

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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September 1, 2009

Federal Trade Commission
Office of the Secretary, Room H-135 (Annex A)
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Debt Collection Roundtable – Comment, Project No. P094806

Dear Secretary:

The U.S. Chamber of Commerce, the world's largest business federation representing more than three million businesses and organizations of every size, sector, and region, is writing to you to comment on the recent Roundtables on Debt Collection held by the FTC. The Chamber strongly believes that pre-dispute arbitration agreements offer a valuable means of dispute resolution that is mutually advantageous to consumers, employees, and businesses. We support the FTC's decision to hold regional roundtables to examine the important issues facing consumers in debt-collection litigation and arbitration proceedings. In addition, we appreciate the FTC's recognition that these issues are not unique to or caused by arbitration, but are equally if not more prevalent in the court system.

Consumers face a myriad of problems in courtroom debt-collection proceedings. For instance, at the time that debt collectors file complaints, consumers may lack sufficient information regarding the amount of money allegedly owed. Moreover, consumers frequently do not receive proper notice that a debt-collection action has been initiated against them. As a result, consumers often do not appear in court, and creditors usually win by default. The consumers who do participate must navigate the complex court system without an attorney and often without knowing what evidence they should present or how to present it.

Some of the problems may not be unique to the court system, but are also alleged to be present to some degree in arbitration proceedings. At the same time, however, the simplicity and convenience of the arbitration process provide important advantages to consumers that the court system cannot match. We commend the FTC for recognizing these advantages, and for approaching these roundtables with the view that arbitration can and should be part of the solution for consumers.

The Court Debt-Collection System

A number of media sources have picked up on problems plaguing courtroom debt-collection proceedings. For example, the *Boston Globe* has reported that "the small-claims courts have mutated into a system that often ignores individual rights and shows favoritism

toward collectors and their lawyers.”¹ According to the *Globe*, the court debt-collection system today is “tilted against” consumers, often with “no oversight by judicial officials.”² Moreover, the stories of abuses that have become commonplace in court were described by the chief justice of the Massachusetts district court system as nothing short of “horrific.”³

Combined with the fact that many consumers do owe money to the creditors who bring these actions, the result is that consumers virtually never win debt collection actions in court.⁴ According to preliminary results from an ongoing study by the Searle Civil Justice Institute, “business claimants bringing debt collection cases [in court] won some relief in 99.7% of the cases going to judgment, and in those cases were awarded 99.5% of the amount sought.”⁵

As extensively discussed during the roundtables, a number of issues have contributed to the present state of affairs in courtroom debt-collection proceedings. Unfortunately, the problems in court are unlikely to go away. As the *Boston Globe* reported, small claims cases in Massachusetts are rising while “court budgets have been slashed and court staff reduced by 14 percent.”⁶ Court officials admit that “there’s barely time to get through the docket” as things currently stand, “much less attend to the considerations behind each claim.”⁷ And Massachusetts is not alone: the *New York Times* recently reported that at least 25 state court systems are suffering from budget shortfalls in a crisis that will require “court cutbacks and fee increases.”⁸

Arbitration and Consumers

Some allege that the problems plaguing debt collection proceedings are not unique to the court system, but may also occur to some degree in arbitration as well. But to the extent that issues exist, they largely stem from the nature of debt collection itself.

There have been recent, troublesome allegations brought against one provider of debt collection arbitrations, the National Arbitration Forum (NAF). According to a suit filed by the Minnesota Attorney General, NAF had undisclosed ties to the debt collection industry, leading some to question whether proceedings before that forum reflect an appearance of impropriety. But this particular issue has now been resolved: as part of a settlement with the Minnesota Attorney General, the NAF has agreed to stop administering consumer debt-collection arbitrations altogether.

¹ *Dignity Faces a Steamroller: Small-Claims Proceedings Ignore Rights, Tilt To Collectors*, BOSTON GLOBE, July 31, 2006.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ “*Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Domestic Policy Subcomm. of the Oversight & Government Reform Comm.*, 111th Cong. 1 (2009) (statement of Christopher R. Drahozal, Professor of Law, University of Kansas School of Law).

⁶ *Dignity Faces a Steamroller*, *supra* note 1.

⁷ *Id.*

⁸ John Schwartz, *Pinched Courts Push To Collect Fees and Fines*, N.Y. TIMES, Apr. 6, 2009.

Of course, no system is perfect. But arbitration provides benefits to consumers that our civil court system does not. For example, unlike court proceedings, a consumer usually has the choice to conduct his or her arbitration over the phone or “on the papers,” which saves the consumer from having to take any days off from work to resolve the dispute.

Further, arbitration’s streamlined procedures with regard to discovery and evidence are navigable by ordinary consumers. While it is exceedingly difficult for consumers with modest claims to secure an attorney for litigation—effectively barring them from the complex and expensive procedures of our court system—consumer arbitration procedures are designed to enable consumers to effectively participate even without an attorney.

Arbitration also takes a great deal of pressure off of the clogged court system. While budget shortfalls are leading many states to cut court services and raise fees, businesses usually foot the bill for most if not all of the cost of a consumer arbitration. Not only are the pressures on the court system eased by the availability of arbitration, non-profit forums like the leading American Arbitration Association (AAA) do not have the same financial and time pressures that have led courts to give less attention to consumers in each of the massive number of debt collection claims filling the court system.

These same benefits work to the advantage of consumers in arbitration claims that they initiate themselves, not just in debt-collection claims in which they are defendants. Primary among these benefits is the simplicity of the arbitration process. For example, to initiate a claim under the AAA’s rules, a consumer claimant is asked to (1) briefly explain the dispute; (2) provide the names and addresses of the consumer and the business; (3) specify the amount of money at issue; and (4) describe the relief the consumer wants. These requirements are less stringent than required in courts of general jurisdiction, and individuals can navigate them without an attorney.

The AAA has also instituted its landmark Consumer Due Process Protocol, which prescribes a number of procedural protections that ensure that consumers involved in an arbitration before the AAA get a fair shake. Moreover, the AAA caps the amount of fees that consumers may have to pay at only \$125 in claims alleging up to \$10,000 in damages.⁹ The Supreme Court, too, has ensured that an arbitration agreement may not be enforced if it will force a consumer to pay excessive costs to arbitrate.¹⁰

⁹ American Arbitration Association, *Supplementary Procedures for Consumer Related Disputes* § C-8, available at <http://www.adr.org/sp.asp?id=22014>. If the consumer is pursuing a claim of between \$10,000 and \$75,000, the consumer’s arbitration costs are capped at only \$375. *Id.*

¹⁰ *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000). The availability of court review for fairness does not solely extend to the costs setting: the Supreme Court has interpreted the Federal Arbitration Act (FAA) to permit anyone to challenge an arbitration agreement if that challenge is based on generally applicable state contract law. Applying this standard, courts around the country routinely apply state legal principles to strike down arbitration agreements that do not provide consumers with fair notice or fair procedures.

Finally, arbitration is much faster than litigation. Even if consumers are able to overcome the many obstacles presented by the court process, such as motions to dismiss and summary judgment, they may wait many years to receive a decision. By contrast, most arbitrations last only a matter of months before a consumer is able to get a determination on the merits.¹¹

Given the many benefits for consumers that are available in arbitration, it is thus unsurprising that the Searle Center recently found that consumers win a majority of cases that they bring against businesses in arbitration.¹² Because of the difficulty of obtaining an attorney without the promise of a large damages award, many of those consumers would likely have been unable even to pursue their claims in court if arbitration were unavailable.

The Path Forward

Debt collection proceedings present a number of challenges regardless of the forum, and the FTC's regional roundtables could not come at a better time. The present economic crisis has left many consumers in heavy debt and our nation's courts at the breaking point. At the same time, it is clear that the vast majority of consumers do indeed owe the debts claimed. There must be a mechanism for the collection of those debts.

We believe that while no system is perfect, arbitration provides benefits for both consumers and our overburdened courts. Any productive approach to the issues raised in the regional roundtables must incorporate arbitration as part of the solution.

In its testimony at the Chicago Roundtable, the AAA proposed convening a "Consumer Debt Protocol Committee" that would recommend specific procedural safeguards to protect the due process rights of consumers in arbitration debt collection proceedings. The AAA's previous success in bringing together a broad and inclusive coalition to develop its well-regarded Consumer Due Process Protocol would serve as the model for this new Committee. Under the AAA's proposal, this new working group will address due process issues that are unique to debt collection claims, including notice, arbitrator neutrality, pleading and evidentiary standards, respondent defenses and counterclaims, and arbitrator training and recruitment.

The U.S. Chamber of Commerce strongly supports the AAA's proposal. We believe that it provides an effective path forward that will preserve the benefits of arbitration while addressing the unique problems inherent to debt collection proceedings.

Sincerely,

R. Bruce Josten

¹¹ Searle Civil Justice Institute, *Consumer Arbitration Before the American Arbitration Association: Preliminary Report* xiii (March 2009) ("The average time from filing to final award for the consumer arbitrations studied was 6.9 months.")

¹² *Id.* (reporting that in the AAA arbitrations studied, "[c]onsumers won some relief in 53.3% of the cases they filed and recovered an average of \$19,255")