflect the different nature of cases brought by business and consumer claimants. Businesses were mostly looking to collect fees owed for services performed while consumers were bringing claims for faulty cars and faulty products, among others.

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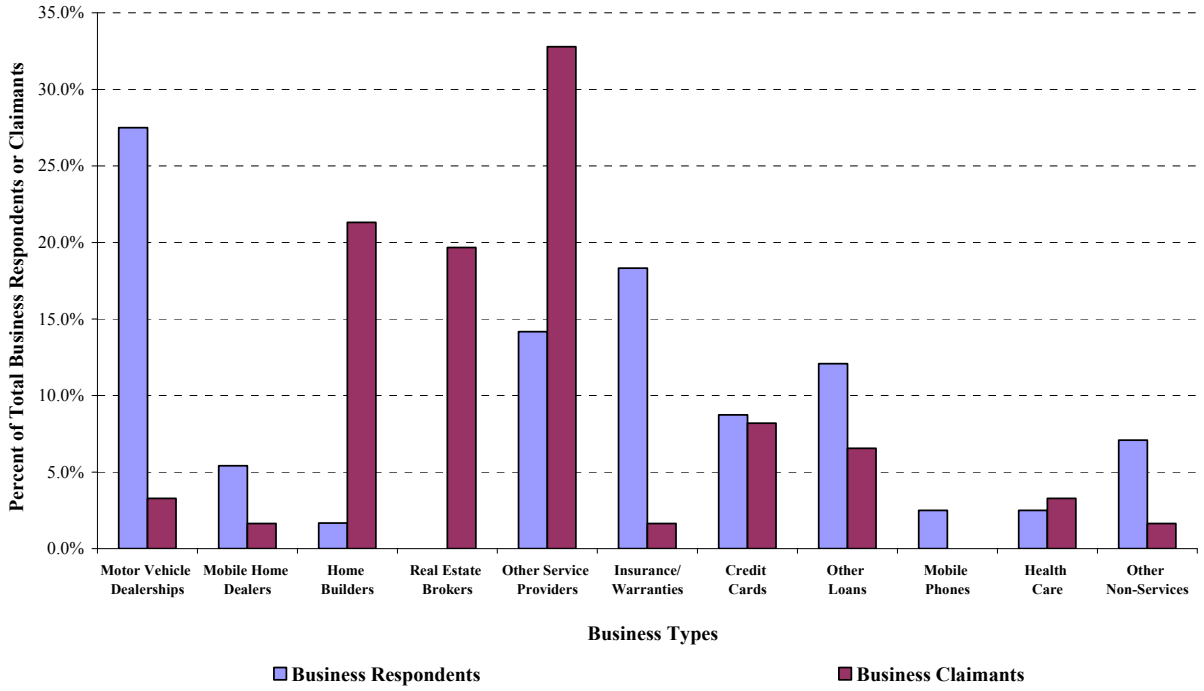
[17] The two-group t-test accounting for unequal variances resulted in t = -0.9056 (DF = 102.497 and p = 0.3673). The variances between the two groups are significantly different however. The f-statistic was 0.4083 (DF = 45, 60 and p = 0.0021), allowing us to reject the null hypothesis that the variances between the two groups were the same.

[18] The two-group t-test accounting for unequal variances resulted in t = 1.0948 (DF = 466.817 and p = 0.2741). The variances between the two groups are significantly different, however, owing to several large claims in cases that were eventually settled. The f-statistic was 7.4138 (DF = 344, 234 and p = 0.0000), allowing us to reject the null hypothesis that the variances between the two groups were the same.

Figure 3:
Business Types as a Percent of Total Business Respondents and Total Business Claimants
(Cases = 301)



The entries for business type in the AAA consumer dataset are less reliable than for the case file sample. However, we generally find the same business types for business claimants and respondents in both datasets. Business claimants were mostly service providers: home builders (59 of 455, or 13.0% of cases), real estate brokers (53 of 455, or 11.6% of cases), and other service providers such as law and accounting firms (84 of 455, or 18.5% of cases). Common types of business respondents were motor vehicle dealerships (451 of 2765, or 16.3% of cases) and insurance/warranty companies (207 of 2765, or 7.5% of cases). Note that in the AAA consumer dataset, the type of business as a percentage of the total was generally lower than in the case file sample. This is mostly due to a higher proportion of cases involving credit card issuers and other creditors in the AAA consumer dataset, most of which never went to an award.

4. Ex Parte Proceedings

Of the 301 cases in the case file sample, 26 cases (8.6%) were resolved on an ex parte basis – i.e., in the absence of one of the parties. All twenty-six cases involved claims of $75,000 or less, and in all twenty-six cases the absent party was the consumer. Interestingly, however, not all of the ex parte cases involved a business claimant. Twenty-two of the ex parte cases were brought by business claimants. The remaining four cases were brought by consumers, who then either did not appear at the hearing or submit documents. Three of the four consumers originally

were represented by counsel, who filed the claim but then withdrew from representing the consumer. Ex parte cases were not recorded in the AAA consumer dataset, so a comparison is not possible.[19]

5. Case Resolutions – Awarded Versus Non-Awarded

The case file sample is limited to awarded cases, so to examine the frequency of other case resolutions (and the relative frequency of awarded cases) we use the AAA consumer dataset. The AAA consumer dataset categorizes cases consistently into awarded and non-awarded categories.

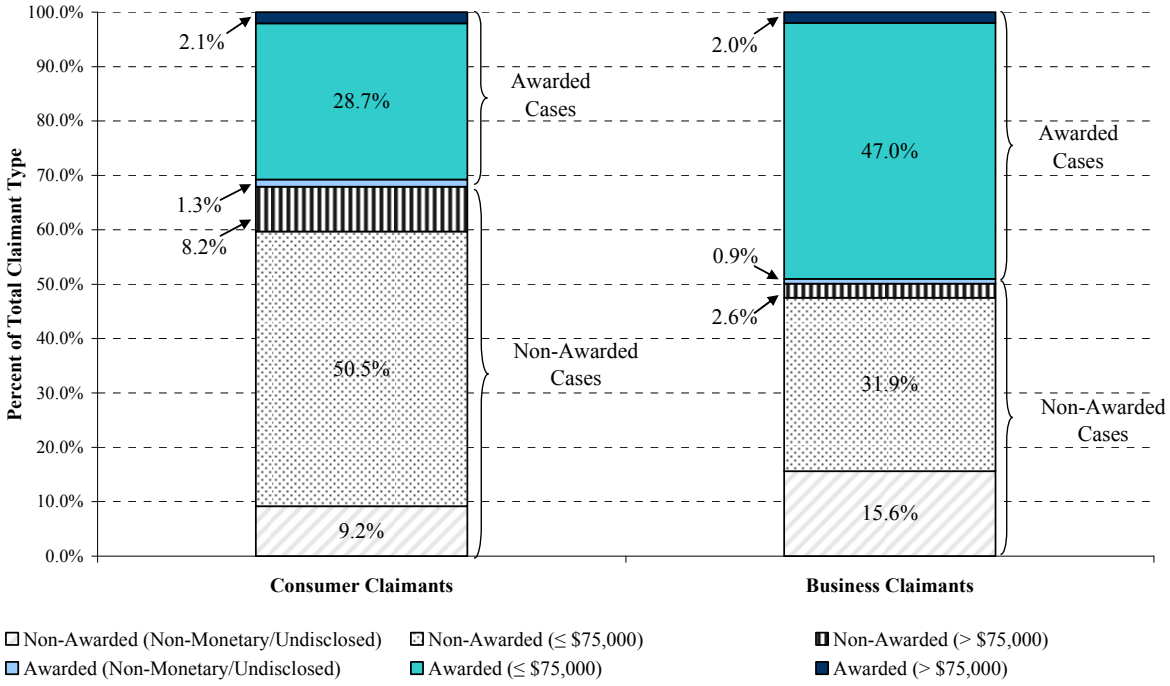
In cases involving business claimants, 227 (or 49.9%) were resolved by an award and 228 (or 50.1%) were otherwise closed.[20] Of the 227 awarded cases, 214 had claims of $75,000 or less, 9 had claims of more than $75,000, and 4 sought non-monetary relief or sought an unspecified remedy. Of the 228 non-awarded cases, 145 had claims of $75,000 or less, 12 had claims of more than $75,000, and 71 sought non-monetary relief or sought an unspecified remedy.

In cases involving consumer claimants, 887 (or 32.1%) were resolved by an award and 1878 (or 67.9%) were otherwise closed. Of the 887 awarded cases, 57 had claims of more than $75,000, 793 had claims of $75,000 or less, and 37 sought non-monetary relief or sought an unspecified remedy. Of the 1878 non-awarded cases, 228 had claims greater than $75,000, 1397 had claims of $75,000 or less, and 253 sought non-monetary relief or sought an unspecified remedy. Figure 4 below shows the relative differences between case dispositions by amount claimed.

[19] As discussed *infra* Part IV(1).D.2, the number of ex parte awards likely is related to the win-rate for business claimants.

[20] The AAA database does distinguish among withdrawn, settled, and administratively closed cases, however those distinctions are not always accurate since the AAA relies on the parties to report a settlement or withdrawal. As such, we distinguished only between awarded and non-awarded cases in our analysis.

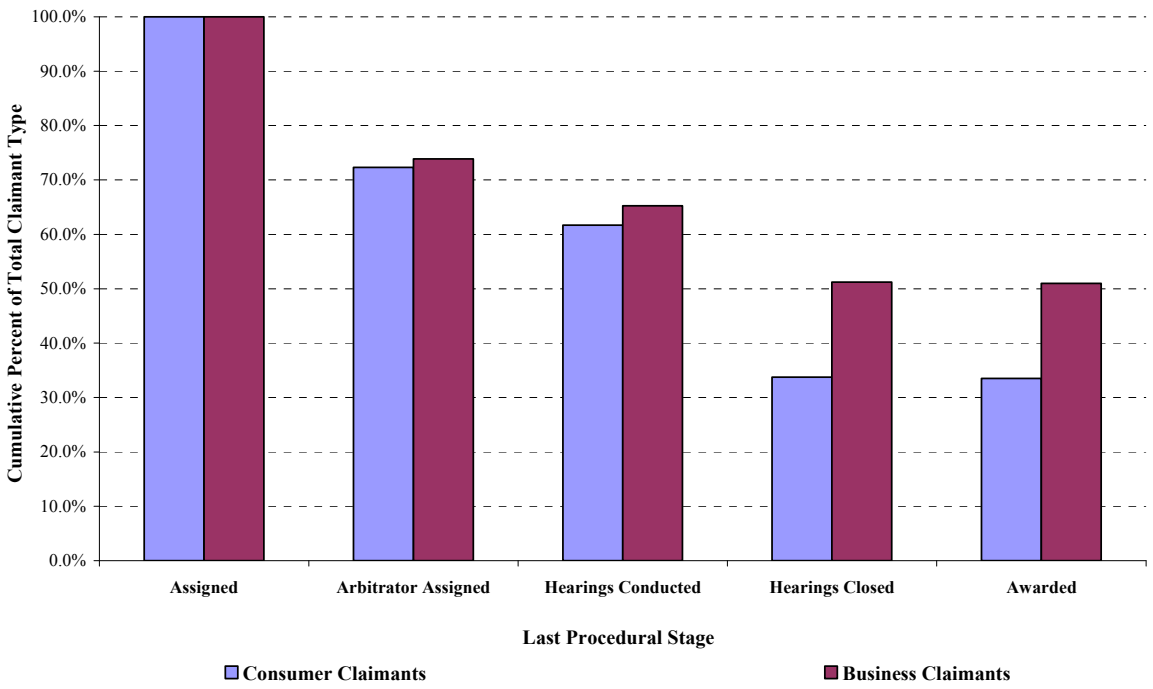
Figure 4:
Percent of Awarded and Non-Awarded Cases by Claimant Type and Amount Claimed
(Cases = 3220)



Using the key dates (which were reliably recorded in the AAA consumer dataset), we were also able to estimate how far in the arbitration process cases progressed before being resolved. We categorized the procedural stages using the Assignment Date (the date the case was entered into the AAA's system), the Arbitrator Assignment Date (the date an arbitrator was appointed), Hearing Dates (the date or dates of any hearings, including preliminary hearings), Hearing Closed Date (the date the hearing, if any, was declared closed), and Award Date (the date of the award). Cases were categorized by the last listed date in the database before the case was closed. For business claimants, 26.2% (or 119 out of 455) of the cases were closed before an arbitrator was appointed; for consumer claimants, the percentage was similar (766 out of 2765, or 27.7% of cases). But cases with consumer claimants are much less likely than cases with business claimants to be resolved by an award. Figure 5 below shows the comparison in case progression between consumer and business claimants.[21]

[21] We note that a small number of cases (1.1% of cases with business claimants and 1.4% of cases with consumer claimants) have awarded dates but are categorized in the AAA consumer dataset as settled or otherwise closed. We do not have an explanation for this seeming discrepancy. It does not, however, materially affect our findings.

Figure 5:
Cumulative Percent of All Cases by Procedural Stage by Claimant Type
(Cases = 3220)



B. Cost of AAA Consumer Arbitrations

As described above,[22] the AAA has a tiered fee structure based on the amount of compensatory damages claimed.[23] The fees are not based on other amounts such as punitive damages, interest, or attorneys' fees.[24] Table 1 summarizes the AAA's fees for consumer cases.

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22 *See supra* Part II.A.
23 AAA, Consumer Rules, *supra* note 7, Rule C-8.
24 *Id.* Rule C-8.

Table 1: AAA Consumer Arbitration Fees

Amount Claimed	Fees Owed By Consumer	Fees Owed By Business
< $10,000	• Half of arbitrator's fees up to $125	• $750 in AAA administrative fees • $200 in Case Service Fees if a hearing is held • Remaining arbitrator's fees (usually $125)
$10,000 - $75,000	• Half of arbitrator's fees up to $375	• $950 in AAA administrative fees • $300 in Case Service Fees if a hearing is held • Remaining arbitrator's fees (usually $375)
> $75,000 (or Non-Monetary)	• AAA administrative fees according to the Commercial Fee Schedule • Half of arbitrator's fees at usual rates	• AAA administrative fees according to the Commercial Fee Schedule • Remaining arbitrator's fees at usual rates

This Section describes the amount of arbitration costs assessed, how these arbitration costs are allocated in practice in AAA consumer arbitrations, and how arbitration costs relate to the amount sought in cases in the case file sample. We have data on arbitrators' fees and the AAA's administrative fees, but we do not have comparable data on amounts the parties paid to their own attorneys, if any.[25] We do not provide comparisons to the AAA consumer dataset in this Section because we are unable to break down the data in analogous ways.

1. Fees Assessed to Consumers and Businesses

The AAA fee schedule and fee allocations by arbitrators in awards interact to determine the total amount of fees assessed to consumers and businesses.[26] In this section, we summarize the total amounts of administrative and arbitrator's fees assessed to consumers and businesses as well as their respective shares of those fees in the case file sample.[27]

In cases with business claimants, the business is assessed an average of $958 in AAA administrative fees and $751 in arbitrator's fees, as shown in Figure 6. In these same cases, consumers are assessed an average of $215 in AAA administrative fees and $256 in arbitrator's fees. Thus, on average, consumer respondents are responsible for 18.3% of total AAA administrative fees and 25.4% of total arbitrator fees in those cases. At the tail of the distribution,

[25] Although Elizabeth Hill used awards of attorney's fees as a proxy for attorney's fees paid by the parties, *see* Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 798-99 (2003) [hereinafter Hill, *Due Process*], we do not believe we have enough data to make reliable statements regarding attorney's fees paid by the parties in the case file sample. For further discussion of attorney's fee awards, see *infra* Part IV(1).D.2.

[26] In addition, on occasion contract provisions provide that consumers are to pay a lower fee than set out in the AAA fee schedule.

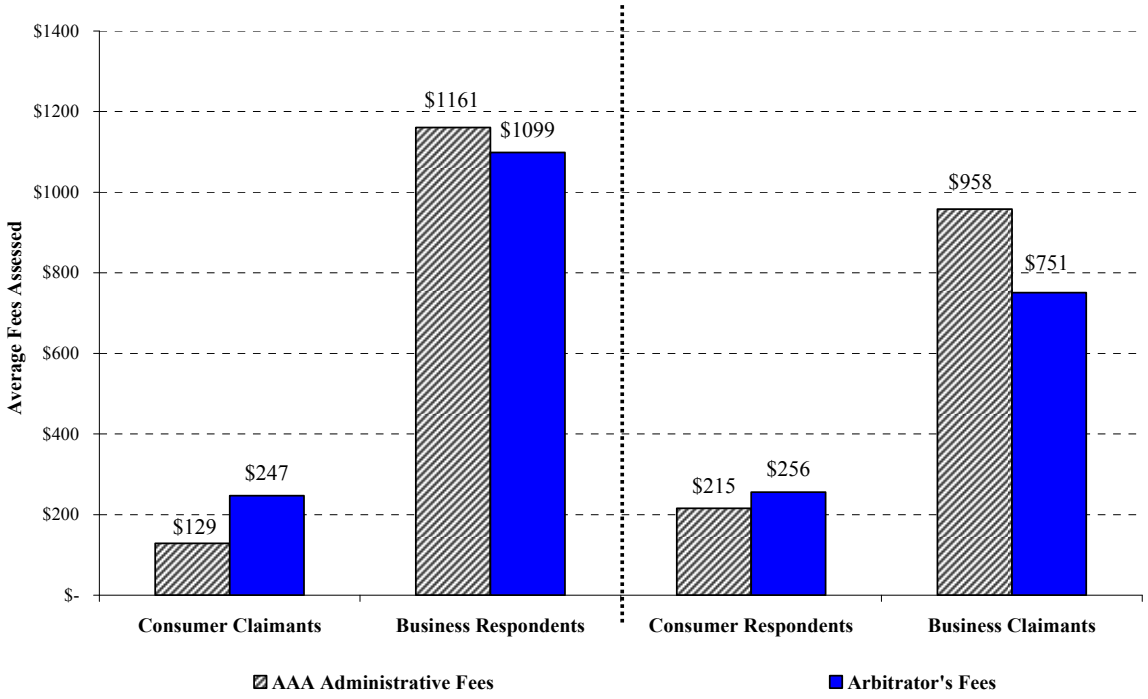
[27] We describe the fees as "assessed" to businesses and consumers because the parties did not necessarily pay the fees as assessed. Further, we do not have systematic data on the extent to which consumers receive fee waivers or deferrals from the AAA, and so we report no results on that issue.

three consumer respondents were assessed AAA administrative fees in excess of $1000 and/or arbitrator's fees in excess of $1000. All three brought counterclaims of $75,000 or more.

In cases with consumer claimants, the consumer is assessed an average of $129 in AAA administrative fees and $247 in arbitrator fees, as shown in Figure 6. In these same cases, businesses are assessed an average of $1161 in AAA administrative fees and $1099 in arbitrator's fees. Thus, on average consumer claimants are responsible for 10.0% of total AAA administrative fees and 18.4% of total arbitrator's fees in those cases. Note that these amounts include fees from cases with claims over $75,000, so we would expect that on average consumers pay some AAA administrative fees, even though for claims under $75,000 the business is to pay all administrative fees under the AAA consumer rules.[28] At the tail of the distribution, ten consumer claimants were assessed AAA administrative fees in excess of $1000 and/or arbitrator's fees in excess of $1000. All but one brought claims of $75,000 or more.

Overall, then, consumers are responsible for a larger share of AAA administrative and arbitrator's fees when they are respondents, but never more than approximately one-fourth of the total.

Figure 6:
Average AAA Administrative Fees and Arbitrator's Fees Assessed by Party Type
(Cases = 301)



[28] *See supra* Part II.A.

If we break down the fees assessed to consumers and businesses by claim size, using the categories used by the AAA in determining fees, we find that consumer claimants on average are assessed less than the amount specified by the fee schedule. By comparison, consumer respondents are assessed more on average, but this is mostly due to the fact that in a few cases the arbitrator allocated all of the fees to the consumer respondent.[29]

In cases with claims of less than $10,000, consumer claimants are assessed on average $1 in AAA administrative fees (or 0.1% of the total, with the business assessed the rest);[30] for cases with claims between $10,000 and $75,000 they are assessed on average $15 (or 1.2% of the total);[31] and for cases with claims greater than $75,000 they are assessed on average $1,448 (or 38.6% of the total).

For arbitrator's fees, consumer claimants pay on average $95 in arbitrator's fees (or 23.4% of the total) in cases seeking less than $10,000, noticeably less than the $125 in arbitrator's fees charged under the AAA fee schedule.[32] In cases with claims between $10,000 and $75,000, consumer claimants are assessed on average $204 in arbitrator's fees (or 16.9% of the total), again, substantially below the $375 charged under the AAA fee schedule.[33] Finally, in cases with claims greater than $75,000, consumer claimants are assessed on average $1256 in arbitrators' fees (or 18.8% of the total). Figure 7 summarizes these findings.

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[29] See *infra* Part IV(1).B.2.

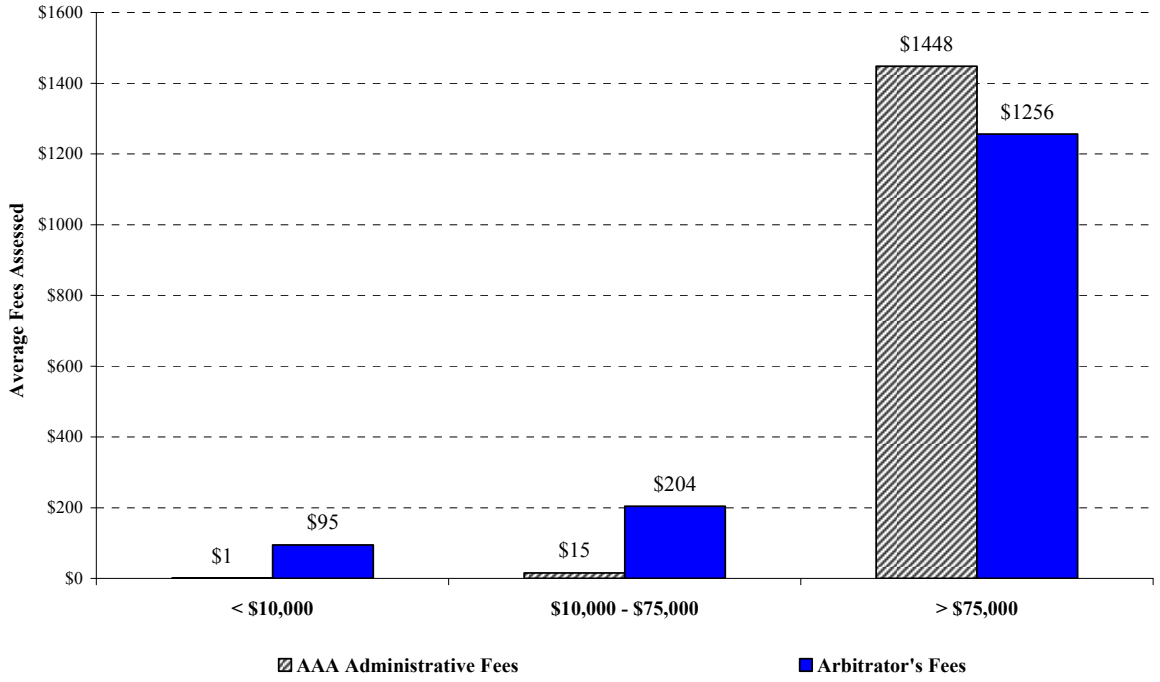
[30] There is one case with a claim under $10,000 for which a consumer was assessed any AAA administrative fees. The fees were allocated "as incurred" by the arbitrator after an in-person hearing, but it is not clear from the file why the consumer was assessed these fees.

[31] There are three cases with claims between $10,000 and $75,000 for which a consumer was assessed AAA administrative fees. In all three cases, the arbitrator allocated the AAA administrative fees equally between the parties in the award.

[32] *See supra* Part II.A. This is largely due to the fact that in 21 cases (22.8% of the time), the arbitrators allocated arbitrator's fees to the business respondent in the award.

[33] *See supra* Part II.A. This is largely due to the fact that in 47 cases (38.2% of the time), the arbitrators allocated arbitrator's fees to the business respondent in the award.

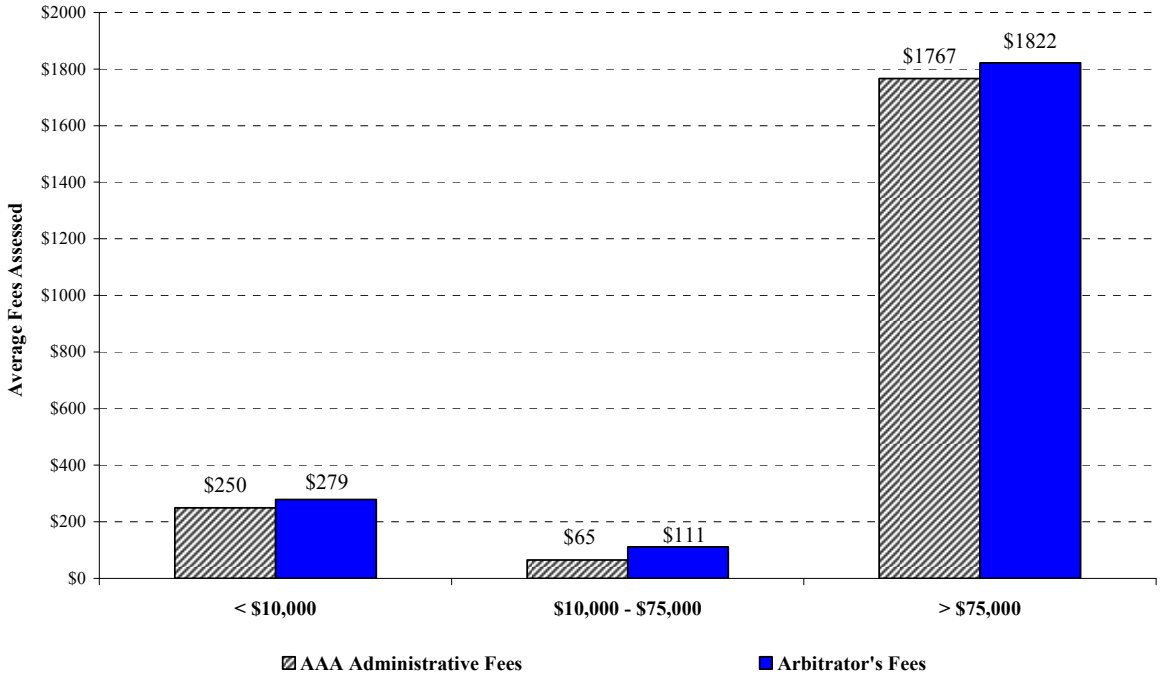
Figure 7:
Average Fees Assessed to Consumer Claimants by Amount Claimed
(Cases = 235)



Consumer respondents were generally assessed higher fees on average than consumer claimants, as shown in Figure 8. On average, consumer respondents were assessed $250 in AAA administrative fees and $279 in arbitrator's fees for cases with claims less than $10,000. These average fees are influenced by a single case in which the consumer respondent asserted a counterclaim for over $75,000, and was assessed over $8000 in total arbitration fees. Excluding that outlier, consumer respondents were assessed on average $71 in AAA administrative fees and $100 in arbitrator's fees for cases with claims less than $10,000. For cases with claims between $10,000 and $75,000, on average consumer respondents were assessed $65 in AAA administrative fees and $111 in arbitrator's fees.[34] Finally, for cases with claims greater than $75,000, on average consumer respondents were assessed $1767 in AAA administrative fees and $1822 in arbitrator's fees.

[34] In 10 cases (27.8% of the time) arbitrators allocated arbitrator's fees to consumer respondents equally, partially, or solely.

Figure 8:
Average Fees Assessed to Consumer Respondents by Amount Claimed
(Cases = 61)



Because we have no data on the financial situation of individual consumer claimants, we are unable to evaluate how affordable these costs of arbitration are to consumers. Of course, all of the cases in the case file sample are ones in which the consumer was able to bring the case, and hence cases in which arbitration costs did not preclude the consumer from asserting his or her claim.

2. Fee Allocations in Awards

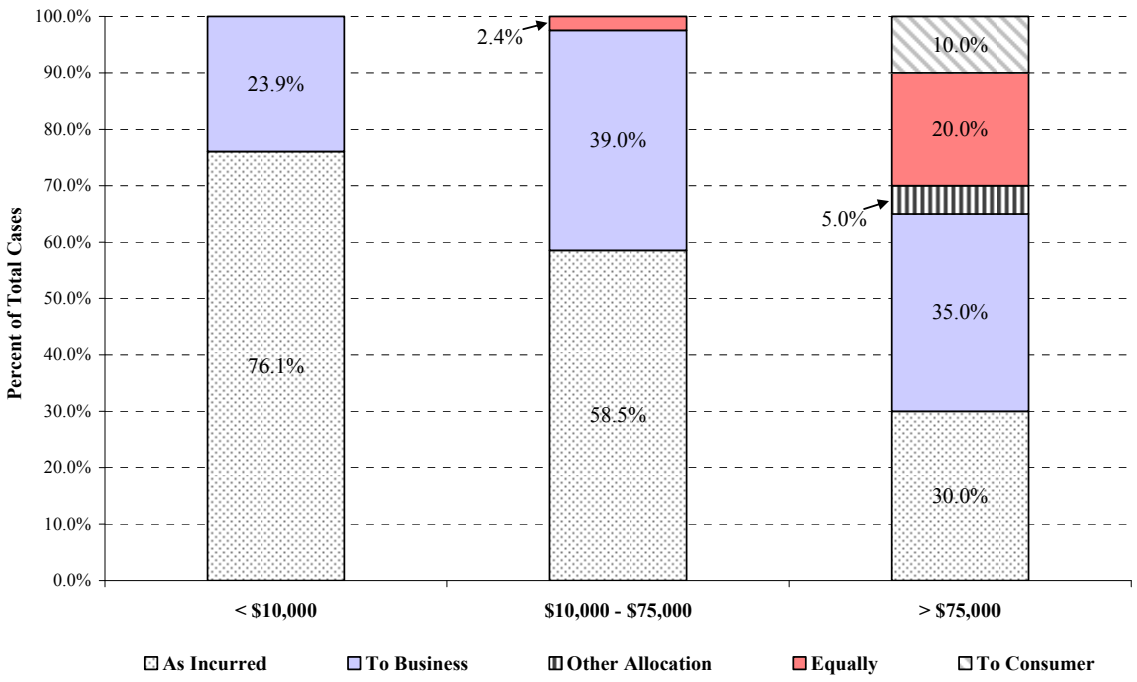
As discussed in the previous subsection, the fees assessed to a party are determined in part by how the arbitrator allocates fees in the award. Under the AAA's rules, the arbitrator has the power to apportion the AAA's administrative fees and arbitrator's fees among the parties in the award as he or she deems appropriate.[35] Arbitrators can direct that fees be borne "as incurred," specify that fees be shared equally by the parties, or require one party to bear most or all of the fees. The arbitrator can allocate administrative fees in the same or in a different manner from the arbitrator's fees.

[35] AAA, Commercial Rules, *supra* note 7, Rule R-43(c).

In the majority of the 301 cases in the case file sample, the arbitrator directed that fees be borne "as incurred." For business claimants, the award provided that AAA administrative fees be borne "as incurred" in 55.7% of the cases and that arbitrator's fees be borne "as incurred" in 42.6% of the cases. Of the remaining cases with business claimants, AAA administrative fees were allocated solely to the businesses 36.1% of the time and solely to the consumer respondents 8.2% of the time (5 cases).[36] Likewise, arbitrator's fees were allocated solely to the business 18.0% of the time, allocated equally or disproportionately to the business 31.2% of the time, and allocated solely to the consumer 8.2% of the time.[37]

For consumer claimants, fee allocations in awards varied depending on the amount sought – i.e., whether the case was subject to the AAA's low-cost arbitration procedures. Specifically, AAA administrative fees were allocated solely to consumer claimants twice, both in cases with claims seeking over $75,000. Arbitrators allocated AAA administrative fees equally or partially to consumers another eight times. Otherwise, arbitrators allocated AAA fees as incurred or solely to the business as shown in Figure 9.

Figure 9:
Percent Allocated AAA Administrative Fees in Consumer Claimant Cases by Amount Claimed
(Cases = 235)

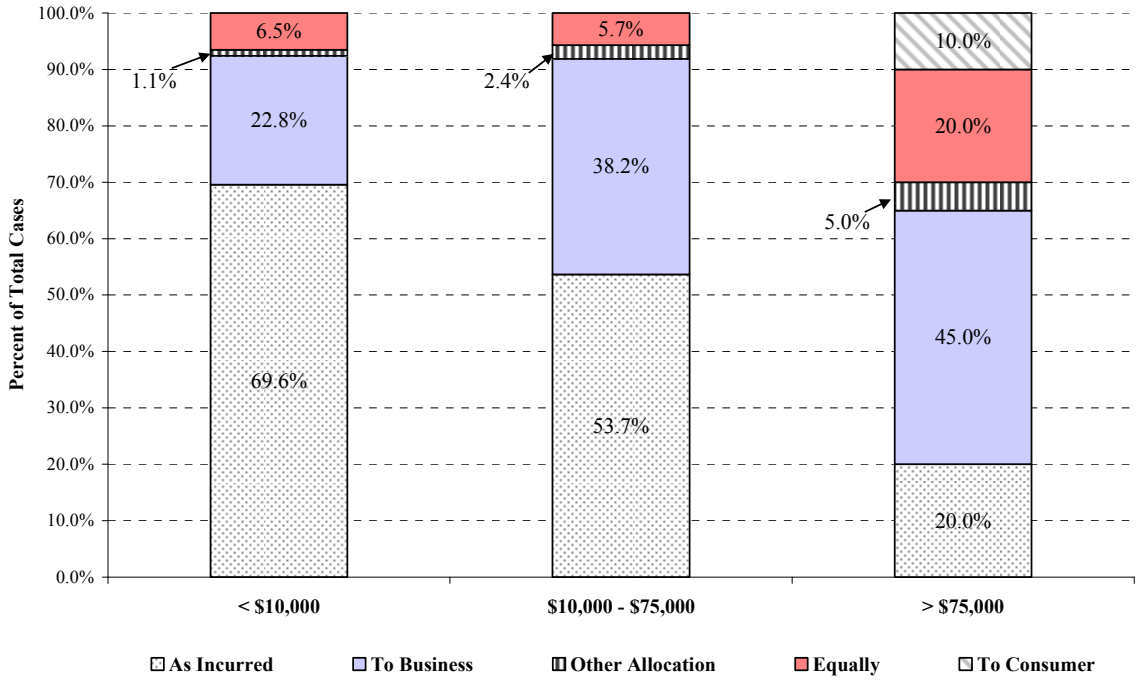


[36] It is not clear why the arbitrator allocated all AAA administrative fees to the consumer respondents in these five cases, but in two cases the consumers did bring counterclaims.

[37] The same five cases allocated both AAA administrative fees and arbitrator's fees solely to the consumers.

The allocation of arbitrator's fees for cases with consumer claimants was similar to the allocation of AAA administrative fees. In the two cases in which the arbitrator allocated AAA administrative fees to the consumer, the arbitrator also allocated arbitrator's fees to the consumer. In twenty-two cases the arbitrator allocated the arbitrator's fees equally or partially to the consumer, while in another 137 cases the arbitrator ordered the arbitrator's fees to be borne as incurred.[38] In the remaining 79 cases, the arbitrator allocated arbitrator's fees solely to the businesses. Figure 10 shows the breakdown by claim type of arbitrators' fees owed by consumer claimants.

Figure 10:
Percent Allocated Arbitrator's Fees in Consumer Claimant Cases by Amount Claimed
(Cases = 235)

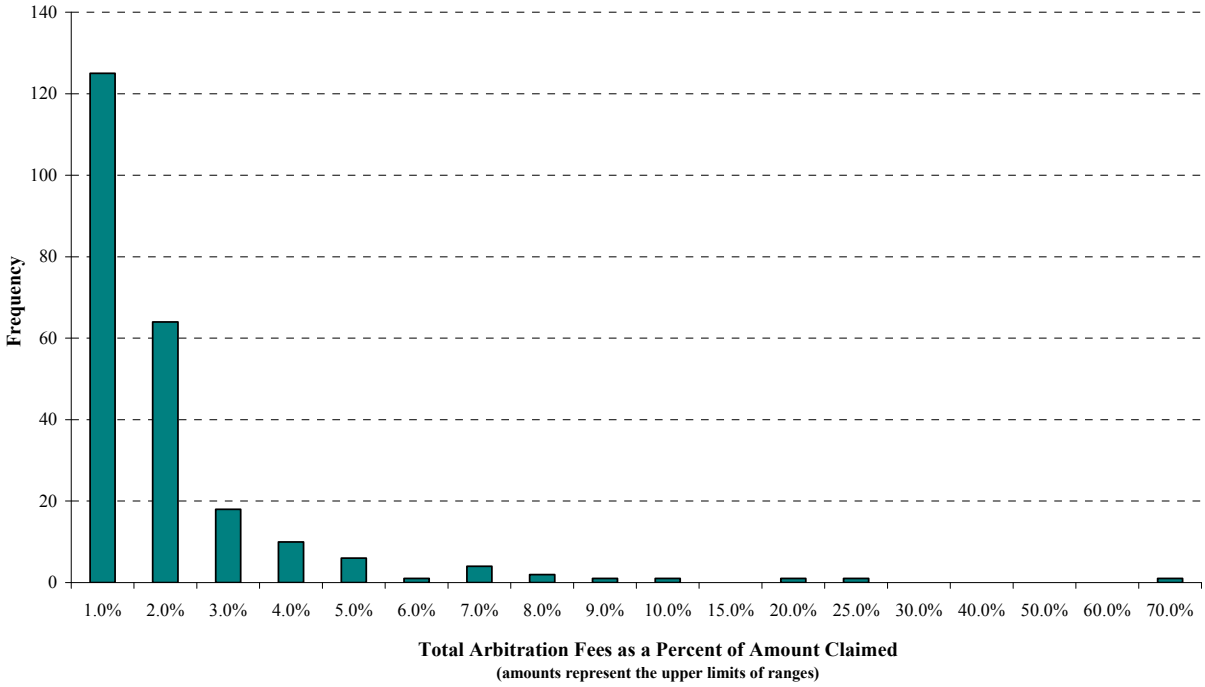


3. Fees as Percent of Amount Claimed

Finally, we calculated the total arbitration fees (i.e., AAA administrative fees and arbitrator's fees assessed to the consumer) as a percentage of the amount claimed. In the majority of the 235 cases in the case file sample with consumer claimants, total arbitration fees were one percent or less of the amount claimed, as shown in Figure 11.

[38] Consumers must pay half of the arbitrator's fees under the AAA's low-cost arbitration rules. *See supra* Part II.A. An order that arbitrator's fees be borne as incurred thus has the effect of maintaining that original allocation. An order that the consumer share the arbitrator's fees with the business equally likely has that same effect as well.

Figure 11:
Frequency of Total Arbitration Fees as a Percent of Amount Claimed
in Cases with Consumer Claimants
(Cases = 235)



The range has a long tail, due largely to a single outlier: total arbitration fees (i.e., both administrative and arbitrator's fees) ranged from 0.0% of the amount claimed to 65.1% of the amount claimed. The outlier was a case in which the amount sought was less than $200. In no other case did the total arbitration costs exceed 25.0% of the amount claimed. The mean for the entire case file sample of total arbitration fees as a percent of amount claimed by consumers was 0.8%. On average, for claims of $10,000 or less, the ratio of total fees to amount claimed for consumer claimants was 1.6%;[39] for claims between $10,000 and $75,000 the average ratio was 0.6%; and for claims greater than $75,000 the average ratio was 1.0%.

Overall, then, the fees paid by consumer claimants typically constitute less than two percent of the amount claimed.

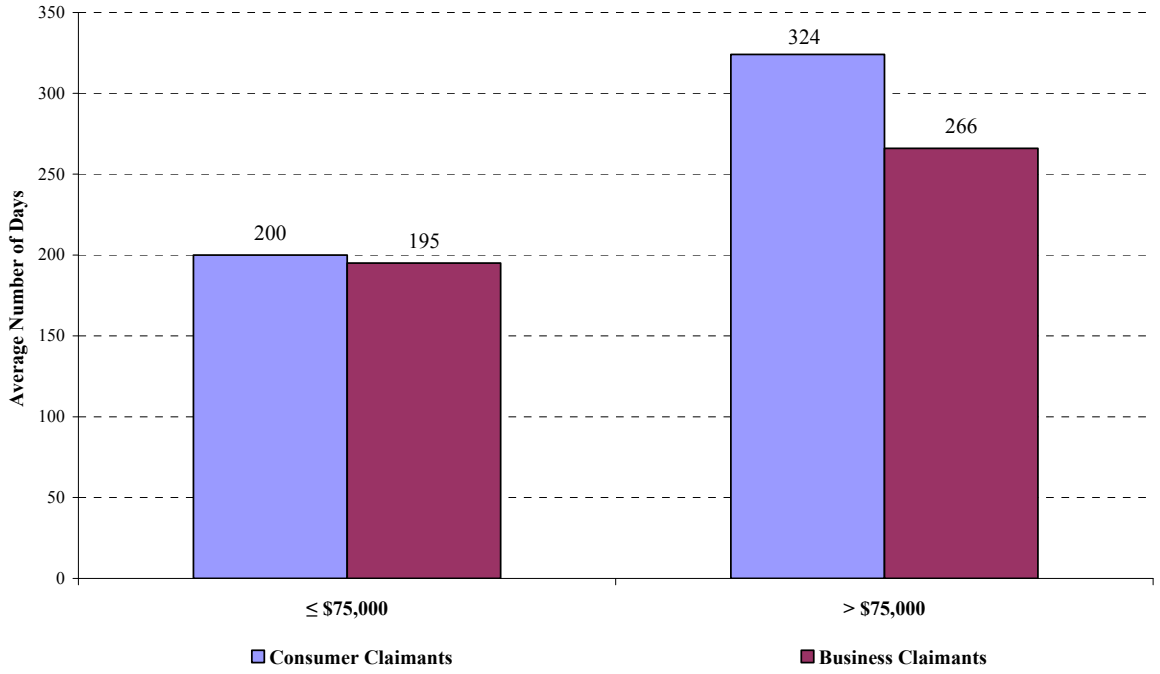
C. Speed of AAA Consumer Arbitrations

Generally arbitration is considered a relatively quick form of dispute resolution. Our results do not appear to contradict that impression, and are consistent with prior empirical studies

[39] Note that this result is due to the same outlier mentioned above.

on the issue.[40] On average, for the 301 cases in the case file sample, the time from filing to final award was 207 days (6.9 months).[41] The median time from filing to final award was 168 days (5.6 months), with a range of 64 to 992 days (2.1 months to 2.8 years). Cases with business claimants were about 10 days shorter on average than cases with consumer claimants (198 days, or 6.6 months, instead of 209 days, or 7.0 months). The median duration for cases brought by business claimants likewise was about 10 days shorter than for cases brought by consumer claimants (160 days, or 5.3 months, instead of 169 days, or 5.6 months). However, the range was greater for cases brought by business claimants (68 to 992 days, or 2.3 months to 2.8 years, as compared to 64 to 763 days, or 2.1 months to 2.1 years, for cases brought by consumer claimants). The upper tails of the ranges for business and consumer claimants were driven by a few outliers. Four cases involving consumer claimants lasted more than a year-and-a-half; and three cases involving business claimants lasted more than a year-and-a-half. Not surprisingly, cases with higher amounts claimed tended to take longer to resolve, as shown in Figure 12.

Figure 12:
Average Number of Days from Filing to Award by Amount Claimed
(Cases = 296)



The time from filing to award changes substantially depending on the type of hearing involved in the case. In the majority of cases in the case file sample (187 of 301, or 62.1%), the

[40] *See supra* Part I.A.2.

[41] We were not able to find the filing date for one of the cases so we used the assignment date as a reasonable proxy. See Part III.B for a discussion on the consistency tests of the AAA dataset.

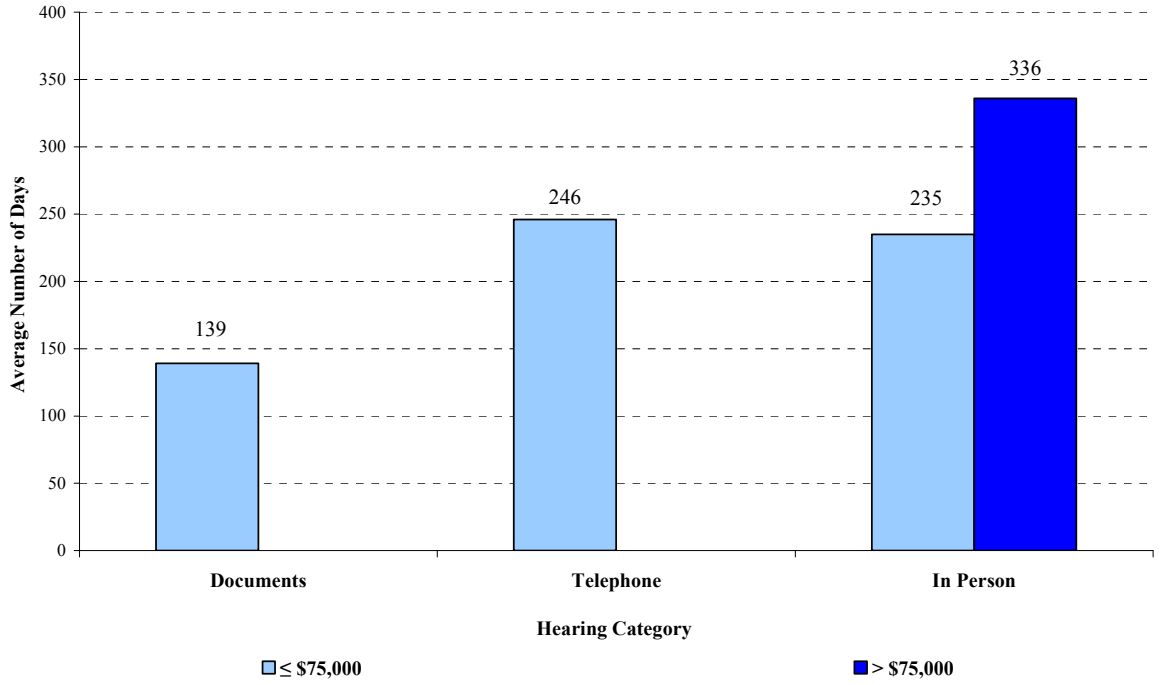
arbitrator held either an in-person or telephone hearing. The remaining cases were resolved on the basis of documents only.[42] Cases brought by consumer claimants whose claims were resolved on the basis of documents only were awarded in 139 days (4.6 months) on average, or 125 days (4.2 months) at the median. Cases brought by consumer claimants and resolved by an in-person hearing were awarded in 235 days (7.8 months) on average for claims of $75,000 or less and 336 days (11.2 months) on average for claims greater than $75,000.[43] The comparable median times to award are 188 days (6.3. months) for claims of $75,000 or less and 291 days (9.7 months) for claims greater than $75,000. For consumer claims of $75,000 or less, the difference in time from filing to award between cases resolved by documents only and cases resolved by in-person hearings is statistically significant.[44] Figure 13 below shows the relative differences in average time from filing to award for consumer claimants by claim size.

[42] In two cases, the arbitrator issued the final award pursuant to motions for summary disposition; we did not include those two cases in the results for cases resolved on the basis of documents.

[43] Clearly, it is not the time of the hearing itself that results in the greater time to an award. On average, in-person and telephone hearings lasted 1.23 days for cases with claims of $75,000 or less, 1.91 days for cases with claims of more than $75,000, and 1 day for non-monetary claims. Instead, presumably, the greater complexity of the cases and the difficulties of scheduling in-person or telephone hearings account for the added time.

[44] We used a two-group t-test for averages in number of days from filing to final award for cases resolved by documents only and for cases resolved by an in-person hearing. All cases were brought by consumer claimants seeking less than or equal to $75,000. The t-statistic was 7.1718 (DF = 200.151 and p = 0.0000 and accounting for unequal variances), which indicates that we may reject the null hypothesis that the averages between the two groups were the same.

Figure 13:
Average Number of Days from Filing to Award for Consumer Claimants
by Amount Claimed and Hearing Type
(Cases = 233)



The milestone dates in the AAA consumer dataset were generally reliable, which permits us to use that dataset as a check on our findings from the case file sample.[45] On average, the cases in the AAA dataset that were closed by an award from 2005 through 2007 (1114 cases) took 219 days (7.3 months) from filing to award, with a median case length of 176 days (5.9 months). Individual cases ranged in length from 55 days to 1203 days (or 1.8 months to 3.3 years). Overall, then, the results from the AAA consumer dataset are broadly consistent with the results from the case file sample.[46]

There is some potential for selection bias in both the case file sample and the AAA consumer dataset. The case file sample is limited to cases awarded from April 2007 through December 2007, and hence does not include cases that were filed during that period but awarded after December 2007. Similarly, the AAA consumer dataset does not include cases filed from 2005 through 2007 but resolved after December 2007. Thus, it is possible that, on average, our

[45] For the AAA consumer dataset, we use the assignment date as a proxy for filing date because the filing date is not captured. As discussed in Part III.B, however, assignment date is a reasonable proxy for filing date.

[46] The AAA consumer dataset did not track consistently whether the case was decided only by a review of documents or otherwise, so we could not use that dataset to check the results on type of hearing from the case file sample.

results understate somewhat the time to award. The amount of any understatement is not likely to change our results substantially, however.[47]

As such, the average time from filing to award for AAA consumer arbitration cases is approximately seven to eight-and-a-half months. By comparison, the median time from filing to award for AAA consumer arbitration cases is approximately five-and-a-half to seven months.

D. Outcomes of AAA Consumer Arbitrations

In this Section, we present the results of our analysis on outcomes in AAA consumer arbitrations. First, we describe limitations of the data as to outcomes. Second, we present general data on outcomes – win-rates for consumer claimants and business claimants; amounts of compensatory damages, interest, punitive damages, and attorneys' fees awarded; and the amount of compensatory damages awarded as a percentage of the amount claimed. Third, we examine the relationship between outcome and whether the consumer was represented by counsel. Finally, we look at what our data suggest about the existence of a repeat-player effect and, if there is such an effect, whether it results from bias in favor of repeat businesses or from case screening by repeat businesses.

1. Limitations of the Data

We use data from the 301 cases in the case file sample in analyzing outcomes because the AAA consumer dataset does not permit reliable tracking of party wins and award amounts. The case file sample has several limitations. First, as discussed above, claimants (particularly consumer claimants) do not always specify an exact amount demanded, sometimes seeking less

[47] Using cases filed and/or awarded in 2005 in the AAA consumer dataset as a reasonable proxy for the mix of cases filed and/or awarded in other years, we can examine the extent of any likely selection bias. Based on a review of case characteristics, we find no reason to believe that cases filed and/or awarded in 2005 would be systematically shorter or longer than cases filed and/or awarded in 2007. We also know of no exogenous event that might cause a difference in the types of cases filed in either year. We relied on the AAA consumer dataset and supplementary information from the AAA on cases still pending as of May 16, 2008, and February 18, 2009, to construct the set of cases filed and/or awarded in 2005. Specifically, we looked at (1) all cases filed in 2005 and awarded by December 2007; (2) all cases awarded in 2005; and (3) any cases filed in 2005 and listed as still pending as of May 16, 2008 and February 18, 2009. (There might be some cases that were filed in 2005 but closed between January 1, 2008 and May 15, 2008, that we may not have captured in this analysis. But the number of such cases is likely to be very small, if any exist at all.) For the resulting 520 awarded cases, the average length of time from filing to award was 252 days (8.4 months), and the median length of time from filing to award was 206 days (6.9 months). Individual cases ranged in length from 65 to 1151 days (2.2 months to 3.2 years). Additionally, according to the AAA, there were 57 cases filed in 2005 that were pending as of May 16, 2008. These same 57 cases were still pending as of February 18, 2009. Of those cases, 53 are held in abeyance due to party agreement or court order. Should any of these cases be awarded, the time to award in the case will be greater than 1000 days. However, in the AAA consumer dataset, only four cases were pending for more than 1000 days prior to an award; thus few, if any, of these 57 cases will likely be awarded. These cases are approximately five percent of the total cases filed in 2005. As such, they will not likely change the average of 252 days by a substantial amount.

than or more than a particular amount or a bounded range of amounts.[48] Our approach for dealing with this issue is described above.[49] Because only twenty-two cases with consumer claimants are affected, alternative approaches do not drastically change the results below.

Second, claimants sometimes include interest, punitive damages, attorneys' fees or other damages in the amount claimed in the demand for arbitration, instead of only including the amount of compensatory damages sought.[50] In order to mitigate this problem, when collecting the data we segregated those other damage amounts from the amount of compensatory damages when possible. However, there may be some claim amounts that include interest or other damages or were amended without evidence in the file. In the calculations below (unless otherwise noted) we report percent recoveries using claims and awards of compensatory damages. Because claimants often did not claim specific amounts for other kinds of damages, calculating those percent recoveries was not possible.

Similar issues arise on the award side as well, although not as frequently. In general, arbitrators specified in the award the types of damages being awarded, although the award was not clear as to the breakdown of the amount awarded in a few cases. Again, this could overstate the amount of compensatory damages awarded.

Third, we consider any time the arbitrator found for the claimant and awarded damages of some kind to be a win for the claimant and a loss for the respondent, regardless of the amount awarded. (We do not, however, treat the reallocation of arbitration costs alone as making the case a win for the claimant.) We use this definition of a win for both initial claims and counterclaims. We recognize, as discussed above, that this definition may overstate the extent to which the claimant truly prevails on its claim.[51] We deal with that possibility by presenting data on win-rates as well as on the amount awarded.

2. General Outcomes

Because of the differing nature of the respective claims,[52] we present win-rates for consumer claimants and business claimants separately.[53] For cases with consumer claimants, the consumer won some relief in 53.3% (128 of 240) of the cases, as shown in Table 2. By comparison, for cases with business claimants, the business won some relief in 83.6% (51 of 61)

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[48] *See supra* Part IV(1).A.2.

[49] *See supra* Part IV(1).A.2.

[50] On some of the demand for arbitration forms used by the AAA, claimants can check a box to indicate whether they are seeking recovery of attorneys' fees, punitive damages, interest, arbitration costs, or other damages. See AAA, Form Demand for Arbitration, *available at* http://www.adr.org/si.asp?id=3807 (last visited December 31, 2008). Because it is not clear that those items of damages should not be included in the line item for "Dollar amount of claim" on the form, it is possible that some claimants included those items of damages in the amount claimed.

[51] *See supra* Part I.A.3.

[52] *See supra* Part IV(1).A.1.

[53] Note that we do not consider settlements in our win-rates since we do not have enough data to determine whether their inclusion would be appropriate in this context.

of the cases.[54] The higher win-rate for business claimants may be due to the fact that businesses tend to bring debt collection actions and other similar cases in which the likelihood of success for the business is high.[55] Although we cannot reach any definitive conclusions about the success of consumer claimants, because we have no baseline for comparison, we can at least say that the consumer claimants won some relief more often than they lost against businesses in AAA consumer arbitrations.

Table 2: Win Rates by Case Type and Party

	Cases with Consumer Claimants Only		Cases with Business Claimants Only	
Party	**Consumer**	**Business**	**Consumer**	**Business**
Wins	128	112	10	51
Total Cases	240	240	61	61
Win Rate	**53.3%**	**46.7%**	**16.4%**	**83.6%**

Consumer claimants who bring large claims tend to do better than consumers who bring smaller claims, although the number of consumers bringing large claims is small. As Table 3 shows, consumer claimants won some relief in 60.0% of cases (12 of 20) seeking more than $75,000, and won some relief in 52.1% of cases (112 of 215) seeking $75,000 or less. In both types of cases, the consumer claimant won some relief against the business more than half the time.

Table 3: Consumer Claimant Win Rates by Amount Claimed

	Cases with Consumer Claimants Only	
Claim	**≤ $75,000**	**> $75,000**
Consumer Wins	112	12
Total Cases	215	20
Consumer Win Rate	**52.1%**	**60.0%**

[54] If we include the fifty-seven counterclaims in the case file sample in the above analysis, consumer claimants won some relief in 53.4% (134 of 251) of the cases and business claimants won some relief in 80.4% (86 of 107) of the cases.

[55] *See* Peter B. Rutledge, Arbitration -- A Good Deal for Consumers: A Response to Public Citizen 10-11 (April 2008) (report prepared for and released by the U.S. Chamber Institute for Legal Reform), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091.

We also analyzed the amounts awarded to business and consumer claimants. Our results are summarized in Table 4.[56] The mean amount awarded to business claimants in the case file sample was $20,648 and the mean percent recovery was 93.0%.[57] The median amount awarded to business claimants was $11,110 and the median percent recovery was 100.0%. For consumer claimants, the mean amount awarded was $19,255 and the mean percent recovery was 52.1%, while the median amount awarded was $5000 and the median percent recovery was 41.7%.

Table 4: Compensatory Damages Recovered by Consumer Claimants and Business Claimants

	Prevailing Consumer Claimants			Prevailing Business Claimants		
	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)
Maximum	$419,259	$500,000	**100.0%**	$156,048	$156,048	**100.0%**
Minimum	$0	$178	**0.0%**	$873	$1,215	**16.3%**
Average	$19,255	$40,955	**52.1%**	$20,648	$21,420	**93.0%**
Median	$5,000	$16,530	**41.7%**	$11,110	$12,827	**100.0%**
Std. Dev.	$50,592	$67,056	**38.9%**	$26,732	$27,138	**16.0%**
Cases	119	119	**119**	51	51	**51**

We also examined the amounts awarded to consumers based on the whether the consumer claimed more or less than $75,000, as shown in Table 5. The mean amount awarded to consumers claiming $75,000 or less in the case file sample was $8871 and the mean percent recovery was 51.6%. The median amount awarded to consumers claiming $75,000 or less was $4800 and the median percent recovery was 41.6%. For consumers claiming more than $75,000, the mean amount awarded was $111,847 and the mean percent recovery was 56.2%, while the median amount awarded was $78,062 and the median percent recovery was 72.7%. Thus, prevailing consumers who claimed amounts in excess of $75,000 tended to receive awards in excess of $75,000. The average percent recovery between the two groups is similar, however.

[56] Consumer claimants prevailed in an additional nine cases, but in those cases either the claim sought non-monetary relief or the dollar amount awarded was not available in the case file. Accordingly, we excluded those cases from our analysis. Since our definition of a win includes the claimant recovering any part of the claim, we did include two cases with consumer claimants who were awarded attorneys' fees but no compensatory damages.

[57] In this section, all average percent recoveries were calculated as the average from a distribution of each claimant's percent recovery.

Table 5: Compensatory Damages Recovered by Consumer Claimants by Amount Claimed

	Prevailing Consumer Amount Claimed ≤ $75,000			Prevailing Consumer Amount Claimed > $75,000		
	Compensatory Damages Awarded	**Compensatory Damages Claimed**	**% Recovery (Amt. Awarded/ Amt. Claimed)**	**Compensatory Damages Awarded**	**Compensatory Damages Claimed**	**% Recovery (Amt. Awarded/ Amt. Claimed)**
Maximum	$60,000	$75,000	**100.0%**	$419,259	$500,000	**100.0%**
Minimum	$0	$178	**0.0%**	$784	$80,000	**0.8%**
Average	$8,871	$23,816	**51.6%**	$111,847	$193,785	**56.2%**
Median	$4,800	$12,378	**41.6%**	$78,062	$150,000	**72.7%**
Std. Dev.	$12,108	$23,069	**38.7%**	$125,071	$121,527	**42.2%**
Cases	107	107	**107**	12	12	**12**

Because we have no baseline for comparison, we cannot evaluate whether these recoveries are favorable or unfavorable for consumers.[58] We can say that the differing outcomes between business claimants and consumer claimants do not necessarily show that the process is unfair to consumers. Instead, the differing outcomes appear likely to be due to the types of cases brought by business claimants and consumer claimants rather than any form of systematic bias. Business claimants usually bring claims for specific monetary amounts representing debts for goods provided or services rendered. Many of the cases are resolved ex parte, with the consumer failing to appear.[59] By comparison, cases with consumer claimants are much less likely to involve liquidated amounts and more likely to be contested by businesses.

Figure 14 further illustrates the variation in awards of compensatory damages to business claimants and consumer claimants. In 41 of the 51 cases in which a business claimant prevailed, the business recovered between 90.0% and 100.0% of the amount claimed. In contrast, the distribution of outcomes for prevailing consumer claimants is bimodal. In the 119 cases in which consumer claimants received monetary awards, the consumer recovered 20.0% or less of the amount claimed in 36 cases and between 90.0% to 100.0% of the amount claimed in 37 cases. This bimodal distribution is consistent with studies of AAA commercial arbitration awards[60] and international arbitration awards.[61] It also suggests that arbitrators do not commonly make compromise awards in AAA consumer arbitrations.[62]

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[58] Again, we hope to develop such a baseline in a future report.

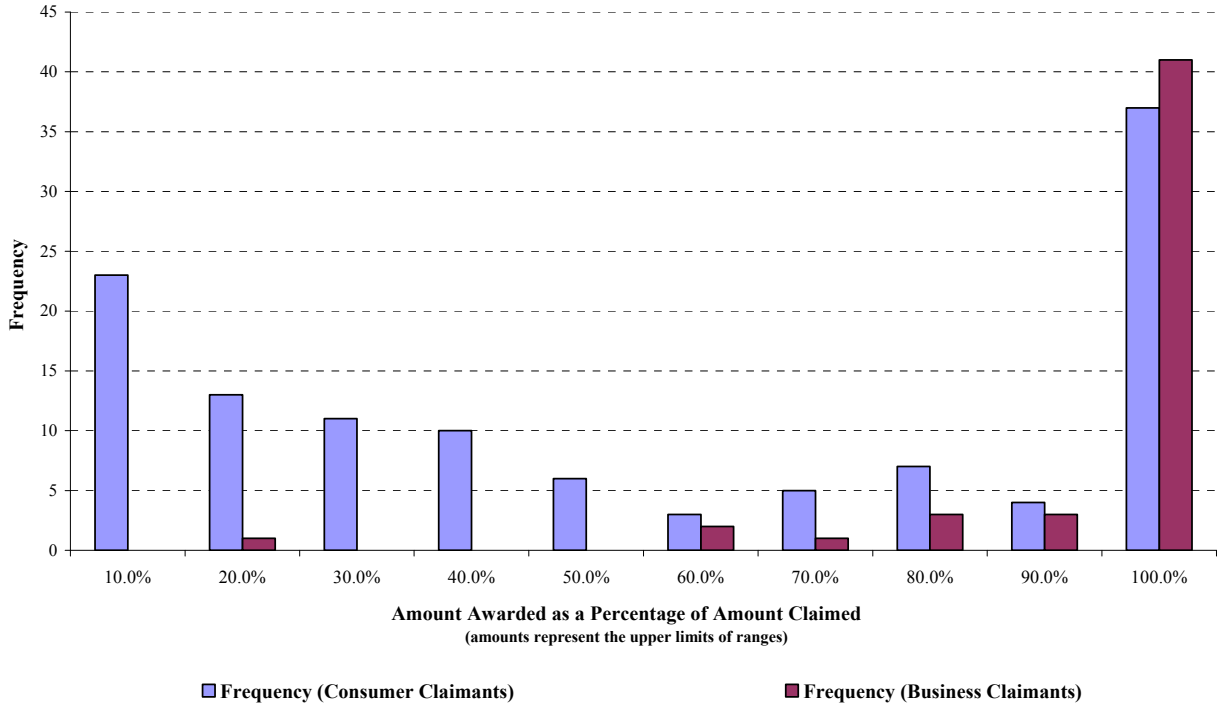
[59] Twenty-two out of the sixty-one cases (or 36.1%) brought by business claimants were resolved on an ex parte basis. The business won some relief in 100.0% of those 22 cases, and on average recovered 94.1% of the amount claimed.

[60] American Arbitration Association, *Splitting the Baby: A New AAA Study* (Mar. 9, 2007), *available at* www.adr.org/sp.asp?id=32004.

[61] Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do not "Split the Baby" – Empirical Evidence from International Business Arbitration*, 18 J. INT'L ARB. 573 (2001).

[62] *See* Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1260-61 (2005); Alan Scott Rau, *Integrity in Private Judging*, 38 SO. TEX. L. REV. 485, 523 (1997).

Figure 14:
Amount Awarded as a Percent of Amount Claimed by Consumer and Business Claimants
(Cases = 170)



In addition to compensatory damages, prevailing claimants also were awarded other types of damages, including attorneys' fees, punitive damages, and interest.

In the case file sample, consumer claimants made a claim for attorneys' fees in 65 of the 128 cases (or 50.8%) in which they prevailed. In 41 of those 65 cases (or 63.1%), the arbitrator awarded attorneys' fees to the consumer.[63] In those cases in which the award of attorneys' fees specified a dollar amount (35 cases), the average attorneys' fee award was $14,574 and the median award was $9000. Of course, in 44 of 63 (or 69.8%) of the cases in which prevailing consumer claimants did not seek attorneys' fees, they were proceeding pro se and did not have to pay an attorney anything.[64]

[63] Because claimants sometimes amended their claims without formal indication in the AAA file, there are occasions where the claimant was awarded damages they had not originally requested. Since we understand from the AAA that the arbitrators are not to award damages beyond those claimed, we assume that claims for those damages were made.

[64] There are four cases in which consumer claimants proceeded pro se but asked for attorneys' fees. In two of those cases, the arbitrator did not award attorneys' fees and the claim may have been a misunderstanding on the part of the claimant in filling out the arbitration demand form. The other two pro se consumer claimants were awarded attorneys' fees. However, both of theses cases came to arbitration from state courts, so the attorneys' fees claims may have resulted from fees incurred in state court or some other involvement of an attorney in the process.

Of the 51 cases in which the business claimant prevailed, the business made a claim for attorneys' fees in 41 cases and was awarded those fees in 16 cases (or 39.0%). The mean attorneys' fee award was $2302 and the median fee award was $1534. The data in the files were not sufficient to determine the basis on which business claimants' recovered attorneys' fees from consumers.

Awards of punitive damages were less common. Prevailing consumer claimants were awarded punitive damages in 12 of the 46 (26.1%) cases in which they were sought. The mean punitive damages award was $39,557, while the median punitive award was $2100. The higher mean is due to one case in which the consumer claimant received a punitive damages award of $427,500. In contrast, prevailing business claimants almost never sought punitive damages. Of the 51 cases in which business claimants prevailed, the business sought punitive damages in three, and was awarded punitive damages in two. The average amount of punitive damages awarded in those two cases was $10,778.

Arbitrators also awarded interest to prevailing parties that requested it in their claims. Prevailing consumer claimants were awarded interest in 19 of the 36 cases (or 52.8%) in which it was sought. Prevailing business claimants were awarded interest in 21 of the 27 cases (or 77.8%) in which it was sought. Because interest is often awarded without a specific dollar amount in the written awards, it is difficult to determine the magnitude of the amounts awarded.

3. Pro Se Consumers

In almost half (150 of 301, or 49.8%) of the cases in the case file sample, consumers arbitrated the case themselves – i.e., without an attorney. (In the other half of the cases, of course, that means that consumers were represented by attorneys in the arbitration proceeding.) As Table 6 shows, consumer claimants were far more likely to be represented by counsel than consumer respondents. This difference may be due to the different type of claim involved,[65] or to the fact that consumer claimants, unlike consumer respondents, might be represented on a contingency fee basis.

[65] For a more detailed discussion of ex parte cases, see *supra* Part IV(1).A.4.

Table 6: Consumer Representation by Case Type

	Cases with Consumer Claimants Only	Cases with Business Claimants Only*
Consumer Represented by Attorney	133 (55.4%)	18 (29.5%)
Consumer Proceeded Pro se	103 (42.9%)	22 (36.1%)
Consumer Did Not Appear (Ex Parte Case)	4 (1.7%)	22 (36.1%)
Total Cases	240	61

* Note that one consumer respondent was represented by an attorney but eventually did not appear. This case appears twice in the above table in the Business Claimants column - once in the first row and again in the third row. Accordingly, the total number of cases in which consumers proceeded pro se (150) consists of the entries in the table above for consumers proceeding pro se and consumers who did not appear, less the one case in which a consumer was represented by an attorney but did not appear.

As a general matter, pro se consumers have a lower win-rate than consumers represented by attorneys, both in cases in which the consumers are claimants and in cases in which businesses are claimants. As Table 7 shows, pro se consumer claimants won some relief in 44.9% of the cases they brought, while consumer claimants with counsel won some relief in 60.2% of the cases they brought. By comparison, pro se consumers won in 7.0% of the cases brought by businesses, while consumer respondents with counsel won in 38.9% of such cases.

Table 7: Consumer Win Rates by Case Type and Consumer Representation

	Cases with Consumer Claimants Only			Cases with Business Claimants Only		
Consumer Representation	**All**	**Attorney**	**Pro se**	**All**	**Attorney**	**Pro se**
Consumer Wins	128	80	48	10	7	3
Total Cases	240	133	107	61	18	43
Consumer Win Rate	**53.3%**	**60.2%**	**44.9%**	**16.4%**	**38.9%**	**7.0%**

The results are similar if we take into account the amount claimed. As Table 8 shows, consumer claimants fare better when represented by an attorney both for cases in which the

claimant seeks $75,000 or less and for cases in which the claimant seeks more than $75,000, although pro se claimants are much less common in the latter category.

Table 8: Consumer Claimant Win Rates by Amount Claimed and Representation

	Consumer Amount Claimed ≤ $75,000		**Consumer Amount Claimed > $75,000**	
Consumer Representation	**Attorney**	**Pro se**	**Attorney**	**Pro se**
Consumer Wins	67	45	11	1
Total Cases	115	100	16	4
Consumer Win Rate	**58.3%**	**45.0%**	**68.8%**	**25.0%**

At least two explanations are possible for the higher success rate of consumers with attorneys.[66] First, hiring an attorney may increase the consumer's likelihood of success because of the specialized advocacy skills of an attorney.[67] Second, in deciding whether to take on a client, attorneys accept only cases that are more likely to prevail, screening out less meritorious cases. From our data, we are unable to distinguish between these two explanations.

In addition to a higher win-rate, consumer claimants who are represented by attorneys also tend to receive higher damages awards. As shown in Table 9,[68] consumer claimants with attorneys received an average award of $27,233 and a median award of $6702, while pro se claimants received an average award of $5656 and a median award of $3029. [69]

Similar explanations are possible here as with win-rates – either attorneys are able to obtain higher recoveries for their clients, or attorneys screen cases for those with higher potential

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[66] Prior empirical studies on employment arbitration report mixed results on the question. *Compare* Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 405, 433 (2007) ("the employee win rate was 22.6 percent where represented by counsel and only 13.7 percent where the employee was self-represented, a statistically significant difference") *with* Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May/July 2003, at 15 ("The win-loss ratio for both lower-income employees with representation and those who proceeded *pro se* was .50"); Hill, *Due Process*, *supra* note 25, at 819 (reporting similar results).

[67] Because of the less formal nature of arbitration, this explanation seems somewhat weaker than it would as applied to a case in court, although clearly at least some of an attorney's skills are transferable from court to arbitration.

[68] The outcomes results are only for those cases with known amounts of compensatory damages claimed and awarded.

[69] We used a two-group t-test for averages in compensatory damages awards to pro se consumer claimants and consumer claimants with counsel, excluding non-monetary claims and awards and accounting for unequal variances. The t-statistic was 2.9591 (DF = 78.6227 and p = 0.0041), which indicates that we may reject the null hypothesis that the averages between the two groups were the same.

recoveries. Our data again are unable to distinguish definitively between these two explanations, although they are suggestive. All consumer claimants who filed claims and were represented by attorneys sought an average of $57,529 in compensatory damages, while pro se claimants sought an average of $31,774, amounts that are statistically different albeit at the 10% level.[70] Likewise, median claim amounts are higher for consumer claimants with attorneys ($32,000 versus $8576 for pro se claimants). While higher claim amounts may in part reflect value added by attorneys, it seems likely that a substantial part of the difference reflects the underlying value of the claim. As such, the data at least suggest that consumer claimants are more likely to be represented by counsel in cases with higher stakes.[71]

Table 9: Compensatory Damages Recovered by Consumer Claimants by Consumer Representation

	Prevailing Consumer Claimants with Attorneys			**Prevailing Pro se Consumer Claimants**		
	Compensatory Damages Awarded	**Compensatory Damages Claimed**	**% Recovery (Amt. Awarded/ Amt. Claimed)**	**Compensatory Damages Awarded**	**Compensatory Damages Claimed**	**% Recovery (Amt. Awarded/ Amt. Claimed)**
Maximum	$419,259	$500,000	**100.0%**	$44,472	$99,898	**100.0%**
Minimum	$0	$2,770	**0.0%**	$0	$178	**0.0%**
Average	$27,233	$57,659	**44.9%**	$5,656	$12,483	**64.3%**
Median	$6,702	$33,905	**31.3%**	$3,029	$7,342	**72.8%**
Std. Dev.	$62,171	$78,760	**38.4%**	$8,472	$18,650	**37.0%**
Cases	75	75	**75**	44	44	**44**

Two additional results are worth noting. First, pro se consumer claimants recovered a higher percentage of the amount claimed than consumers who were represented by attorneys. Prevailing pro se consumer claimants averaged a 64.3% recovery of the amount claimed, while prevailing consumer claimants with attorneys averaged a 44.9% recovery of the amount claimed. We have no clear explanation for this finding.[72]

Second, consistent with findings reported in the previous section,[73] of the 80 cases in which prevailing consumer claimants were represented by attorneys, the claimant was awarded attorneys' fees in 39 of the 61 cases in which they were sought (a success rate of 63.9%). The

[70] We used a two-group t-test for averages in claims made by represented and pro se consumer claimants, excluding non-monetary claims and accounting for equal variances. The t-statistic was 1.7093 (DF = 233 and p = 0.0887), which indicates that we fail to reject the null hypothesis that the averages between the two groups were the same at higher than the 10% level.

[71] Attorneys will be more likely to accept cases with higher stakes, while cases with lower stakes may encourage consumers to minimize their costs and forego legal representation.

[72] One possibility is that attorneys are more aggressive in formulating damages claims than pro se claimants. A second possibility is that attorneys are less precise in their demands, specifying ranges rather than precise amounts of damages.

[73] *See supra* Part IV(1).D.2 & n.65.

frequency with which attorneys' fees are awarded in arbitration provides at least some incentive for attorneys to agree to represent consumers in arbitration.

4. Repeat-Player Effect

As discussed above, previous research on employment arbitration has found a "repeat-player effect," in which businesses that arbitrate on a regular basis tend to have a higher win-rate than businesses that arbitrate less often.[74] Several possible explanations for the repeat-player effect have been offered. The first is that the repeat-player effect is due to bias on the part of arbitrators and arbitration service providers, seeking to curry favor with businesses that are more likely to provide future business. The second is that businesses are able to structure the arbitration process in a favorable manner through their control of dispute systems design. The third is that the repeat-player effect is due to case selection by repeat businesses, who are more sophisticated in their case screening than non-repeat businesses. We first look at whether there is a repeat-player effect in the AAA's consumer cases. Finding some evidence of such an effect, we then test for whether the effect is likely due to bias (of arbitrators or otherwise) or case selection.

To test for the presence of a repeat-player effect, we used two different definitions of repeat business. First, we defined a business to be a repeat business when it appeared more than once in the AAA consumer dataset.[75] We refer to a business that meets this definition of a repeat business as a "repeat(1) business." Second, we used information from the AAA business list (which it maintains to help in administering the Consumer Due Process Protocol[76]) to identify a category of repeat businesses. As explained above,[77] on the AAA business list the AAA identifies a sub-category of "acceptable businesses" (businesses for which it will administer consumer arbitrations). The businesses in this sub-category typically are large entities for which in the past there had been some confusion over the appropriate contact person when a consumer brought a claim against the business. For those businesses, the AAA business list typically identifies an appropriate contact person to receive the demand for arbitration. The fact that those businesses have had additional dealings with the AAA in administering their consumer arbitrations may make it appropriate to treat them as repeat businesses. We refer to businesses that meet this definition of repeat business as "repeat(2) businesses."

Using the first definition of repeat business (businesses who appear more than once in the AAA consumer dataset), we do not find statistically significant evidence of a repeat-player effect in the cases in the case file sample. As shown in Table 10, consumer claimants won some relief in 51.8% of cases against repeat(1) businesses and 55.3% of cases against non-repeat businesses,

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74 *See supra* Part I.A.3.

75 This definition is similar to that used in other studies in that it focuses on the number of times the business appears in cases in the case file sample. *E.g.*, Colvin, *supra* note 66, at 430; Hill, *supra* note 66, at 15. It differs from other studies in that we are able to use a broader sample of cases in determining the number of times the business appears.

76 *See supra* Part II.B.

77 *See supra* Part II.B.

a difference that is not statistically significant.[78] In cases in which the business is the claimant, consumers won some relief in 13.3% of cases against repeat(1) businesses and 25.0% of cases against non-repeat businesses. But in this latter case the sample size is too small to reliably test the difference statistically. Again, using this definition of repeat business we do not find a statistically significant repeat-player effect, and consumer claimants still recover some amount against both repeat(1) and non-repeat businesses over half the time in the case file sample.

Table 10: Consumer Win Rates by Case Type and Presence of a Repeat(1) Business

	Cases with Consumer Claimants Only			Cases with Business Claimants Only		
Business Type	**All**	**Repeat(1)**	**Non-Repeat**	**All**	**Repeat(1)**	**Non-Repeat**
Consumer Wins	128	71	57	10	6	4
Total Cases	240	137	103	61	45	16
Consumer Win Rate	**53.3%**	**51.8%**	**55.3%**	**16.4%**	**13.3%**	**25.0%**

The results are similar when we categorize consumer claimants by amount claimed. The difference in Table 11 is that consumers tend to do better against repeat(1) businesses when claiming more than $75,000, although again the sample size is too small for reliable statistical analysis.

Table 11: Consumer Claimant Win Rates by Amount Claimed and Presence of a Repeat(1) Business

	Consumer Amount Claimed ≤ $75,000		Consumer Amount Claimed > $75,000	
Business Type	**Repeat(1)**	**Non-Repeat**	**Repeat(1)**	**Non-Repeat**
Consumer Wins	60	52	7	5
Total Cases	121	94	11	9
Consumer Win Rate	**49.6%**	**55.3%**	**63.6%**	**55.6%**

As shown in Table 12, consumers who prevail against a repeat(1) business recover a higher percentage of the mean (and median) amount of compensatory damages claimed than consumers who prevail against non-repeat businesses. Prevailing consumer claimants recover on average 60.9% of compensatory damages claimed against repeat(1) businesses (and 75.6% of compensatory damages claimed at the median) and on average 41.4% of the amount claimed against non-repeat businesses (and 31.4% of the amount claimed at the median), a statistically

[78] The Pearson's Chi-squared statistic is 0.2919 (DF = 1 and p = 0.589), which fails to allow us to reject the null hypothesis that consumer wins are not associated with whether the respondent is a repeat(1) business.

significant difference.[79] Although we have no clear explanation for these results, at a minimum they seem inconsistent with the existence of a repeat-player effect.[80]

Table 12: Compensatory Damages Recovered by Consumer Claimants by Presence of a Repeat(1) Business

	Prevailing Consumer Claimants Repeat(1) Business Present			Prevailing Consumer Claimants Non-Repeat Business Present		
	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)
Maximum	$250,000	$300,000	**100.0%**	$419,259	$500,000	**100.0%**
Minimum	$1	$178	**0.0%**	$0	$538	**0.0%**
Average	$20,084	$39,467	**60.9%**	$18,256	$42,746	**41.4%**
Median	$6,000	$12,000	**75.6%**	$4,475	$22,742	**31.4%**
Std. Dev.	$43,407	$59,386	**39.4%**	$58,494	$75,805	**35.8%**
Cases	65	65	**65**	54	54	**54**

Using the second definition of repeat business (based on a sub-category of businesses on the AAA business list), we find a greater repeat-player effect, at least as to win-rates, albeit one that is weakly statistically significant. As Table 13 shows, consumer claimants won some relief in 43.4% of cases against repeat(2) businesses and 56.1% of cases against non-repeat businesses, a difference that is statistically significant at the 10% level.[81] In cases in which the business is the claimant, consumers won in none of the cases against repeat(2) businesses and 16.4% of cases against non-repeat businesses. But in this latter case the sample size is too small for reliable tests of statistical differences.

[79] We used a two-group t-test for averages in percent recoveries between consumer claimants arbitrating against repeat(1) businesses and non-repeat businesses, excluding non-monetary claims and awards and accounting for equal variances. The t-statistic was -2.7983 (DF = 117 and p = 0.0060), which indicates that we may reject null hypothesis that the averages between the two groups were the same.

[80] Some other studies include zero dollar awards (i.e., claimant losses) in calculations of the percentage recovery, which makes comparisons to those studies difficult. *See* Colvin, *supra* note 66, at 429-31. We exclude zero dollar awards from Table 12 so that we can examine percentage recovery separately from win-rate; including zero dollars awards conflates the two measures.

[81] The Pearson's Chi-squared statistic is 2.6987 (DF = 1 and p = 0.100), which fails beyond the 10% level to allow us to reject the null hypothesis that consumer wins are not associated with whether the respondent is a repeat(2) business or not.

Table 13: Consumer Win Rates by Case Type and Presence of a Repeat(2) Business

	Cases with Consumer Claimants Only			Cases with Business Claimants Only		
Business Type	**All**	**Repeat(2)**	**Non-Repeat**	**All**	**Repeat(2)**	**Non-Repeat**
Consumer Wins	128	23	105	10	0	10
Total Cases	240	53	187	61	7	54
Consumer Win Rate	**53.3%**	**43.4%**	**56.1%**	**16.4%**	**0.0%**	**18.5%**

The results are similar when we categorize consumer claimants by amount claimed, as Table 14 indicates. The win-rate for consumer claimants seeking $75,000 or less is 39.1% against repeat(2) businesses and 55.6% against non-repeat businesses, a statistically significant difference at the 5% level.[82] By comparison, consumers seeking more than $75,000 won some relief more often against repeat(2) businesses than against non-repeat businesses, but the number of such cases is too small to reliably test the results statistically.

Table 14: Consumer Claimant Win Rates by Amount Claimed and Presence of a Repeat(2) Business

	Consumer Amount Claimed ≤ $75,000		Consumer Amount Claimed > $75,000	
Business Type	**Repeat(2)**	**Non-Repeat**	**Repeat(2)**	**Non-Repeat**
Consumer Wins	18	94	4	8
Total Cases	46	169	5	15
Consumer Win Rate	**39.1%**	**55.6%**	**80.0%**	**53.3%**

Again, as Table 15 shows, if consumer claimants do prevail on their claim, they recover on average an almost identical percent of the amount claimed against repeat(2) businesses (52.4%) as against non-repeat businesses (52.0%).[83] The results are reversed for the median, with prevailing consumer claimants recovering at the median a lower percentage of the amount claimed against repeat(2) businesses (39.5%) than against non-repeat businesses (41.7%).

[82] The Pearson's Chi-squared statistic is 3.9402 (DF = 1 and p = 0.0470), which fails beyond the 5% level to allow us to reject the null hypothesis that consumer wins for cases with claims of less than $75,000 are not associated with whether the respondent is a repeat(2) business.

[83] We used a two-group t-test for averages in percent recoveries between consumer claimants arbitrating against repeat(2) businesses and non-repeat businesses, excluding non-monetary claims and awards and accounting for equal variances. The t-statistic was -0.0485 (DF = 117 and p = 0.9614), which indicates that we fail to reject null hypothesis that the averages between the two groups were the same.

Table 15: Compensatory Damages Recovered by Consumer Claimants by Presence of a Repeat(2) Business

	Prevailing Consumer Claimants Repeat(2) Business Present			Prevailing Consumer Claimants Non-Repeat Business Present		
	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)	Compensatory Damages Awarded	Compensatory Damages Claimed	% Recovery (Amt. Awarded/ Amt. Claimed)
Maximum	$250,000	$250,000	**100.0%**	$419,259	$500,000	**100.0%**
Minimum	$15	$178	**0.3%**	$0	$192	**0.0%**
Average	$26,693	$46,803	**52.4%**	$17,568	$39,629	**52.0%**
Median	$4,500	$23,313	**39.5%**	$5,000	$15,893	**41.7%**
Std. Dev.	$56,537	$62,958	**40.1%**	$49,309	$68,193	**38.8%**
Cases	22	22	**22**	97	97	**97**

Overall, then, we find some evidence of a repeat-player effect when using our second definition of repeat business, and even then only as to win-rates and not as to percentage recoveries. But as discussed above,[84] the existence of a repeat-player effect does not necessarily show arbitrator (or other) bias in favor of repeat businesses. Instead, a repeat-player effect also may result from case selection by repeat businesses, who settle meritorious claims and arbitrate only weaker claims, while non-repeat businesses are more likely to arbitrate all claims, even meritorious ones.

Our evidence tends not to support the hypothesis that arbitrator (or other) bias is the likely explanation for any repeat-player effect in the case file sample. First, cases with repeat player combinations of any kind make up a small portion of the case file sample. Second, and perhaps more importantly, we find that case screening by businesses may explain any repeat-player effect in the case file sample. Specifically, we find that repeat businesses are more likely to settle or otherwise close cases before an award than non-repeat businesses.

First, a small percentage of cases in the case file sample involved any combination of repeat players, such as repeat pairs of arbitrators and businesses, arbitrators and attorneys for businesses, arbitrators and consumers, arbitrators and attorneys for consumers, as well as businesses and consumers. In the case file sample, 35 of 301 cases (11.6%) involved repeat pairs of any kind (see Table 16).[85] Of those 35 cases, 7 involved business claimants and 28 involved consumer claimants.

[84] *See supra* Part I.A.3.

[85] Multiple repeat pairs were present in many of the cases. Hence, the numbers in Table 16 add to significantly more than the total thirty-five cases with repeat pairs.

Table 16: Cases with Repeat Combinations

Combination Type	Number of Cases
Arbitrator and Business	27
Arbitrator and Business Attorney	29
Arbitrator and Consumer	2
Arbitrator and Consumer Attorney	11
Business and Consumer	4

In all of the cases with repeat combinations that were brought by business claimants, the business won some relief (7 of 7, or 100.0%), which may be due to the types of cases involved. However, in two of those cases the consumers asserted counterclaims and won some relief on those counterclaims both times.

In the 28 cases with consumer claimants, consumers won some relief in 12 (or 42.9% of the cases), a slightly lower win-rate than for the entire case file sample.[86] This lower win-rate might be due to the fact that the majority of the consumers in the cases with repeat combinations were proceeding pro se (16 out of 28 cases, or 57.1%), a higher rate than for the entire case file sample.[87] Because pro se consumers tend to have a lower win-rate than consumers with attorneys,[88] it may be the lack of legal representation rather than the presence of a repeat pair that explains the lower win-rate in these cases.[89]

Second, if the repeat-player effect were due to case screening rather than arbitrator bias, one might expect that repeat businesses would be more likely to settle or otherwise resolve cases before an award than non-repeat businesses. To test for this possibility, we used the AAA consumer dataset, limited to the same period (April-December 2007) as the case file sample. Table 17 summarizes case dispositions (either as awarded or non-awarded) for cases in which consumer claimants brought claims against repeat(2) businesses.[90] Of consumer claims against repeat(2) businesses, 71.1% (133 of 187) were resolved prior to an award, while 54.6% (226 of

[86] Thirteen of the 28 cases involved the same business respondent; consumers won some relief in roughly half of those cases (6 of 13, or 46.2%). Due to the small number of cases, we cannot reliably test this difference statistically.

[87] Due to the small number of cases, we cannot reliably test this difference statistically.

[88] *See supra* Part IV(1).D.3.

[89] The presence of a repeat business-arbitrator pair cannot explain the consumer's pro se status because the arbitrator would not be appointed until after the consumer filed the claim.

[90] We used the second definition of repeat business because only for repeat businesses so defined did we find any evidence of a repeat-player effect.

414) of consumer claims against non-repeat businesses were resolved prior to an award, a statistically significant difference.[91] Thus, consistent with the hypothesis that the repeat-player effect is due to case screening, we find that repeat businesses are much more likely to resolve cases prior to an award.

Table 17: Disposition of Cases by Consumer Claimants Against Repeat(2) and Non-Repeat Businesses

	Repeat(2) Business	Non-Repeat Business
Awarded	54 (28.9%)	188 (45.4%)
Non-Awarded	133 (71.1%)	226 (54.6%)
Total Cases	187	414

In short, while we find some indication of a repeat-player effect, the evidence seems to suggest that the repeat-player effect is more likely due to case screening by repeat businesses than arbitrator (or other) bias.

[91] The Pearson's Chi-squared statistic is 14.6401 (DF = 1 and p = 0.000), which allows us to reject the null hypothesis that whether a case is awarded is not associated with whether the respondent is a repeat(2) business.

TOPIC 2. AAA ENFORCEMENT OF THE CONSUMER DUE PROCESS PROTOCOL

This Part presents our findings on each of the research questions of interest concerning the American Arbitration Association's ("AAA's") enforcement of the Consumer Due Process Protocol: (1) to what extent do the consumer arbitration clauses in the case file sample comply with the Consumer Due Process Protocol? (2) how effective is AAA review of arbitration clauses for protocol compliance? (3) how frequently does the AAA refuse to administer consumer cases because of noncompliance with the Protocol? and (4) how do businesses respond to AAA enforcement efforts? In addition, we address several related questions: how frequent are post-dispute (as opposed to pre-dispute) agreements to arbitrate? how often do arbitration clauses contain class arbitration waivers? and how does the AAA administer cases arising out of the health care industry? Our focus is solely on the AAA. Although other providers also have promulgated due process protocols, we have no data on their enforcement practices.

A. Problematic Clauses

The substantial majority of arbitration clauses we examined contained no provisions that violated the Consumer Due Process Protocol as applied by the AAA. Consistent with the AAA's treatment of the cases, we examined cases seeking $75,000 or less separately from cases seeking more than $75,000 (a much smaller group) and cases seeking non-monetary relief.

Of the 271 clauses in cases seeking $75,000 or less in the case file sample, 208 (or 76.8%) had no provision that violated the Protocol, as shown in Figure 1. Of the 23 clauses in cases seeking more than $75,000, 18 (or 78.3%) had no provisions that violated the Protocol. An additional five cases sought no monetary remedy; three of those five clauses (or 60.0%) had no problematic provisions. Overall, then, 229 of 299[1] clauses (or 76.6%) had no provisions that violated the Protocol.[2]

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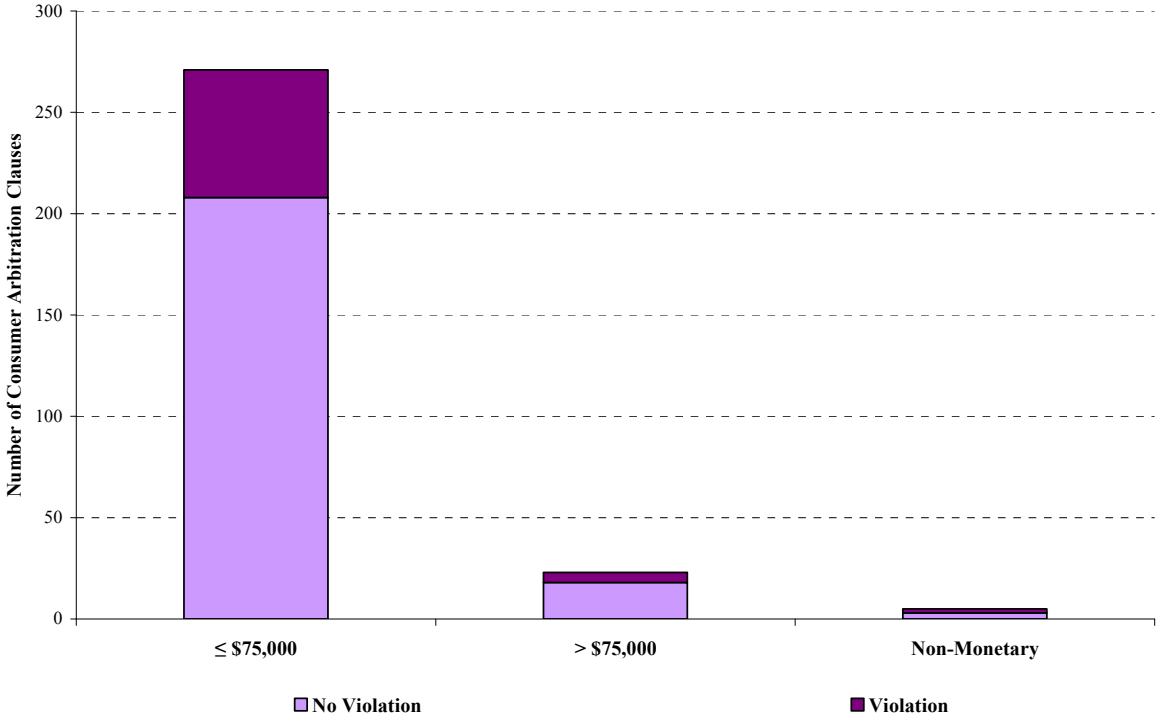
[1] As discussed above, two files for cases in the case file sample did not contain complete arbitration clauses. *See supra* Part III.B.

[2] A number of businesses appeared in the case file sample more than once, so that their arbitration clauses were counted multiple times. That may be the better approach, since it weights the clauses according to the frequency with which they gave rise to disputes that were arbitrated to an award. By comparison, 78.1% (150 of 192) of the clauses in the case file sample (counting each business's clause only once) included no problematic provisions under the Protocol.

Figure 1:
Number of Consumer Arbitration Clauses with Protocol Violations by Amount Claimed
(Cases = 299)



There was no statistically significant difference in the frequency of protocol violations across categories of amount claimed[3] – even though the AAA does not review clauses for protocol compliance in cases seeking more than $75,000. This likely is true for several reasons. First, the Consumer Due Process Protocol applies to all consumer arbitrations, not just those seeking $75,000 or less. The difference is that protocol compliance is an issue for the arbitrator to decide in cases seeking more than $75,000 rather than a matter for review by the AAA. Second, businesses are unlikely to be able to differentiate in their standard form contract terms between consumers based on the amount of any likely claim. Third, to the extent businesses seek to develop a reputation for fair dealing, they will not distinguish between consumers in their contracting practices.

A total of seventy (or 23.4%) of the clauses in the case file sample contained at least one provision that violated the Consumer Due Process Protocol as applied by the AAA. Of those clauses, sixty-three (90.0%) included one problematic provision, five (7.1%) included two problematic provisions, and two (2.9%) included three problematic provisions.

[3] The Pearson's Chi-squared statistic is 0.0271 (DF = 1 and p = 0.8690), which means we fail to reject the null hypothesis that protocol violations are not associated with amount claimed if categorized into claims $75,000 or less and greater than $75,000. Including cases seeking non-monetary relief resulted in cells with a minimum expected count of less than five.

By far, the most common problematic provision was one that dealt with arbitration costs in a manner inconsistent with Principle 6 of the Protocol, which requires that arbitration be available at reasonable cost to the consumer.[4] Of the seventy clauses with at least one problematic provision, forty-eight (68.5%) contained a provision inconsistent with Principle 6. Typically, the provisions either required three arbitrators to resolve the dispute (thus increasing the cost over the cost of a single arbitrator) or specified that the consumer was to share the administrative fees with the business. (Under the AAA consumer procedures, the consumer pays a share of the arbitrator's fees but does not pay any of the AAA's administrative fees.[5]) The second most common type of problematic provision was one that limited the available remedies contrary to Principle 14,[6] usually by precluding or limiting the recovery of punitive damages. Of the seventy clauses, seventeen (or 24.3%) included such a provision. Other problematic clauses were much less common: eight clauses (or 11.4%) specified a potentially inconvenient location for the hearing contrary to Principle 7;[7] four clauses (or 5.7%) were inconsistent with the requirement of an impartial arbitrator under Principle 3;[8] and one clause (1.4%) limited discovery contrary to Principle 13.[9] Figure 2 summarizes the results. (Note that the totals here sum to more than the total number of cases because a few clauses contained more than one provision that violated the Protocol.)

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[4] National Consumer Disputes Advisory Committee, Consumer Due Process Protocol princ. 6 (April 17, 1998), *available at* www.adr.org/sp.asp?id=22019 [hereinafter Consumer Due Process Protocol].

[5] *See supra* Part II.A.

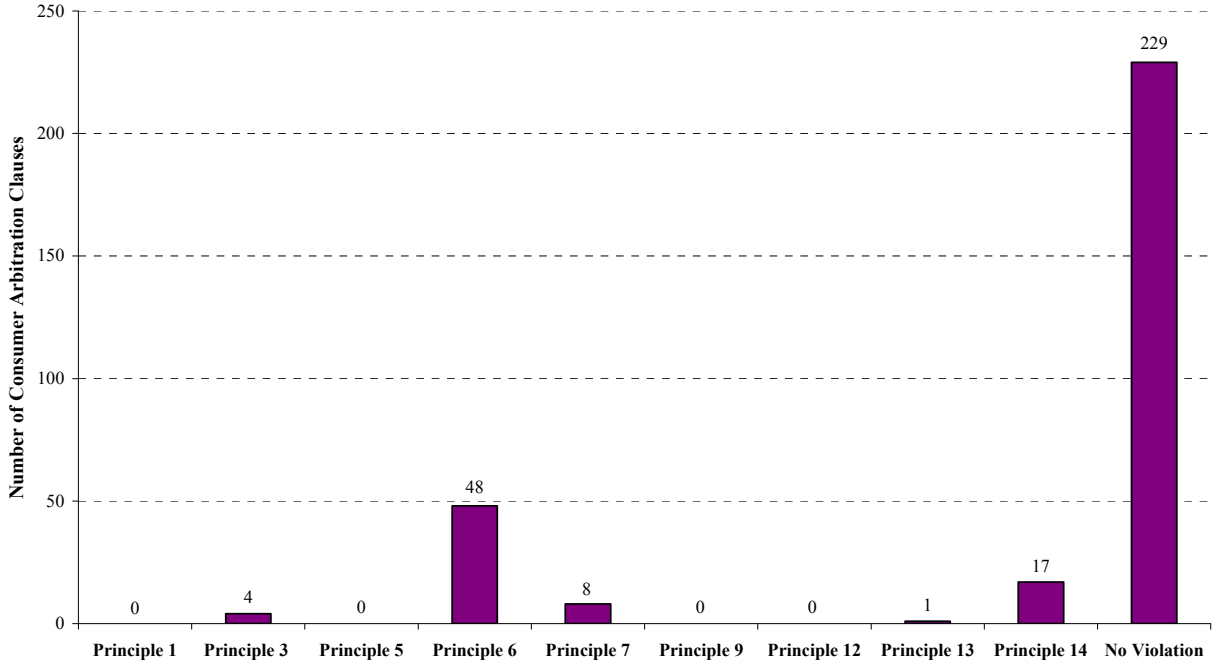
[6] Consumer Due Process Protocol, *supra* note 4, princ. 14.

[7] *Id.* princ. 7.

[8] *Id.* princ. 3.

[9] *Id.* princ. 13.

Figure 2:
Types of Protocol Violations in Consumer Arbitration Clauses
(Cases = 299)



Further description of the four clauses that were problematic under Principle 3 may be of interest, given that an impartial arbitrator is central to the fairness of an arbitration proceeding.[10] None of the clauses gave the business control over arbitrator selection or the pool of prospective arbitrators. Instead, all of the clauses were problematic because they required the arbitrator to have qualifications that might give rise to questions about the arbitrator's impartiality. Three of the clauses were in car sales contracts and required, at least under some circumstances, that the arbitrator be a certified master mechanic.[11] The other clause was in a home inspection contract and required that the arbitrator be an experienced member of one or another association of home inspectors.

Presumably, the concern is that to meet the qualification provisions would require prospective arbitrators to be employed by or engaged in the type of business involved in the arbitration. In addition, these required qualifications conflict with the AAA's policy of appointing only attorneys (with ten or more years of experience) or retired judges as arbitrators

[10] *E.g.*, Armendariz v. Foundation Health Psychcare Servs., Inc., 6 P.3d 669, 682 (Cal. 2000) (stating that the requirement of a "neutral arbitrator ... is essential to ensuring the integrity of the arbitration process") (*citing* Graham v. Scissor-Tale, Inc., 623 P.2d 165, 176 (Cal. 1981)).

[11] Two of the clauses required the presiding arbitrator to be a certified master mechanic when three arbitrators were selected; the requirement of three arbitrators itself is problematic under Principle 6 (reasonable cost) of the Protocol.

in consumer cases, unless the parties agree otherwise post-dispute. Although the AAA properly identified the provisions as ones that violated Principle 3 of the Protocol,[12] the provisions illustrate well the trade-off between expertise and impartiality that commonly arises in arbitration.[13]

Here, again, we face possible selection bias in the case file sample. Initially, clauses with provisions that violate the Consumer Due Process Protocol might discourage consumers from bringing claims (as might provisions that were waived by the business but never modified in the contract), so our results might understate the frequency of problematic provisions. We have no data on how frequently consumers fail to bring claims, so we cannot test for this possibility. As an imperfect proxy, we can examine whether damages limitations seem to deter consumers from asserting claims for punitive damages. In the case file sample, consumers sought punitive damages in 6 of 17 (or 35.3%) cases in which the arbitration clause contained a damages limitation, and in 72 of 282 (or 25.5%) cases in which the arbitration clause did not. Thus, consumers were more likely to assert a claim for punitive damages when facing a damages limitation than when not facing a damages limitation (although the number of cases with damages limitations is too small for reliable statistical testing). Certainly asserting a claim for punitive damages after having brought a claim in arbitration is a much lower cost activity than bringing a claim in the first place. Thus, as noted, this is an imperfect proxy but the results suggest at least one circumstance in which a standard form contract provision may not discourage consumers from asserting a claim.

We also considered carefully the possibility that arbitration clauses may have had more (or fewer) problematic provisions, and that AAA compliance review might have been less (or more) effective, in non-awarded cases than in awarded cases – i.e., that our results are subject to selection bias because we studied only awarded cases. Several considerations give us some degree of confidence that this source of selection bias is not a serious problem with our results.

First, using the AAA consumer dataset for all cases closed from April through December 2007, we are able to determine that the non-awarded cases appear to have been administered properly under the Protocol, at least so far as the administrative fees assessed to consumers.[14] The most common type of protocol violation in the case file sample (awarded cases) was a violation of Principle 6, which requires that the cost of arbitration to consumers be reasonable.[15] The contract provisions that violated this Principle either sought to impose on the consumer a

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[12] Consumer Due Process Protocol, *supra* note 4, princ. 3 ("Independent and Impartial Neutral").

[13] Sphere Drake Ins., Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 620 (7th Cir. 2002) ("The more experience the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties. Yet all participants may think the expertise-impartiality tradeoff worthwhile."); Stephen J. Ware, *Arbitration and Unconscionability After* Doctor's Associates, Inc. v. Casarotto, 31 WAKE FOREST L. REV. 1001, 1022 (1996) (describing "technical areas" such as medicine in which "[t]hose who can understand the facts will be found disproportionately among specialists in the field, i.e., those with a presumed bias").

[14] Although the AAA consumer dataset has slightly lower accuracy rates for AAA administrative fees assessed per party than other variables, it is the only data available for this purpose.

[15] Consumer Due Process Protocol, *supra* note 4, princ. 6.

greater share of costs than permitted under the AAA Consumer Rules, or required three arbitrators to resolve the dispute.[16] In 353 out of 361 (97.8%) of the non-awarded cases with claims seeking $75,000 or less, consumers paid no administrative fees (as provided in the AAA Consumer Arbitration Rules). In seven of the eight cases in which the consumer paid fees, it appears that the business may have failed to pay its share of fees and that the consumer chose to advance the fees in order to proceed with the case. In one case the consumer and the business shared the fees.[17] Moreover, in all of the non-awarded cases with claims seeking $75,000 or less, one arbitrator (rather than three) was appointed.[18] In short, the cases appear to have been administered properly under the cost provisions of the Protocol and the AAA Consumer Rules. For other principles of the Protocol, evaluating compliance is difficult, if not impossible, without examining the parties' arbitration clause.

Second, we compared the businesses involved in the non-awarded cases from the AAA consumer dataset closed from April through December 2007 to the businesses involved in the awarded cases in the case file sample, as well as to the AAA business list. Of the 361 non-awarded cases seeking $75,000 or less, 158 involved businesses that matched those in the case file sample. None of the clauses in those cases included unwaived protocol violations. Another 144 cases involved businesses that were classified as acceptable on the AAA business list. As to these 302 cases (83.7% of the 361 non-awarded cases), all indications are that the arbitration clause did not include an unwaived protocol violation. Another thirty-nine cases involved businesses that did not appear on the AAA business list.[19] For the case file sample, thirty-eight cases involved businesses that did not appear on the AAA business list, a larger percentage than for the non-awarded cases. The remaining twenty cases involved businesses that were classified as unacceptable on the AAA business list. Based on the date of their most recent status change on the AAA business list, fifteen of those businesses appear to have been added after the non-awarded case we were considering was filed. For the other five, it is possible that they could have been administered under a court order or a post-dispute arbitration agreement. But even assuming that the AAA should have refused to administer all of those cases, the percentage of unwaived violations among the non-awarded cases would have been 5 out of 361, or 1.4%.

Obviously, we cannot be certain that the frequency of protocol violations and (more importantly) unwaived protocol violations is the same in non-awarded cases as awarded cases. But we have no reason to believe that our focus on awarded cases results in any significant bias to our results.

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16 *See supra* Part II.C.

17 We have no data on the share of the arbitrator's fees paid by the consumer.

18 If any; many cases were closed before any arbitrators were appointed.

19 The businesses likely should have been reported so that they could be added to the AAA business list. But the failure to do so should not have affected parties in future cases because the case intake staff in each case is to review the arbitration clause without regard to the businesses' status on the AAA business list.

B. AAA Review of Protocol Compliance

As discussed above, AAA review for protocol compliance is limited to cases seeking $75,000 or less in compensatory damages.[20] We have 271 such cases in the case file sample, 63 of which involved an arbitration clause with a problematic provision. The next question is the extent to which the AAA properly identified and responded to those problematic provisions by requiring a waiver from the business.[21]

Initially, we examined the type of procedure by which the AAA made the determination of protocol compliance -- i.e., how often did businesses obtain advance review of their arbitration clause for compliance with the Consumer Due Process Protocol? We found that in the vast majority of cases, AAA review for protocol compliance occurs after a dispute arises. Very few businesses obtained approval of their consumer arbitration clauses before a dispute arose. Of the 1706 businesses listed as acceptable on the AAA business list,[22] 15 (or 0.9%) obtained AAA approval of their arbitration clause before a dispute arose.[23] The potential benefits of advance review were rarely obtained in consumer cases.[24]

We then evaluated the effectiveness of AAA post-dispute review for protocol compliance. Of the 271 consumer cases from the case file sample with a demand amount of $75,000 or less, five (1.8%) included an arbitration clause that violated the Consumer Due Process Protocol as applied by the AAA but had not been waived by the business.[25] Table 1 summarizes the findings. Most cases (76.8%) arose out of clauses that did not violate the Protocol, as noted above.[26] Of those cases with clauses that did violate the Protocol, the AAA obtained a waiver from the business before administering the case in 51 cases (18.8%). The

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[20] In other cases, the Protocol continues to apply, but application of the Protocol is a matter for the arbitrator. *See supra* Part II.B.

[21] For discussion of the possibility of selection bias due to our focus on awarded rather than non-awarded cases, see *supra* Part IV(2).A.

[22] In our review of the documentation supporting the AAA business list, we identified a number of businesses that were on the AAA business list but for which there were no supporting files. This was either because the business was no longer treated as a consumer business (70 businesses, typically involving the home construction industry) or else because the business had been added to the AAA business list before the AAA began maintaining the supporting files (10 businesses). We excluded both types of businesses from the analysis. Because we did not perform a similar review of many of the files of businesses listed as acceptable, the number of such businesses (1706) may be slightly overstated. Any such difference is immaterial here, however.

[23] The AAA business list shows only businesses that obtained advance approval of their consumer arbitration clause. It does not show businesses that sought approval but were turned down because their clause violated the Protocol. We have no information on how many clauses the AAA refused to approve through the advance review process.

[24] We do not include as advance review cases those cases in which the party sought and obtained AAA approval of changes to its arbitration clause in response to the AAA's determination that a prior version of the clause violated the Protocol. Those types of cases are relatively common, as discussed *infra* Part IV(2).D.

[25] An alternative measurement would be to calculate a false negative rate – the number of unwaived violations (false negatives) as a percentage of all clauses with protocol violations. FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 482 (2d ed. 2002). So calculated, the false negative rate here is 5 out of 63 cases, or 7.9%.

[26] *See supra* Part IV(2).A.

AAA handled the protocol violation in three cases (1.1%) administratively.[27] In four cases (1.5%), the AAA administered the case without a waiver because the case had been ordered to arbitration by a court.[28] Again, only five cases involved an unwaived protocol violation. Stated otherwise, in 266 out of 271 cases (98.2%), the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.

Table 1: AAA Review of Protocol Compliance

	Number of Cases (% of Total Cases)
No protocol violation	208 (76.8%)
Provision waived by business	51 (18.8%)
Violation handled administratively	3 (1.1%)
Case administered per court order	4 (1.5%)
Unwaived violation	5 (1.8%)
Total Cases (seeking $75,000 or less)	**271**

We examined the case files for those five cases to determine what happened in the case.[29] Table 2 summarizes key characteristics of the cases.

[27] In all three cases, the AAA case intake staff identified the provision that violated the protocol. In two cases, the provision raised a cost issue (in one, by requiring three arbitrators for claims above $20,000, and in the other by requiring the parties to share the costs of arbitration equally). In both cases, the AAA administered the case under the Protocol and contacted the business separately to request it to update the clause. In the other case, the parties had entered into two arbitration agreements, one of which provided for AAA arbitration but included a punitive damages waiver and required the hearing to be held at the business's location. The other clause did not mention the AAA but also did not contain any provisions problematic under the Protocol. The AAA administered the case under the Protocol and contacted the business separately to address the protocol issues.

[28] The AAA's usual practice in such cases is to administer the case pursuant to the Protocol, *see supra* Part II.C, so that the unwaived violation may have had little effect on the proceedings.

[29] Mark Weidemaier raises the possibility that the consumer might waive the protections of the protocol and permit the arbitration to go forward despite the objectionable term. W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 662 & n.26 (2007). He indicates that JAMS permits such waivers, and that such a waiver is equivalent to a post-dispute agreement to arbitrate, which should be permissible. *Id.*; *see also* Consumer Due Process Protocol, *supra* note 4, Reporter's Comments to princ. 1 ("Assuming they have sufficient knowledge and understanding of the rights they are waiving, however, Consumers may waive compliance with these Principles after a dispute has arisen."). We found no cases in the case file sample in which the AAA permitted a case to go forward based on a consumer waiver of the protections of the Protocol when a provision in an arbitration clause violated the Protocol. We did find seven cases in which the consumer voluntarily paid the business's share of the arbitration fees when the business failed to do so, cases in which the business's behavior rather than the arbitration clause was problematic.

Table 2: Unwaived Protocol Violations

	Type of Violation	Events in Case
Case 1	Location provision	Consumer did not respond to demand for arbitration
Case 2	Remedy limitation	No claim for punitive damages in case
Case 3	Remedy limitation	No claim for punitive damages in case
Case 4	Location provision and remedy limitation	AAA identified location provision; issue not resolved prior to hearing. AAA did not identify remedy limitation; no claim for punitive damages in case
Case 5	Remedy limitation	Arbitrator relied on consequential damages exclusion as alternative basis for award

In Case 1, the clause provided that the arbitration hearing was to be held at the business's location, which was distant from the consumer's home.[30] The consumer did not respond to the business's demand for arbitration.[31] In Cases 2 and 3, the arbitration clause contained a punitive damages waiver;[32] the claimant in the cases did not seek punitive damages.[33]

Case 4 was complicated. The arbitration clause contained two provisions that violated the Due Process Protocol: a provision limiting the recovery of punitive damages and a provision selecting the business's home as the location for the arbitration hearing. The AAA did not identify the remedy limitation. The business claimant was not seeking punitive damages and the consumer did not bring a counterclaim.

The AAA identified the location provision as a Protocol violation. The business objected, arguing that the dispute was not a consumer dispute so the Protocol did not apply. The AAA concluded that the arbitrator would have to decide whether the Protocol applied, and proceeded to appoint an arbitrator from the state in which the business was located. Meanwhile, the consumer filed suit in her home state challenging the enforceability of the arbitration agreement, resulting in the arbitration being held in abeyance for over a year. Eventually, the trial court held that the dispute had to be arbitrated, and the state appellate court affirmed. Meanwhile, the consumer changed counsel. The result was that no one raised the location issue until right before the hearing was held, at which point the arbitrator deemed it too late to reschedule the hearing.

In the award, the arbitrator did hold that the case was a consumer case and that the Protocol applied. Relying on the Protocol, the arbitrator then refused to enforce a "loser-pays" provision in the arbitration clause, which would have required the consumer (who lost in the

[30] *See* Consumer Due Process Protocol, *supra* note 4, princ. 7.

[31] The business was the claimant in the case, and was seeking to recover the amount it allegedly was owed for its services.

[32] *See* Consumer Due Process Protocol, *supra* note 4, princ. 14.

[33] On whether consumers might be discouraged from seeking punitive damages by the presence of a punitive damages waiver, see *supra* Part IV(2).A.

arbitration) to pay all the business's attorneys' fees. In so holding, the arbitrator went beyond the AAA's administrative application of Principle 6 of the Protocol, under which the AAA does not deem loser-pays provisions to violate the Protocol.[34]

The provision in Case 5 that violated the Protocol was a remedy limitation – a provision that precluded the recovery of consequential or special damages. It appears that the AAA identified the violation and handled the issue administratively,[35] but there is no evidence that it obtained a waiver of the provision in the arbitration proceeding itself. In the award, the arbitrator relied on the remedy limitation to preclude the consumer's recovery in part, finding no gross negligence by the business that would have made the remedy limitation inapplicable. The arbitrator also concluded that the consumer had failed to establish the business's liability for damages in the first place, so that the remedy limitation was only an alternative basis for the business to prevail.

One final note: as Table 2 illustrates, the most common type of unwaived violation was a provision limiting in some way the amount of damages the consumer could recover in arbitration. Typically, but not always, these provisions preclude the award of punitive damages in arbitration. There are several possible explanations for why remedy limitations are the most commonly overlooked protocol violation. First, the provisions vary widely in language – ranging from a waiver of all punitive damages recovery to some sort of cap on (but not waiver of) damages recovery. The variations in the type of the provision may make problematic provisions more difficult to identify. Second, it may not always be clear whether the remedy limitation is in the arbitration clause (and hence subject to protocol compliance review) or merely near the arbitration clause and perhaps not subject to AAA review. Third, as discussed above, the AAA has adopted a broad interpretation of Principle 14 of the Consumer Due Process Protocol.[36] Under a narrow reading of the Protocol, a remedy limitation would be permissible so long as the limitation was lawful under the governing law. But the AAA applies the Protocol more broadly, refusing to administer arbitrations arising out of clauses with remedy limitations even if the remedy limitation would be permitted under the governing law. If consumers (or arbitrators) are not aware of the broader interpretation, they may not raise the protocol issue in cases in which the AAA does not itself raise the issue.[37]

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[34] Except in cases from California, in which AAA policy is to follow California law on loser-pays provisions. *See infra* App. 3, n.8.

[35] The AAA eventually classified the business as unacceptable on the AAA business list when it failed to respond to requests that it update its arbitration clause.

[36] *See* American Arbitration Association, Fair Play: Perspectives from American Arbitration Association on Consumer and Employment Arbitration 34 (Jan. 2003) ("There may be circumstances where AAA will not provide administration even if a provision may be legally enforceable, as the standard followed by AAA may be higher than the law allows.").

[37] That said, cases in which the consumer or the consumer's attorney assert a protocol violation appeared to be rare in the case file sample, although if the issue was raised with the arbitrator there may have been no record of it in the files we reviewed. Case 4 above, *see supra* text accompanying note 34, was unusual in this regard.

C. Refusal to Administer Cases

When a business refuses to waive a provision that violates the Consumer Due Process Protocol, or when the business fails to pay its share of the arbitration costs in an arbitration,[38] the AAA's policy is to refuse to administer the case.[39] The result is that the case filings and fee are returned to the claimant, and the business is classified as unacceptable on the AAA business list. In addition, the AAA refuses to administer future consumer cases involving the business, at least until the business provides a blanket waiver of any provisions that violate the Protocol.

From the AAA pre-filing cases[40] we identified 129 cases that likely were cases the AAA had refused to administer because of protocol violations in 2007.[41] Of those cases, we were able to confirm that eighty-five (65.9%) in fact were protocol-related refusals to administer.[42] The other forty-four cases (34.1%) likely also were protocol-related refusals to administer, but we were unable to confirm the status of the cases definitively.[43] Moreover, there may be other refusals to administer that our methods did not uncover. Accordingly, we can confidently say that in 2007 the AAA refused to administer at least 85 cases, and probably at least 129 cases, due to violations of the Consumer Due Process Protocol. We did not examine data from other years, but we have no reason to believe the results from 2007 are atypical.

Those cases constitute 9.4% of the 1378 consumer cases closed by the AAA during 2007.[44] The total consumer cases closed in 2007 consisted of 439 cases (31.9%) that resulted in an award;[45] 544 cases (39.5%) that did not result in an award; and 395 pre-filing cases (28.7%)

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[38] If the business refuses to pay its share of the arbitration fees, the consumer has the option of paying the fees and then trying to collect them later from the business. American Arbitration Association, Supplementary Procedures for the Resolution of Consumer-Related Disputes, Rule C-8 ("Arbitrator Fees") (effective Sept. 15, 2005), *available at* http://www.adr.org/sp.asp?id=22014 ("If a party fails to pay its fees and share of the administrative fee or the arbitrator compensation deposit, the other party may advance such funds. The arbitrator may assess these costs in the award.") If the consumer pays the arbitration fees, the AAA will administer the case. As noted previously, *see supra* note 29, we found seven cases in the case file sample in which the consumer paid some or all of the business's arbitration costs when the business had failed to do so. Thus, only if the business refuses to pay its share of the fees and the consumer declines to advance the amount of the fee will the case be rejected while in pre-filing status.

[39] *See supra* Part II.B.

[40] *See supra* Part III.B.

[41] We identified the cases by comparing the businesses involved in the case to those classified as unacceptable on the AAA business list. *See supra* Part III.B.

[42] We confirmed the status of the cases by examining the AAA files documenting the AAA business list.

[43] The primary distinction between the cases we could confirm and those we could not was whether the business was or was not already listed as unacceptable. For businesses that were not already on the AAA business list, the AAA created a file containing the documentation of the Protocol violation. That documentation included the name of the case, which enabled us to verify the entry on the list of AAA pre-filing cases. For businesses that already were listed as unacceptable, the AAA does not add additional documentation to the files for subsequent refusals to administer. Accordingly, for those cases we were unable to determine definitively the reason the AAA refused to administer the case. Nonetheless, it is quite likely that the cases are ones that the AAA refused to administer under the Protocol.

[44] The cases closed in 2007 consist of the cases in the AAA consumer dataset and the AAA pre-filing cases.

[45] The case file sample includes 301 of these cases, closed between April and December 2007. The number for all of 2007 is adjusted for several exclusions from the case file sample, as described *supra* Part III.B.

that never met the AAA's filing requirements, either because they settled very early on, because the claimant failed to meet the filing requirements, or because the AAA refused to administer the case due to protocol violations.

Various types of protocol violations gave rise to the refusals to administer, as shown in Table 3. The AAA refused to administer forty-four cases (of 129, or 34.1%) because the business already was classified as unacceptable on the AAA business list. The remaining cases (85 of 129, or 65.9%) involved businesses that were not already classified as unacceptable. Of those cases, the AAA refused to administer fifty-five because the business failed to pay its share of the arbitration fees and the rest (thirty cases) because the arbitration clause violated the Protocol.[46]

Table 3: AAA Refusals to Administer, 2007

Reason for Refusal to Administer	Number of Cases (% of Total Cases)
Business failed to pay fees	55 (42.6%)
Business already classified as unacceptable	44 (34.1%)
Cost issue	11 (8.5%)
Remedy limitation	8 (6.2%)
Location issue	6 (4.7%)
Multiple violations	5 (3.9%)
Total	**129**

Although we are able to estimate with some degree of confidence the number of cases that the AAA refused to administer for protocol violations, we have no information on what happened to the cases afterwards. In some cases the dispute might nonetheless end up in AAA arbitration. If a business subsequently resolves the protocol issue, the case may be refiled with the AAA. Or a party might obtain a court order requiring the case to be arbitrated, which the AAA will honor.[47] We have no evidence, however, whether any of the 2007 refusals to administer were refiled with the AAA or were administered pursuant to a court order.

Another possibility is that the case was subsequently filed with another arbitration provider. Some arbitration clauses give the claimant the choice among several alternative

[46] The provisions violated were Principle 6 ("Reasonable Cost") (11 cases); Principle 14 ("Arbitral Remedies") (8 cases); Principle 7 ("Reasonably Convenient Location") (6 cases); and multiple provisions (5 cases). A business's failure to pay its share of the arbitration fees has the same effect in that case as a contract term that imposes all costs on the consumer while permitting the consumer to recover the fees from the business. The failure to pay differs from such a contract clause, however, because it is limited to the particular consumer dispute. Accordingly, we classify the failure to pay separately from other protocol violations.

[47] *See supra* Part II.B.

arbitration providers, and specify that if one will not administer the case it should be filed instead with a different one.[48] Again, we do not know whether any of the 2007 refusals to administer were subsequently filed with another arbitration provider.

A third possibility is that the case might end up in court. A handful of reported cases have addressed whether a party can litigate when the AAA has refused to administer the arbitration, with divided results. In ***Brown v. Dillard's, Inc.***[49] the Ninth Circuit held that a business that refuses to pay its share of arbitration fees materially breaches the arbitration agreement, permitting the consumer to file suit in court.[50] The facts of *Dillard's* match the most common type of case in which the AAA refuses to administer a consumer arbitration.[51] In those cases, under *Dillard's*, the consumers could assert their claim against the business in court.[52]

A more difficult question is whether a consumer can go to court when the AAA refuses to administer a case because of a provision in the arbitration clause that violates the Protocol. The courts are split. In ***Martinez v. Master Protection Corp.***,[53] the AAA had refused to administer an employment arbitration agreement because of provisions inconsistent with the Employment Due Process Protocol.[54] The employee then sought to assert his claim in court, while the business sought to have the court appoint an arbitrator. The California Court of Appeal held that the trial court had erred in appointing an arbitrator, stating that California arbitration law "does not permit the trial court to choose an alternative forum when the chosen forum refuses to hear the case."[55]

Similarly, in ***Mathews v. Life Care Centers of America, Inc.***,[56] the AAA relied on the Health Care Due Process Protocol to refuse to administer a negligence and elder abuse claim against a nursing home. But in this case, the Arizona Court of Appeals affirmed the trial court's order compelling arbitration. The court of appeals explained that the trial court correctly relied on Arizona arbitration law to appoint an arbitrator when the AAA would not do so because "the record contains no evidence that an AAA arbitration panel was a significant or material term to [the claimant] when she executed the Agreement."[57] If future courts were to follow the approach

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[48] Again, we have no data on the extent to which such clauses are used in consumer contracts; we only know anecdotally that they exist.

[49] 430 F.3d 1004 (9th Cir. 2005).

[50] *Id.* at 1010.

[51] *See supra* text accompanying note 46.

[52] In Cox v. Ocean View Hotel Corp., 533 F.3d 1114 (9th Cir. 2008), the Ninth Circuit distinguished *Dillard's* on the ground that the employee in *Ocean View* never filed a demand for arbitration with the AAA. *Id.* at 1123-24. Instead, the employee had merely written to the employer asserting a claim of sex discrimination and requesting the employer to "provide the date and time of the arbitration hearing" to the employee's attorney. *Id.* at 1118.

[53] 12 Cal Rptr 3d 663 (Cal. Ct. App. 2004) (alternate holding)

[54] *Id.* at 674.

[55] *Id.* at 675; *see also In re* Salomon Inc. Shareholders' Derivative Litigation, 68 F.3d 554, 561 (2d Cir. 1995) ("None of these cases, however, stands for the proposition that district courts may use § 5 to circumvent the parties' designation of an exclusive arbitral forum.").

[56] 177 P.3d 867 (Ariz. Ct. App. 2008).

[57] *Id.* at 872. *Cf.* Brown v. ITT Consumer Fin'l Corp., 211 F.3d 1217, 1222 (11th Cir. 2000) (stating that when chosen forum is unavailable, arbitration agreement is not void unless the chosen forum "was an integral part of the

of the Ninth Circuit in *Dillard's* and the California Court of Appeal in *Martinez*, rather than that of the Arizona Court of Appeals in *Mathews*, they would reinforce the AAA's enforcement of the Protocols and give businesses a greater incentive to comply.

Finally, the case may end up not being brought at all. We have no data on how frequently cases end up being dropped after the AAA refuses to administer the arbitration.[58]

Overall, then, we find that in enforcing the Consumer Due Process Protocol, the AAA refused to administer at least 85 consumer cases, and likely 129 consumer cases – amounting to 9.4% of its consumer caseload – in 2007. We have no information, however, on what happened to those cases after the AAA refused to administer them.

D. Business Responses to AAA Compliance Review

This Section addresses how businesses respond to the AAA's enforcement of the Due Process Protocol. Of course, most cases in the case file sample do not present a protocol violation in the first place; most businesses comply with the protocol in advance of AAA review. Thus, as explained above, 76.6% of the cases in the case file sample contained no provision that violated the Protocol as applied by the AAA. Similarly, the number of businesses classified as "acceptable" on the AAA business list (i.e., the 1706 businesses for which it will administer consumer arbitrations) is more than two-and-one-half times as large as the number of businesses (647) classified as "unacceptable."[59]

One possibility is that the business might respond by waiving the violation in the pending case and/or revising the clause for future cases.[60] Since the AAA began reviewing consumer clauses for protocol violations, over 150 businesses have updated their arbitration clauses to remove a protocol violation and/or have waived such provisions for future cases, as shown in Table 4.[61] In a handful of those cases (five), the business waived future violations but then

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agreement to arbitrate").

[58] The court of appeals in *Dillard's* asserted that "[m]any people in Brown's position would simply have given up." Brown v. Dillard's, Inc., 430 F.3d 1004, 1030 (9th Cir. 2005).

[59] As discussed above, while we examined occasional files of businesses classified as acceptable on the AAA business list, we did not subject those businesses to the same comprehensive review as those classified as unacceptable. As a result, there may be businesses so classified that no longer arbitrate using the AAA's consumer arbitration rules. *See supra* Part III.B. Conversely, however, AAA case intake staff may be less likely to make sure that acceptable businesses are added to the AAA business list than unacceptable businesses; clauses from acceptable businesses need to be reviewed again each time the business is involved in a consumer arbitration in any event. *See supra* Part II.B. Thus, the number of businesses that have been involved in AAA consumer arbitrations with clauses that fully comply with the protocol may be either more or less than 1706, although likely not materially so in either direction.

[60] As between the two, revising the clause would seem preferable, as it reduces the possibility consumers might not file a claim and thus not learn of the waiver.

[61] As Mark Weidemaier explains, businesses may have an incentive to waive violations and change their clause to comply with the Due Process Protocol because of the "legitimacy" provided by arbitrating with a well-respected arbitration provider. Weidemaier, *supra* note 29, at 661 ("providers may also sell legitimacy. Arbitration

indicated it would remove the AAA from its arbitration clause. In one case the business waived future violations and then informed the AAA it was eliminating its arbitration clause altogether. Those businesses are in addition to over 1550 businesses with arbitration clauses that did not violate the Protocol.

By far the most common protocol issue in these cases involved arbitration costs. Sixty of the clauses presented only cost issues and a number more raised cost issues together with other protocol violations.[62] Eliminating provisions raising cost issues (either by waiver or updating the clause) likely would benefit all consumers who arbitrate against the company under the revised clause. Otherwise the consumer would either have had to pay a larger share of the arbitration costs or else contribute toward the fees of three arbitrators instead of one. In Mark Weidemaier's words: "these are cases in which the due process rules yield a clear benefit to individual claimants."[63] By comparison, not every consumer will benefit from the elimination of a remedy limitation or a location provision (requiring the hearing to be held at a distant location); not every consumer will have a claim for punitive damages and not every consumer will want an in-person hearing. Nonetheless, for those consumers who do, the AAA's protocol review process again has clear benefits.

Table 4: Business Responses to AAA Protocol Compliance, On Business List As "Acceptable"

Business Response	Total Cases
No Response Necessary	1539
Updated Clause	95
Waived Violation for Future Cases	51
Waiver and Removed AAA	5
Waiver and Removed Arbitration	1
Sought Advance Review	15
Total "Acceptable" Businesses	**1706**

A second possibility is that the business might respond by doing nothing -- either not participating in the case or not updating its clause for future cases. A number of businesses simply fail to pay their share of arbitration fees in a case or do not respond to requests by the AAA to waive any problematic provisions under the Protocol. As shown in Table 5, 358

clauses are often challenged by parties who would prefer to litigate their disputes in court, and the designation of a recognized provider may help immunize the arbitration agreement from challenge.").

[62] *See infra* Part IV(2) Annex A.

[63] Weidemaier, *supra* note 29, at 670 (distinguishing between cases in which "the offending term serves no function" and "'meaningful' waivers" of provisions that violate the protocols).

businesses are classified as unacceptable on the AAA business list for these reasons. Most commonly, the business failed or refused to pay its share of arbitration costs even though its arbitration clause fully complied with the Protocol. Somewhat less commonly, the business failed to pay arbitration fees and to waive a problematic provision under the Protocol as well.[64]

Table 5: Business Responses to AAA Protocol Compliance, On Business List As "Unacceptable"

Business Response	Total Cases
Did Not Respond to Case Initiation	358
Did Not Respond to AAA Contact	201
Refused to Pay, Update Clause, or Waive	61
Notified Removing AAA	13
Removing Arbitration Clause	1
Out of Business	10
Unable to Locate	3
Total "Unacceptable" Businesses	**647**

Another 201 businesses are classified as unacceptable because they did not respond to a subsequent contact by the AAA seeking to have the business update its arbitration clause to remove a protocol violation. An additional 61 businesses refused to comply with the protocol, either by refusing to pay their share of arbitration fees or refusing to waive a protocol violation or update their arbitration clause.[65]

A third possibility is that the business might remove the arbitration clause altogether from its consumer contracts or replace the AAA with a different arbitration provider. We have limited ability to determine the extent to which companies in fact switched to other arbitration providers or removed arbitration clauses from their consumer contracts. A business that changes its clause in either of these ways presumably would no longer show up in the case file sample. But we would be unable to determine whether their failure to show up was due to their switching arbitration providers or whether they simply did not have any disputes with consumers go to arbitration during the period we studied.[66]

[64] The types of provisions that businesses most commonly refused to waive or change were provisions addressing arbitration costs, specifying the location of the arbitration hearing, and limiting remedies. *See infra* Part IV(2) Annex B.

[65] Although we attempted to follow the classification scheme in the AAA business list by distinguishing between cases in which the business did not respond and cases in which the business refused to comply, one should not place too much significance on these differing classifications. As a practical matter, the result is the same in both types of cases: the business does not pay its share of fees and/or the problematic provision remains.

[66] The remaining categories shown in Table 5 are that the business went "out of business" (ten cases) or that

The AAA does record on the AAA business list those businesses that inform the AAA they have removed or will be removing the AAA (or arbitration in general) from their dispute resolution clause. The number of such businesses is quite small. Of the 647 businesses listed on the AAA business list as unacceptable, thirteen (or 2.0%) informed the AAA that they had removed or would be removing the AAA from their clause, and one (or 0.15%) informed the AAA that its dispute resolution clause no longer provided for arbitration. Another five businesses (of 1706, or 0.3%) listed as acceptable waived any protocol violations but then informed the AAA they would no longer provide for AAA arbitration in their dispute resolution clause. And one business (0.05%) listed as acceptable waived any protocol violations but then removed arbitration altogether from its consumer contracts. Overall, then, eighteen businesses (0.8%) of those on the AAA business list informed the AAA that they would no longer provide for AAA arbitration, and two businesses (0.08%) removed their arbitration clause altogether.

But of course not all businesses that switch dispute resolution providers (or remove arbitration altogether from their contract) necessarily inform the AAA that they are doing so. Any number of businesses classified as unacceptable by the AAA might have changed their contracts without informing the AAA.

Another way to identify businesses that switch away from the AAA is to look at data from other arbitration providers. California law requires arbitration providers to disclose basic information about their consumer arbitration cases, including the name of the business party.[67] As others have noted, the disclosure documents are not always in the most useful format for researchers.[68] But Public Citizen has compiled data from the National Arbitration Forum's ("NAF's") California disclosures into a spreadsheet available on Public Citizen's web site.[69] We matched the businesses that brought NAF arbitrations in California against the AAA's list of unacceptable businesses to try to identify businesses that might have switched from the AAA to NAF.

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the AAA was unable to locate the business (three cases).

[67] CAL. CODE CIV. PROC. § 1281.96.

[68] California Dispute Resolution Institute, Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure 27 (Aug. 2004) ("Many providers posted required information on their websites. However, a number of data points were not provided. Some providers, however, posted data that resulted in inconsistent, incomplete and/or ambiguous data.").

[69] *See* NAF California Data Jan. 2003 to Mar. 2007, *available at* www.citizen.org/congress/civjus/arbitration/NAFCalifornia.xls. Public Citizen describes the spreadsheet as follows:

> This spreadsheet consists of the information on 33,948 National Arbitration Forum cases conducted in California between Jan. 1, 2003 and Mar. 31, 2007. It was compiled from quarterly reports that the National Arbitration Forum posted in a difficult-to-find place on its Web site in Adobe Systems' Portable Document Format (PDF). Public Citizen converted them to an Excel spreadsheet so California residents and others interested in binding mandatory arbitration may do their own analysis of NAF arbitrations in California and of the records of NAF arbitrators.

Public Citizen, Binding Mandatory Arbitration and Access to Courts, www.tradewatch.org/congress/civjus/arbitration/ (last visited Nov. 10, 2008).

Of the 647 businesses classified as unacceptable on the AAA business list, we found five (or 0.8%) that were subsequently listed as arbitrating cases using the NAF during the period covered. The combined caseload of those businesses before the NAF was small; they were not major contributors to the NAF caseload.[70] Interestingly, three of the five businesses were ones that had informed the AAA that they would no longer use AAA arbitration in future cases. Two businesses classified by the AAA as unacceptable showed up in the NAF cases that had not already informed the AAA they were switching providers. And one of those two appeared before the AAA because of a claim it had acquired from another business, arising out of a contract providing for AAA arbitration.

The NAF data have various limitations. First, obviously they only involve arbitrations administered by the NAF. If the business switched from the AAA to a provider other than the NAF, it would not show up in the NAF data. Second, the disclosures are limited to California.[71] To the extent businesses switching from AAA arbitration do not operate in California, they would not show up in the NAF data. That said, one would expect that a major business operating nationally might have at least one case in California during the period covered by the NAF disclosures. Third, we do not have access to the arbitration clause giving rise to the NAF arbitrations. Some arbitration clauses permit the claimant to choose either the AAA or the NAF (or sometimes JAMS) to administer their arbitration.[72] It might be that the arbitrations before the NAF were brought under such a clause, rather than a clause that removed the AAA as provider. Thus, the mere fact that the business appears both on the AAA business list and in the NAF spreadsheet does not necessarily mean that the business is one that switched from the AAA. Subject to those caveats, however, we find little evidence that businesses have switched from the AAA to the NAF as an alternative arbitration provider.[73]

E. Other Issues

The case file sample also permits us to address several other issues related to the Due Process Protocols. First, to what extent do consumer arbitrations arise out of post-dispute versus pre-dispute agreements? Second, how common are class arbitration waivers -- which are not addressed by the Protocols -- in consumer arbitration agreements? Third, how did the AAA

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[70] To avoid the possibility of identifying any of the businesses, we do not quantify the percentage of the NAF caseload provided by the businesses, although it was small. We can say that neither MNBA Bank nor Banc One – which with their assignees and successors accounted for a substantial majority of the NAF caseload in the Public Citizen spreadsheet – was one of the businesses that switched from the AAA to the NAF.

[71] *See supra* text accompanying note 67.

[72] *See*, *e.g*, J.P. Morgan Chase & Co. Arbitration Agreement (2005), *available at* www.citizen.org/congress/images/JPMorgan.05.jpg ("The party filing a Claim in arbitration must choose one of the following two arbitration administrators: American Arbitration Association or National Arbitration Forum.").

[73] *See* Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMPLOYEE RTS. & EMPL. POL'Y J. 363, 399 (2007) ("To the extent those rogue arbitration agencies and opportunistic employers represent a significant share of the market, they could place competitive pressure on AAA and JAMS to deviate from their rules and policies. There are reasons to believe that this is not a widespread problem.").

handle cases in the case file sample involving the health care industry, which might be subject to the Health Care Due Process Protocol?

1. Pre-Dispute v. Post-Dispute Agreements

The Consumer Due Process Protocol does not bar enforcement of pre-dispute arbitration agreements, although the matter was controversial among the drafters of the Protocol.[74] Thus, it is not surprising that arbitrations arising from pre-dispute clauses are common in the case file sample. Indeed, virtually all of the 301 cases in the case file sample -- 290 (or 96.3%) -- arose out of pre-dispute agreements; 11 (or 3.7%) arose out of post-dispute agreements to arbitrate.[75] These results are consistent with prior studies of employment and international arbitration.[76]

The more interesting question is what, if anything, can be learned from the dramatically greater number of arbitrations arising from pre-dispute as opposed to post-dispute agreements. A common argument by critics of pre-dispute consumer arbitration agreements is that if arbitration were fair, parties would agree to it post-dispute even if they could not agree to it pre-dispute.[77] The usual response is that parties are unlikely to agree post-dispute to arbitrate, even if arbitration would make them both better off ex ante. Once parties know of their claim, they often will be unable to agree to arbitration, either because of limitations on the bargaining process[78] or because an uncertainty that would have permitted the parties to make a beneficial bargain earlier has been resolved.[79]

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[74] *See supra* Part I.B.2. By comparison, the Health Care Due Process Protocol does preclude enforcement of pre-dispute arbitration agreements "in cases involving patients." Commission on Health Care Dispute Resolution, Health Care Due Process Protocol, princ. 3 (July 27, 1998), *available at* www.adr.org/sp.asp?id =28633 [hereinafter Health Care Due Process Protocol] ("In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.").

[75] Although we treated two of the clauses as missing for purposes of evaluating AAA protocol compliance review, *see supra* Part III.B, those clauses plainly were predispute clauses, and we treat them as such here, even though we could not determine all of the provisions.

[76] Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, 1(2) ICC INT'L CT. ARB. BULL. 14 (1990), *reprinted in* CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 65, 67 (2005) ("Of the cases submitted to the ICC Court, only four [of 237] in 1987 and six [of 215] in 1989 resulted from *a compromis*, that is, an agreement to submit an already-existing dispute to arbitration."); Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 319 (2003) ("AAA found only 6% (69/1148) of their 2001 employment arbitrations were the result of post-dispute agreements. In 2002, the frequency of post-dispute agreements was even lower, 2.6% (29/1124).").

[77] *E.g.*, Charles Knapp, *Common Sense and Contracts Symposium: The Gateway Thread – AALS Contracts Listserv*, 16 TOURO L. REV. 1147, 1173 (2000) ("[I]f arbitration is so economically sound for everybody, then let the consumer be persuaded 'once the dispute has arisen' that arbitration is in her best interests too.").

[78] Christopher R. *Drahozal, Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 747 (2006).

[79] *E.g.*, Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 278-80 (2008); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 262-64 (2006).

While our results do show that arbitrations arising out of post-dispute agreements to arbitrate are rare, they do not resolve the disagreement over the implications of that rarity. If pre-dispute agreements to arbitrate consumer disputes are made unenforceable, it seems likely that the number of consumer arbitration proceedings would decline dramatically. But the data provide no evidence on the reason for that decline.

2. Use of Class Arbitration Waivers

As noted above, one criticism of the Consumer Due Process Protocol is that it is underinclusive – i.e., it does not include all provisions in arbitration clauses that some see as unfavorable to consumers.[80] The most frequently litigated such clause, and one central to the policy debate over consumer arbitration, is the class arbitration waiver.

The existing empirical evidence is mixed on how frequently consumer arbitration clauses include class arbitration waivers. Eisenberg, Miller, and Sherwin found that in a sample of contracts from consumer financial services companies and telecommunications companies,[81] twenty of twenty-six (76.9%) consumer contracts included arbitration clauses[82] and all twenty of the contracts with arbitration clauses included class arbitration waivers.[83] Based on this "fairly narrow" sample,[84] they concluded that "apart from the role of arbitration clauses in shoring up the validity of class action waivers, it is not clear why consumer arbitration would appeal to companies… [F]rom the perspective of corporate self-interest, concern over class actions remains the most likely explanation for the prevalence of arbitration clauses in consumer agreements."[85]

By contrast, in end user license agreements (EULAs) for computer software, Florencia Marotta-Wurgler found almost no use of arbitration clauses and no use of class arbitration waivers.[86] Her conclusions are in stark contrast to those of Eisenberg, Miller, and Sherwin: "Although much analysis remains to be done, these results immediately cast doubt on casual

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[80] *See supra* I.B.3.

[81] Theodore Eisenberg, Geoffrey Miller, & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 881-82 (2008) (describing their sample as consisting of the following types of companies (with the number of such companies in parentheses): "Telecommunications (7); Cable services (CATV, Internet, phone) (5); Securities services (4); Commercial banks (3); Retail credit card issuers (2); and Financial credit company (1)").

[82] *Id.* at 883.

[83] *Id.* at 884.

[84] *Id.* at 891 ("Our study is limited to a fairly narrow range of industries. As described above, only six major groups appear in our sample.").

[85] *Id.* at 894. The study is unclear whether its conclusions apply to businesses generally or apply only to the types of businesses studied.

[86] Florencia Marotta-Wurgler, *"Unfair" Dispute Resolution Clauses: Much Ado about Nothing?*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 45, 51 (Omri Ben-Shahar ed. 2007) ("Not a single EULA out of 597 includes a class-action waiver."). Of the consumer EULAs she studied, only 15 or 259 (or 5.8%) included an arbitration clause. *Id.* at 52.

claims that sellers' rampant use of choice of forum and arbitration clauses deprive buyers of their day in court, or that sellers are shielding themselves from liability by making it impossible for buyers to aggregate low-value claims."[87]

An older study found only limited use of class arbitration waivers in a variety of consumer contracts. Linda Demaine and Deborah Hensler examined dispute resolution clauses in a sample of contracts from businesses that an average consumer "was most likely to patronize."[88] Of the 161 contracts they examined, 57 (or 35.4%) included an arbitration clause.[89] The use of arbitration clauses varied widely across their industry groups, from a high of 69.2% in financial businesses to none in food and entertainment businesses.[90] They also found that a minority (30.8%) of the arbitration clauses included class arbitration waivers, but they did not provide a breakdown by industry type.[91] Demaine and Hensler collected their data in 2001,[92] however – prior to *Bazzle* – and so their results do not provide any insight into the post-*Bazzle* use of class arbitration waivers.

We also find varied use of class arbitration waivers in consumer contracts giving rise to AAA consumer arbitrations in 2007. Overall, of the clauses we examined in the case file sample, 109 of 299 (or 36.5%) included class arbitration waivers. The use of class arbitration waivers varied widely across contract types, as shown in Figure 3. Consistent with Eisenberg, Miller, and Sherwin, we found that all cases involving cell phone companies (5 of 5, or 100.0%) and all cases involving credit card issuers (26 of 26, or 100.0%) arose out of arbitration clauses with class arbitration waivers. By comparison, just over half of cases arising out of car sale contracts (34 of 64, or 53.1%) and contracts with home builders (11 of 17, or 64.7%) included class arbitration waivers. Meanwhile, none of the cases arising out of insurance contracts or real estate brokerage agreements included class arbitration waivers.[93] Thus, while some types of consumer contracts in the case file sample commonly included class arbitration waivers, other types did not.

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87 *Id.*

88 Linda J. Demaine & Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 59 (2004). The businesses were from the following types of industries: "housing and home services," "retail services," "transportation," "health," "food and entertainment," "travel," "financial," and "other." *Id.* For a more detailed listing of the types of businesses they studied, see *id.* tbl. 1.

89 *Id.* at 63-64 tbl. 2.

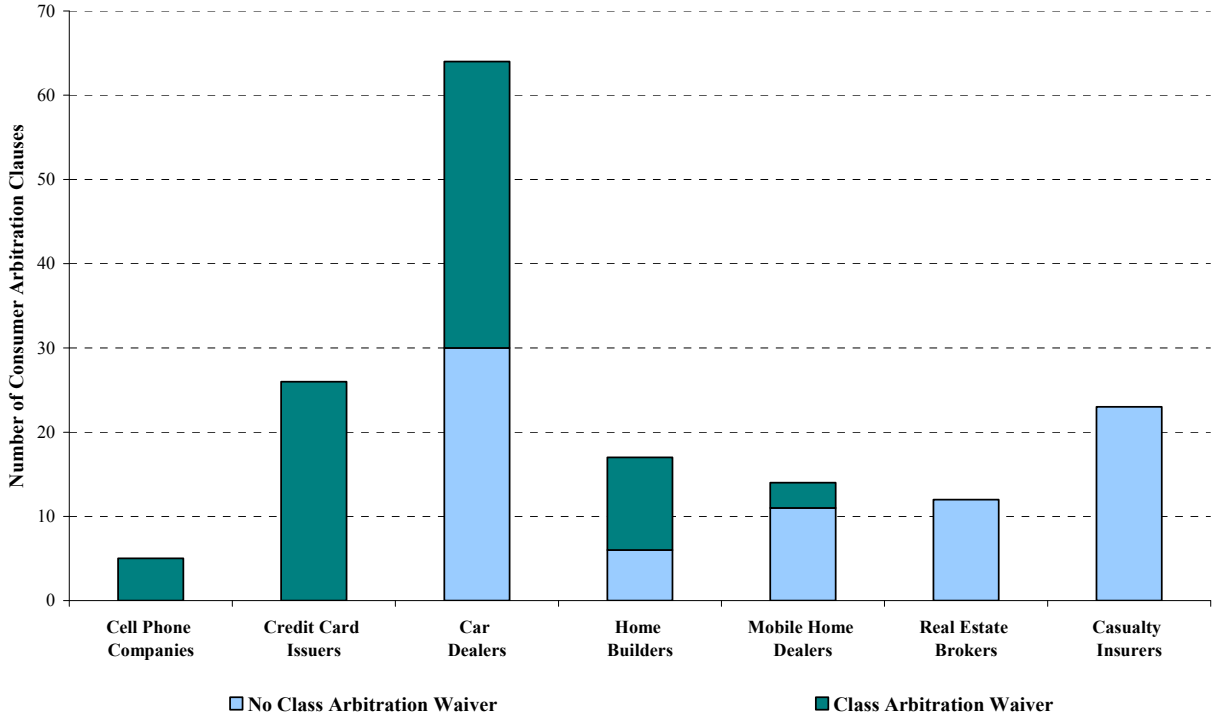
90 *Id.*

91 *Id.* at 65.

92 *Id.* at 60.

93 We should note that almost all of the insurance cases involved a single insurer.

Figure 3:
Use of Class Arbitration Waivers by Type of Contract
(Cases = 161)



One caveat to these findings: the case file sample of arbitration clauses is limited to those giving rise to AAA consumer arbitrations closed in 2007. Clauses selecting other providers may differ in how frequently they include class arbitration waivers.[94] Moreover, many of those arbitrations (180 of 301, or 59.8%) were filed in 2007, although a number were filed earlier. We do not have data on the date on which the arbitration agreements giving rise to those arbitrations were entered. For some types of contracts, such as car sales agreements, one would expect a dispute to arise relatively close in time to when the sales contract was signed. But for others, there may have been a time lag between the time the arbitration agreement was entered and when the case arising out of the arbitration agreement was closed. So we cannot exclude the possibility that the arbitration clauses we examined might have changed subsequently to include class arbitration waivers.

That said, the evidence suggests that many consumer arbitration clauses may not include class arbitration waivers. Studies that have found widespread use of class arbitration waivers focused on types of businesses that most commonly used class arbitration waivers. The evidence

[94] The AAA has promulgated rules governing the administration of class arbitrations and has a well established class arbitration docket. *See* American Arbitration Association, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), *available at* www.adr.org/sp.asp?id=21936; *see also supra* Part I.B.3. We do not know whether the availability of class arbitration before the AAA makes it less likely or more likely that arbitration clauses specifying the AAA will include class arbitration waivers.

here suggests that those businesses may not be representative of all the businesses that include arbitration clauses in their consumer contracts.

3. Health Care Cases

Although the focus of this Report is on the Consumer Due Process Protocol, the case file sample provides a limited opportunity to consider the AAA's application of the Health Care Due Process Protocol as well. As discussed above, unlike the other due process protocols, the Health Care Due Process Protocol provides that "[i]n disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises."[95] In its Healthcare Policy Statement, the AAA has indicated that it would not administer "cases involving individual patients" unless the parties agreed to arbitrate after the dispute arose.[96] The AAA distinguishes cases involving a "patient undergoing health care treatment" from "other situations involving an individual," in which the AAA "will continue to administer pre-dispute agreements to arbitrate."[97] Thus, under the AAA's Healthcare Policy Statement, if the dispute involves treatment of the patient, a post-dispute arbitration agreement is necessary; but for other disputes, such as those involving the payment of money, the AAA will still administer pre-dispute arbitration agreements, even in the health care field.

The case file sample included seven health-care-related cases. Three of the cases were disputes between a health insurance company and its insured. In two cases, the claimant sought coverage of treatment that had not yet been provided. In both of those cases, the parties entered into a post-dispute arbitration agreement. In the other case, the claimant sought coverage for treatment that already had been provided; in other words, the dispute was over reimbursement of money to the consumer. The parties arbitrated that case pursuant to a pre-dispute arbitration agreement.

The other four health-care-related cases were brought by or against nursing homes. In one case, a consumer sought damages against the nursing home for negligence in the care it provided. In that case, the parties entered into a post-dispute arbitration agreement. One of the other claims was a claim by a consumer for overcharges against the nursing home. The other two cases were collection actions brought by the nursing home against the patient or a family member. All three of those cases were brought pursuant to pre-dispute arbitration agreements.

Overall, then, the AAA's administration of the small number health care cases in the case file sample seems to have followed the line it draws between cases involving treatment of a patient and cases involving other types of disputes (e.g., the recovery of money).

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[95] Health Care Due Process Protocol, *supra* note 74, princ. 3.

[96] American Arbitration Association, Healthcare Policy Statement (effective Jan. 1, 2003), *available at* www.adr.org/sp.asp?id=32192.

[97] *Id.*

ANNEX A. BUSINESS RESPONSES TO AAA PROTOCOL COMPLIANCE, ON THE AAA BUSINESS LIST AS "ACCEPTABLE"

Business Response	Protocol Issue	Number of Cases	Total Cases
No Response Necessary			
	No issues	1539	
	Total No Response Necessary		1539
Updated Clause			
	Cost issue	44	
	Location issue	9	
	Remedy limitation	16	
	Cost issue and location issue	3	
	Cost issue and remedy limitation	13	
	Others	9	
	Unspecified	1	
	Total Updated Clause		95
Waived Violation for Future Cases			
	Cost issue	16	
	Location issue	4	
	Remedy limitation	5	
	Cost issue and location issue	2	
	Cost issue and remedy limitation	7	
	Unpaid fees	9	
	Others	3	
	Unspecified	5	
	Total Waived Violation for Future Cases		51
Waiver and Removed AAA			
	Cost Issue	4	
	Remedy Limitation	1	
	Total Waiver and Removed AAA		5
Waiver and Removed Arbitration			
	Hearing Issue	1	
	Total Waiver and Removed Arbitration		1
Sought Advance Review			
	Approved as submitted	14	
	Approved after revision (various protocol issues)	1	
	Total Sought Advance Review		15
	Grand Total "Acceptable" Businesses		**1706**

ANNEX B. BUSINESS RESPONSES TO AAA PROTOCOL COMPLIANCE, ON THE AAA BUSINESS LIST AS "UNACCEPTABLE"

Business Response	Protocol Issue	Number of Cases	Total Cases
Did Not Respond to Case Initiation			
	Unpaid fees	252	
	Cost issue	41	
	Location issue	20	
	Remedy limitation	15	
	Cost issue and location issue	2	
	Cost issue and remedy limitation	6	
	Cost issue and arbitrator selection issue	5	
	Location issue and remedy limitation	3	
	Other	10	
	Unspecified	4	
	Total Did Not Respond to Case Initiation		358
Did Not Respond to AAA Contact			
	Cost issue	30	
	Location issue	12	
	Remedy limitation	23	
	Cost issue and location issue	1	
	Cost issue and remedy limitation	4	
	Cost issue and arbitrator selection issue	2	
	Location issue and remedy limitation	2	
	Other	5	
	Unspecified	2	
	Did not examine	120	
	Total Did Not Respond to AAA Contact		201
Refused to Pay			
	Unpaid fees	29	
	Unpaid fees and cost issue	2	
Refused to Update Clause			
	Remedy limitation	2	
Refused to Waive			
	Cost issue	9	
	Location issue	6	
	Remedy limitation	9	
	Cost issue and remedy limitation	2	
	Other	1	
	Unspecified	1	
	Total Refusals		61
Removing AAA			
	Unpaid fees	3	
	Cost issue	6	
	Remedy limitation	2	
	Cost issue and remedy limitation	1	
	Unspecified	1	
	Total Removing AAA		13
Removing Arbitration Clause			
	Remedy limitation	1	
	Total Removing Arbitration Clause		1
Out of Business			
	Unavailable	10	
	Total Out of Business		10
Unable to Locate			
	Unavailable	3	
	Total Unable to Locate		3
	Grand Total "Unacceptable" Businesses		**647**

CONCLUSIONS

A. Empirical Findings

TOPIC 1. COSTS, SPEED, AND OUTCOMES OF AAA CONSUMER ARBITRATIONS

Our central empirical findings on this topic are as follows:

- Consumer claimants brought the substantial majority (approximately 86.0%) of cases in the American Arbitration Association ("AAA") consumer dataset from 2005 through 2007. Of the cases brought by consumer claimants, 32.1% were resolved by an award, while in cases brought by business claimants, 49.9% were resolved by an award. The remaining cases typically were either settled or dismissed voluntarily by the parties.

- Overall, in the case file sample of consumer cases awarded from April 2007 through December 2007, consumer claimants were assessed an average of $129 in AAA administrative fees and $247 in arbitrator's fees. Consumer claimants seeking less than $10,000 were assessed an average of $1 in AAA administrative fees and $95 in arbitrator's fees, while consumer claimants seeking between $10,000 and $75,000 were assessed an average of $15 in AAA administrative fees and $204 in arbitrator's fees. Consumer claimants seeking more than $75,000 were assessed an average of $1448 in administrative fees and $1256 in arbitrator's fees. For cases subject to the AAA's low-cost consumer arbitration rules (i.e., with a claim amount of $75,000 or less), consumers almost never paid more than the amount specified in the rules and often paid less – as a result of the arbitrator reallocating some portion of the consumer's share of costs to the business in the award.

- The average time from filing to final award for the AAA consumer arbitration cases in the case file sample was 207 days (6.9 months), subject to some possible degree of case selection bias. Cases with business claimants were resolved in 198 days (6.6 months) on average; cases with consumer claimants were resolved in 209 days (7.0 months) on average.

- Of the cases in the case file sample, consumer claimants won some relief in 53.3% of the cases (128 of 240) they brought. On average, successful consumer claimants were awarded $19,255 in compensatory damages and recovered 52.1% of the amount they sought; the median amount awarded was $5000 and the median percent recovery was 41.7%. Business claimants won some relief in 83.6% of the cases (51 of 61) they brought. On average, successful business claimants were awarded $20,648 and recovered 93.0% of the amount they sought; the median amount awarded was $11,110 and the median percent recovery was 100.0%. We cannot evaluate whether these recoveries are favorable or unfavorable for consumers.

- Consumer claimants sought to recover attorneys' fees in 65 of the 128 cases in which they were awarded damages. In 41 of those 65 cases (or 63.1%), the arbitrator awarded attorneys' fees to the consumer. In those cases in which the award of attorneys' fees

specified a dollar amount (35 cases), the average attorneys' fee award was $14,574 and the median award was $9000.

- Under the usual definition of a repeat business, we find no statistically significant repeat-player effect: consumer claimants won some relief in 51.8% of cases against repeat businesses so defined and 55.3% of cases against non-repeat businesses, a difference that is not statistically significant.[1] Under an alternative definition of a repeat business, based on the AAA's categorization of businesses in enforcing compliance with the Consumer Due Process Protocol, we find some evidence of a repeat-player effect as to win-rate (claimants won some relief in 43.4% of cases against repeat businesses and 56.1% of cases against non-repeat businesses, a difference that is weakly statistically significant)[2] but not as to the percentage of claim amount recovered by consumer claimants (claimants actually recover a higher percentage of the amount claimed against repeat businesses than against non-repeat businesses). But the evidence suggests that any repeat-player effect is not due to arbitrator (or other) bias in favor of repeat businesses. Instead, it appears to result from case screening by repeat businesses, with those businesses resolving consumer claims prior to an award at a much higher rate than non-repeat businesses.

TOPIC 2. AAA ENFORCEMENT OF THE CONSUMER DUE PROCESS PROTOCOL

Our central empirical findings on this topic are as follows:

- In the case file sample of AAA consumer arbitrations, the majority of consumer arbitration clauses (229 of 299, or 76.6%) fully complied with the Consumer Due Process Protocol as applied by the AAA. We found no statistically significant difference in how frequently clauses violated the Protocol between cases seeking $75,000 or less (which were subject to AAA protocol compliance review) and those cases seeking over $75,000 (which were not).

- The AAA's review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations. Of the 271 cases in the case file sample subject to the AAA's protocol compliance review, five (or 1.8%) included an arbitration clause with an unwaived violation of the Consumer Due Process Protocol. Stated otherwise, in 266 out of 271 cases (98.2%), the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.

- The AAA in the time period studied refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (or 9.4% of its total consumer caseload), because the business failed to comply with the Consumer Due Process Protocol. The most common

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1 See *supra* Part IV(2).D.4.
2 See *supra* Part IV(2).D.4.

reason for refusing to administer a case (55 of 129 cases, or 42.6%) was the business's failure to pay its share of the costs of arbitration rather than any problematic provision in the arbitration clause.

- In response to AAA protocol compliance review, over 150 businesses have either waived problematic provisions or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol. Those businesses are in addition to over 1550 businesses with arbitration clauses that did not violate the Protocol. By comparison, the AAA has identified 647 businesses for which it will refuse to administer arbitrations. The most common reason (358 of 647, or 55.3%) for the AAA to refuse to administer consumer arbitrations for a business is the business's failure to pay its share of the arbitration costs.

- Of the clauses in cases in the case file sample, 109 (36.5%) included class arbitration waivers -- provisions that waive the availability of class relief in arbitration. The results varied significantly by industry. All arbitration clauses in cases involving cell phone companies (5 of 5, or 100%) and credit card issuers (26 of 26, or 100%) included class arbitration waivers. By comparison, no arbitration clauses in insurance contracts and real estate brokerage agreements included class arbitration waivers.

B. Policy Implications

These empirical findings have important implications for the debate over consumer arbitration – for Congress, for state legislatures, for the courts, and for others seeking to help formulate policy about consumer arbitration.

1. Not all consumer arbitrations are alike. In the case file sample of AAA consumer arbitrations, for example, the types of claims brought by consumer claimants differed from the types of claims brought by business claimants. Arbitration clauses in some types of contracts commonly included class arbitration waivers, while arbitration clauses in other types of contracts did not. Likewise, not all arbitration providers are alike. Some administer claims that are predominantly brought by businesses, while others have a higher proportion of claims brought by consumers. Policy makers should not assume that empirical findings for one type of consumer arbitration necessarily will be the same for other types. Nor should policy makers assume that empirical findings for arbitrations administered by one arbitration provider necessarily will be the same for arbitrations administered by other providers. Of course, the same holds true for the empirical findings in this Report – that they do not necessarily hold for other types of arbitration or for other arbitration providers. These variations suggest the need for a nuanced approach to pubic policy concerning arbitration.

2. Private regulation complements existing public regulation of the fairness of consumer arbitration clauses. Our evidence indicates that the AAA effectively reviews arbitration clauses for protocol compliance and appropriately responds to clauses that do not comply. A number of

businesses have responded to AAA compliance efforts by changing their arbitration clauses to comply with the Protocol. Any consideration of the need for legislative action should take into account such private regulation of consumer arbitration.

Courts and policymakers usefully could consider ways to reinforce the AAA's enforcement of the Consumer Due Process Protocol. For example, courts could give businesses additional incentive to waive violations of the Protocol (or pay their share of arbitration fees) by making clear that the consumer can bring the case in court if the business does not do so. The rationale could be that the identity of the provider was "material" to the agreement to arbitrate; hence, the inability to arbitrate before the AAA would result in invalidation of the entire arbitration clause. Congress, state legislatures, and the courts also might consider ways to extend the protections of the Consumer (or Employment) Due Process Protocols to arbitration clauses that do not provide for AAA arbitration.

Although our evidence indicates that the AAA effectively reviews clauses for protocol compliance, that review process could nonetheless be improved in several ways. First, the process of reviewing consumer clauses might be centralized in a single person, as it is for the Employment Due Process Protocol. Centralization might reduce further the number of unwaived protocol violations, although at some resource cost to the AAA. Second, the AAA might provide additional training for case intake staff, particularly on how to identify problematic remedy limitations, the most commonly overlooked type of violation. Third, the AAA might publish the standards it uses in reviewing clauses for protocol compliance. Publication would give businesses better information on what provisions are problematic, and could enlist consumer claimants and their attorneys in enforcement of the Protocol. Finally, the AAA might give more prominent notice of the availability of advance review, such as by incorporating advance review into its Consumer Arbitration Rules.

3. For several reasons, consumers may pay less to arbitrate disputes than the cost shown in arbitration rules. When arbitrators in the case file sample exercised their authority to reallocate costs in their award, they did so most often to reallocate costs from consumers to businesses – i.e., to reduce the costs of arbitration to consumers. In addition, arbitrators awarded attorneys' fees to prevailing consumer claimants in almost two-thirds of the cases in which they sought such an award (and in over half the cases in which consumer claimants were awarded any compensatory damages). The widespread availability of attorneys' fee awards in arbitration further reduces the effective cost of arbitration to consumers.

4. Empirical studies have tended to find that repeat players fare better in arbitration than non-repeat players. To the extent such a repeat-player effect exists in arbitration, the critical policy question is what causes it. Is the repeat-player effect due to arbitrator bias in favor of repeat players? Is it due to bias resulting from control by repeat players over the design of dispute resolution systems? Or is it due to better case screening by repeat players, who settle stronger cases and arbitrate weaker cases against them? Our findings are consistent with prior studies in suggesting that any repeat-player effect is likely caused by better case screening by repeat players rather than arbitrator (or other) bias in favor of repeat players. A further as yet

unresolved question is whether a repeat-player effect exists in litigation, and, if so, how litigation compares to arbitration in this regard.

5. Finally, despite the insights that empirical research can provide, it nonetheless has important limitations. First, our results are limited to AAA consumer arbitrations. Our data do not address arbitrations administered by other arbitration providers. Second, one must have a baseline for comparison to evaluate the cost, speed, and outcomes of consumer arbitrations; data on arbitration proceedings alone are not enough. Accordingly, this Report's findings are only a beginning. While they provide a look into consumer arbitrations administered by the AAA, further work remains to be done – work that we hope to undertake in a future phase of this project.

APPENDIX 1. EMPIRICAL STUDIES OF CONSUMER ARBITRATION

This appendix lists the empirical studies of consumer arbitration discussed in the body of this Report. For each study, it describes the sample and summarizes the central findings of the study. It also briefly describes criticisms of the study, if any.

A. AAA Consumer Arbitration

1. American Arbitration Association, Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007, *available at* http://www.adr.org/si.asp?id=5027

Sample: 310 AAA cases resulting in an award from January 2007 through August 2007.[1]

Findings: 41% of the cases were decided on the basis of documents only, while 59% were resolved after a telephone or in-person hearing. Cases on average took about four months to resolve on the basis of documents and about six months to resolve on the basis of an in-person hearing. Consumer claimants won 48% of awarded cases they brought; business claimants won 74% of awarded cases they brought.[2]

Criticisms: Public Citizen criticized the AAA's analysis on several grounds. First, it found the win-rate calculated by the AAA "unreliable because any arbitrator award was counted as a win, regardless of its relation to the amount sought. This means for example that AAA would deem victorious a claimant who sought $50,000 and received only $5."[3] Second, Public Citizen faulted the AAA because Public Citizen was unable to duplicate the AAA's findings from the AAA's public disclosures.[4] Third, Public Citizen pointed out that business claimants had a higher win-rate than consumer claimants.[5]

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[1] American Arbitration Association, Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007, *available at* http://www.adr.org/si.asp?id=5027.

[2] *Id.*

[3] Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration 12 (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf [hereinafter Public Citizen, Arbitration Debate Trap].

[4] *Id.* ("[W]e could discern the victorious party only in approximately 7 percent of the cases. AAA left the 'prevailing party' field – a required disclosure – blank in more than 90 percent of the cases it has reported.").

[5] *Id.*

2. Statement of the American Arbitration Association, Annex D, *in* S. 1782, The Arbitration Fairness Act of 2007: Hearing Before the Constitution Subcomm. of the Senate Comm. on the Judiciary, 110th Cong., 1st Sess. 135 (Dec. 12, 2007)

Sample: 987 cases brought by consumer claimants before the AAA that were resolved in 2006.[6]

Findings: The AAA reported that 42% of the cases were resolved by an award, while 58% were resolved prior to award. The consumer was awarded some monetary amount in 48% of the cases resolved by an award. Cases awarded on the basis of documents (34% of all awarded cases) took on average 3.8 months; cases awarded following an in-person hearing (66% of all awarded cases) took on average 7.4 months.[7]

3. Ernst & Young, Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases 16, App. A (2004), *available at* http://www.adrforum.com/rcontrol/documents/ ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf

Sample: As part of its study of NAF arbitrations described below,[8] Ernst & Young examined forty-four AAA consumer cases classified as involving "banking" disputes. The cases were among those included on the AAA web site as part of its required disclosures under California law.[9]

Findings: Ernst & Young reported that: (1) the average amount claimed was $81,371; (2) the average fee paid (in the 31 cases for which such information was available) was $1935; (3) 50% of the cases settled, 11% were withdrawn by the claimant, and in the remaining 39% the arbitrator issued a decision; and (4) no information was provided for the amount awarded and rarely was the prevailing party identified.[10]

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[6] Statement of the American Arbitration Association, Annex D, *in* S. 1782, The Arbitration Fairness Act of 2007: Hearing Before the Constitution Subcomm. of the Senate Comm. on the Judiciary, 110th Cong., 1st Sess., at 135 (Dec. 12, 2007).

[7] *Id.*

[8] *See infra* text accompanying notes 30-36.

[9] Ernst & Young, Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases 16, App. A (2004), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf.

[10] *Id.*

B. Other Consumer Arbitration

1. Jeff Nielsen et al., Navigant Consulting, National Arbitration Forum: California Consumer Arbitration Data (July 11, 2008), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1212

Sample: Same as in Public Citizen, The Arbitration Trap (see study no. 2, below).[11]

Findings: Of the 33,948 total NAF arbitrations, 26,665 were either heard by an arbitrator or dismissed (the excluded cases were settlements). Navigant concluded that "[o]f these 26,665 arbitrations, consumer parties were reported to have prevailed outright or had the case against them dismissed in 8,558 cases (32.1%). Claims against consumers were reduced by NAF in an additional 4,376 cases (16.4%)."[12] According to Navigant, "the median reduction was $636 and the median percentage reduction was 8.6%."[13] Of the 33,935 cases in which an arbitration fee was paid, the consumer paid no fee in 33,689 cases (99.3%). In the remaining 246 cases, the median fee paid by the consumer was $75.[14]

Criticisms: Public Citizen criticized the Navigant report on several grounds. First, the vast majority (8534 of 8558, or 99.6%) of the cases that Navigant treated as cases in which the consumer prevailed were dismissals, rather than awards. And of the dismissals, almost all (7783, or 91.2%) occurred before an arbitrator was appointed. According to Public Citizen: "These cases can hardly be used as evidence of the fairness of NAF arbitration. They scarcely involved arbitration at all."[15] Second, the 700 dismissals after appointment of an arbitrator, according to Public Citizen, might have occurred "for any number of manipulative reasons," such that "it is possible that the consumers who 'won' the cases ... lost the very same cases later."[16]

2. Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf

Sample: Relying on the National Arbitration Forum's California disclosures (which it reformatted into an Excel spreadsheet[17]), Public Citizen analyzed outcomes in 33,948 NAF

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[11] Jeff Nielsen et al., Navigant Consulting, National Arbitration Forum: California Consumer Arbitration Data 1 (July 11, 2008), *available at* http://www.instituteforlegalreform.com/index.php?option=com_ilr_docs&issue_code=ADR&doc_type=STU; *see infra* text accompanying notes 17-18.

[12] Nielsen et al., *supra* note 11, at 1.

[13] *Id.* at 3.

[14] *Id.*

[15] Public Citizen, Arbitration Debate Trap, *supra* note 3, at 10.

[16] *Id.* at 11.

[17] *See* Public Citizen, NAF California Data Jan. 2003 to Mar. 2007, *available at* http://www.citizen.org/congress/civjus/arbitration/NAFCalifornia.xls ("This spreadsheet consists of the information on 33,948 National Arbitration Forum cases conducted in California between Jan. 1, 2003 and Mar. 31, 2007. It was compiled from quarterly reports that the National Arbitration Forum posted in a difficult-to-find place on its Web site in Adobe Systems' Portable Document Format (PDF). Public Citizen converted them to an Excel spreadsheet so California residents and others interested in binding mandatory arbitration may do their own analysis of NAF

consumer arbitrations between January 1, 2003 and March 31, 2007. The vast majority of cases were filed by businesses against consumers; only 118 (0.35% of the cases) were brought by consumers against businesses.[18]

Findings: In the cases with consumer claimants, businesses prevailed in 61 cases and consumers in 30 cases; in the remaining cases the prevailing party was listed as "N/A." In 14,654 cases, no arbitrator was ever appointed and the case was either settled or dismissed. In the 19,294 cases in which an arbitrator was appointed, the business won in 18,091 (or 93.8%) – most of which were resolved on the basis of documents only with the consumer not appearing – while the consumer won in 781 (4.0%).[19] Public Citizen also provided information on the arbitrators who decided the cases: 28 arbitrators decided 89.5 percent of the cases in which an arbitrator was appointed, with the busiest according to Public Citizen deciding 68 cases in a single day.[20]

Criticisms: Professor Peter B. Rutledge criticized Public Citizen's data analysis on several grounds. First, the focus of the report was narrow, addressing a single arbitration provider (NAF) and a single type of business (consumer credit).[21] Second, the high win-rate for businesses was due to the type of claim involved – debt collection actions – which tend to have "very little to dispute."[22] He notes: "Studies of debt collection actions in major cities reveal that the lender typically wins between 96% and 99% of the time, right in line with the lender win-rate data cited in the Public Citizen Report."[23] Rutledge also states that Public Citizen misinterpreted the NAF data in estimating the number of cases decided by arbitrators in a single day.[24]

3. Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL, July 2006, at 32

Sample: Mark Fellows of the National Arbitration Forum reported information about NAF arbitrations from 2003-2004. The data was compiled from disclosures made by NAF as required by California law.[25]

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arbitrations in California and of the records of NAF arbitrators.").

[18] Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers 15 (2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf [hereinafter Public Citizen, Arbitration Trap].

[19] *Id.*

[20] *Id.* at 16.

[21] Peter B. Rutledge, Arbitration -- A Good Deal for Consumers: A Response to Public Citizen 10 (April 2008) (report prepared for and released by the U.S. Chamber Institute for Legal Reform), *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1091.

[22] *Id.* at 11.

[23] *Id.*

[24] *Id.* at 11-12 ("This argument mischaracterizes the California data. Those data include a field for the date of the award. The Public Citizen Report treats this listed date as the day when the arbitrator actually rendered an award. This is incorrect. Rather, the California data reflect the date that the award was entered into NAF's system. An arbitrator may render a series of awards over several days, yet NAF enters those awards into its system in a single day.").

[25] Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL, July 2006, at 32.

Findings: Fellows found that consumer claimants "prevail in 65.5% of the cases that reach a decision," while business claimants "prevail in 77.7% of the cases that reach a decision." The time from filing until disposition averaged 4.35 months for consumer claimants and 5.60 months for business claimants. On average, consumer claimants paid $46.63 in arbitration fees while business claimants paid $149.50 in arbitration fees.[26]

Criticisms: Public Citizen criticized Fellows' analysis on several grounds. First, Fellows treats a business withdrawing a claim as a win for the consumer. But "[t]hese claims are not comparable to judicial decisions after bench trials.[27] When only cases decided by an arbitrator are considered, businesses prevail at a much higher rate. Second, Public Citizen was not able to duplicate Fellows' estimate of consumer claimants' win-rates, finding instead that "consumers prevailed in only 37.2 percent of consumer-initiated cases that reached a decision."[28] Regardless, cases with consumer claimants "account for a miniscule percentage of NAF arbitrations and therefore are not representative of NAF arbitrations."[29]

4. Ernst & Young, Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases 16, App. A (2004), *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf[30]

Sample: 226 NAF arbitrations brought by consumers between January 2000 and January 2004.[31] The study did not include information on arbitrations brought by businesses.

Findings: The largest category of disputes involved credit card fees and charges (38.9% of the cases), with other significant case types including disputes over credit card chargebacks (8.4%), mortgage loans (8.4%), and other loans (7.5%).[32] The substantial majority of claims (73.0%) sought $15,000 or less; only 7.0% of claims were for more than $75,000.[33] Overall, 129 of the 226 cases (or 57.1%) were dismissed before hearing, either due to settlement or on request of the plaintiff. Ernst & Young classified all but four of those cases as cases in which the consumer prevailed.[34] Of the cases that reached a decision by the arbitrator, the consumer

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[26] *Id.*

[27] Public Citizen, Arbitration Debate Trap, *supra* note 3, at 9.

[28] *Id.* at 10.

[29] *Id.*

[30] *See also supra* text accompanying notes 8-10.

[31] Ernst & Young, *supra* note 9, at 7. Of the 250 casefiles provided by the NAF, Ernst & Young excluded 24 employment-related cases from the study. *Id.* at 7.

[32] *Id.* at 8.

[33] *Id.*

[34] *Id.* ("Under the first measure, a claimant is said to prevail if the arbitration decision favored the claimant, or if the case was dismissed at the claimant's request or per party agreement. This measure assumes that the consumer was sufficiently satisfied with the settlement to dismiss the arbitration proceedings."). The four dismissals in which the consumer did not prevail, according to Ernst & Young, were ones in which either the NAF dismissed the case due to some deficiency or the consumer dismissed the case because he or she could not afford to continue. *Id.* at 9 & n.11.

prevailed in 53 out of 97 cases (or 54.6%).[35] Ernst and Young concluded: "Consumers appear to be satisfied with settlements accomplished prior to hearings and if a hearing takes place, consumers are not losing a disproportionate number of cases. Therefore, the findings from this analysis do not support claims that the arbitration process is harmful to consumers."[36]

Criticisms: Bland et al. have criticized the Ernst & Young study on several grounds.[37] First, the study examined only the arbitration process and did not compare arbitration to litigation. Second, it included dismissals, whether by claimant request or party agreement, as wins by the claimant. It also included any case in which a claimant prevailed, regardless of the amount recovered, as a win. Third, the study focused only on the claims filed by consumers, "disregarding more than 100,000 filed by corporations against consumers during the same four-year period."[38]

5. California Dispute Resolution Institute, Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure (Aug. 2004), *available at* http://www.mediate.com/cdri/cdri_print_aug_6.pdf

Sample: 2175 arbitration cases from January 2003 through February 2004, posted on websites of six different arbitration providers as required by California law. The six providers were the AAA, ADR Services, Arbitration Works, ARC Consumer Arbitrations, JAMS, and Judicate West.[39] Although the study included data on both consumer and employment arbitration, the reported results did not distinguish between the two.[40]

Findings: The CDRI prefaced its findings with the statement that "[i]n general, inconsistencies, ambiguities and the lack of reported data in some areas limit this study's utility for the purposes of informing policy."[41] Data on both filing and disposition dates was available for 1559 cases. For those cases, the mean disposition time was 116 days, while the median was 104 days.[42] The amount of arbitrator's fee was available for 1404 cases; the mean fee was $2256 while the median fee was $870.[43] The prevailing party was identified for 302 cases. The consumer prevailed in 215 (or 71.2%) of those cases, while the business prevailed in the

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35 *Id.* at 9.

36 *Id.* at 10. In addition to its case analysis, Ernst & Young surveyed 29 of the consumers involved in the cases (25 of whom had prevailed in their cases). Of those responding, 25 (or 69%) either "were satisfied or very satisfied with the arbitration process." *Id.* at 11-12.

37 F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS 11 (5th ed. 2007); *see also* Public Citizen, Arbitration Trap, *supra* note 18, at 20.

38 BLAND ET AL., *supra* note 37, at 11.

39 California Dispute Resolution Institute, Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure 14 (Aug. 2004), *available at* http://www.mediate.com/cdri/cdri_print_aug_6.pdf.

40 *Id.* at 22 fig. 1.

41 *Id.* at 18. For a detailed description of the problems, see *id.* at 27-32.

42 *Id.* at 19.

43 *Id.* at 21.

remaining 87 cases (or 28.8%).[44] The amount of the award was reported for 540 cases; the mean amount awarded was $33,112 while the median amount awarded was $7615.[45]

Criticisms: Bland et al. identified the following criticisms of these results. First, as the CDRI itself recognized, the data it was reviewing were too incomplete to reach any firm conclusions.[46] Second, the study "appears to exclude collection actions brought by creditors against consumers and any arbitrations from the National Arbitration Forum, a lightning rod concerning the fairness of consumer arbitration."[47]

6. Answers and Objections of First USA Bank, N.A. to Plaintiff's Second Set of Interrogatories, Ex. 1, Bownes v. First U.S.A. Bank, N.A. et al., Civ. Action No. 99-2479-PR (Ala. Circuit Ct. 2000), *available* at http://www.tlpj.org/briefs/McQuillan%20 exhibits%2016-19%20(300dpi).pdf

Sample: Data on NAF arbitration outcomes between 1998 and 2000, produced by First USA Bank in response to interrogatories in an Alabama lawsuit.[48]

Findings: The data showed that of the 51,622 NAF arbitrations in which First USA was involved with consumers, it prevailed in 19,618 while the cardholder prevailed in 87. Of the cases in which First USA prevailed, the substantial majority (17,293 of 19,618, or 88.1%) were cases in which the consumer did not respond. Another 28,248 cases expired, typically for failure to serve the cardholder within ninety days, and another 3666 were pending at the time the discovery response was made. Consumers brought four cases against First USA, prevailing in

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44 *Id.* at 25.

45 *Id.* at 20.

46 BLAND ET AL., *supra* note 37, at 12; *see also* Public Citizen, Arbitration Debate Trap, *supra* note 3, at 11-12.

47 BLAND ET AL., *supra* note 37, at 12.

48 Answers and Objections of First USA Bank, N.A. to Plaintiff's Second Set of Interrogatories, Ex. 1, Bownes v. First U.S.A. Bank, N.A. et al., Civ. Action No. 99-2479-PR (Ala. Circuit Ct. 2000), *available* at http://www.tlpj.org/briefs/McQuillan%20exhibits%2016-19%20(300dpi).pdf (last visited Dec. 10, 2008).

two of the cases and settling a third; the fourth was still pending.[49] These results are commonly cited as showing that "First USA prevailed in an astonishing 99.6 percent of cases."[50]

Criticisms: The NAF responded that collection cases in court have a similar success rate for businesses ("creditors win about 98 percent of collection actions brought against debtors in federal courts") and that "'expired' cases should be counted as victories for consumers."[51]

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[49] *Id.* at 38 ex. 1.

[50] Public Citizen, Arbitration Trap, *supra* note 18, at 13.

[51] Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E01 (quoting Ed Anderson, NAF managing director).

APPENDIX 2. EMPIRICAL STUDIES OF EMPLOYMENT ARBITRATION AND SECURITIES ARBITRATION

This appendix lists empirical studies of employment and securities arbitration, organized by type of arbitration and author name.

A. Employment Arbitration

Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Differenc*e, *in* ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303 (Samuel Estreicher & David Sherwyn eds. 2004)

Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002)

Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, IRRA 50TH ANN. PROC. 33 (1998)

Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998)

Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, N.Z. J. INDUS. REL., June 1998, at 5

Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPL. RTS. & EMPLOY. POL'Y J. 189 (1997)

Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108 (1996)

Lisa B. Bingham, *Is There a Bias in Arbitration of Non-Union Employment Disputes?*, 6 INT'L J. CONFLICT MGMT. 369 (1995)

Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPL. RTS. & EMPLOY. POL'Y J. 405 (2007)

Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 56

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APPENDIX 3. SUMMARY OF DUE PROCESS PROTOCOLS[1]

PRINCIPLE 1. FUNDAMENTALLY-FAIR PROCESS

AAA Employment:[2] No provision
AAA Consumer:[3] "All parties are entitled to a fundamentally-fair ADR process."
AAA Health Care:[4] "All parties are entitled to a fundamentally-fair ADR process."
JAMS Consumer:[5] No provision
JAMS Employment:[6] No provision
NAF:[7] "All parties in an arbitration are entitled to fundamental fairness."

PRINCIPLE 2. ACCESS TO INFORMATION REGARDING ADR PROGRAM

AAA Employment: No provision
AAA Consumer: "Providers of goods or services should undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs."
AAA Health Care: "Full and accurate information regarding the program, in writing, should be provided by the plan to patients and providers in plain, easily understood language."
JAMS Consumer: "The consumer must be given notice of the arbitration clause. Its existence, terms, conditions and implications must be clear."
JAMS Employment: No provision
NAF: "Information about arbitration should be reasonably accessible before parties commit to an arbitration contract."

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[1] The organization of this Appendix is based on the Consumer Due Process Protocol. The provisions of the other protocols are reproduced under the heading included in the Consumer Protocol, with the goal of facilitating comparison of the different protocols. Those protocols, of course, do not use the same numbering scheme, and may well not include a similar heading. Moreover, the Appendix does not reprint the complete text of the protocols, although it aims to capture the key portions of the various provisions of the protocols.

[2] Task Force on Alternative Dispute Resolution in Employment, Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (May 9, 1995), *available at* www.adr.org/sp.asp?id=28535.

[3] National Consumer Disputes Advisory Committee, Consumer Due Process Protocol (April 17, 1998), *available at* www.adr.org/sp.asp?id=22019.

[4] Commission on Health Care Dispute Resolution, Health Care Due Process Protocol (July 27, 1998), *available at* www.adr.org/sp.asp?id=28633.

[5] JAMS, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness (revised Jan. 1, 2007), *available at* www.jamsadr.com/rules/consumer_min_std.asp [hereinafter JAMS Consumer Minimum Standards].

[6] JAMS, JAMS Policy on Employment Arbitration, Minimum Standards of Procedural Fairness (revised Feb. 19, 2005), *available at* www.jamsadr.com/rules/employment_Arbitration_min_stds.asp [hereinafter JAMS Employment Minimum Standards].

[7] National Arbitration Forum, Arbitration Bill of Rights (2007), *available at* www.adrforum.com/users/naf/resources/ ArbitrationBillOfRights3.pdf.

PRINCIPLE 3. INDEPENDENT AND IMPARTIAL NEUTRAL; INDEPENDENT ADMINISTRATION

AAA Employment: "Our recommendation is for selection of impartial arbitrators and mediators.... Regardless of their prior experience, mediators and arbitrators on the roster must be independent of bias toward either party."

AAA Consumer: "All parties are entitled to a Neutral who is independent and impartial.... If participation in ... arbitration is mandatory, the procedure should be administered by an Independent ADR Institution.... The Consumer and Provider should have an equal voice in the selection of Neutrals in connection with a specific dispute."

AAA Health Care: "All parties are entitled to a Neutral who is independent and impartial.... Administration of the ADR program should be neutral, and independent of the parties.... All parties should have an equal voice in the selection of neutrals in connection with a specific dispute."

JAMS Consumer: "The arbitrator(s) must be neutral and the consumer must have a reasonable opportunity to participate in the process of choosing the arbitrator(s)."

JAMS Employment: "The arbitrator(s) must be neutral, and an employee must have the right to participate in the selection of the arbitrator(s)."

NAF: "The arbitrators should be both skilled and neutral.... An arbitration should be administered by someone other than the arbitrator or the parties themselves."

PRINCIPLE 4. QUALITY AND COMPETENCE OF NEUTRALS

AAA Employment: "Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment."

AAA Consumer: "All parties are entitled to competent, qualified Neutrals."

AAA Health Care: "All parties are entitled to competent, qualified neutrals."

JAMS Consumer: No provision

JAMS Employment: No provision

NAF: "The arbitrators should be both skilled and neutral."

PRINCIPLE 5. SMALL CLAIMS

AAA Employment: No provision

AAA Consumer: "Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction."

AAA Health Care: No provision

JAMS Consumer: "[N]o party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction."

JAMS Employment: No provision
NAF: No provision

PRINCIPLE 6. REASONABLE COST[8]

AAA Employment: "We recommend ... a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower paid employees."

AAA Consumer: "Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute .... In some cases, this may require the Provider to subsidize the process."

AAA Health Care: "Nonbinding arbitration may be required, as can binding arbitration in cases not involving patients, in which case the plan should pay the costs of at least one day of hearing before a single arbitrator, including the arbitrator's fees and expenses."

JAMS Consumer: "With respect to the cost of the arbitration, when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is $250, which is approximately equivalent to current Court filing fees. All other costs must be borne by the company ...."

JAMS Employment: "An employee's access to arbitration must not be precluded by the employee's inability to pay any costs or by the location of the arbitration. The only fee that an employee may be required to pay is JAMS' initial Case Management Fee. All other costs must be borne by the company ...."

NAF: "The cost of an arbitration should be proportionate to the claim and reasonably within the means of the parties, as required by applicable law."

PRINCIPLE 7. REASONABLY CONVENIENT LOCATION

AAA Employment: "The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating authority, including the authority to determine the time and place of the hearing ...."

AAA Consumer: "In the case of face-to-face proceedings, the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances."

AAA Health Care: "The place of the proceedings should be reasonably accessible to the parties and to the production of relevant evidence and witnesses. In cases involving a patient, the place should be in close proximity to the patient's place of residence."

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[8] In addition, the JAMS Minimum Standards for both consumer and employment arbitrations incorporate the prohibition on "loser pays" provisions of California law. *See* JAMS Employment Minimum Standards, *supra* note 6, Standard 6; JAMS Consumer Minimum Standards, *supra* note 5, ¶ 8; *see* CAL. CODE CIV. PROC. § 1284.3(a) ("No neutral arbitrator or private arbitration company shall administer a consumer arbitration under any agreement or rule requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, provider, organization, attorney, or witnesses."). Not surprisingly, neither the Employment Due Process Protocol nor the Consumer Due Process Protocol refer to the California law because it had not been enacted at the time they were promulgated.

JAMS Consumer: "The consumer must have a right to an in-person hearing in his or her hometown area."

JAMS Employment: No provision

NAF: "Hearings should be convenient, efficient, and fair for all."

PRINCIPLE 8. REASONABLE TIME LIMITS

AAA Employment: "The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating authority, including the authority to determine the time and place of the hearing ...."

AAA Consumer: "ADR proceedings should occur within a reasonable time, without undue delay. The rules governing ADR should establish specific reasonable time periods for each step in the ADR process ...."

AAA Health Care: "ADR proceedings should occur within a reasonable time, and without undue delay. The rules governing ADR should establish specific reasonable time periods for each step in the ADR process ...."

JAMS Consumer: No provision

JAMS Employment: No provision

NAF: "A dispute should be resolved with reasonable promptness."

PRINCIPLE 9. RIGHT TO REPRESENTATION

AAA Employment: "Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing."

AAA Consumer: "All parties participating in processes in ADR Programs have the right, at their own expense, to be represented by a spokesperson of their own choosing."

AAA Health Care: "All parties participating in processes in ADR Programs have the right, at their own expense, to be represented by an attorney or other spokesperson of their own choosing."

JAMS Consumer: "The clause or procedures must not discourage the use of counsel."

JAMS Employment: "The agreement or clause must provide that an employee has the right to be represented by counsel. Nothing in the clause or procedures may discourage the use of counsel."

NAF: "All parties have the right to be represented in arbitration, if they wish, for example, by an attorney or other representative."

PRINCIPLE 10. MEDIATION

AAA Employment: "The members of the task force felt that mediation and arbitration of statutory disputes conducted under proper due process safeguards should be encouraged ...."

AAA Consumer: "The use of mediation is strongly encouraged as an informal means of assisting parties in resolving their own disputes."

AAA Health Care: No provision

JAMS Consumer: No provision

JAMS Employment: "JAMS encourages the use of mediation and of voluntary arbitration that is not a condition of initial or continued employment."

NAF: "The preferable process is for the parties themselves to resolve the dispute."

PRINCIPLE 11. AGREEMENTS TO ARBITRATE

AAA Employment: "The Task Force takes no position on the timing of agreements to mediate and/or arbitrate statutory employment disputes, though it agrees that such disputes be knowingly made."

AAA Consumer: "Consumers should be given: (a) clear and adequate notice of the arbitration provision and its consequences ...; (b) reasonable access to information regarding the arbitration process ...; (c) notice of the option to make use of applicable small claims court procedures ...; and, (d) a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process."

AAA Health Care: "The agreement to use ADR should be knowing and voluntary.... In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises."

JAMS Consumer: No provision

JAMS Employment: "JAMS encourages the use of mediation and voluntary arbitration that is not a condition of initial or continued employment. JAMS does not take a position on the enforceability of condition-of-employment arbitration clauses ...."

NAF: "An agreement to resolve disputes through arbitration is a contract and should conform to the legal principles of contract and applicable statutory law."

PRINCIPLE 12. ARBITRATION HEARINGS

AAA Employment: "The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating authority, including the authority to determine the time and place of the hearing ...."

AAA Consumer: "All parties are entitled to a fundamentally-fair arbitration hearing.... [T]he Neutral should have discretionary authority to require a face-to-face hearing upon the request of a party."

AAA Health Care: "The pre-hearing and hearing should be conducted with adequate notice and with a fair opportunity to be heard and to present relevant evidence and witnesses. There should be a right to examine and cross-examine witnesses, and to argue orally and/or in writing."

JAMS Consumer: "The consumer must have a right to an in-person hearing in his or her hometown area."

JAMS Employment: "At the arbitration hearing, both the employee and the employer must have the right to (a) present proof, through testimony and documentary evidence, and (b) to cross-examine witnesses."

NAF: "Hearings should be convenient, efficient, and fair for all."

PRINCIPLE 13. ACCESS TO INFORMATION

AAA Employment: "Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims."

AAA Consumer: "Consumer ADR agreements which provide for binding arbitration should establish procedures for arbitrator-supervised exchange of information prior to arbitration, bearing in mind the expedited nature of arbitration."

AAA Health Care: "After a dispute arises, participants should have access to all information necessary for effective participation in ADR."

JAMS Consumer: "The arbitration provision must allow for the discovery or exchange of non-privileged information relevant to the dispute."

JAMS Employment: "The procedures must provide for an exchange of core information prior to the arbitration."

NAF: "The parties should have access to the information they need to make a reasonable presentation of their case to the arbitrator."

PRINCIPLE 14. ARBITRAL REMEDIES

AAA Employment: "The arbitrator should be empowered to award whatever relief would be available in court under the law."

AAA Consumer: "The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity."

AAA Health Care: "The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity."

JAMS Consumer: "Remedies that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration clause, unless the consumer retains the right to pursue the available remedies in court."

JAMS Employment: "All remedies that would be available under the applicable law in a court proceeding, including attorneys fees and exemplary damages, must remain available in the arbitration."

NAF: "The remedies resulting from an arbitration must conform to the law."

PRINCIPLE 15. ARBITRATION AWARDS

AAA Employment: "The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim."

AAA Consumer: "In making the award, the arbitrator should apply any identified, pertinent contract terms, statutes, and legal precedents.... At the timely request of either party, the arbitrator should provide a brief, written explanation of the basis for the award."

AAA Health Care: "The arbitration award should be in writing, and should be accompanied by an opinion, where requested by an party."

JAMS Consumer: "An Arbitrator's Award will consist of a written statement stating the disposition of each claim. The award will also provide a concise written statement of the essential findings and conclusions on which the award is based."

JAMS Employment: "An arbitration award will consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, awarded as to each claim. The Arbitrator will also provide a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the award is based."

NAF: No provision

OTHER PROVISIONS

JAMS Consumer: "The arbitration agreement must be reciprocally binding on all parties ...."

JAMS Employment: "JAMS will not administer arbitrations pursuant to clauses that lack mutuality. Both the employer and the employee must have the same obligation (either to arbitrate or go to court) with respect to the same kinds of claims."

APPENDIX 4. DATA CODING INSTRUCTIONS FOR THE CASE FILE SAMPLE

Variable Name	Variable Description	Coding Instructions
Case Identification		
Numb_Orig_Parties	Total number of parties originally involved in the arbitration	Enter the number of parties in the suit, even if one was dropped later.
CaseID	Internal AAA case ID number	Enter the AAA case ID number (12-digit number): first two digits are the region, sixth digit is the last digit of the filing year, and last five digits are the sequence number of the case
Party1_2	Short case identifier	Enter the information in the variables Party1 and Party 2 as "Party1_Party2"
Center	AAA Center that administered the case	Enter the location of the AAA Center that administered the case
Case_Manager	AAA Case Manager	Enter the name of the AAA Case Manager responsible for the case
Parties		
Party1	Name of first party listed	Enter the name of the first party listed on the demand for arbitration
Party_Type1	Type of Party1 involved in dispute	Enter either "consumer" or a brief description of the type of business for Party1
Party_Addr1	Address of Party1	Enter the city and state listed for Party1
Party2	Name of second party listed	Enter the name of the second party listed on the demand for arbitration
Party_Type2	Type of Party2 involved in dispute	Enter either "consumer" or a brief description of the type of business for Party2
Party_Addr2	Address of Party2	Enter the city and state listed for Party2
Party3	Name of third party listed	Enter the name of the third party listed on the demand for arbitration
Party_Type3	Type of Party3 involved in dispute	Enter either "consumer" or a brief description of the type of business for Party3
Party_Addr3	Address of Party3	Enter the city and state listed for Party3
Party4	Name of fourth party listed	Enter the name of the fourth party listed on the demand for arbitration
Party_Type4	Type of Party4 involved in dispute	Enter either "consumer" or a brief description of the type of business for Party4
Party_Addr4	Address of Party4	Enter the city and state listed for Party4
Party5	Name of fifth party listed	Enter the name of the fifth party listed on the demand for arbitration
Party_Type5	Type of Party5 involved in dispute	Enter either "consumer" or a brief description of the type of business for Party5
Party_Addr5	Address of Party5	Enter the city and state listed for Party5
Party_Numb_Claimant	Parties who are the case claimants	Enter the party number of each claimant. If there is more than one, separate with semicolons (;)
Party_Numb_Respondent	Parties who are the case respondents	Enter the party number of each respondent If there is more than one, separate with semicolons (;)

Variable Name	Variable Description	Coding Instructions
Party Representatives		
Rep_Name1	Name of representative for Party1	Enter the name of the representative, if any, listed for Party1 on the demand for arbitration. If the party is the representative enter "pro se".
Rep_Addr1	Address of representative for Party1	Enter the address (city, state) of the representative of Party1
Rep_Name2	Name of representative for Party2	Enter the name of the representative, if any, listed for Party2 on the demand for arbitration. If the party is the representative enter "pro se".
Rep_Addr2	Address of representative for Party2	Enter the address (city, state) of the representative of Party2
Rep_Name3	Name of representative for Party3	Enter the name of the representative, if any, listed for Party3 on the demand for arbitration. If the party is the representative enter "pro se".
Rep_Addr3	Address of representative for Party3	Enter the address (city, state) of the representative of Party3
Rep_Name4	Name of representative for Party4	Enter the name of the representative, if any, listed for Party4 on the demand for arbitration. If the party is the representative enter "pro se".
Rep_Addr4	Address of representative for Party4	Enter the address (city, state) of the representative of Party4
Rep_Name5	Name of representative for Party5	Enter the name of the representative, if any, listed for Party5 on the demand for arbitration. If the party is the representative enter "pro se".
Rep_Addr5	Address of representative for Party5	Enter the address (city, state) of the representative of Party5
Demand for Arbitration - Party# (1 through 5)		
Counterclaim#	Is the claim by Party# a counterclaim?	=1 if yes; 0 otherwise
Amt_Sought#	Dollar amount of damages sought in demand	Enter the dollar amount of compensatory damages sought by Party#; do not include punitive damages. If several parties made a joint claim and the amounts cannot be separated by party, enter the joint claim.
Atty_Fees#	Were attorneys' fees sought in the demand?	=1 if yes; 0 otherwise
Atty_Fees_Amt#	Dollar amount of attorneys' fees sought.	Enter amount of attorneys' fees sought in demand, if amount is specified. If several parties made a joint claim and the amounts cannot be separated by party, enter the joint claim.
Arb_Costs#	Were arbitration costs sought in the demand?	=1 if yes; 0 otherwise
Arb_Costs_Amt#	Dollar amount of arbitration costs sought.	Enter amount of arbitration costs sought in demand, if amount is specified. If several parties made a joint claim and the amounts cannot be separated by party, enter the joint claim.
Interest#	Was interest sought in the demand?	=1 if yes; 0 otherwise
Interest_Amt#	Dollar or percentage amount of interest sought.	Enter amount of interest (including percentage) sought in demand, if amount is specified. If several parties made a joint claim and the amounts cannot be separated by party, enter the joint claim.
Punitives#	Were punitive damages sought in the demand?	=1 if yes; 0 otherwise
Punitive_Amt#	Amount of punitive damages sought in demand	Enter amount of punitive damages sought in demand, if amount is specified. If several parties made a joint claim and the amounts cannot be separated by party, enter the joint claim.
Other_Relief#	Was other relief sought in the demand?	=1 if yes; 0 otherwise
Other_Relief_Des#	Other relief sought in demand	Describe any other relief sought in the demand
LocaleRqtd#	Hearing locale requested by Party# demand	Enter the location sought by Party# in the demand for any hearing to be held
Dispute Description		
Dispute_Des	Subject matter of dispute between the parties	Briefly describe the subject matter of the dispute between the parties

Variable Name	Variable Description	Coding Instructions
Arbitration Clause		
Pre-Dispute	Was the case submitted to arbitration on the basis of a pre-dispute agreement to arbitration?	=1 if yes; 0 otherwise
Principle1	Does the clause give the business more control over arbitration process than the consumer?	=1 if yes; 0 otherwise
Principle3	Does the clause give the business more control over arbitrator selection than the consumer?	=1 if yes; 0 otherwise
Principle5	Does the clause prohibit consumers from going to small claims court?	=1 if yes; 0 otherwise
Principle6	Would the clause result in the consumer paying more than provided in the AAA consumer fee schedule?	=1 if yes; 0 otherwise
Principle7	Does the clause provide for a locale for the business's benefit?	=1 if yes; 0 otherwise
Principle9	Does the clause restrict the consumer's freedom to pick a representative?	=1 if yes; 0 otherwise
Principle12	Does the clause restrict the manner in which a consumer can provide evidence?	=1 if yes; 0 otherwise
Principle13	Does the clause restrict discovery?	=1 if yes; 0 otherwise
Principle14	Does the clause limit the remedies available to the consumer?	=1 if yes; 0 otherwise
Protocol_Waiver	Does the file contain a waiver by the business of any violation of the Due Process Protocol?	=1 if yes; 0 otherwise
ClassArb_Waiver	Does the arbitration clause contain a class arbitration waiver?	=1 if yes; 0 otherwise
Nonseverability	Does the arbitration clause contain a provision making the class arbitration waiver nonseverable?	=1 if yes; 0 otherwise
Arbitrators		
Case_Manager_Arb	Name of the case manager who chose the arbitrator or arbitrator list.	Enter the name of the case manager appearing on the initial correspondence with the arbitrators during the arbitrator selection.
Arbitrator_Final	Name of the arbitrator used in the arbitration	Enter the name of the arbitrator used in the arbitration
Arb_Final_Notes	Any notes regarding the Final Arbitrator	Note any ground for objection to the arbitrator used in the arbitration and the resolution of the objection by the AAA. Also note any other relevant information.
Arbitrator_Choice1	Name of the first prospective arbitrator notified	Enter the name of the first prospective arbitrator
Arbitrator_Choice1_Notes	Any notes regarding the first choice arbitrator	Note any ground for objection to the first prospective arbitrator and the resolution of the objection by the AAA. Also note any other relevant information.
Arbitrator_Choice2	Name of the second prospective arbitrator notified	Enter the name of the second prospective arbitrator
Arbitrator_Choice2_Notes	Any notes regarding the second choice arbitrator	Note any ground for objection to the second prospective arbitrator and the resolution of the objection by the AAA. Also note any other relevant information.
Arbitrator_Choice3	Name of the third prospective arbitrator notified	Enter the name of the third prospective arbitrator
Arbitrator_Choice3_Notes	Any notes regarding the third choice arbitrator	Note any ground for objection to the third prospective arbitrator and the resolution of the objection by the AAA. Also note any other relevant information.
Arbitrator_Choice4	Name of the fourth prospective arbitrator notified	Enter the name of the fourth prospective arbitrator
Arbitrator_Choice4_Notes	Any notes regarding the fourth choice arbitrator	Note any ground for objection to the fourth prospective arbitrator and the resolution of the objection by the AAA. Also note any other relevant information.
Arb_Alt	Any comments on arbitrators or arbitrator selection	Note any indication in the file on how the arbitrators were selected this includes ranking information and other arbitrators considered but not necessarily notified

Variable Name	Variable Description	Coding Instructions
Proceedings		
Ex_Parte	Did the case proceed on an ex parte basis (i.e., in the absence of one of the parties?)	=1 if yes; 0 otherwise
Hearing	Was there a hearing?	=1 if yes; 0 otherwise
Hearing_Type	Type of hearing	Enter the type of hearing that occurred (if any) – phone or in-person
Hearing_Days	Number of days of hearing time	Enter the number of days of in-person hearings that were conducted
Hearing_Locale	If in person, the place where the hearing took place	Enter the location (city, state) of any in-person hearing that was conducted
Disposition	How did the case get resolved?	Enter how the case got resolved, using one of the following categories: award, settlement, mediation settlement, withdrawn, closed administratively
Awards - Party# (1 through 5)		
Prevail#	Did Party# prevail in its claim?	=1 if yes; 0 if no; "no claim" if Party# did not make a claim.
Award_Amt#	The amount of any award of compensatory damages	Enter the amount of any compensatory damages awarded to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
Punitive_Awd#	The amount of any award of punitive damages	Enter the amount of any punitive damages awarded to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
AdminFee_Awd#	The reimbursement of AAA administrative fees in the award	Describe how administrative fees were reimbursed to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
ArbFee_Awd#	The reimbursement of arbitrators' fees in the award	Describe how arbitrator fees were reimbursed to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
AttyFee_Awd#	The amount of any award of attorneys' fees	Enter the amount of any award of attorneys' fees to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
Interest_Awd#	The amount of any award of interest	Enter the amount of any award of interest to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
Other_Awd#	The amount of any other award	Enter the amount of any other award to Party#. If several parties received a joint award and the amounts cannot be separated by party, either enter the joint award or enter "see PartyX" where X is the number of the party where the joint award amount was entered.
Reason_Awd#	Did the arbitrator give reasons for his/her award to Party#?	=1 if yes; 0 otherwise
Reason_Awd#_Des	The reason given for the award and/or other relevant notes	Enter the reason given for the award or any other relevant notes to the award

Variable Name	Variable Description	Coding Instructions
Costs		
Ruling_AdminFee	The allocation of AAA administrative fees as given in the arbitrator's ruling	Enter the arbitrator's ruling on AAA administrative fees
AdminFee_Pd1	Admin Fee paid by Party1 in accordance with the arbitrator's ruling	Enter the administrative fee paid by Party1 in accordance with the arbitrator's ruling
AdminFee_Pd2	Admin Fee paid by Party2 in accordance with the arbitrator's ruling	Enter the administrative fee paid by Party2 in accordance with the arbitrator's ruling
AdminFee_Pd3	Admin Fee paid by Party3 in accordance with the arbitrator's ruling	Enter the administrative fee paid by Party3 in accordance with the arbitrator's ruling
AdminFee_Pd4	Admin Fee paid by Party4 in accordance with the arbitrator's ruling	Enter the administrative fee paid by Party4 in accordance with the arbitrator's ruling
AdminFee_Pd5	Admin Fee paid by Party5 in accordance with the arbitrator's ruling	Enter the administrative fee paid by Party5 in accordance with the arbitrator's ruling
Ruling_ArbFee	The allocation of arbitrator fees as given in the arbitrator's ruling	Enter the arbitrator's ruling on arbitrator fees
ArbFee_Pd1	Arb Fee paid by Party1 in accordance with the arbitrator's ruling	Enter the arbitrator fee paid by Party1 in accordance with the arbitrator's ruling
ArbFee_Pd2	Arb Fee paid by Party2 in accordance with the arbitrator's ruling	Enter the arbitrator fee paid by Party2 in accordance with the arbitrator's ruling
ArbFee_Pd3	Arb Fee paid by Party3 in accordance with the arbitrator's ruling	Enter the arbitrator fee paid by Party3 in accordance with the arbitrator's ruling
ArbFee_Pd4	Arb Fee paid by Party4 in accordance with the arbitrator's ruling	Enter the arbitrator fee paid by Party4 in accordance with the arbitrator's ruling
ArbFee_Pd5	Arb Fee paid by Party5 in accordance with the arbitrator's ruling	Enter the arbitrator fee paid by Party5 in accordance with the arbitrator's ruling
Total_AdminFee	Total administrative fee paid by the parties	Enter the total amount paid by the parties for administrative fees
ArbComp	Arbitrator compensation billed by the AAA	Enter the total amount of arbitrator compensation billed by the AAA
MedComp	Mediator compensation billed by the AAA	Enter the total amount of mediator compensation billed by the AAA
Dates		
Date_Filed	The date the claimant filed the demand for arbitration	Enter the date (mm/dd/yyyy) the claimant filed the case with the AAA (based on the date stamp on the demand for arbitration)
Date_Assigned	The date the AAA entered the case in its system	Enter the date (mm/dd/yyyy) the AAA entered the case in its system
Date_ArbList1	The date the AAA entered the first list of arbitrators in its system	Enter the date (mm/dd/yyyy) the AAA entered the first list of arbitrators in its system
Date_ArbList2	The date the AAA entered the second list of arbitrators in its system	Enter the date (mm/dd/yyyy) the AAA entered the second list of arbitrators in its system
Date_ArbList3	The date the AAA entered the third list of arbitrators in its system	Enter the date (mm/dd/yyyy) the AAA entered the third list of arbitrators in its system
Date_Arb_Apptd	The date the AAA appointed the arbitrator	Enter the date (mm/dd/yyyy) the AAA appointed the arbitrator
Date_PrelimHng	The date of the preliminary hearing	Enter the date (mm/dd/yyyy) of the preliminary hearing
Date_FirstHng	The date of the first hearing	Enter the date (mm/dd/yyyy) of the first hearing
Date_LastHng	The date of the last hearing	Enter the date (mm/dd/yyyy) of the last hearing
Date_HngClosed	The date the arbitrator closed the hearing	Enter the date (mm/dd/yyyy) the arbitrator closed the hearing
Date_Award	The date the arbitrator issued the award	Enter the date (mm/dd/yyyy) the arbitrator issued the award
Date_CaseClosed	The date the AAA administratively closed the case	Enter the date (mm/dd/yyyy) the AAA administratively closed the case
Comments		
Database	The AAA database from which the record originated	Enter "Under $75" or "Over $75"
Comments	Any other comments about the case file	Enter any other comments about the case file not covered in one of the previous entries