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FEDERAL TRADE COMMISSION

DEBT COLLECTION:
PROTECTING CONSUMERS

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Searle Center

Northwestern Law School

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INTRODUCTION AND WELCOMING REMARKS

MR. PAHL: Good morning, everyone. Those of you who are coming back for your second day, welcome back. Those of you who are new to our program today, welcome. We are the FTC and the Searle Center here at Northwestern University School of Law with our roundtable debt collection program to discuss debt collection litigation and arbitration.

Yesterday we focused on debt collection litigation, and today we're going to turn our focus to debt collection arbitration. I'd like to turn the program over to Julie Bush who will give some housekeeping remarks and introduce our first speakers.

MS. BUSH: Thank you for coming. I'm really glad to see so many people here today.

I think we have an exciting program planned for you. We have some top-notch speakers on a range of subjects, and we're going to be exploring the nature of arbitration and debt collection.

A couple of reminders. Please, if you have a cell phone, turn it off or turn it on vibrate. The rest rooms are located to the back of the auditorium and to the left. This program today is going to be transcribed. The transcript will be available on our public website once it's been proofread and so forth, so give us a few weeks for that, but it will be part of

the public record.

The format is going to be the same as yesterday. For those of you who are here for the first time, we're going to have all of our discussions seated. We will have a rotating cast of FTC staff moderators, each just focusing on different topics that have to do with arbitration and that are on our program.

There will be a couple of short breaks. Lunch will be on your own. You have 1-1/2 hours for lunch, and we have a handout and a map that lists a number of local area eating establishments where you can have your lunch.

In terms of questions, we're trying to reserve the last few minutes of each session for questions. Questions can come in through the webcast audience if they are typed in and sent to the address consumerdebtevents@FTC.gov, and I encourage our webcast audience to do that.

For those of you in the auditorium, you should have question cards in your packets, and we ask you to pass your question cards to the aisles where people will be going up and down to collect them. If you have used up your question cards, we will have a supply of additional question cards, so you can ask for a question card if you want to write out a question.

And I just want to remind everyone that we're accepting public comments about the topics covered in the workshop and about arbitration and litigation for debt collection suits generally. Comments can be sent to the FTC at our address that's posted on FTC.gov, you can send them through a web form, or you can send them in writing, if you prefer.

And I'd like to remind you that we have announced the dates for our next set of roundtables which will take place somewhere in the Northern California area on September 29th and 30th of this year. Thank you.

Thank you. Without further ado, I'd like to introduce our bureau director of the Federal Trade Commission, David Vladeck. We're honored to have him here with us today. His bio is presented in the bio document in your folder, and he'd like to open the program with a few words. Thank you.

(Applause.)

OPENING REMARKS

MR. VLADECK: Good morning. Welcome back for the second day of the FTC's debt collection roundtable discussion. You guys must be the hard core.

I am required by my superiors at the FTC to

emphasize at the outset that what I say today reflects my own views and does not necessarily reflect the views of the Federal Trade Commission.

I want to begin by offering our special thanks to our cohosts here, the Searle Center on Law, Regulation, and Economic Growth at the Northwestern University Law School.

I'm also pleased that so many distinguished experts from industry, consumer groups, academia, and law enforcement agencies are here to contribute to our discussion today. Their participation and your participation will be crucial in helping us understand the issues and brainstorming about possible solutions to consumer protection in debt collection arbitration. I thank you for helping us, the Federal Trade Commission, in our efforts to better protect American consumers.

As you know, today's discussion is a series -- it's one of a series of roundtable events the FTC will host this year as part of our ongoing effort to address consumer protection issues in debt collection.

I also want to underscore that we welcome any public comments, particularly because there are so many with expertise on this issue who may not be able to attend the Roundtables. Individuals and organizations may submit comments in paper or electronic form by our

newly extended deadline of September 1st, 2009. There are instructions for submitting comments on your folders, in the literature, and on our website.

This series of FTC regional Roundtables grew out of our comprehensive study and review of consumer debt collection. Our earlier work recognized that litigation and arbitration are important aspects of the debt collection process and convinced us that we needed to build a more extensive record to guide policy-making.

The Roundtable discussions are designed to help us better identify critical issues, understand various issues in different jurisdictions and identify best practices and guiding principles. We hope that our discussions will enable us to make well-informed policy recommendations as to debt collection litigation and arbitration that are fair to all.

Yesterday's Roundtable discussion focused on issues in litigation. Today's discussion will focus on issues in consumer debt arbitration. This is obviously not an ordinary time to be giving attention to this issue.

As most of you know, in mid-July, the Minnesota Attorney General's Office sued the National Arbitration Forum, by far the leading arbitration agency for consumer debt collection matters. The suit alleged that NAF committed consumer fraud, deceptive trade

practices, and false advertising by holding itself out as an impartial dispute arbiter, despite having a complex and undisclosed web of affiliations with key members of the debt collections industry.

Almost immediately after -- the complaint was filed, NAF and the Minnesota Attorney General's Office entered into a settlement requiring NAF to refrain from arbitrating consumer debt collection disputes nationwide.

Similarly, responding to a request from the Minnesota Attorney General's Office, the American Arbitration Association also has announced that it too will refrain from arbitrating consumer debt collection disputes.

Thus at the moment, there are many uncertainties surrounding the potential arbitration of consumer debt disputes, but there remains a large demand among creditors for arbitration services. As it has been construed by the courts, the Federal Arbitration Act has been read to favor enforcing mandatory pre-dispute arbitration clauses that creditors include in their contracts.

We therefore suspect that other arbitration providers may emerge to fill the gap that NAF and AAA's decision not to arbitrate consumer collection disputes arises. I would say, however, that whenever a new

entity steps in to fill the void, it's going to do so, I think, subject to scrutiny that probably did not exist in the past. The allegations against NAF were quite far-reaching, and I suspect that any new entity will have to show a great sensitivity to the kinds of issues that were alleged by the Minnesota Attorney General.

Today's discussion will assume -- will proceed on the assumption that new entities do, in fact, emerge to provide arbitration of consumer debt matters, and so what we want to focus on today is what principles should govern that process to protect a consumer's right without placing an undue burden on industry.

Today's discussion will focus prospectively on how to construct a consumer debt collection arbitration system that treats participants fairly.

First, our panelists will discuss how arbitration proceedings can be initiated in ways that make consumers better aware of the process and the potentially serious consequences that flow from it. Questions about service arose yesterday, I know, and I suspect that we'll be returning to some of those today.

We will also explore whether improvements in consumer notification are likely to increase consumer participation in arbitration proceedings.

We'll then turn to the role of consumer choice in debt collection arbitration, including what can be done to enhance consumer choice. The discussion will address what information consumers may need to make informed choices about whether to arbitrate their disputes or not.

We will then examine changes in the law or industry practice that might lead to higher consumer participation rates or a more appropriate degree of consumer choice about arbitration disputes.

After lunch, we will look briefly at procedures that have been adopted by various arbitration providers to help level the playing field for consumers in arbitration between consumers and companies. We will examine what procedures ought to be adopted to provide for a fair resolution of consumer debt disputes.

We will then examine bias and perceptions of bias in debt collection arbitration. What ties, for instance, if any, ought to exist between the arbitration providers and the debt collectors? What sort of ties should be disclosed or should be prohibited?

We will also consider whether arbitration proceedings could and should be more transparent and whether arbitration results reasonably could and should serve as precedent. We will also discuss the

desirability of requiring systematic reporting about consumer debt collection arbitration, including outcomes.

Finally, for those of you who have the mettle to be here by the end of the day, we will also explore how arbitration decisions ought to be enforced or contested. In particular, we will ask if any changes in the law or industry practices should be implemented with respect to consumers converting -- excuse me, to collectors converting awards into judgments or in consumers contesting those awards.

I hope that by the end of the day all of us will have a clearer idea of how to design the consumer debt collection arbitration system. I hope we learn from one another's ideas and can be tolerant of one another as we move forward.

It's a pleasure and honor to be here today with such distinguished experts and such a knowledgeable audience. I look forward to a lively and important discussion, and I want to thank each of you again for assisting the Federal Trade Commission in this very important work.

Thank you very much.

(Applause.)

MS. BUSH: Thank you. I'd like the panelists to briefly state your names and give one sentence only

about what you're expecting or hoping for today.

MR. BLAND: My name is Paul Bland. I'm a staff attorney with Public Justice. It's a nonprofit public interest law firm in Washington D.C. I'm hoping that what will come out of today is a set of rules and protections that will make it possible that in the future we never again see the kinds of just unbelievable abuses that have gone forth in consumer debt collection in arbitration in the last 10 years.

MR. CANTER: My name is Ron Canter. I'm in the private practice of law in Rockville, Maryland. Prior to creating my own firm 25 years ago, I was with a large collection firm. For 10 of those years, I represented creditors in arbitration proceedings, and I will be presenting my viewpoints on how arbitrations were pursued, how they were enforced, and hopefully, in the future what improvements can be made to the system.

MR. DRAHOZAL: I'm Chris Drahozal. I teach arbitration law at the University of Kansas and do research in the area. I find it very interesting, and I think having today talking about arbitration and having yesterday talking about litigation in the debt collection area, I think it's a useful context to discuss the issues that arise in those sorts of disputes in different procedural academia.

MR. FRANK: I'm Josh Frank from the Center for

Responsible Lending. I'm an economist and senior researcher. I hope to have a good discussion that brings out some of the pitfalls of the arbitration process and how it really is impossible to have a process that is guaranteed to be free of bias and also is a mandatory process.

MR. JOHNSON: I'm Ray Johnson. I'm an attorney in private practice from West Des Moines, Iowa. I would like to, when we leave today, see everyone in this room agree that consumer pre-dispute arbitration clauses are a bad deal. That probably won't happen.

MS. JACKSON: My name is Chris Jackson. I'm a member of Chris Jackson Law, LLC, which is a private practice in Indianapolis. We represent consumers against predatory lending and collection abuse. I would like to see by the end of the day that we reach some sort of consensus on how to make this process fair for consumers.

I don't believe that mandatory arbitration is appropriate with consumers because they just don't have the knowledge of how to operate within the system. So I'd like to see some rules for how consumers -- get some education for consumers to be able to navigate the system if they find themselves in arbitration.

MR. KAPLINSKY: Good morning. I'm Alan Kaplinsky. I'm a partner and chair of the Consumer

Financial Services Group at Ballard, Spahr, Andrews & Ingersoll. I work out of Philadelphia. I get involved in counseling banks and other consumer financial services providers on federal and state -- compliance with federal and state consumer protection laws, and I also get involved in defending those clients when they get sued in class actions and in other types of litigation involving consumer financial services.

Some people consider me the pioneer of arbitration and consumer arbitration, and I am a great believer in it. And during the course of the day today, I hope to give examples of why I think it can be used very effectively.

And, indeed, after listening yesterday to the problems associated with using the court system to collect debt, I had an epiphany; and the epiphany is, we have an opportunity here with all the stakeholders present at the table representing various points of view to essentially design a system that would be fair to consumers and fair to companies and probably wouldn't involve having to amend the Fair Debt Collection Practices Act or to give the FTC rule-making authority under that Act. There is a real opportunity that exists, and I hope we take advantage of it.

MR. NAIMARK: Hi, I'm Richard Naimark from the American Arbitration Association where I'm the senior

vice president. I think given the current environment in the country related to the stressed financial system and some of the more significant debt issues and questions in the public eye, and given the very rich and fascinating discussion yesterday about all these related issues which I think are issues both in the court system to varying degrees and in the arbitration process, this I think is a wonderful opportunity to get some discussion so we can jointly identify both problems and potential solutions.

MR. SORKIN: I'm David Sorkin. My one sentence is going to have a lot of semicolons in it. I teach at John Marshall Law School here in Chicago. I teach information technology law, Internet law, privacy law, consumer law, and dispute resolution. I have also been a dispute resolution panelist and arbitrator for the World Intellectual Property Organization and for the National Arbitration Forum, including handling about 60 consumer collection matters for NAF.

I'm hopeful that we'll come up with some ideas for crafting the proper role for arbitration and debt collection going into the future. I'm very sensitive to many of the criticisms and tend to agree with them, criticisms about arbitration in this context, although I wouldn't go so far as to say that arbitration in this context is inherently unfair.

And I'm hopeful that we won't end up simply making a scapegoat of those who aren't here today like I think kind of happened with process servers yesterday and unscrupulous attorneys who weren't represented. Today I think there is a likelihood that may happen with certain arbitration providers, and hopefully we'll come up with something more constructive than that.

MS. BUSH: Thank you. I'd like to acknowledge that the representative for the National Arbitration Forum informed us that he would be unable to come and that that doesn't reflect a decision on the FTC's part, to respond to Professor Sorkin.

But if everyone would please welcome our illustrious panel, I'd appreciate it.

(Applause.)

MS. BUSH: At this time, we have asked Professor Drahozal to give a brief introduction to some of the legal concepts that underlie consumer arbitration and the fair -- excuse me, the Federal Arbitration Act, and there will be slides featured as part of his presentation. Thank you.

CONSUMER ARBITRATION AND THE FAA: A PRIMER

MR. DRAHOZAL: Thank you, Julie.

This is basically a semester's course in arbitration law in 25 to 30 minutes, so it will be very general in terminology; but I think the idea is, arbitration laws at some aspects anyway are somewhat necessary.

There's actually very difficult and challenging legal and conceptual issues involved which we may get into in the course of the discussion, which I'm going to tend to gloss over a little bit here; but hopefully, this will give us all -- and there's also people in the audience who know more about this stuff than I do, so I apologize to them for having to put up with me for this talk, but hopefully, this will give us all a baseline of what the legal framework is governing arbitration in the United States.

And, again, this is a general level. There are

certainly more issues and uncertainties in different aspects of the law I'm going to talk about, and those things may well come up in our discussion during the day. So this is general statements, but the law is not nearly as clear as it may sound from this general overview.

The starting point for us is, what is arbitration? I'm sure you all have a general sense of what arbitration is. It's essentially not a term that's defined in any statute dealing with arbitration law, so there are some court cases that have come up.

The basic idea of arbitration is private judging. Right. Instead of government-paid judges like we saw yesterday on the panel, what you have are private judges who are paid by the parties.

One interesting issue that there is in here is -- the one contrast is arbitration does not mediate. Right. Mediation -- although the phrases are sometimes interchanged, mediation is a neutral facilitation of the parties coming to an agreement. The idea of an arbitrator is someone who decides the issue, and it's a binding decision on the parties.

There was a Seinfeld episode from several years back when the show was still on where, in fact, the mailman next door was appointed as an arbitrator by the parties, but Jerry called him a mediator, and it

made me cringe. It otherwise was a great episode illustrating the application of arbitration, but the distinction is mediation is facilitative, but the mediator does not decide. An arbitrator, what we're talking about today, decides the issue, decides the dispute between the parties.

The legal framework or the governing law is somewhat complex, but to a large degree, arbitration is governed by the Federal Arbitration Act in the United States. The scope of the FAA is defined to -- as construed by the Supreme Court, it's to govern everything that Congress has the power to regulate, under Congress's power.

As we all know, as the lawyers in the audience know, that's a heck of a lot of stuff; and so in the vast, vast majority of cases, with a couple of exceptions where minority courts have held that the FAA does not apply, even in those sorts of settings -- because I know that there are nursing home contracts and home residential construction and sales contracts on occasion -- those are minority positions. Most courts hold that the FAA applies to those.

You know, as I think about it, basically if a court holds that the FAA does not apply, it's implicitly holding that Congress cannot regulate this subject matter. So if you think about it that way, we

all know Congress can do an awful lot of stuff. It certainly regulates the nursing homes. It certainly regulates a lot of aspects of business that at one point would have been thought not to be subject to federal power. So basically, the FAA governs an awful lot of stuff, and the courts have said -- you can't really think of anything the FAA does not apply to.

So as opposed to yesterday where you've got 50, 100, thousands of different court systems and court rules, here at least the basic framework in general is governed by one statute, the Federal Arbitration Act. Now, it's a 75- or 80-plus-year-old statute, which has a different set of issues, but at least we're sort of typically talking in a lot of cases about the same set of rules.

In general, and as I think you've already heard I think, the Federal Arbitration Act makes pre-dispute clauses in consumer and other contracts enforceable. It also makes post-dispute arbitration clauses enforceable.

There are several exceptions that have been adopted by Congress in recent years. The one most relevant to this discussion is contracts between consumer lenders and military personnel. In those sorts of contracts, pre-dispute arbitration clauses are not enforceable, but that's the one exception relevant

here. There's also an exception for contracts between car dealers and manufacturers, and I guess there's somewhat of an exception to agricultural contracts.

And it's already -- I guess it's not noted, but the background here is, there is legislation pending in Congress that would make pre-dispute arbitration clauses unenforceable in all consumer employment and many franchise agreements. It's, like I say, in committee at this point. It's hard to know -- probably your panelists may have a better sense than I do what may come of that, but that's in the background of this discussion that we're having today.

Once you have an arbitration agreement, what can you arbitrate? Basically, again, it's pretty much every type of claim can be arbitrated. Now, if we're talking about debt collection claims, right, those are usually state law contract claims, and so to that extent, it's not surprising that they would be subject to arbitration.

But in addition to sort of the flip side -- and think about what claims the consumers might bring against lenders, creditors, debt collectors and so forth, all the relevant federal statutes have been held to be subject -- claims arising under those statutes have been held to be subject to arbitration; and similarly, state law claims, any state consumer

protection act claims are going to be subject to arbitration because of the preemptive force of the Federal Arbitration Act. Basically, the FAA makes arbitration agreements enforceable, and to the extent the state laws are contrary, those state laws are generally overridden by the FAA.

Once we have talked about several of the states where claims are subject to arbitration, there are defenses that parties who don't want to arbitrate can raise; and so the general rule is, they are basic contract law defenses: lack of assent, lack of consideration, fraud, those sorts of things.

An important one that's raised probably the single most often, I think, although my fellow panelists might -- this is probably right, is unconscionability. Okay. What happens in unconscionability cases is a consumer or a party in general seeking to go to arbitration cannot argue that arbitration itself is unfair because, for example, there is no juror and hence the arbitration clause is unenforceable. The Supreme Court has certainly indicated in dicta that you can't make that sort of argument, focusing on the unique characteristics of arbitration.

So instead what tends to happen in the unconscionability arguments is, it's not the underlying

obligation to arbitrate that's alleged to be unconscionable, it is other provisions in the arbitration clause, such as waivers of punitive damages, such as waivers of the ability to arbitrate on a class-wide basis, such as provisions allocating costs of arbitration, and so forth.

Virtually every court has allowed unconscionability challenges in those areas. There's a range of outcomes in those cases. I think for pretty much any type of contract provision, perhaps with the exception of provisions that pre-define tribunal, you could find some court saying this provision is unconscionable, and some court saying that it's enforceable, that there's no unconscionability problem. But that in general is sort of the leading challenge to arbitration clauses.

Now, the effects of that challenge depend on whether the invalid provision, such that there is one, is held severable from the obligation to arbitrate or whether it is held not severable. So if the provision is severable -- say, a punitive damages waiver is held severable -- then basically what happens is, that provision is stricken, and the case is sent to arbitration where it is arbitrated on that provision in effect. If the provision or other provisions are held not to be severable, basically the whole arbitration

clause is invalidated, and the case proceeds in court. Again, you get differing outcomes there in different courts as to how it comes out.

Now, this is somewhat of an aside, but I certainly think it's relevant here in sort of a broader context for what's going on; and that is, what effect do arbitration clauses have on just any proceeding in court. I mean, the basic idea of an arbitration clause is, you don't proceed in court. You go to arbitration instead. That has implications for whether cases can proceed as class actions in court.

And typically, as a general matter, the effect of an arbitration clause is that the party who is subject to an arbitration clause cannot participate as a party to a class action in court. Instead, they have to go to arbitration, assuming the arbitration clause is enforceable. So accordingly, the presence of arbitration can have an effect on, if not get rid of altogether, a pending class action in court.

Then the question is, well, what happens to these claims? And the law as it has evolved since the Supreme Court's decision in Green Tree versus Bazzle is as follows -- and I will note, there's a pending Supreme Court case that will be decided this fall called Stolt-Nielsen out of the Second District. I'm not completely sure what the Court is going to do with

that case because I think it's messier than it may be thinking it is; but then again, I sort of think that in every arbitration case the Court takes, and they somehow manage to typically decide things.

So there's a lot of uncertainty in this area of what's going to happen, but at least as the law now stands prior to at least Nielsen this is what happens: If you have an arbitration clause in the contract, the party to the arbitration clause cannot participate in a class action in court.

If, in addition, the arbitration clause has a waiver of class arbitration proceedings that is enforceable, then essentially the case proceeds on an individual basis, if it proceeds at all. If there is no class arbitration waiver or if it's been held unenforceable by the courts, then the case proceeds on a class basis in arbitration, and the AAA has a fairly extensive class arbitration docket, and you can find information on it on AAA's web page.

So that's the current state of the law. An arbitration clause, no class action in court, maybe a class arbitration, depending upon what else the contract has to say.

Now, one of the complications to arbitrators -- we sort of talked about the defenses that may be available to the enforcement of an arbitration clause.

One complication and sort of a conceptually challenging aspect of arbitration law is who decides those defenses. You can sort of do the -- it's sort of like a brain teaser actually. My students' heads start spinning around for a couple days when we start talking about this.

But basically, the bottom line is the following, because conceptually what the Supreme Court has set out and typically the way all our arbitration statutes deal with this is that arbitration agreements are separable conceptually from the main contract. Okay. Which means -- and the problem is the following: just to illustrate, a party alleges that it was tricked into entering into a contract with an arbitration clause. If the arbitrator decides that there was, in fact, trickery or fraud, well, the arbitration -- the arbitrator's jurisdiction is based on the existence of an arbitration clause.

If the arbitrator rules that arbitration clause invalid, what happens to the arbitrator's jurisdiction? Does it undercut his own -- his or her own decision by making a finding of fraud? That's the sort of brain teaser problem. It's been described as cutting the legs off of the chair you're sitting on, the arbitrator's decision.

To deal with that conceptual problem, as I

said, arbitration statutes generally say the arbitration clause is separable so that the arbitrator doesn't undercut his or her own jurisdiction in ruling that the underlying contract is nonexistent. That has been applied by the U.S. Supreme Court to sort of allocate jurisdiction or authority to decide certain defenses between the arbitrator and the court.

The way it boils down is, if the challenge is to the entire contract that includes an arbitration clause, so that I was lied to about what I was supposed to get out of this contract, I was lied to about what the interest rates were in the contract or something like that, that's a challenge to the entire contract, not to the arbitration clause, and that's an issue for the arbitrator to decide.

If instead the allegation is that the arbitration clause itself is invalid, so that someone -- they told me arbitration was a public judge decides the dispute. So the fraud allegation is directed to the arbitration clause, and that's something that the courts can decide. So, for example, unconscionability of the arbitration clause would be something that the courts typically would decide.

Whereas challenges to the contract as a whole, such as in the Buckeye case from the U.S. Supreme Court where the argument was the arbitration clause was in a

payday loan agreement that charges nefarious interest rates, the Court held that the arbitrator was to rule on the illegality issue, that the arbitration clause was separable, and the Court could not rule on whether the underlying contract was illegal.

Another issue for the court is not the illegality, and I think this is pretty well agreed now perhaps with a little bit of uncertainty, issues of assent in the first place, right, I never signed this contract at all. My signature is a forgery. Even if it's directed at the whole contract, that is an issue that the courts can decide; and so unless the allocation of authority issue -- again, you've got defenses to arbitration, but some of those defenses have to be adjudicated in the arbitration proceeding itself.

Okay. The final topic of this semester overview in 30 minutes or whatever of arbitration law is -- everything I've talked about so far deals with the arbitration agreement and enforcing the agreement, and there certainly the FAA is going to control in the vast majority of cases.

The other end of the process, which will be one of the topics of this afternoon, is what about enforcing the award that the arbitrator adduced in a binding decision? Okay. And there you've got the

Federal Arbitration Act setting out various standards.

It's less clear in that setting whether the Federal Arbitration Act governs. It may be that you use state standards in that setting to some degree, and nobody really knows that yet. It's very -- there's a lot of uncertainty as to how you do that. The courts do it a lot of different ways. They're very similar, so there's not huge differences, but there are some cases when there are -- when they have, not in the vast majority of cases.

So the basic grounds for a court setting aside an award typically focus on procedure rather than substance. Courts do not review the substance of an award. It's not like an appellate court de novo even deferentially on reviewing a fact finding. Instead the focus tends to be on things like: Was the arbitrator biased? Was there a failure to disclose potential conflicts of interest? Were there procedural problems that prevented a party from effectively presenting the case? Did the arbitrators exceed their authority in ruling on -- in making the award?

Sort of an example of a case where an arbitrator exceeds their authority, which looks a little like there might be some substantive reviews, is whether there was an agreement to arbitrate in the first place. If there is no agreement to arbitrate,

the arbitrators have no authority, and therefore the award should be set aside. So that actually -- the lack of agreement is a ground for setting aside the award. By comparison, again, on the merits of the case itself, typically, it is not something that courts review.

The general exception there is, every court of appeals, U.S. court of appeals has held that there is, in fact, as of now -- well, it's a little complicated, but typically held that the courts can review an award for a manifest disregard of the law, not de novo on the merits, but if the arbitrator demand is a manifest disregard for the law, the award can be vacated; and that typically means the arbitrators knew what the law was and sort of consciously, knowingly disregarded it. They thumbed their nose at the law. They said, Yeah, we know this is the law, but we don't like that rule, and did something else.

Even that standard review is now kind of up in the air because there was some Supreme Court case at least suggesting that you may not be able to do that. The circuits are kind of all over the place on how this is going to come out. At some point, the Supreme Court will resolve that issue.

There's actually a couple of cert petitions pending right now that will be decided in October in

which it may take up that issue, but the extent of any merits review at this point is uncertain, but clearly even prior to this uncertainty, it's a lesser degree than you would find.

Again, there's lots of other issues that may arise here. I'm sure they will come up in our discussion, and you'll probably get a better flavor for the uncertainty about what's out there, but, again, hopefully, this gives us a baseline that we can all build on in our discussion. So thank you very much.

(Applause.)

INITIATING PROCEEDINGS AND CONSUMER PARTICIPATION RATES

MS. MURPHY: Good morning. I'm Bevin Murphy. I'm a staff attorney with the Federal Trade Commission, I'm in the Washington D.C. office, and it looks like we have a great panel here today. We are certainly going to be using their experience and their wisdom and their

expertise to talk about some tough issues here.

So we're going to begin at the logical place to begin, which is initiating arbitration proceedings and particularly looking at consumer participation rates.

So looking at how our arbitration procedures are initiated, are consumers aware of them? How can we make them better aware of them? If they're aware of the actual arbitration proceeding, are they aware of the consequences? And looking at what is done in practice now, is that what should be done, and if not, what changes should be made?

So a little bit of housekeeping. We have an hour to talk about this, and we're going to be having a break at 10:45. I'm going to try to leave time for questions at the end, so probably about 10 minutes of questions from our audience here or from the webcast, and we are going to be, I guess, putting up our nameplates if we would like to speak, if we remember. I'll start off by putting mine up.

So I guess I'll just really throw it out there to begin with, if anyone wants to speak either in their experience or normatively what they feel should be occurring, how should arbitration proceedings be initiated?

Mr. Naimark?

MR. NAIMARK: The AAA is a long-term

arbitration provider. We're a not-for-profit. We have been around 83 years, and we cut our teeth and grew for many years on a variety of other kinds of arbitration: business-to-business, union-to-management, a whole variety of kinds of things, a lot of automobile-insured personal injury claims for the State of New York, the State of Minnesota. These cases are narrowly defined.

Consumer debt claim collection cases are fairly dramatically different in form. For instance -- and I think perhaps this is maybe the most significant issue, and we heard a lot about it yesterday also in the court process -- extraordinarily high rates of nonappearance or nonparticipation by consumers, maybe going over 90 percent, extremely high rates of nonparticipation, which creates a systemic problem.

So I would say of all the issues, and there are a number of significant issues that we're going to talk about today, this is perhaps the most important one.

MS. MURPHY: Mr. Bland?

MR. BLAND: Thanks. I think there's three different issues that we've seen come up on a systematic basis about the way that consumers were notified about arbitration cases and debt collections.

With all due respect to the questions not beating up on the empty chair, like 99 percent of consumer debt collection cases were handled by the

National Arbitration Forum, that is the universe of the real world as it's existed for the last 10 years. So I think there's no way to talk about what's gone wrong without referring to their practices. So I'm going to focus on three things that we've seen and heard from literally hundreds of consumers.

The first thing is that consumers by and large who get a piece of mail from the National Arbitration Forum or particularly from a debt buyer typically don't know the name of the entity on the envelope. Someone who knows that they have a credit card from MBNA, for example, they don't know what the National Arbitration Forum is, they don't know what Polema Receivables II in Buffalo is, this kind of stuff. So when they get a piece mail from someone they don't recognize, they throw it out. They don't open it. They don't understand what it is.

So if an arbitration forum is going to send a notice or a debt buyer or some assignee is going to send a notice, there needs to be something on the envelope in big print that says, Relating to the MBNA credit card you have from year this to year that. So the consumer has a conceivable way of knowing what it's talking about because most people don't open mail from anonymous groups that they've never heard of, and that is what they were getting.

Secondly is that there needs to be something bold and short on the envelope that explains what arbitration is as brief and credible -- and Chris really did a great job summarizing the law here, but what I've heard again and again is that the vast majority of consumers do not know what arbitration is.

If they get something from a court -- now, I know a lot consumers still default and don't show up for court, but nearly nobody, I mean almost nobody that I have spoken to as an actual living, breathing consumer of goods in America knows what arbitration is. They get something from the National Arbitration Forum. They don't get that it's a private judge.

There needs to be something -- like when I do a class action notice, we'll put a sentence on the outside of the envelope that says something like, There are allegations you've been cheated out of money. If you fill out the form and send it back, you could get a lot of money, something like that and really like a sentence in bold print. We have very high redemption rates in a lot of my cases.

I think there should be something on the envelope that says, Arbitration is like a private judge who is going to decide whether or not this company gets to sue you for money, gets to take money from you. People don't know that. There needs to be something on

the envelope in bold, simple English.

You know the FDA, when they send out notices, they have rules to decide how something is going to be readable or not, and they take the length of the words and the length of the sentences and that sort of thing. There needs to be something at an eighth-grade level or below explaining what arbitration is so that someone will open the envelope.

Secondly, the service that has been served over the last 10 years to literally at this point hundreds of thousands of consumers was almost always sent to an address that jumped back quite a few years. I know a number of people -- I've talked to a number of people who had services sent to addresses that were 10-years old. Okay. That's just completely not acceptable.

If you're going to send a notice for something, we're going to send -- the notices start the clock running because there are a lot of courts that say that if the consumer doesn't file something in 90 days after the entry of an award, they start losing all these different defenses even if it passes the statute of limitations and even with junk fees and all this kind of crap thrown in. So the notice matters.

If the notice is sent to an address that's several years old -- you know, a demographer will tell you that there's something like 16 percent of the

population moves every year. People who are victims of predatory lending with low income tend to move a lot more often than that.

So there are things you can do to track down people who don't respond if the letter bounces back, if the letter doesn't get through. For example, in a class action notice setting, we will pay money to have something -- we'll use some services like skip tracing services or things like that. There needs to be several rounds of notice.

In a typical class action involving a lot of money, I have a settlement involving a payday lender, where we have, you know, several thousand dollars per person or a larger settlement, we'll sometimes go through three or four rounds of notice.

They keep sending out credit card debt where they're trying -- you know, adding interest on interest and a whole lot of phony fees and so forth, and $1,000 debt becomes a $20,000 debt. They did it by -- they basically sent out a single notice. I think that that's laughable. I think it's a disgrace, and that's part of the reason that most people discover that they've gone through an arbitration -- gone through an arbitration when they get a notice from a court of a judgment being entered against them.

The third thing which I think is important is

there was widespread fraud, deceit, lying about who -- about how these notices were sent. Okay. I've seen it again and again in documents. They're signed by a guy in Minnesota -- it's a stamped signature; it's not an actual signature -- that purported -- was written like a certificate of service.

So if I'm a server for a guy, in a case like AT&T, where he's serving him, I'm representing AT&T and sending him a copy of a brief. Okay. Somebody in my office is actually going to put the brief in the envelope and put the stamp on it and send it to, you know, Alan, sign this, with penalty of perjury that I served this notice upon opposing counsel listed below. Right.

What NAF was doing was, they had to have something that looks a lot like that, that says this is an actual service of process, you're certifying, use the word "certifying" in the service of process. And then what it would be would be a stamp. This is all by one guy. Just one guy in theory sent out like a million notices. I find that very hard to believe. Okay. The guy is in Minnesota, a lot of the notices had postmarks from New York or other different parts of the country. So the guy in Minnesota is giving personal certification that he sent notices that were sent from other parts of the country, and this happened

on a huge basis. Okay.

So now the forum itself knows, obviously, the guy who is certifying these things is not actually doing it. Okay. The credit card companies and the debt collection companies that are sending out these things on a widespread basis know that the action of the certification is false certification. Okay.

I think that that is in and of itself unfair and deceptive practice. I think the entity should have rules that if someone is going to certify something, that they actually did it. There needs to be a forum for what certification is. It's not a joke. It doesn't render that something is meaningless.

I think that there should be -- I think this is something that should be before the bar counsel. I think there are people who are involved in widespread sending of false certifications and people not getting notices where people end up losing a lot of money. We're talking people who went bankrupt. We're talking people who have lost their homes because judgments were entered against them where they never got the thing, and the process that was supposed to ensure that they got the thing was phony.

I think that's the kind of thing -- I've seen people disbarred for much less than that. I think that this happened on an enormous widespread basis, and it's

a scandal.

MS. MURPHY: Thank you.

Mr. Canter has patiently had his name tag up.

MR. CANTER: My experience in representing creditors in consumer arbitrations, including those before the National Arbitration Forum, is different.

The procedure that was followed, combined with the National Arbitration Forum rules which parallels service of process rules in state courts; that is, a process server would either have to deliver the claim to the individual or to a person of suitable age and discretion at the individual's address.

There was one feature in the rules that was different than the state court or federal court service of process rules, and that allowed service upon the individual through overnight delivery, so the Federal Express or UPS could obtain the signature of the addressee.

And moving forward in terms of addressing a prospective model, certainly, if there are going to be consumer arbitration rules, in my view it makes sense to allow for notice, not by regular mail, and I'm not familiar with any cases that I sent by regular mail. I don't think that's proper.

The rules should parallel the process server's rules and state rules, but with the addition that you

allow service by these overnight mails which can now -- couriers which can now capture the signature and make an electronic copy, and that electronic copy can be evidence of the service of process, just like a certified mail service of process.

Now, I just want to take a few moments to talk about service of process, which was discussed ad infinitum yesterday.

The model of service of process is a person who delivers actual notice, but the law has said for many years in conforming with due process standards that if you cannot give actual notice, you must give notice that it's the best practicable under the circumstances.

I'm going to close by talking about one case that I handled in Maryland that involved a debt collection case. The debtor would not open the door, would not accept certified mail.

So what my client -- or what I did for the client is file a motion to hold alternative service. Now, this is not a case where they got an address from 10 years ago or that they sent to a place of employment. This was a case where the server was able to verify through property records that the person lived there and through driving records. The court allowed service by regular mail and by posting on the property only after we could establish we made efforts

to get actual notice.

Well, the debtor spent more money fighting the case than paying the bill, took it all the way up to the Maryland court of appeals, and the Maryland court of appeals sent it back as a permissible substitute of service of process for default posting and mailing.

So to reach a final point in my comments, notification in my view as I practice consumer arbitration should parallel the types of notice provided for by state rules or service of process rules.

MS. MURPHY: Thank you.

Mr. Johnson?

MR. JOHNSON: I actually agree with that. There are two -- it's important to remember there are two critical stages in an arbitration for notification to the consumer. The first is the initiation of the consumer proceeding, and I think that I -- I think I'm agreeing with Ron that needs to be service, that needs to be personal service or something that apprises the consumer that a very important proceeding is about to start.

And I agree with everything that Paul said. I'm going to refer to Paul a lot. He's the guru on this issue from the consumer end. But anyway, the notice has to be something that clearly lets the

consumer know what is about to happen.

Consumers are not familiar with arbitration. A lot of lawyers that they might go to -- first off, most consumers don't go to lawyers. They can't find one, but if they did find a lawyer, there's a pretty good chance that that lawyer also is not really familiar with arbitration and will not understand it.

Just to give an example of that, I recently within the last couple months was speaking to a group of 100 magistrates in Iowa, and then I had another speech that I was giving in front of the Iowa Bar Association, a room full of lawyers; and I asked them if any of you were to receive something in the mail from Minnesota that says arbitration award on it, $30,000, how many of you would do anything about it? There were no hands that went up, and they were shocked when I told them, well, in Iowa, if you never agree to arbitration, if you have done nothing whatsoever about that award -- and I'll ask the same question today. I've already set it up.

Is there anybody in this room when they got that, the arbitration from the Ray Johnson Arbitration Forum in West Des Moines, Iowa, is there anybody here when they get that by regular mail who is going to do anything about it? Hopefully, you all are going to now from what I've said. You're going to go to a lawyer

and --

MS. MURPHY: For those of you watching on the webcast, I did not see many hands go up.

MR. JOHNSON: If you know what you're doing, you're going to go get a lawyer, and you're going to pay that lawyer at your own expense, and you're going to hope that you've got a lawyer that's pretty good because in the next 90 days, if you don't, you owe $30,000 to one of the gentleman's clients sitting up here or somebody else in that room.

There is virtually -- and I know that we -- I make the arguments and Paul has made the arguments that some consumer lawyers have been successful, and they should be successful in arguing that there is no agreement to arbitrate. You should be able to go into court at a later date and do it, but unfortunately, in Iowa, we have a court of appeals that doesn't agree with that, and they're requiring -- and there have been court of appeals from other states who have required that, too, they require you to go in in that first 90 days and contest it.

So there's two very important stages for notice. One is to initiate the arbitration, and the second one is when that award is delivered, and that's the award that Paul was referring to that the Minnesota -- from NAF, and I don't have any problem

with talking about somebody who is not in the room because they had the opportunity to be here, and they're not here, and almost all of the consumer arbitrations are going through NAF, and what was going on there was outrageous, and we cannot go forward without discussing what happened at NAF.

So we have two important -- and I think you need personal service for both of them. I think at the very least you need certified or registered mail. If you want to deal with the issue of somebody not signing, you need to have registered mail or overnight delivery or something that at least you can show what address you sent that to and that you actually sent it.

Keep in mind in this modern era, a lot of people don't read their mail. A lot of people from West Des Moines are in Chicago at a conference and don't have time to read what arbitration award comes in their junk mail or whatever. A lot of people get their information over the Internet or through other sources now. The mail is a dying breed of a way to send stuff. It's kind of the pony express, but not much more than that. So regular mail is not an adequate way to notify people of awards.

And on the issue of service, just to a couple points, this isn't something that only relates to consumers. It's not like corporations and credit card

banks and everybody read their mail any better than anybody else. I have initiated arbitrations against credit card banks. It's not like they respond on time.

The only reason that they're okay is because these gentlemen at AAA and at NAF, they're going to protect them. They're not going to let the consumer go and get a default arbitration against Citibank or Discover or whatever. We can't do that because if they're not paying, they're not going to do the arbitration.

I had one with NAF where I tried to take a default against the bank who didn't respond to the arbitration. I was unable to do it until it took me about seven letters. NAF sent them three notices spread over like a six-week period. I know they called them, tried to get somebody to respond. Nobody responded, and finally they gave me an arbitration award for $750 and no attorneys' fees on a default.

So it's not just the consumer that doesn't get notice. It's a two-way street, and I think that we need to provide for that.

I won't go on. I could go on all day.

MS. MURPHY: Thank you.

Ms. Jackson?

MS. JACKSON: Yes. The other issue we're going to talk about is consumer participation here is let's

say you actually get someone that has an arbitration notice and opens the mail, they don't know what to do. I mean, they can barely navigate the civil court system, and then they're exposed to this whole new process.

And as a private practitioner, you -- for reasons I think we'll get into later on, it's very risky for you to take an arbitration course because basically they can decide against the law you have no recourse. So if you're making your living representing consumers where you've got on paper a fee-shifting provision, which is a violation of the law, where if you're successful, the other side has to pay your fee, you're taking a big risk, and so there aren't any attorneys out there, as Mr. Johnson said, that will even take an arbitration case.

But for the few that have either tried to dispute that there was an agreement made to arbitrate or in identity cases where you're trying to deal with NAF, again, to say that, Hey, this person didn't even -- you know, they didn't even sign the account at all, what they get in the mail is something that they can't understand. I mean, they brought their little notice to me and, shoot, I couldn't understand it. I mean, it's not very consumer friendly.

As Paul was saying, when we're dealing with

people with, you know, an eighth-grade education level, and the notices with small print, very -- legalese and basically refers them back to the arbitration rules, which you can get on the Internet or you can get a booklet from the arbitration company, when you get those rules, you find out there's some very short time frames in it.

So I think the thing about multiple notices or personal service where someone has to actually sign for it, and then some additional information to really help that consumer navigate in regular person language. I mean, someone who could afford to, you know, pay for an attorney to send something up to the Maryland Supreme Court isn't the normal consumer that I see. Most of them have gotten in over their heads. Something bad went wrong, a medical problem, lost their job, and the person has the credit card default rate that just goes bad for them, and, in effect, there's just really no way to be able to pay off that debt.

So usually there's not much money to spend on an attorney if they can even find one. So I think it would behoove us if we go forward with consumer arbitration, that the consumers are given better instructions, instructions that they can understand on how to participate in the process.

And the other thing I think we'll get into

later this afternoon is this mandatory arbitration really doesn't give the consumer the option to go ahead and do the right things. If someone wants to participate in the arbitration process, then that should be a decision that the consumer has, a real decision in the process, not something that's been mandated by the credit card company.

But, like I said, part of the participation rate is even if they get service, they look at it, and they don't know what to do, and there's very limited help out there to get help if you're a consumer just faced with having to go through an arbitration.

MS. MURPHY: Thank you.

Mr. Drahozal?

MR. DRAHOZAL: After sitting through yesterday's panel and so far today, this really seems to be a systemic problem with debt collection cases in general, that you've got massive numbers of consumers who move around a lot, and so they're difficult to find, and who do not have a lot of exposure to the civil justice system or the arbitration process or whatever.

I think we've gotten some very good suggestions, again, both yesterday and today about how to address that problem. Again, it doesn't strike me as you need arbitration. I mean, this is something

that's, again, based on what I heard yesterday and what I know about the arbitration process is something -- it's just a problem clearly of needing to notify people that they are subject to a potential claim.

And I think Paul had some very good suggestions in the arbitration setting for how to help consumers understand what they're facing. I mean, service of process is sort of the ideal, and we heard yesterday how many problems there are with service of process, which doesn't mean we should go away from it, but it suggests to me that, again, this is a systemic issue where -- I don't know whether there's advantages arbitration has in this context, but it's something that we need to deal with across the board, I mean, for the court system and arbitration.

MS. MURPHY: Mr. Kaplinsky?

MR. KAPLINSKY: Yeah. I agree with Professor Drahozal about that, that by and large the things that Paul described are problems in general in making sure that the consumers are notified of the fact that an action has been taken against them, but I would go a bit further.

I would say it's not enough for whatever arbitration system gets designed to replace what NAF was formerly doing. It's not enough just to replicate how service of process has been working in the courts.

You heard yesterday from the panelists about a wide array of procedural rules that exist with respect to service of process.

You heard about a situation in Minnesota that I never heard about before. The fact that you essentially can initiate a lawsuit without actually filing a complaint in court. There's a wide variation in the way the courts are dealing with service of process, what the rules are.

Here we have an opportunity in an arbitration context, whether it's through AAA or whether it's through some other arbitration administrator that may be interested in taking the place of NAF to administer debt collection arbitrations, we have the opportunity to design a better system than what the courts have been doing. Something that goes beyond what the courts have been doing because what the courts have been doing isn't good enough.

That's the message that I heard yesterday, and I think the nice thing about the ability to design this is that we already have AAA, a nonprofit organization that's been in existence for many, many years, tremendous credibility that goes with AAA.

They have already indicated, and I'd like to hear Richard comment on this some more, but in congressional testimony that they gave about a

week-and-a-half ago in the aftermath of the collapse of the NAF, it sounded to me like AAA was willing to get into the business of administering debt collection arbitrations, if they are done properly with a high degree of fairness to consumers; and one of the things that AAA identified both in the written testimony and in the oral testimony that Richard gave at that hearing was the notice issue. That, in fact, was the first issue that they identified.

Now, maybe studies need to be done about maybe lawyers -- I can't figure out the best way to make sure that notice is given to consumers of the fact that an action and arbitration has been commenced against them. Maybe we have to turn to other professors in other disciplines, human behaviorists, people that can figure out what is the best way to make sure that consumers get appropriate notice.

Now, there are not unlimited amounts of money that can be spent doing that, so that has to be tempered by what are the costs going to be. But I would say that if AAA is going to put together a blue ribbon panel to study this issue, they ought to make sure that included on that panel are not just lawyers, but also people who are expert in how you make sure you get notice out.

Maybe, Paul, there are people I know, for

example, in the class action area, there are companies that you can hire that are expert in making sure that notices get sent out and delivered and received and read. That's the important thing, not put in the circular file, read by consumers.

Now, you have to be a bit careful here, I think, and that is, Paul, your idea of putting on an envelope something like, you know, the letter in this envelope is related to a debt that you owe to MBNA, or, you know, there has been an action brought against you in arbitration, and this is like a private judge. I think if you're sending that kind of letter by regular mail, I think there are privacy issues that are implicated by that, and I think, you know, that would have to be done, I think, with a great deal of caution.

But I don't think anybody would disagree, whether you're representing consumers or you're representing banks like myself, all of us can agree that it's important that if an action is being brought against a consumer, whether it be in court or an arbitration, that we do the very best to make sure that the consumer gets the notice, and that only makes sense because the companies would prefer not to go to small claims court for a hearing, not to go to an arbitration hearing. They would much prefer to resolve it short of that; and therefore, it's not in their interests for a

lousy notice to be sent out.

MS. MURPHY: Mr. Naimark?

MR. NAIMARK: Yes. First of all, just briefly, I would be remiss if I didn't respond to the underhanded slap by Mr. Johnson to AAA. Please do not characterize us by the behavior of others. The idea that AAA goes out of its way to protect a corporation against consumers is --

MR. JOHNSON: Just to respond to that, I was referring -- and it wasn't an underhanded slap. I'm just talking about the reality that it was NAF and AAA. I have -- there were instances, and it happens all the time, where AAA -- where I'll initiate an arbitration, and the other side doesn't pay their fee.

AAA doesn't default those people. It's not like consumers where you're defaulted, and you go in and get an award. I get a letter from AAA that says that they didn't pay their fee, and they're dismissing the arbitration. That's what you guys do.

So, I mean, it wasn't meant as -- it wasn't meant as a backhanded slap to AAA. I personally think that you guys are miles ahead of NAF, but I think that there's a lot of problems with consumer arbitration in AAA.

MS. MURPHY: Just to respond on that, we are going to be discussing protocol and procedures and

enforcement of it, and we can certainly raise that.

MR. NAIMARK: Yes. Well, I agree there are problems. That's how I started off in this program, and that was essentially the content of our testimony in Congress. Particularly in this area of consumer debt collection, there are a lot of unresolved issues.

I would say not just in the arbitration process, but we heard yesterday that the courts are struggling with this. We had some very interesting and informative comments from the three judges who were struggling with this and also asking for guidance.

I think that's the purpose of this kind of discussion, to try to expand the input, try to get all points of view incorporated into this and see if we can't move to a different place. That really would be our intent. It would be the only way we would be interested in remaining involved in this particular area in the future. Without that, I don't think it's viable.

I will say I think this notice issue, we've got some good sort of proactive suggestions from Paul and others. I don't think we've begun to resolve it yet. I was struck yesterday by the comment from the panel that there aren't 25 or even 50 different forms of process service in this country, but there are hundreds, and there seems to be no uniformity.

I think that's a problem. It's a societal problem, and I think particularly in these cases, the reality is these cases are ugly. They're not pleasant cases. They often involve people who are in financial difficulty, often not responding for a variety of reasons. The collection business is extraordinarily unpopular in the public eye, particularly in a time like this. So I think we really need to think creatively and thoroughly about putting together a better process.

MS. MURPHY: Mr. Frank?

MR. FRANK: I just wanted to real briefly say something about the issue of incentives, as I think this whole concept is going. I think it's probably going to be a recurring theme, but I just wanted to point out that when we talk about the notice issue being the same in the public court system as in the arbitration system, on the service issue, but an underlying deeper issue that separates that, and it ties maybe to what we're going to talk about this afternoon, the possibility of bias and so on.

I don't think you can separate that completely because the incentives for how notice is treated in arbitration is quite different from the way it would be treated in court because of the underlying incentives of the forums, as opposed to the public court system

where there is an underlying incentive for a forum to serve their client who really does bring the business to them, who is the firm doing the collections.

So there definitely is different incentives on how to treat a notice that is imperfect, and therefore, how this will be done.

MS. MURPHY: Mr. Bland?

MR. BLAND: Like any mediation, before you reach the end stage where everyone like shakes hands and signs and everyone gets along, I still think that we have more disagreeing to do here at the outset. I think it's an important thing to sort of not to rush in this event to agree, and I admire Richard enormously, but I think that there's still some disagreement, and I want to get out a couple.

I am not -- I am not jumping into bed with the idea that there is no difference between court and arbitration with respect to notice at the beginning of the case for a couple of reasons. First, I actually thought this was where Josh was going to go, and I am going to jump ahead to the bias issue in part because I think it ties into the notice right at the beginning of how these things go.

I agree completely with the comments that both Ray and Chris made that it's very hard to find a lawyer. We've got hundreds and hundreds and hundreds

of consumers who felt that they were being abused and cheated by the NAF who wanted a lawyer. I am not in a position, I do not have the resources in my organization to begin to handle the wealth of individuals in small debt collection cases.

We make an enormous effort. We used lip service. I called people. I put the bite on people who I've done favors for trying to get lawyers to represent individuals in this setting, and it was next to impossible to do. Very few lawyers in America will handle a case in front of NAF for an individual, a few dozen, a few dozen.

The people who did it nearly always were able to defeat the NAF awards in court. They lost to the NAF no matter what they did. If they got a videotape of the person who was not paying the bill, they still would lose, but they would generally go on and win in court if you could get a lawyer.

But there was a way, there was something that people who had a lawyer, the handful of people who had a lawyer knew that the people who did not have a lawyer, which was like 99.9 of the people, did not, and this is something that nobody has ever told you, and that was that this organization had a deal which was -- with the credit card companies, they had basically a deal where they were going to be funneling as many of

the cases as possible to a small group of decision makers where you knew where they were going to rule.

Out of 34,000 cases that were decided in California, more than 90 percent of them were funneled to two dozen arbitrators, and Josh did a terrific study, a wonderful piece of academic work that shows that the small group of people ruled for the credit card company in a higher percentage and in larger amounts than everyone else did.

The people who -- and this was a conscious -- there ought to be, you know, I'm like a criminal watching, you know, why is that? Gee, how can you not rule for the Minnesota Attorney General? Well, because it's a secretive organization. It's how to tell them from NAF. You see how they treat their consumers, but you don't know what they're thinking.

No one knows, you know, the decisions and how -- who had what conversations to steer cases to certain arbitrators, but from the outside, something that everybody could tell was that they were steering a vast majority of cases to a handful people for reliable votes. We know from the people who were blackballed, of whom there are quite -- there are several examples, that they were steering cases away from people who would tend to go for the consumer.

So what you knew if you had a lawyer was, that

when you got the notice from the NAF, what you needed to do is, you needed to come up with $350 or something at the outset, and say, Oh, we don't want you to pick the arbitrator. We want an arbitrator who will be in person in my town.

MS. MURPHY: Actually, I want to jump in on a question on that point, something I was hoping to get out to the panel. To what extent do you think, Mr. Bland, I'll direct it to you, a low consumer participation rate is based on lack of notice, inability to find an attorney or something else?

MR. BLAND: I think that there are a bunch of factors there. I think that notice is an issue. I think the ability to find a lawyer is a big issue. I think a lot of people do owe some debt, and then a lot of times that debt really multiplies. I think that something that Ray said actually reflects one of the reasons consumers don't respond, which he said -- Ray said, well, most of the people didn't agree.

The word "agreement" in the normal sense that laypeople use it, nobody thinks they've agreed to arbitration, but the courts, the legal system thinks that all of these people agreed to arbitration. What happens is, is that in your bill stuffer with your credit card agreement, they change the arbitration clause every few weeks, the NAF statement.

Everyone has got a credit -- does anyone in the room have a credit card? Okay. Well, this month, you're going to get something buried in your bill that's going go say, Oh, by the way, the National Arbitration Forum is no longer the arbitrator now. It's going to be AAA and JAMS. Okay.

The number of people in America -- of the 500 million credit card notices that go out, the number of people who will read that and have any sense of what that means is going to be in the hundreds, maximum. Right. I mean, but I think there is -- this idea that there is an agreement -- most consumers don't understand that there's an agreement.

So I mean, I think you -- I think you raised an important and complex point, but let me just quickly finish the final point I wanted to make that you can do with arbitration, if I can, which is that a handful of people who have a lawyer who are in the know could pull themselves out of the system where nearly all the cases were funneled to a couple of reliable folks if they knew where they were going to go. So a couple of people I know have great success rates meeting with NAF, but getting outside of sort of the race that arbitrators are always going to go the right way and going to someone else.

Now, the fact that that's something that people

haven't been given notice of, and they say, Well, you know, we had 1500, you know, arbitrators, many of whom are former judges and Rhode scholars and astronauts and so forth, you know, yeah, maybe they have, you know -- maybe Ralph Nader was on their list of arbitrators. Okay. He wasn't given many cases. Okay. The cases were all being funneled to a couple people who were going to rule for NAF every time and give them everything they wanted.

That's a secret. It's a secret known to a couple of dozen consumer lawyers and no one else, and is that something that's the same in courts, no. When I go into a courthouse, it's a good random system. Okay. There's not a sort of secret deal in which the clerk gets together and meets with the defendant and says, Hey, who do you want? We're going to steer the cases to them.

That was the system in arbitration. It wasn't something that a consumer had any possible way of finding out unless they were some kind of nut who would actually go and read Josh's study on the Internet. A number of people have read Josh's studies on the Internet. There's been a number in like -- excluding his immediate family, there's been a number in the dozens; right?

MS. MURPHY: Mr. Drahozal?

MR. DRAHOZAL: Actually, Ron was next.

MS. MURPHY: Okay.

MR. CANTER: Okay. Thank you. I thought the question related to notice and consumer participation rates.

MS. MURPHY: It does.

MR. CANTER: So we can spend a lot of time here for the consumer people to articulate very good arguments about what has happened in the past. We know the NAF debacle is behind us. So to spend a lot of time to talk about it in the context of hashing over what went wrong, I don't know how productive that is in terms of responding to the specifics and particularly responding to what was said by Mr. Vladeck at the beginning, that let's presume new entities will emerge, and I'm trying to focus my comments on that and use my past experience to talk about it. Although a little bit, you know, that's a big presumption, like law school, a hypothetical question, will new entities emerge?

In terms of notice, I think I've already covered the issue. I think that there must be personal actionable notice in the first place that the claim has been initiated; but after that, I don't think the consumer is entitled to actionable notice and service of process of the award. It comes through the mail,

just like a court will notify you of a judgment.

Participation rates -- and that's what I want to focus on for the rest of my comment. My experience is that the percentage of participation in consumer arbitrations was no different than the percentage of people who showed up in court. Probably statistically significant, but our economists and our professors can tell us, in fact, whether there is a statistically significant difference in participation.

What I did perceive, and this I think ties back to what types of disclosures should be made when the consumer was given notice that an arbitration claim was being done, is that a large minority of the consumers who participated, their objection was that they never agreed to arbitrate, not that they didn't owe the debt or not that there was identity theft or not that it was past the statute of limitations, but they didn't agree to arbitrate.

I think looking prospectively that, you know, taking into account the Supreme Court's preference for arbitration and taking into account the law that says when you get the terms and conditions, if you use the card, you're bound by what was delivered even if you never read it. I think in terms of looking forward, I would agree that there could be some type of standardized notice in a consumer arbitration that must

be personally delivered along with the notice of the claim.

Finally, in closing, I do note that although it's still a proposal, the proposed consumer financial protection agency, there is a section in the new bill if it passes that will allow the agency to regulate consumer arbitrations. So that would certainly be a type of regulation that could be pretty good, and that is have standardized language that when you're served with a claim, it explains what happens.

MR. DRAHOZAL: Two quick thoughts, one is on the question of bias, I think that's a topic for this afternoon, but that things that have happened before suggest possible ways of addressing bias in the future, and I think that's the lesson we might want to talk about this afternoon, and I guess this is the underlying question of why consumers don't show up at arbitration. I don't think we know.

I mean, the same issue came up yesterday with why consumers default in court, and there's huge numbers of default in court. It may be lack of notice in some cases. It may be lack of understanding in some cases. It may be simply, I owe the debt, and I can't pay it, and there's not much I can do in some cases. We really don't know which of those combinations it is.

But, again, I'm not sure there's a reason to

think that consumer behavior necessarily is different in arbitration than in court, but if it is, there have been suggestions for notice -- or for the way the notice process might change to try and deal with that.

MS. JACKSON: This came up yesterday, too, as far as consumer participation, and I hear over and over again, like, well they owe the debt, they owe the debt; but in those instances where I have been able to get discovery and to do an analysis of, quote, the debt that is owed, what I find a lot of times is that it's not that people don't want to pay what they owe. It is because of the way the credit card is structured and the terms and conditions of that credit card structure, that it is impossible for them to pay it off, and they just kind of throw their hands up in the air.

I have typical instances where you've got someone who had $1500 on a card in 2000, and she tried to make her payments of $25 or $100 a month for six years, and over that six years, she paid $4800, and she's still being sued for $3400.

So, you know, part of the consumer participation has to do with the actual debt itself. It's not the debt that they originally charged up. In most of the accounts that I've analyzed, they have paid for what they have purchased, they have paid a decent interest rate on what they have purchased, but because

of the gouging by the credit card system, there are always excessive fees and excessive interest rates at, you know, 30 percent or 32 percent now, that there is just no way that someone can be able to pay that off. So I think that might be part of the reason, too, that people just throw up their hands in the air.

I also note that it's hard to deal with the original credit card dealers. They say to call them and work something out. The fact of the matter is that they don't. I'm trying to deal with my parents who are getting divorced after 50 years, and there's a lot of credit card debt, and there's a home associated there, and I ended up getting an attorney to try and call and work with these people and getting nowhere. So that, I think also has to do with lack of consumer participation. They have just had it. They've called to try to work things out. They tried to find someone to help them, and they just don't get anywhere.

Now, as far as arbitration goes, I think we discussed yesterday, too, that lots of people can't really understand the court process, but at least they've seen it on TV, and they've got some general idea, skewed as it may be, of the court process.

I think really for arbitration to work and be fair, there would have to be certain things in place which likely would be a little bit cost-prohibitive,

and we talked about cost. You know, we talk about private service and UPS and FedEx, I don't want to leave anybody out there, but, you know, if the person who is showing up could go ahead and try to explain to the person signing, Hey, this is an important letter, it's like being sued in court except it's a private thing, you really need to pay attention to it, that would go a long way for someone to actually go I do, and not to toss something that they received in the mail in the trash.

The other thing would be maybe a pre-notice with, you know, just a general idea of how arbitrations work. I mean, our country does not train anyone in financial literacy, and that includes us at this panel and the judges and everyone else.

You know, the conspiracy person in me thinks it's very easy to take advantage of uneducated people, and we have seen this on a massive scale in the mortgage market, and the next one getting ready to hit is the amount of credit card debt which has all been secured, and it's going to be tough, too. So part of it is, you know, to explain to these people maybe before they actually get the suit or have a notice handed to them by the little FedEx guy, but something that tells them that this is similar to the court system.

And as far as the participation phrase, as far as they never agreed to arbitrate, of course they've never agreed to arbitrate because they -- we know what the law says, but what regular people say. I mean, when I raise this issue even to judges and other attorneys, they're just shocked. What do you mean? What do you mean?

I mean, so we don't even know, and the only reason I found this out is because I just chose this area of law. I'm a second career attorney. I used to be an IRS criminal investigator, worked with the court system, did money laundering, put bad guys in jail. I had no idea that this was going on until four years ago. Oh, my God, I'm going to go back and read my mortgage because I probably got screwed.

So part of this is the problems with the system and the problems with notice, and there's also problems with people just being overwhelmed because of how debt is being computed. I mean, if someone gets behind on their credit card, credit should be stopped, and they should be allowed to pay back at a regular interest rate. That's not what happens.

They continue to get their limits bumped up. They continue to get a default rate. I think they charge about 70 bucks a month or a $39 late fee and a $39 over-the-limit fee. So the debt becomes

overwhelming, and I think it's a combination of those two things, lack of notice -- lack of notice, failure to know the system and the way the debt is accumulating where they can never really pay it off. That all kind of leads to the lack of participation by the consumer.

MS. MURPHY: Thank you.

Mr. Sorkin?

MR. SORKIN: Thanks. I just want to address the question about why consumers don't participate. Certainly some of it has to do with service problems. I tend to agree with the consumer advocate critics of the effectiveness of service in the arbitration context. I don't think that that's unique to arbitration, although there certainly are some greater problems we have experienced there.

The difficulty of getting people's attention now I think is greater than it's ever been. That's a problem we haven't solved in other contexts either. If you just look at other forms of disclosures in credit applications, that's something that we have gone back and forth on for many years and still don't have a very good answer to, and it's certainly something that's more challenging when you look at pre-dispute arbitration agreements, how to disclose those if we're going to allow them in a way that consumers do have some sort of meaningful choice.

My suspicion is that if you give a consumer a credit card application with the rate of 9.8 percent or 9.7 percent if you agree to a pre-dispute arbitration clause, most of them will take the tenth of a point on the rate without knowing what arbitration is, even if you point out that they have to make a choice one way or the other. So I don't think that's necessarily meaningful.

But as far as participation, aside from notification and service issues, I suspect it's mostly because consumers don't really have much to say and don't expect that their participation is going to be meaningful or beneficial to them. That's not to say that they shouldn't have something to say. I think most of them probably should. Most of them don't have legal advice that could give them a better idea of what role they could play there.

My experience on this admittedly is fairly limited. I have handled about, like I said, about 60 collection cases for National Arbitration Forum over about eight years. I didn't get any of the default cases. My understanding is that the forum will send out default cases in bulk to an arbitrator, and an arbitrator might get a stack of 50 or 100 or 200 cases, all of which had very similar files with no response by the respondent/consumer, and those cases probably went

to a very small number of arbitrators consistent with the experience in California that Paul described.

The cases in which a response was filed, obviously, were in the great minority before the National Arbitration Forum. All 60-odd cases that I had involved some sort of a response; but judging just from the content of those responses, generally speaking, I think I would say there wasn't really much in there. Usually, it was simply evidence of service, the consumer received it. It said something to the effect that I have high medical bills and have been trying to pay this, or I lost my job, or I downloaded something from the Internet that says that credit is illegal, and, in fact, they owe me my credit limit, and I want to make claim for that. There wasn't really any kind of substantive response.

In a few cases, there was. In a few cases, it was, this isn't really my account, or I did pay this off and it's another creditor now. Almost all of the -- the majority of the cases, 80 percent of them that I had were the original creditor. So I didn't see the cases brought by some debt buyer without any means to back up the debt.

In the cases where there was some kind of question raised about identity theft or payments, I would get more information, maybe copies of the

statements. There were cases where I asked the creditor for some sort of evidence that it actually was the consumer's debt. In one case, I think I actually asked for something bearing a physical signature. They didn't come up with anything and they lost, but those were really the minority cases.

I could probably count on one hand the number of cases where there was a substantive defense raised maybe in a two-sentence handwritten response giving some sort of reason that raised enough at least to consider events. Usually, there wasn't anything for the respondent to say.

So the value to a consumer/respondent of responding strategically would be fairly great. It would delay it. It would make it less likely that the case would be sent to an arbitrator who was just handling hundreds of default cases. If the consumer asks for an in-person hearing, that would delay it somewhat further, perhaps increase the opportunity to get an arbitrator who is going to hear it on the merits.

But in most of these cases, there isn't a defense that's going to be raised, partly because of the lack of counsel, and I don't think that it's -- you know, I think the challenge is finally the way to identify the cases where there really is something to

be argued before a decision maker, be it an arbitrator or a judge, and enabling consumers to figure out what that point is and how to make that point.

MS. MURPHY: Mr. Kaplinsky, I believe you had a question.

MR. KAPLINSKY: Yeah. First of all, I guess I figured out a potential new career for myself. I wonder what the networks would think about Arbitrator Kaplinsky? Do you think that might fly? Paul, do you like that idea?

MR. BLAND: Yes.

MR. KAPLINSKY: I know that we're not supposed to deal with bias issues until later today, but I think what cannot go unresponded to is one comment that Paul made. He made the statement that the NAF had a deal with the credit card companies to funnel all the cases in California, some 4,000 cases to two dozen arbitrators. I would challenge him not now, but in the afternoon to show me evidence of that kind of agreement, not now.

MR. BLAND: I said they apparently acted as if they had a deal. I have no knowledge of any deal. Can I retract that? That was a misstatement.

MR. KAPLINSKY: Yeah, I think you should.

MR. BLAND: Because they acted like they had a deal, but I have no idea if they actually had a deal.

MR. KAPLINSKY: The next question raised by Chris -- or not a question, but an issue, she talked about excessive fees, you know, additional late fees, additional interest being tacked on to the credit card bills. Whether or not that was permissible is a question of what's in the credit card agreement or whatever other consumer loan contract we're talking about and what is permitted under federal and state law.

So you don't know whether or not there has been an inappropriate tacking on of fees and late fees unless you try to analyze the particular credit card unpaid debt, but I would say that's nothing unique to arbitration. You heard yesterday, the panel yesterday talked about that same problem. Okay. So that's not an arbitration-specific issue.

The question -- the next issue, you heard it from Paul, you heard it from Chris, and I think you heard it from Ray, is consumers when they went to a lawyer who had been -- a demand to arbitrate had been filed against them, they said they didn't know they were a party to an arbitration agreement. They were shocked to find that out.

Well, I would submit to you that I think that is a post hoc rationalization. Once they've gone to a lawyer -- the problem is most plaintiff's lawyers don't

want to be in arbitration. They want to be in court. They're more comfortable in court than they are in arbitration. I think they feel they can accomplish more in a court, not just for their client maybe, but for perhaps also their self. They may be able to make more money by representing somebody in court, rather than in arbitration.

The data that's out there, to the extent it exists, show that consumers are aware of the fact that arbitration today is rather ubiquitous, particularly among the credit card industry. It's been going on now for 10 years. It's been on the front page of the newspapers. All the major media outlets have reported about arbitration.

My goodness, when the NAF went out of business as a result of a lawsuit filed by the Minnesota AG, that was huge news. It was reported by all the newspapers. It was all over the Internet. It was on the radio. It was on TV. And to say that consumers have no clue about what arbitration means is absolute nonsense. It just isn't true.

Now, if you --

MS. MURPHY: I'm going to have to interrupt you with a question.

MR. KAPLINSKY: Yes.

MS. MURPHY: The day is young, though. We're

going to have time to get into it.

We have a question that is addressing what we had discussed previously about -- and I think I asked Mr. Bland about it, that practically, what we can do to make sure we notify consumers that what they receive adequately conveys what arbitration is?

Specifically, we have a question that asks, Why do you assume that consumers that owe debts that go through the arbitration process have an eighth-grade education level? I think what this question is asking is that how -- we are a bunch of lawyers, so how do we ensure that consumers who may be receiving an arbitration notice are aware of what that means, if anyone wants to take that one on.

MR. KAPLINSKY: I'd be happy to just comment on it very briefly. I would support the idea of when a notice goes out, the demand for arbitration, that there be a clear one-page disclosure in simple interest that -- not simple interest -- that describes it in a way that an eighth-grader can understand what it means now to have been named in an arbitration proceeding, that this is the same thing or the equivalent of being sued in court, and you should go see a lawyer. This is serious business; and if you do nothing about it, a judgment will be entered against you, and it might result in a garnishment of your bank account or a

garnishment of your wages, et cetera, et cetera. I think all that can be done in one page.

MR. CANTER: Can I just say one thing? It is written, and it should be written in simple language. Let's not have the same person who wrote the 16-92(g) notice write that notice.

MR. KAPLINSKY: Agreed.

MS. MURPHY: Mr. Bland?

MR. BLAND: I think I was the one who used the eighth-grade figure. I'm not sure what the actual education level is. I know that in highly -- I've hired readability experts to look at clauses and look at some of the unconscionability challenges, and I've had people in a payday lending setting say that the payday lending companies in their advertisements, their website and so forth, they communicate at an eighth-grade level there, although the arbitration clause is written for Yale PhDs, but we had a demographer in a case say that the eighth grade was sort of the target level of communicating to consumers.

My guess is that credit card borrowers probably tend towards a higher degree of education, but I think if it's something that you think is important that a lot of people should understand -- I do think that, for example, that the FDA drug interactions, they have a formula where they came at a certain grade level

because it's really important that people not take two drugs that are going to interact badly and it's going to cause someone to get sick or crash a car. And I think that they use something close to eighth grade. I doubt it's over 10th grade, for example.

MS. MURPHY: Okay. We probably have about two minutes left, one last question from the audience. What has the industry done, if anything, to educate the public on what arbitration is? This is a topic that came up yesterday throughout, the importance of more education.

Anyone?

MR. NAIMARK: The industry being arbitration?

MS. MURPHY: Well, I'll just broaden that to what has anyone done to educate, be it industry, consumer advocates? What's being done to educate consumers about arbitration? Other than Judge Kaplinsky's idea for the show.

MR. KAPLINSKY: Arbitrator.

MR. DRAHOZAL: On that point, Judge Judy actually is an arbitrator as a legal matter, so maybe that is kind of a moderator. There are cases on point. I'm not just making this up, and I know Alan was being facetious in trying to promote an alternate career, but maybe there's --

MR. KAPLINSKY: I'm getting close to

retirement.

MR. DRAHOZAL: There you go. To give people some idea of what the forum of arbitration is, and I don't know if that can be useful or not.

MR. NAIMARK: I like Judge Judy, but I'm not sure that's the model that we're going to promote.

MR. DRAHOZAL: Fair enough. There are many reasons not to.

MS. MURPHY: Okay. I need a short one-minute answer about what's out there for consumers.

MR. BLAND: I think the consumer advocacy community spends a ton of time trying to interest the mainstream media to talk and write about this and maybe a ridiculous -- I spend a ridiculous number of hours trying to get reporters to write about it and get pieces on the networks and so forth. I'm happy that Alan feels like it's been so successful and everyone in America knows.

There has been hundreds of sources that have written, but I just don't think that the level of penetration in the consumer consciousness is -- Alan and I could not disagree more about the extent to which it's been successful. I think that nearly everybody who represents consumer advocates or consumers think that is probably one if not -- it's one of the five biggest problems facing consumer rights. I've been

trying to interest the media in it, but it's a very hard sell a lot of times.

MS. JACKSON: I'd like to speak for the State of Indiana where I've been involved on several task forces to try to educate consumers, mainly with the focus on mortgage foreclosures and predatory lending practices.

I can say arbitration hasn't even really hit the radar, and as a recent graduate of law school, this is my second career, so this is only my fourth year of practicing law, I can tell you that most of my fellow classmates, most college-educated people, they really don't know what arbitration is. It hasn't hit the radar in any substantive form.

There really isn't that much media focused on it, and, of course, we as consumer lawyers and industry lawyers, of course, we're paying attention to that, but everybody else is on, you know, American Idol and Entertainment Tonight. They're not watching, you know, hard-core news for what arbitration is, and if it comes on, they get their clicker and change the channel.

So I think there's a huge effort that has to be made to educate the general public, and I mean, I'll go even further and say educated people. I mean, people with college degrees don't understand that when they have a credit card, they have given up their right to

go to court and present their claims there, that they are locked into a private arbitrator and, you know, that's just the way it is. They don't know. People just do not know irregardless of their education level.

MS. MURPHY: Thank you very much. I think this has been very helpful and very informative.

I think we have all earned a break. You should be back here in 15 minutes, and we're going to have a discussion of choice of provider, location, and role of consumer choice.

(A brief recess was taken.)

CHOICE OF PROVIDER, CHOICE OF LOCATION, AND ROLE OF CONSUMER CHOICE

MS. BUSH: Thank you for coming back, everybody. My name is Julie Bush, and I'm going to be moderating this next panel, which has to do with choice of provider, choice of location, and generally the role of consumer choice in arbitration.

First, one housekeeping note, I have been

informed by the camera crews that people putting their documents vertically cause a problem with focusing on people's faces, so I'd like to ask instead for a hand raise during this panel, if that will work for people.

To start off, I want to ask to what extent do consumers exercise meaningful choice as to whether their debt collection disputes will be subject to arbitration and whether the amount of choice they exercise is sufficient?

Yes?

MR. KAPLINSKY: Julie, a couple of points to be made here. Number 1, the AAA consumer dispute process protocol has a requirement that a company designating AAA to administer consumer arbitrations must include in its arbitration agreement a small claims carve-out provision; and by that I mean language giving the consumer the right, if he or she wants to exercise that right, to elect not to allow the claim against him or her, the debt collection claim, to be heard in an arbitration in front of AAA.

Now, despite the fact that AAA had that, and I don't know off the top of my head whether the NAF had a similar provision or whether or not JAMS has a similar requirement, I think if you looked at most of the arbitration agreements that are drafted by credit card issuers, other major providers of consumer financial

services, cell phone providers, cable TV providers, they have that kind of a carve-out included.

Now, that raises the question: How many consumers are aware of that? I don't know. If they read -- you can't force the consumer to read their arbitration agreement. They don't read anything. Consumers don't read anything in the credit card agreement.

But if they care to read it, they would realize that there is that kind of a carve-out, and perhaps one of the things -- we talked during the last panel about the idea of making sure that the consumer who has become a defendant in an arbitration proceeding, or a respondent, that they're aware of what it involves and what rights they have and what ramifications could result if they ignore the demand for arbitration.

That notice probably ought to contain a clear disclosure that if you don't want to arbitrate this debt, you've got the right to have it heard in small claims court, and you've got to do the following in order to take advantage of that.

The other point I want to make is the question of whether or not consumers have any choice in entering into the arbitration agreement to begin with, and I would say, by and large, it's not a provision that is negotiated. It's like most of the other things that

are in a credit card agreement or a mortgage loan. They aren't things that the consumer can negotiate, and most consumers wouldn't want to negotiate them. You'd have to be a very rare consumer who would sit down with their bank and try to, you know, say, Gee, I don't like the default provision in my credit card agreement. Would you take that out?

However, an increasing number of credit card issuers and other companies give the consumer an unfettered, unconditional right to opt out or reject the arbitration provision in their credit card agreement if they do so within a period of time, anywhere from I've seen 15 days up to as long as 60 days to exercise that right.

And with respect to my clients, and a lot of them have been doing that for years, I have been counseling them to do that because I think, you know, it's the right thing to do; but the consumer, if they really don't want to arbitrate, let them exercise that right to get out of it. And, of course, if you're going to give the consumer that right, you've got to disclose that right, and it's got to be disclosed very prominently.

Now, no guarantee that the consumer is going to read it. Sometimes it doesn't matter whether it's in 50-point bold-face type, consumers -- many of them

aren't going to read anything that's put in front of them. However, I think you can try, you can do things by drafting your credit card agreement or any other kind of a consumer contract in a way to try to bring attention to that opt-out right if that opt-out right is provided.

MS. BUSH: Mr. Frank?

MR. FRANK: A few things. First of all, some of the research we've talked a lot about is, do people who get consumer loans know they have an arbitration clause, and the evidence is that the vast majority of them do not.

And credit card companies, it's -- we've also done a lot of research on other credit card terms, and believe me, most cardholders do not understand much simpler and much more prominent things than that, things like payment allocation under 6 percent, I don't know if they understand that, and that's something that's disclosed much more prominently, and it's easier to understand in a lot of ways; but people do not understand these disclosures, and they're not aware of them, and actually we know that.

The credit card companies, they make a choice when they create their agreements. There are things they want to have you see, and there's things they don't want you to notice necessarily; and clearly the

way the arbitration is disclosed, it's disclosed in a manner that definitely the case is it's not something that the company wishes you to be focused on. It's not surprising they don't want to focus your attention, but they are going to be focusing your attention on where they want it to be focused.

So if they did want to make this clear, they very definitely could, so they're making a choice. It's not a matter of consumers are too bored or too stupid to understand this. True, the detailed language of the arbitration clause might be difficult, but it would be very easy to put in a disclosure that this is subject to an arbitration clause which means this in simple language, but that's not done.

Speaking to Mr. Kaplinsky's point about the opt-out clause, I have seen those, but I have yet to see a prominent one in any -- written by any credit card company.

MR. KAPLINSKY: You have never seen what? I couldn't hear you.

MR. FRANK: A prominently disclosed.

MR. KAPLINSKY: Oh, prominent, I put it right in the heading. On the front page, the very top of the loan agreement, I put in there, This agreement is subject to an arbitration provision, and this means that if you have a dispute with the creditor, you're

going to have to resolve that dispute in arbitration and not in court. This could have a significant impact on your rights; and if you don't want to be subject to arbitration, you have the right to reject it if you act promptly. See paragraph whatever, you know, wherever we have the opt-out right.

MS. BUSH: Mr. Frank?

MR. FRANK: Yeah, I wanted to get -- in credit card payments?

MR. KAPLINSKY: Any contract provision.

MR. FRANK: I'll just say, you know what, I believe that that's true, but I have looked at a lot of credit card agreements and a lot of credit card mailings, and I have yet to see a prominent disclosure of terms and conditions about that, but I just wanted to make a couple other points.

One thing that was brought up earlier is that people will agree, and I think that this is true, people if they had a choice between a slightly -- let's say, a 19.9 or a 19.6 interest rate and an arbitration clause or not, a lot of consumers might choose the lower interest rate. So it really begs the question of what is the meaning of informed consent, and that's because it's not just awareness -- actually, let me take a step back.

Right now consumers don't have a choice. It's

in pretty much every agreement, so even if you did shop, there really wouldn't be a point in a lot of types of loans to shop them because there wouldn't be an option, unless you go on to certain credit offers or something else.

But this idea of what is informed consent is important. I think it's one thing to say -- there's a lot of behavioral and economic research on what people do, but something like a credit card offer has so many different terms and conditions involved, people tend to focus basically on a couple of key variables, and it might be the most prominent thing is a short-term rate, then a long-term rate, and then an annual fee. There's only so many things that a consumer can focus on at once.

So weighing 20 interventions, which is really literally the case of credit cards or more, it's really quite difficult. So it's true that they might not -- they might discount, and especially when it's contingent that it's further discounted. When something -- this might take place later. This might have an effect later. That becomes especially hard for consumers to focus on something and not just for a consumer to focus on what might occur and not focus on what they know will occur.

MS. BUSH: I'm sorry. I was just going to sum

up. So you're saying that that takes away from the consumer's ability to choose?

MR. FRANK: I think, yeah, I mean, the difference between knowing and the consumer seeing language that says there is an arbitration clause and having a more detailed disclosure as to what that means. How would that affect you? What kind of situation -- and even the level of detail of maybe 94 percent of the cases in a certain scenario will be won by the firm. You know, statistics, that kind of information needs to be out there in a public way.

MS. BUSH: Okay. I'm sorry. Ms. Jackson is next and then Mr. Canter.

MS. JACKSON: You know, this gets into what you were talking about informed choice, and I don't have to even just go to my clients, I can just go to my own credit cards and my own bank.

I could not find a bank that would let me open up a client trust account and/or an operating account with a small business without agreeing to an arbitration clause, and so these contracts -- there really isn't any choice because almost every consumer contract has them in there. So it's not like people have the choice. You want a phone, you're going to get arbitration. You want a credit card, you're going to get an arbitration clause. There really isn't any

meaningful way to negotiate that away.

And the other thing that I'd like to comment on was with Mr. Kaplinsky saying that, well -- is that, you know, people that want credit cards really don't, you know, want to negotiate any of these provisions anyway.

Well, yeah, I think they would. I think consumers would like to be able to negotiate if I miss my payment once, my interest rate doesn't automatically go up to 30 percent. You know, I think I should be able to do that maybe twice. I should be able to do such a thing at 3:00 in the afternoon. So there's a lot of these small little provisions I think consumers --

MR. KAPLINSKY: You're talking about after they were going into default.

MS. JACKSON: No, I'm talking about just getting a credit card.

MR. KAPLINSKY: Well, I'd like to find those consumers who you have identified.

MS. JACKSON: We give them no choice. We give them no choice. Right now they have no choice. Credit card contracts are extremely difficult to understand. I have difficulty reading them, and I've been trained as a lawyer. I mean, I have to go through it piece by piece and break it apart.

And then the other issue is, do I want to choose a lower interest rate or an arbitration, to kind of say that that is a negotiated term between the borrower or the creditor is kind of false because guess what, the credit card company can change its interest rate at any time for any reason. So the fact that you might have like negotiated it for the arbitration clause because you got a lesser rate interest, that doesn't mean next month they're not going to raise the rate 12, 14, 15 percent.

So what I see in my own personal experience and what I do with my consumers that come to me is that there isn't really any choice, and I don't think anybody even in this audience, which is going to be a pretty educated crowd, can say that they read their stuffers that are in the bill.

One more point that you had made -- so you get your bill, and you know it's due at the end of the month, and in it unbeknownst to you is a little stuffer that says you have 15 days to opt out of this clause. Well, heck, I might not even open that until it's time for the due date. So there are very many ways that the consumers are not really involved in negotiating the terms, and they're just kind of stuck with these mandatory arbitration clauses.

MS. BUSH: Thank you.

Mr. Canter?

MR. CANTER: Intuitively, I believe that people that receive credit cards don't read what's in them. I know personally I have searched the Maryland Judiciary Case Search hundreds of times. Each time I go in there, I have to check that I agree to the terms. I didn't read the terms, but I wanted to find out what was happening in the docket.

So I had what you may consider a little data or a little bit more that was sort of off the wall in terms of how can you let people know they have choices, if they have any? How can you let them know they can opt out? Any time you get a credit card or a renewal, you can't use it until you make a telephone call and activate the card.

Now, credit card companies, you know, Alan's clients or my clients, some of my clients, too, this might be heresy, but they do it because security, fraud prevention, and they also have the opportunity to sell you another product. That's the enterprise. That's the American way. That's the way it should be.

But if you have to call to activate your card, that's a perfect time for disclosures to be made. The person has to listen. They can't activate the card until they have been provided certain information, and it says if you want to have information on opting out,

dial 1, and we will send it to you; or if you want to opt out right now, dial 2.

Now, I'm not suggesting that our lenders will do that, but what I am suggesting is there should be and there can easily be some form of notice, and that would take 60, maybe 120 seconds, that when you call to activate, you're given certain basic information. You can't ignore that, like ignoring the bill stuffers, because if you don't listen, you won't be able to use your credit card.

MS. BUSH: Mr. Johnson?

MR. JOHNSON: Well, there's some areas where disclosures to consumers will help, for example, like Paul was discussing. I think this is an area where disclosure to a consumer is not going to have any effect whatsoever.

I agree that consumers are not going to negotiate this. I agree that -- or I believe that if a consumer does negotiate it or calls in and opts out, six years later, seven years later when the debt buyer or even when the credit card company gets a local attorney in Iowa or California or wherever they're doing it, and they file a lawsuit, they're going to go to their drawer or their briefcase, and they're going to pull out, Oh, this is a Chase card. Oh, let's pull out the Chase arbitration agreement and put it in.

I don't think there's going to be any record kept that it really makes any difference whether the consumer opted out. I think when they go ahead and file the arbitration, we're going to have the same problem with service and everything else that we've seen.

And I know that the purpose of this forum is to identify some problems and some ways that we can change the system, but the system doesn't work. It simply doesn't work. Pre-dispute consumer arbitration simply doesn't work.

And I'm going to use this opportunity, when we're talking about choice of provider and choices and choices that the consumers make, there is no choice. I think at one point it was either Paul or somebody else mentioned that a couple of years ago that it would be virtually malpractice for any attorney like Mr. Kaplinsky or somebody not to advise their client to stick an arbitration clause in their contract.

MR. BLAND: It was Alan who said that.

MR. JOHNSON: Oh, Alan said that. Okay.

MR. BLAND: There was a famous ABA Journal or a Business Law article about that, but I didn't say that.

MR. JOHNSON: I knew I had heard it or read it someplace, but anyway --

MR. KAPLINSKY: And I'll be happy to explain

that at the appropriate time.

MR. JOHNSON: I actually would -- I actually agree with Alan. I think that from Alan's perspective that it would be because arbitration is so favorable to the creditors, and I think that -- just one last point and then I think I'll be quiet on this, but I think all of this has to be viewed in the context of, well, this is an area where we've got the consumer, this is an area in arbitration, and we've got them here, and we've got them here, and we've got them here.

All of this combines together, from the stuff that we had yesterday and what's going on, and there are real consequences to real people for all of this. We talked about people who owe the debt, and, you know, they owe it. They should pay it.

I agree with the comment that people sometimes -- the stupid thing that they did is they were dumb enough to get laid off from their job. I have a client who was, quote, dumb enough to get breast cancer. They're living on $1,000 or less and Social Security. They were dumb enough to have their car break down. They can't afford to do it.

As far as in the area -- I'm just going to say this. I know it's off point a little bit, but in the area of consumer education, we talked about we need to educate these consumers. We need to educate these

consumers. I have a substantial number of clients who live on less than $1,000 a month who get Social Security disability and have for 10 or 15 years who could educate everyone in this room on how to budget their money and how to do it. They're very good at it.

But anyway, the bottom line is, my clients don't have three lobbyists for every member of Congress. If they had three lobbyists for every member of Congress, they wouldn't owe this money, but they do owe the money.

And I agree with the gentleman over here, the law is the law, and that's what we have to deal with, but we have a stacked system here and from how they got into this debt in the first place, and it goes all the way through the arbitration process and all the way through the collection process; and until Congress does something about it and as long as we have the fundamental problems with consumer arbitration, what we're going to be -- NAF is gone, I believe. There's still some lingering problems with that, but another NAF is going to emerge.

AAA is 10 times better than NAF, maybe 100 times better than NAF, but AAA, if you think that you're going to get these consumer arbitrations in the future, you're not, and I'll tell you why you're not; because another NAF is going to emerge, and they're

going to put those things in those credit cards, and we're going to have a race to the lowest common denominator, and that's just the way it's going to end up.

So getting back to disclosure, I don't think disclosure is going to work. It's a more fundamental problem in the entire system.

MR. NAIMARK: You may be right, but if we're all successful in establishing standards and provide actual safeguards for all parties in the process, and we get more people interested in buying, it may, in fact, block that kind of a development.

MR. JOHNSON: I hope you're right.

MR. KAPLINSKY: I can tell you now that my clients are not going to be interested in putting in their arbitration provisions under the section dealing with designation of the arbitrator a fly-by-night arbitration company. They won't do it. They're not interested in doing that. They're not looking to take advantage of consumers. They're not looking for an upper hand.

The whole point of arbitration to begin with was essentially to level the playing field for my clients who could not get a fair shake in court. That was the reason behind it, and I know, Julie, you look like you don't want me to give you the history here,

but it was teed off -- it did get teed off by Ray, you know, who came out and said, you know, we ought to be talking about whether or not arbitration ought to be banned, and if that is an issue on the table either now or this afternoon, I want an opportunity to respond to that because I think that that is really wrongheaded.

MS. BUSH: Okay. I'd like to remind the participants to please raise your hands before speaking, so we can call on people in an orderly way. Thank you.

I'm going to call on Mr. Bland followed by Professor Sorkin, but first, I just want to point out that with the exception of the carve-out provision in AAA, we've been mostly talking about the moment that the consumer signs the original contract for a post -- excuse me, far in advance of when they have the actual dispute that they might bring up in arbitration, and I'd like to ask whether that is the important, relevant moment of consumer choice or whether there are other moments where it makes sense to talk about consumer choice as well.

MR. BLAND: First of all, with respect to the small claims carve-out, which would come at the second point that you identified after the dispute has arisen, the way that it has worked in debt collection cases is that when a case is filed in front of the NAF, which it

was doing 99 or whatever percent of the debt collection cases, it was not -- it was not a defense for a consumer to come in and say, Oh, no, we'd actually rather be in small claims court. That was off the table.

I think that the way that carve-out -- there was a carve-out that was written in the clauses where maybe NAF would say something like, you know, the party initiating the lawsuit can choose to bring the case in small claims court, but it's not a defense. I have never, after watching a ton of litigation, have I ever seen someone get out of a consumer arbitration by saying it's small claims. And to the extent that that's a choice in the AAA, I think that the clause -- I think it's set up in terms of the initiator. I don't think it's a defense.

MR. NAIMARK: It's actually either party.

MR. BLAND: Okay. Well, if this is a party, then, that may explain why AAA wasn't getting any of the debt collection defense cases, but I have not seen that come up as a practical issue ever.

With respect to the opt-out issue, let's just be clear. Let's just have like a moment of honesty entering into the conversation for a second. A lot of times it's void for litigation purposes. After some of the courts, the California Supreme Court in the

Discover Bank case started striking down the class action bans that were embedded in arbitration clauses, then all of a sudden banks started looking for ways to knock out the procedural unconscionability part of the litigation and thought that it ought to provide them with a better way of defending a class action case.

So the opt out came from a place of trying to enforce class action bans and then became a bunch of pretty words that were attached trying to make it seem like this was, you know, a choice that goes back to Thomas Jefferson kind of thing.

The opt out -- because people do not really read these things at the beginning because of the way -- I mean, I don't have enough data to talk about the way it's presented, but the fact is, that only a very, very tiny percentage of people opted out; and in talking to literally hundreds of consumers about this, I have yet to meet a consumer who knew that they had an opt-out provision and missed it. Okay. That person has not yet come up in a very large sample of talking to actual human beings out there. I think the number of people who are aware of opt out is tiny.

The opt out -- in practical terms, in terms of the real world, the opt out is not a meaningful choice. The opt out in practical meaningful terms is a joke. The purpose of it is to trick the court into thinking

that something is not procedurally unconscionable. Okay.

Now, whether it works or not in court, it's something that we have actually been winning more cases on that recently. Fewer courts have been tricked by this, but that's what the opt out is. Let's not all, you know, get all misty-eyed about that incredible -- you know, the good-heartedness of the credit card companies in giving the opt out. Let's just call things what they are.

Do people have a choice? Here's the thing about choice once a dispute comes up. There was a moment there, there was a moment there around 2002, and I'd like to think it's connected to a case that we won in the West Virginia Supreme Court called Topping versus Ameritech where they threw out the NAF clause and said it's a bad deal to let the company who writes the arbitration clause -- in this case a predatory lending case -- that the predatory lender write a clause that picks one company that has an incentive to favor them.

So after the Toppings case, a whole bunch of bill stuffers went out in credit cards, and most of the credit card issuers in America went -- they said, you've got a choice if you're a consumer of AAA, JAMS or NAF. So for like a year-and-a-half there, I felt

like I had done something good and like maybe my life mattered. Okay.

Then what happened was the NAF jacked up its advertising campaign aimed at lenders and said, You really should not be ever sending a case to AAA because AAA has the following provisions. It's like, you know, if a state law would say that a class action ban is unconscionable, AAA will actually allow a class action arbitration. You know, there's some cases where AAA will allow discovery, and NAF allows little or no discovery. They were advertising and going negative on AAA to get rid of them.

Then something happened that was great for the NAF lovers in the world, which is that JAMS committed heresy for about five months, and JAMS said that a ban of class action was inappropriate in their view. They would not administer a case on which there was a class action ban and they were going to arbitration.

After that, Alan and some other people did public speeches in which they said everyone should meet and knock JAMS out. All the arbitration clauses in the lending industry were rewritten to throw JAMS out very quickly.

Now, JAMS knuckled under by about the following February, and JAMS is -- you know, JAMS' moment of courage there was like very brief. It was like maybe

300 seconds. It was like courage, and then it was dead. Right. JAMS was out of all the clauses, but by that time, it was too late, and they couldn't get it back in. AAA started disappearing from clauses thereafter, and it dwindled suddenly back down to NAF.

What happened was, as Ray said, there was a race to the bottom. That's right. That's what happened. Consumers lost the choices. There's not that many clauses anymore that give people several different arbitration providers, and I think now after they got burned so badly, I think you're starting to see some clauses that are going to show up with some choices again, but it's pretty narrow. It's pretty narrow. If you make the change on that, you're going to make a certain guy mad, and you disappear from tons of credit card contracts. Right.

So it's something where the people who are writing the contracts are making the choices, and consumers' choices at that stage, you know, narrow down enormously to a very small body. To the extent nearly all the credit card companies have virtually identical agreements, to the extent the consumer choice at the second stage that you identify really is a very, very small thing. It's a very small thing.

The last thing I want to say is that this idea that we're never going to see another bad actor in this

area because the banks and the credit card companies really want to see -- they don't want to see a fly-by-night company, that is revisionist history in the extreme. Okay.

10 years ago -- 10 years ago, there was evidence in a range of different settings that the NAF was operating a system that was abusive and unfair to consumers in a variety of settings. The number of anecdotes and the number of advertisements that they were sending that clearly sided with one side and did not act in a mutual way were all over the place.

I have been giving public speeches, and I've talked to banks and people who are lawyers in the banks and people that are inside the banks. It's been way out there in all sorts of settings, evidence of abuse of that company, and you know what, a blind eye was turned to that. No one cared. They were delivering the goods. They were giving people in the credit card industry what they wanted.

So to say, Well, you know, we don't need -- you know, now that the bad actor is gone, and we're so surprised to find out there were bad actors until the Minnesota Attorney General showed up, you know, who could have known that these guys were just always giving us what we wanted? They did know they were always getting what they wanted. They made a conscious

decision to dump JAMS, and then a few years later by and large the industry dumped AAA because they were getting what they wanted.

The idea that no one else is going to show up with a wink and a nod and some pretty protocols and so forth to devise a system which again delivers the goods of basically a set system, a guaranteed system to people, and that that is to be protected against -- Alan is not going to let any of his clients sign on with a fly-by-night company, nonsense. I don't buy that for a minute. I don't think anybody -- I don't think any serious person should think, Oh, our problems are solved because the parties who are writing the contracts can be trusted to always write fair contracts from now on. I don't believe it.

MS. BUSH: Thank you.

Mr. Sorkin?

MR. SORKIN: Let me backtrack just a bit. I want to take issue to some extent with the point that Ron Canter made earlier. I don't think it's easy to provide meaningful disclosure and meaningful choice. I think there's a real contest to it.

If we're talking just about notice, I alluded earlier to disclosures made in credit card applications. It's very hard to disclose even a limited amount of information in a way that's

meaningful, and I think, as Josh Frank pointed out, when some of the information is contingent on an unlikely future event, it's even harder to disclose it in a way that enables a meaningful choice.

What we do for student loans, I think is a pretty good example. If a student is getting federally guaranteed student loans, they have to do an online tutorial every year educating them about what the loan means, the fact they're going to be required to pay it back and so on, and then they have to actually take a test online. This is what the federal regulations require, and that's just a way to give notice. We rarely put people through hoops like that in any other context. But I suspect even that doesn't give the kind of notice and give the kind of choice that we'd like to be able to do. So it's quite difficult to do.

If we're looking at whether either in the pre-dispute context or otherwise we're giving consumers a meaningful choice about arbitration, I think what we really ought to do is step back a moment and look at what consumers would do in a post-dispute context. Would consumers, assuming they hadn't already committed themselves to arbitration, voluntarily agree to arbitration once the dispute has arisen?

And I think relatively few people in this room would even try to claim that most consumers would

voluntarily choose arbitration over litigation once the dispute has arisen, and they get a letter from the creditor saying, We're about to sue you over this. Would you like to go to arbitration before a private group, the National Arbitration Forum or whoever that we've designated and waive your right to appear in court? I don't think many consumers would agree to that, and the fact that consumers are agreeing to it legally at least in the pre-dispute context suggests that they're not making a voluntary choice there.

I think the goal ought to be to make arbitration appealing enough so that many or most consumers would choose it freely in a post-dispute context, and once we've accomplished that, then we can talk about how do we do it more efficiently? Can we do it in a pre-dispute context? How do we communicate and get that choice for our consumers?

MS. BUSH: Thank you.

Okay. Mr. Kaplinsky?

MR. KAPLINSKY: Yeah. Let me first respond to Paul, and then I'd like to respond to the idea that David has put on the table.

First of all, with respect to the small claims carve-out language, the ones that I draft, Paul, are not drafted in the manner that you indicated. They conform with the AAA protocol. In fact, they are even

more consumer-friendly than what the protocol technically requires. The protocol requires that either party be given the right to go to small claims court. The provisions that I draft give only the consumer the right to elect to go to a small claims court. It does not give the company that right. That is number 1.

MR. BLAND: Just let me understand --

MR. KAPLINSKY: Let me finish, Paul. I didn't interrupt you. I don't want you to interrupt me. You can respond later when I'm done.

On the opt-out issue, Paul called it a ploy for litigation. Well, look, the unconscionability doctrine -- there is no secret that the unconscionability doctrine is the common law doctrine that exists in a lot of states, and there are two components of unconscionability. There is procedural unconscionability, and there is substantive unconscionability.

In a lot of states, in deciding whether or not a contract is unconscionable and therefore invalid, there's got to be some of each. There's got to be some degree of procedural unconscionability as well as substantive unconscionability. That's not always the case, as I'm sure Paul will point out, but in most states, that's the law.

And the thinking behind that is that if you have a contract that might be considered substantively unconscionable, if you're going out of the way with respect to an opt out, you are basically taking away from the fact that it's no longer an adhesion contract. It's no longer a take it or leave it contract. You're giving the consumer free choice to decide whether or not he or she wants to be subject to an arbitration provision.

Paul makes the point that only a small percentage of people exercise that right, and I don't disagree with that, but I would suggest to you that's not because they are completely unaware of it or if they were unaware of it, they would want to opt out. I suggest to you it's because they prefer arbitration over courts.

There are empirical studies that have been done. Paul and other consumer advocates have been focusing on anecdote after anecdote, but they have no empirical data, and that's why I submitted for the record in this case an outline called "Use of Pre-dispute Arbitration Agreements by Consumer Financial Services Providers," and contained in that document are citations for all the empirical studies that I'm aware of in the consumer area, in the employment area, in the area of customers arbitrating

with securities broker/dealers, and the data all supports what I've just said.

Consumers, employees, customers, and broker/dealers, they like arbitration, and they feel that -- those that have been through the process feel that they have been treated fairly. The only people who don't like arbitration are the -- they're self-appointed advocates like Paul and like other people at this table, who I submit to you are not looking out for the best interests of consumers; rather, they're looking out for the best interests of lawyers, and that's it.

Now, Paul, the Toppings case, you may feel that as a result of the Toppings case that all of a sudden free choice was given to select from other arbitrators under the NAF. You're wrong, Paul. Because almost from the very beginning, and I've been involved in this area of law for about 12 years really, and from the beginning, I urged my clients to give that -- give the cardholder or the customer the choice of selecting from AAA, JAMS, or the NAF.

Now, it's true that at one point I suggested to my clients that they eliminate JAMS. Okay. Why did I do that? Because JAMS essentially usurped the authority of the courts, and Professor Drahozal in his little mini-course this morning on how the FAA works

and how consumer arbitration works made it pretty clear about what issues are supposed to be decided by the courts and what issues are supposed to be decided by the arbitrators.

The ones to be decided by the courts are gateway issues, and they challenge the validity of an arbitration agreement, including a class action waiver is a gateway issue for the court. JAMS should not have been involved in that. AAA got it right right from the beginning. AAA made it clear that they will basically allow someone to engage in class-wide arbitration -- if there is a class action waiver in the arbitration agreement, only if there has been a prior ruling from the court on the validity of the arbitration agreement.

MS. BUSH: Thank you, Mr. Kaplinsky.

Unfortunately, we are running out of time, and there are a few people who wanted to speak. So if there are questions, please bring them to me, but Ms. Jackson, you have a comment?

MS. JACKSON: I'd like to comment, and I've heard this over and over again throughout the last day is that we consumer advocates who represent people don't want this because we can't make money and blah, blah, blah.

Well, the thing that's not been discussed yet is the reason why we can't make money or it's very high

risk for us to take a case in arbitration is because the arbitrator doesn't have to follow the law; and if the arbitrator makes a mistake that goes against the law, I know in my state of Indiana that stands, and there's no appeal process.

So it's very risky as a consumer attorney to take a chance at having a private person decide the case when you know if they make a wrong decision or what you feel is a wrong decision, you have no right to appeal that. In Indiana, if they make a mistake of law -- so if the law says this and they decide they're not going to follow it, unless I can show they deliberately intended not to follow it, and they just made a mistake, I'm screwed, and that stands.

So that is part of the reason why private people who represent attorneys -- who represent the consumers are hesitant to go to arbitration because if somebody makes a mistake, I mean, you can't get it undone.

MS. BUSH: Thank you. I have a list of people who would like to speak, but I'd like to raise the issue of whether there should be changes in law or in industry practice that would change or enhance the degree of consumer choice about arbitration disputes, and why or why not?

And the first person waiting to speak is

Professor Drahozal.

MR. DRAHOZAL: Fortunately, my comments relate to your question anyway, so I'll try to stay on point.

I mean, my main comment is, as David suggested, one possibility is to not allow pre-dispute arbitration clauses at all, to allow choice afterwards.

The effects of that I think will eventually lead to eliminate to a large degree arbitration, and it's not necessarily at least because of any unfairness in the arbitration process. If you look at commercial settings as well, there are studies of international arbitration where you have sophisticated parties on both sides, the vast majority of those arbitrations like the vast majority of consumer arbitrations arise out of pre-dispute clauses.

The reason isn't because of any unfairness in the arbitration process. The reason is because once a dispute arises, parties, attorneys have very different interests than before the dispute arises. If you can get rid of a pre-dispute clause, you're taking a gamble as to what's going to happen afterwards, and, again, it's not limited to the consumer setting. It's not limited to the employment setting. It's also true for the commercial setting, where you don't have a concern about equal bargaining power or information or knowledge and so forth.

So, again, if you have something specific to this context, we need to take into account the downsides, I guess, of making that sort of change which don't necessarily reflect on the fairness of the arbitration process.

MS. BUSH: Mr. Frank?

MR. FRANK: Yeah. I'll address what you asked right there, too. And to clarify what I said earlier, I do think -- I was explaining kind of the difficulty of consumer choosing. I think that as a conclusion, generally, there really can't be informed choice in a mandatory arbitration situation.

I wanted to address just real fast this idea of satisfaction in consumer arbitration. We have on-topic studies about -- that really don't apply to these kind of mandatory consumer arbitrations. There is a study that we did, what consumers would do if they knew they had an arbitration clause, and the answer was clearly that they would try to get out -- or try to not have an arbitration clause if they had a choice. We did do a study about the length of service in debt collection to the address I mentioned.

So I don't think the evidence is -- I think anybody who just recently looks at a case and what would I do and what one already knows, that one would not want an arbitration clause and a mandatory

arbitration clause.

And I think the biggest proof that people don't want it is just the prevalence, the universal prevalence of the mandatory binding arbitration clauses. There may be different interests later, but if arbitration truly is a faster, more efficient, cheaper process that's fair to both parties, why wouldn't arbitration -- why would these companies prefer to have that carve-out afterwards? Because people would not want to do that and would not have agreed to that.

MS. BUSH: Thank you.

Mr. Canter?

MR. CANTER: Yes. I think that there's a need to refine the term "pre-dispute" and "post-dispute" for this reason because we are talking about debt collection. The overwhelming number of consumers who default do not have -- there is no dispute, so to speak, between the consumer and the financial institution; however, the bank has a claim because of the default.

So the dispute conveys some type of challenge. I used the card, and I owe the money. So if we talk pre-claim or post-claim arbitration, I think it's clear that as long as the Federal Arbitration Act allows for client arbitration, that creditors are going to attempt

to justify it and put in mandatory arbitration clauses, and I'm sure the consumer people are going to say -- there's not going to be any agreement. Consumer advocates do not want pre-dispute or pre-claim arbitration.

I mean, I think that was done in the opening remarks. So there's not an agreement on that. There won't be if you talk about those, you know, changes in the law. If Senator Feingold's bill passes, there will not be any pre-dispute or pre-claim arbitration, and our discussion will be moot.

However, if it does not pass, I think that the creditors have the right and will continue to craft agreements that require binding arbitration, and to the extent that the market drives it to the expected -- to bring other businesses in that will do consumer arbitrations, they will continue to exist.

I do note that there was one recent case I just pulled two months ago from California involving AT&T Wireless, a binding arbitration clause, and what the court said is, this was the most favorable one they had seen to consumers. AT&T pays all the fees regardless of who wins the case.

The arbitrator has power to grant statutory and punitive damages and an injunction. A minimum award of 7500 if the arbitrator issues an amount less to the

consumer, but greater than was offered, double the attorney fees to the consumer, customer's exclusive choice of whether arbitration is conducted in-person, telephone, et cetera.

So what I'm suggesting is there are new approaches that can be utilized, but when we talk about, you know, if we're going to have -- if there's going to be consumer arbitration that is productive, if it's post-claim or post-dispute, it will disappear.

MS. BUSH: Thank you.

Does anyone else have a comment on changes to the law or industry practice?

MR. JOHNSON: One of the things that I think is a problem with consumer arbitration, picking up a little bit of what Dave commented on earlier, is I think the groundwork for arbitration simply -- for consumer arbitration simply isn't done yet.

In other words, I was talking to Chris just a little bit in the hall, and he was pointing out that -- you know, I commented that, you know, my issue is I'm with post-dispute arbitration. Post-dispute, you know, if two sides have a problem, and they go and they agree on the arbitrator or the arbitration forum, and you don't have the service problem because these two people are agreeing on it. People aren't defaulting because they don't have any problem with it.

Chris pointed out that there just isn't much of that that goes on, and I'll let Chris speak for himself, and Dave commented a little bit on that. I don't think that there's a system in place that is perceived by attorneys -- and I disagree with the comments from Alan, not just the one that I'm a greedy plaintiff's attorney, but also the one that consumers want this. I question those studies.

I mean, you can talk about studies all you want, and, you know, you see two or three studies that say -- you know, that say arbitration is great. It kind of reminds me of, you know, two or three scientific studies that say in Chicago at two o'clock in the morning, the sun shines, but after about the fifth day that you're out there at two o'clock in the morning and the sun is not shining, you start to question some of the studies.

And these studies, we looked at them and for the one that I believe in the materials that Chris had, to their credit, they point out some of the -- in a good scientific empirical study, they're going to point out what the problems are they're going to study, and this is a very difficult area to study because you can't just categorize wins and losses.

You know, like I mentioned earlier, the NAF arbitration that was a default where we won $750.

Well, was that a win? It certainly didn't feel like it to me considering that any court in Iowa would have given me four or five times that and to my client.

So it's very difficult to come up with empirical studies, and I think the bottom line is that the framework for consumer arbitration, particularly in the debt collection area, simply isn't done. We don't have a model that works, and until that's done, I think it's going to be hard for people who are in this process.

MS. BUSH: I guess I'd like to hypothesize for the moment that there are no envelope stuffers, that people are bound by the contracts at the time they enter into them and wonder what -- whether there is any information that can be provided or whether there is any other way of structuring the contract to give the consumers more legitimate -- excuse me, a more extensive and enhanced degree of choice.

MR. BLAND: I think that -- I think it's very hard to have a disclosure that changes the fundamental -- I think it's very hard, very tricky to have a disclosure that would change the fundamental reality that we're going to have a system where there is a contract that is written by one side to a future dispute, and they're picking the entity that's going to pick the judges.

How do you make a disclosure that makes that reality? And then the decision of those judges is not reviewable, as Chris points out. There's no meaningful judicial review. Legally, wacky decisions judges post will be held, and to find out decisions is next to impossible because it's not a very transparent system.

The sort of disclosure you can make up-front that makes it okay for the stronger party to pick who the judge is, I think is extremely tricky. I've seen a lot of efforts at it, and I haven't seen anything that seems to me to be powerful.

MS. BUSH: So flipping that around, it would be more -- consumers would have more choice, if they had some choice over who the judges were going to be in the arbitration context?

MR. BLAND: I think that if we lived in a world in which the consumers of credit cards or people who get cable TV or rent cars or cell phones or whatever for themselves drafting -- involved in the drafting of contracts, that would be great. I feel like we're clearly in a world in which the company drafts the contract, and they make the decision.

So I don't know -- there's a way that your hypothetical doesn't -- it's so far out for me, it's like saying like what if we were all made of cheese or something. It doesn't seem -- it's not my world.

MS. BUSH: Professor Drahozal?

MR. DRAHOZAL: I mean, certainly there are ways of structuring processes so that the person who -- this is sort of a silly example, but there's actually extensive literature on it, is the one cuts, one chooses. Right. I mean, my kids did it last night. We were having pizza and bread sticks. There was one bread stick left. My son cut it and my daughter chose, and it gave my son the incentive to make it fair because if he cut it off, she would take the bigger piece. That makes sense.

It's a silly example, but actually I can give you literature using those sorts of examples. So perhaps having multiple providers where the drafter picks the providers, and then the consumer chooses among the providers. I don't know if that would work, but I don't think we can per se exclude the possibility that because one side starts the process, it means that inherently it is unfair.

In addition to the fact that the providers themselves are entities, and we'll talk more about those entities as sort of intermediaries in between time. It certainty is not the case that the party drafting the arbitration clause chooses the judge. I mean, that's just incorrect. I mean, if that's the way the system is set up, it's not arbitration, and it's

not enforceable. No one has any problems about that. You've got somewhere in between that.

There may be issues about how they pick, but we want -- I think it's a fair question, and I think it's something we should be thinking about over lunch so we can talk about the procedural stuff this afternoon which is, are there ways to structure a process to prevent -- acknowledging that one party drafts. I mean, that's the world we live in, that somebody is always going to be drafting a form contract that we as consumers can sign.

There's just no way around that without everybody individually negotiating every contract we enter into, which is just not going to happen. So the question is, given those constraints, how are we going to fix it, and, again, I don't have any magic solutions, but I at least think there's some potential in thinking along those lines of how we structure the process.

MS. BUSH: Really fast because we're out of time.

MR. FRANK: Yeah. This is going to be real fast. I think a good example of the way a contract could be structured is what's been done with credit cards with over limit, this concept of opting in. You have to opt in to something. I think that actually is

a better analogy to what Professor Drahozal said about one person designs it and the other person chooses. A real choice would be to choose to accept that clause or not.

MR. KAPLINSKY: Two seconds, Julie.

MS. BUSH: Two seconds because it's time for lunch.

MR. KAPLINSKY: I'll tell you what -- I'll tell you what, I'm willing to opt in on arbitration if Paul and the consumer advocates will agree we can change Rule 23, the class action rule, to make that opt in rather than opt out; and the other thing about opt out, Congress in Gramm-Leach-Bliley clearly decided that if you didn't want to have your personal information shared with other third parties, you could opt out. It's a procedure that is pretty well-established. It's in Rule 23, approved by the U.S. Supreme Court, and Congress has done it.

MS. BUSH: I'd like to thank you all for engaging in some difficult hypotheticals and a very objective discussion. Please have lunch. There are maps outside for where you can have lunch if you don't have one. We'll be back at 1:30. Please show up so we can start promptly at 1:30 because we have a great afternoon program.

(Whereupon, at 12:03 p.m., a lunch recess was

taken.)

AFTERNOON SESSION

(1:34 P.M.)

ARBITRATION PROVIDER PROCEDURES

MS. MURPHY: Thank you very much everyone for actually returning from lunch. We appreciate it. We certainly have more work to do this afternoon.

To start the afternoon session, we are going to be talking about arbitration provider procedures, and to a certain extent, we're going to be talking about issues that we already talked about or are going to talk about.

So what I'd like to do is focus on procedures or protocols that actually have to do with the arbitration proceedings themselves and what goes on there. Of course, to the extent that service of process is an issue, or, you know, anything else that might affect these, we're really talking about what happens in the proceedings to try to get out as much information as possible.

So the question we're going to focus on, and I think Mr. Kaplinsky has touched on it, is that prospectively we might design consumer response systems and a series of protocols which would exist that can help best protect consumers; and to the extent that there are already procedures or protocols out there, and I know we can talk about the Better Business Bureau and various schools that are there, you know, what sort of

changes should there be with respect to those procedures?

So with that, I will open up the mike.

Yes?

MR. KAPLINSKY: Well, first of all, the rules ought to be rules created by the arbitration administrator, and that's how it typically is done. We generally don't follow any federal or state rules of procedure or of evidence. I mean, you could. Theoretically, you could do that, but part of the reason for debt arbitration is to simplify things, so that you're not simply repeating everything that happens in court and putting that into an arbitration setting. That's not number 1.

In terms of protections, I think the AAA was really a leader in providing consumer protections, and I know Richard I'm sure can elaborate on it, but 12 years ago, they adopted a consumer due process protocol after assembling a blue ribbon committee that had a lot of representation from the consumer advocates, from the government. The Federal Trade Commission, I believe was represented on that committee, along with Consumers Union and perhaps the Consumer Federation of America.

And they went into the -- they undertook the task of developing a protocol by putting behind them whatever concerns they had about arbitration in

general. In other words, I know there were people at this table, perhaps all of the consumer advocates that are at the table today, that if they had their druthers, they'd ban arbitrations altogether, and they felt that way 12 years ago, and nothing has changed.

But assuming that arbitration will continue, that Congress is not going to enact a ban, the question is, Where do we go from there, and I think the idea of developing what's called a supplementary due process protocol tailored to deal with debt collection issues, I think that's the right way to go.

In terms of the kinds of things that I think are already covered in the AAA protocol, and if they're not, they should be, but I'm pretty sure they are, and the issue of reasonable cost. Well, there's no question in my mind that you're not going to get an arbitration agreement enforced in court if you're going to saddle the consumer with extraordinary arbitration administrative fees and arbitrator fees. It just isn't going to fly.

So therefore, when I draft an arbitration provision, I generally provide that the company is going to pay everything. They're going to pay all of the arbitration fees, or sometimes what it will say is, they'll pay all the fees other than what they would pay if the matter were pending in court. So if they -- if

you have to pay $100 as a court filing fee, they would have to bear $100 in arbitration.

In terms of -- the other thing, of course, is that AAA, and I believe JAMS, and the NAF when it existed, had an indigency rule, a rule that provided that if the consumer could not afford to pay their fees, just as is the case in court, they would get -- the fees would be waived by AAA or by the other arbitration administrators.

In terms of location of the arbitration, you know, I think maybe before I got involved in this arbitration business, people would put in their arbitration clauses language saying that the arbitration will take place in Fairbanks, Alaska, I mean, crazy things like that, and, of course, that is just downright stupid because no court would ever enforce that kind of an arbitration clause.

So the arbitration clauses that I draft generally say that the arbitration will take place -- if there is an in-person hearing, it will take place at a location that is convenient to the consumer, and, you know, we've never had a problem with that.

Remedies available or, you know, restricting remedies, and I know, Chris, you made a comment toward the end of the morning session that one of the things you don't like about arbitration is that arbitrators

don't need to follow the law. Well, the AAA protocol, NAF, JAMS requires if you're going to use them as an administrator, they won't administer an arbitration if the agreement does not require the arbitrator to follow the law, i.e., the same law that would apply if the case were pending in court.

And therefore, the kind of situation that you hypothesized really shouldn't exist unless you've got some renegade arbitrator, some crazy arbitrator who is going to say, I don't care what the arbitration agreement says. I don't care what the AAA protocol says. I'm just going to do whatever the heck I please. That could happen, I'm not going to doubt that.

MS. JACKSON: It has happened.

MR. KAPLINSKY: And I'm sure there are arbitrators out there who are like that, but I think that really that is the exception rather than the rule. The quality of the arbitrators, AAA arbitrators, JAMS arbitrators and, yes, even I think most of the NAF arbitrators because I don't believe, and I know that we'll be talking about that issue later today, but my guess is that none of them were aware of the so-called "conflict of interest" that the Minnesota Attorney General uncovered.

But, yes, there will be renegade arbitrators, but if the arbitration agreement states expressly that

the arbitrator must follow the law, then that should be the case. The arbitrator should follow the law.

MS. MURPHY: Mr. Bland?

MR. BLAND: We've already talked about how in the vast majority of debt collection cases, there's going to be defaults. In the vast majority of cases, consumers don't show up. And if what happens is that the party making a claim then gets 100 percent of whatever it asks for and there is no check, once there's a default and the consumer doesn't show up, and they just get whatever they ask for, that is an invitation to abuse, an invitation to cheat and just add on a lot of stuff, an invitation to deception in a lot of cases.

There has been a growth in the debt-buying industry that has been meteoric in the last couple of years. You have people buying debts sometimes several generations down for as little as sometimes two cents on the dollar, and one of the things that we're seeing in a lot of cases that were NAF cases were a debt buyer buys debt where the account has been closed and charged off quite a long time ago, and then they will add additional late fees, and they'll add additional interest. You have interest on interest which is illegal. You have all sorts of things that can be added on.

I think there's a problem if you have a system with no checks. If default means whatever dollar you ask for at the end, then I think we have a problem. And we're also seeing identity theft cases where there is a default, but the person didn't understand what they got and so forth, and it seemed, you know, in the dozens of identity theft cases that really verify the debt count.

So I would like to suggest a couple of things. First, with respect to damages, even in a default, I think the courts are all over the place. There's some courts that are much better than others, but there's several courts and the state supreme courts trying to set out protocol for small claims judges to deal with this; and they're looking for -- even in a default, you're not just supposed to give a party whatever damages they claim. A court should, if it's taking its role seriously, demand some backup information. In the debt collection setting, it seems to me you need a breakdown of damages by time. You need to know when the damages were incurred and when the last payment on the card was.

We've seen an enormous number of cases go through the NAF that were way past the statute of limitations. They're Kimber violations. They're violations of the Fair Debt Collection Practices Act.

No one ever asked when the last payment was, and so as a result, no one ever checked.

It's a very easy thing to find out when its past the statute of limitations. In Delaware, it's three years. If the last payment was made seven or eight years ago -- I worked on a case when the last payment was made nine years ago, and that's a zombie debt. That's dead. It shouldn't be walking around anymore asking what the last date of the payments were. Asking for a breakdown of the damages lets you find out whether there's interest on interest or whether there's junk fees or things like that.

With respect to the formation of the contract, even in the case of default, I still think that there should be at least a few basic things. One is, you need a copy of the actual agreement that supposedly is governing this person.

In every single NAF case I saw, which amounts to many hundreds, it was always the same form agreement, but the thing that was impossible about this is that MBNA Bank changed its agreement all the time, and bills with an MBNA credit card group changed a couple of times a year; right? And then they have affinity cards. You can get Washington Redskins affinity cards that have separate terms or get an AARP card that has separate terms.

I've seen the same agreement for every single person that they're doing claims on, hundreds of thousands of people ultimately, and it's always the same agreement. It's not. It can't be. It can't be the same agreement. There should be an actual agreement.

There should be some obligation on the arbitrator to say, I'm not just going to close my eyes and take whatever piece of crap someone throws in front of me and treat it like it's an actual agreement. So they should be asking for -- they should be asking for some evidence that this is the actual agreement.

What that would require is, for people where they sign -- at some point, there's a bank that's been keeping records. If somebody signs something, there should be a signature that goes with that application, or if it's done -- if it's an agreement that's taken over the Internet -- you know, I've seen cases with Dell. Dell has got -- they capture a screen shot at the time and the place where the person clicks through. They have the time. They have an IP number that came through. No one buys a Dell computer and Dell doesn't have a picture of the moment it happened to prove that somebody is buying it. That would take care of the identity victims.

I'm not saying you have to have a full trial.

I understand default means there's less, but you could come forward with some simple, basic evidence that would wipe away all the concerns of identity theft and wipe away all of the concerns of phony fees, and that has not been done. There are tens of thousands of judges out there, and nothing at all was done to verify that the numbers were real or even they had the right guy or woman.

MS. MURPHY: Mr. Drahozal?

MR. DRAHOZAL: I think those are excellent ideas. Again, it's interesting to me to compare the discussion to yesterday. Exactly these same sorts of concerns came up yesterday. The issues of third-party debt buyers, what the necessary documentation is in a claim in court is something that was talked about at length yesterday. I think there was fruitful movement or truthful discussion between the debt-buying industry and consumer advocates about how best to document those things in court, and the same sort of protocols could apply to arbitration, similarly the evidence that's required in the case of default judgment.

The next phase is a study I've been doing that applies to what was mentioned yesterday is looking at court cases involving new debt collection actions, and there's huge difficulties getting data on cases in state courts, it's hard to find cases, or almost all

the state courts; but the ones we've looked at, frankly, the judges in granting the default awards 100 percent of the principal and interest sought by the debtor in essentially -- virtually every single case.

If it's a problem, I don't think it's a problem of arbitration, and it's something that if there are charges that should not be included, we need to think, again, of cross-venue ways of dealing with these sorts of issues. Hopefully, the discussion yesterday can feed into the discussion today for how we might go about doing that.

MS. MURPHY: Mr. Johnson?

MR. JOHNSON: I have a lot of comments on this issue, but I'm going to try to limit them and work some of them in later because we're going to talk later about actual arbitration -- selection of the arbitrator, or is that something we should cover now?

MS. MURPHY: Yeah, in some of the other topics --

MR. JOHNSON: Okay.

MS. MURPHY: -- but brevity is still always appreciated.

MR. JOHNSON: Okay. Well, I do have a problem with the arbitrator selection, but I'll go through it kind of briefly.

I'll talk later about the arbitrator selection

process. I do not believe -- I don't agree that you can leave these rules to the forum. Certainly, the forum -- and I want to premise my comments by I don't think we should be going, I agree with Alan, the consumer response -- the consumer attorneys don't always agree that we should go into arbitration, but I'll go along and make some comments assuming that we would have to revise the process.

The major problem with the arbitrator selection process, and I'll talk about this later, but one thing I want to point out now is something that NAF did should never ever be allowed. When we talk about selecting an arbitrator, we always -- and through all these conversations with everybody here, we seem to assume that we have one arbitrator. That is not the case at NAF. That is not the case with consumer arbitrations.

If you have a contested consumer arbitration, the discovery is done by a different arbitrator. NAF has arbitrators, or Iowa has got the same one. It's some guy from Texas. I'm from Iowa, and they appoint him to rule on discovery disputes, and what a surprise. I wanted to get some information regarding a bias at Mann Bracken, a lot of this stuff that came out from the Minnesota thing I wanted discovery on. I was denied that discovery. I had no input whatsoever as to

who this arbitrator is. I complained to NAF, and they told me that that's a preliminary matter, and they just appoint the arbitrator. The consumer has no input into that at all.

So I go on the Internet. Gee, I wonder who is assigned to my case. Oh, he's a creditor's rights attorney representing credit card banks. His vita probably looks exactly like Alan's. Again, nothing personal, Alan. You were joking --

MR. KAPLINSKY: I was not on the arbitration panel for Iowa.

MR. JOHNSON: You were joking -- when Alan was joking earlier about Arbitrator, Mr. Kaplinsky, I thought what's the difference? I mean, that's what I get. You can tell from these panels that there's a little bit of a disagreement between the consumers and the people on the other side.

Well, we have -- I have arbitrators who have been people on the other side of my cases. I've got people who I have litigated three or four cases with, and fortunately, I'm really easy to get along with, and so I don't think they penalize me for that, but you don't want the defense attorney deciding your case.

Alan doesn't want an arbitration where Paul Bland is the arbitrator, and we don't want arbitrations where Alan is the arbitrator. It seems like a matter

of basic fairness that just because it's a preliminary matter doesn't mean that that arbitrator isn't making very important decisions, and we should have some input as to who that is, and we should never get stuck with a self-proclaimed creditor's rights attorney as one of our arbitrators.

Another thing that NAF did that should never happen again is we had -- there was a lot of discussion yesterday about getting media or getting the documents to file the claims, and there was a lot of dispute yesterday about whether the debt buyers should actually have that information at the time they file the claim.

Well, NAF and AAA don't have these kinds of rules that I'm talking about, but any -- and I don't mean to abuse you over there at that side of the table, AAA doesn't -- when we get an arbitrator with AAA as the arbitrator, we don't have this other thing; and what NAF would do is, if the -- once the case was filed by the debt buyer, if the consumer files an answer, the debt buyer had a unilateral right to stay that arbitration, and they did. All they'd have to do is file a notice of stay, and that arbitration is stayed.

Well, I have under the rules -- the consumer has 10 days to send something to lift the stay, and the 10 days is the 10 days because they mail it out probably on a Friday or a Saturday, and you've got days

gone, and you get the thing, and you come back from your trip to Chicago, and you get back and realize your 10 days is past, and you can't do anything about it.

But anyway the consumer has 10 days to object to that. If you don't object to that during that 10-day period, that arbitration is stayed, and it just doesn't proceed. The whole purpose of that, and NAF I believe marketed this, NAF marketed this to debt buyers and creditors as something where they should use their forum because they have this ability to stay the proceeding.

The problem for the consumer is, is first off, the stay, they should have this stuff ahead of time. The other problem for the consumer is that when is the stay lifted? When do we go back and start arbitrating again? And many consumers have complained that this thing was stayed, and the next thing you know, I had an arbitration award in the mail. They didn't realize that this had been done over again.

MS. MURPHY: I'm actually going to cut you off before your next point. This is one of our shorter panels, and I want to make sure everyone can pitch in.

Ms. Jackson?

MS. JACKSON: Yes. I just wanted to ask Alan over here, you were saying that the creditors were going to pay the fees and that that would -- AAA, do

they do that? That they were going to go ahead, and if they didn't follow the rules -- you know, they were supposed to follow the rules, but what mechanism would be in place for any kind of review or oversight of that? Are you talking about setting up an appeals panel? You know, your arbitrator didn't follow the rules. I mean, I don't get how that could work, you know, if there's some other layer of review.

MR. KAPLINSKY: Yeah. A lot of -- not all my clients, but a lot of them do put in the arbitration agreements language creating a right to appeal to a panel of three arbitrators within arbitration before you even get to the idea of confirming the award or trying to vacate the award in court, but they create a panel of three arbitrators.

Sometimes the arbitration provision does that without restriction. Other times it will only apply to claims above a certain dollar amount because it's expensive. I mean, if you get three arbitrators involved, you've got to pay all three of them, but that's sort of one feature that is very often included in our arbitration agreement. I'll let Richard respond to that.

MR. NAIMARK: Well, if I can make a few comments here. The consumer due process protocols which were referenced earlier, I think were the

beginning of the work that needs to be done here. They gave -- they certainly were state of the art at the time in terms of developing some balance in the process. So I have to say at the time that committee was formed, this was not a controversial issue. You could just sort of see it on the horizon, that it was going to be. What makes these cases different is sort of the huge disparity in part of the contract's adhesion.

So I think this was a good faith attempt to have a good balance, and it's worked very well for most of the other consumer cases, but clearly this specific caseload is different. We're talking about very high rates of nonparticipation by the consumer, and so you have sort of a series of threshold issues that probably need some significant supplementation for any kind of consumer due process protocols.

I think there are a number of areas we can look at. Clearly filing, the discussion yesterday was wonderful. The courts talking about and the advocates talking about what kind of information do you need to provide upon filing, and there's a huge disparity, everything from saying I have a claim to a lot of specifics in terms of the information or the chain of ownership of the case.

So I think we have to find some kind of

standard at least to ensure that there's the possibility of the consumer -- protecting their rights and having some more participation.

There probably needs to be some kind of, I guess I want to say proactive or reaching out or educational kinds of things from the moment of notice, providing perhaps website information, other kinds of information, making -- almost to try and pull the consumer in. I'm not naive. It's possible that in a large number of these cases, they still won't participate; but for those who are marginal, maybe we can pull them into the process and sort of the power to participate. It's unprecedented, never been done in the arbitration process, but why not in this special group of cases that we're talking about.

There are other things you can do relating to the next discussion, and I'll save them for that about arbitrator potential bias issues.

MS. MURPHY: The next panel is actually coming up quicker than you all think. We are actually out of time. But if there are comments you have for them, and, of course, I'd just like to just remind everyone here, we are still accepting written comments. If you want to communicate them, let us know.

So the next panel is going to be bias and perceptions of bias with Tom Pahl.

BIAS AND PERCEPTIONS OF BIAS

MR. PAHL: Good afternoon, everyone. I'm Tom Pahl, assistant director of financial practices of the Federal Trade Commission. I'm glad to be given an opportunity to moderate this panel this afternoon.

We're going to talk about the bias and perceptions of bias in arbitration proceedings. I figured that that's something on which no one is going to disagree on, so it will be an easy panel to monitor.

One thing I would like to follow up on and probably a good place to start is where Ray left off earlier in talking about individual arbitrators; and before we talk about whether the forums are perceived as being biased or actually are biased, I'd like to hear from the panelists about, are the individual arbitrators who hear debt collection disputes, do people think that they are biased, or is there an appearance that they are biased, just as a starting point?

MR. CANTER: I want to address that one, thank you, because I have handled consumer arbitrations for

creditors, both document hearings and participatory hearings and in-person hearings; and setting aside for a moment the question of the connection between the provider of the arbitration service and the creditors, I never perceived any bias.

I did an in-person hearing before a retired circuit court judge. I have done telephone hearings. I had one in Ohio where it was a retired intermediate appellate judge, and he wanted myself and other counsel to brief the question of whether the amendment to the contract was binding under whatever applicable law it was to put an arbitration clause in.

I have had arbitrators who have done the same thing that judges have; and that is, postpone cases at the last minute at the request of the debtor. I have lost cases where -- for example, I remember I lost a participatory hearing where the debtor claimed it was his son and not him who opened the account and the client could not produce a document signed by the father. I have won cases where there have been defenses the same as in court.

So I think it's important when we talk about consumer arbitrations to focus on the question, is there evidence that the individuals who were appointed to actually hear these cases were biased? I believe Mr. Sorkin has done some NAF arbitrations.

MR. SORKIN: The arbitrator in all of the cases that I arbitrated was not binding.

MR. CANTER: I rest my case.

MR. PAHL: Richard, I see you had your hand up.

MR. NAIMARK: Yes. I'd like to approach this really from a procedural point of view in terms of being a provider of arbitration services. There are things you can do to approach a cleaner perception and reality of the bias issue for arbitrators.

First of all, appointment of arbitrators, what would probably be most appropriate in these cases and the few that we did this for is have one master location of arbitrators. No person has selected their alleged favorite arbitrator to give them a certain amount of distance and keep a strict rotation.

Secondly, strict disclosure requirements, arbitrators must disclose any and all previous contact with the parties to see if it looks like it's going to lead to a conflict. The rule that we had set in place for ourselves was, if the consumer objected to the arbitrator, there is a rule of the arbitrator on that. If the business objected, we did nothing, and that's a way to avoid stacking the pool of potential arbitrators.

Trying to keep a strict rotation, what we would like to do is put a limit ultimately on the number of

cases that any arbitrator can receive in his caseload. Albeit this is going to be very difficult if we start running into the hundreds of thousands of cases. We would have to recruit a lot of people from around the country.

I want to say, finally, when you put people on the panel initially, you have to do it with -- you have to try to make sure that you've got balance on the panel, you've got the right kind of people who are handling these cases who have subject matter expertise and the like.

MR. FRANK: We did a study at the Center for Responsible Lending on this issue, and we found that, No. 1, the incentives for arbitrators -- at least on the data we had from the NAF, we'd like to look at others, but that was the only data that was in the state that could be used.

The incentives were there in that whoever -- the arbitrators who found in favor of firms rather than the consumers received more cases in the future. So if you look at the history of an arbitrator, they'd get more cases in a future period if they were more business-friendly. So the incentives are there and people respond to incentives.

And we also found that, in fact, the arbitrators did find in favor of businesses, not just

in favor of businesses, but in favor of businesses who were there more frequently. They got larger awards, and they got awards more often, and that was controlling for a variety of factors, including -- it was a controlling factor for a variety of factors.

MR. PAHL: Professor?

MR. DRAHOZAL: I'd like to offer some general comments on this point.

The first is, we also looked at issues of arbitrator bias in our study of arbitration, and I just wanted to follow up on Josh's comment on the issue of repeat players. There has been a lot of studies actually that have found, not all of them do, but a lot of studies have found that repeat players tend to fare better in arbitration than non-repeat players.

The follow up is, why is that? And the reason that studies have consistently found, including consistent with what we found in our study, is it's not biased. What goes on is that the creditor who appears more often or the business that appears more often is more sophisticated in resolving disputes.

They tend to settle disputes where they have weaker cases and tend to litigate cases where they have stronger cases. So the result is they win more often. It looks like repeat players win more often, but it's not really biased. Again, I see no evidence, again,

any evidence of it, so that's a further confounding factor in figuring out what's going on and taking into account other possible explanations for the results.

And, again, the studies have pretty consistently found that the other explanation for why repeat players are better is the type of cases that they litigate, not whether there's bias of the arbitrators.

The second point is, there are certain incentives. You need to be aware of incentives in designing dispute systems, and if you're paying people based on the number of cases they decide rather than a flat salary, that can affect their incentive.

I think the important thing we should try to do as a panel is try to take into account or figure out ways to structure the process to control the incentives because the incentive problem is across the board. I mean, if you want to think about incentive problems, judges have incentive problems, too, right? They get paid the same amount no matter how many of these cases they decide.

Yesterday, if one of these judges gets 500 cases, they really don't have incentives. I mean, we're not impugning any particular judge when we're talking incentives. They don't have any incentive to give much attention to those cases. They don't earn

any more money. They're going to rubber-stamp them and be done with them.

If we want to do a true incentive analysis, we need to think about incentives on both sides and what the alternatives are, not just looking at the incentives of arbitrators.

I mean, I think the fundamental point is, how do we structure processes to take those sorts of -- to channel those incentives, rather than have them give rise to bias. Whether that's been done or not in certain instances, I'm certainly not here defending NAF. If they can't defend themselves, I'm not -- certainly, I have no interest in doing so. But looking forward, it should be how do we structure the process in a way that's channeled rather than biased.

MR. PAHL: Ray?

MR. JOHNSON: Well, I'm going to respectfully disagree with Chris a little bit here. I've seen the study or at least the summary of the study or one of the studies that Chris is referring to, and I think that it gets back to what was brought up over here. Credit card arbitration is not your typical arbitration, and what Paul had referred to earlier in the discussion regarding California, it's not simply California.

Iowa, which is one of the least populated

states in the country, we have two arbitrators who pretty much do all of the credit card arbitration there for NAF, and all of these run through them; and I can tell you for a fact if any one of those arbitrators starts doing an actual review of a debt settlement company's media that they're filing with that arbitration, they will not have their lucrative arbitration position anymore. It will go by the wayside.

I can tell you for a fact that there's been experiences around the country where an arbitrator, an NAF arbitrator, ruled in favor of a consumer and never worked again. It happened in one of my cases where an arbitrator ruled in my favor. I never saw that arbitrator again. I mean, it's a fact of life that really happens, and you can talk about studies all you want to, but I have actual experience with this.

And let me give you an example. There was some discussion about attorneys' fees the other day and how much the consumer attorneys get. Consumer attorneys, in just a routine, cookie cutter, I think was the word that was used, arbitration, the fee may be a couple thousand dollars or something like that.

These creditors in Iowa are filing credit card collection arbitrations where they argue that Delaware law applies, and Delaware is very creditor-friendly,

obviously, and it allows a contingent fee, a contingent percentage of the attorneys' fees on the award.

So you may have -- on these arbitration awards, you may have -- I've seen attorneys' fees awards, if we're talking about cookie cutter, I mean, good God. NAF is preparing part of the documents for them. They're using legal assistants to do all that, and they're getting $8,000 in attorneys' fees on top of that attorney fee award because the arbitration award is $30,000. Those fees are illegal in Iowa. I mean, you can't collect them, and I think that any arbitrator that bucks that trend and doesn't give that money, that arbitrator is in grave danger of losing that lucrative thing.

I want to say something about AAA arbitration. First of all, NAF just picks the arbitrator. You can reject one, and, you know, like I said, there's two major ones in Iowa, so I have the choice. When they send me the first one, I can reject that name, and then I can get the other one. The next time, they send me the other name, and I can reject that and get the other one. That's my choices.

AAA is a little better, and JAMS is a lot better. JAMS has -- most of the arbitrators are retired judges that do things for JAMS. The problem with JAMS, though, is what we're talking about now, the

fee is $450 an hour. There are no JAMS arbitrators in Iowa, none, and we have one from Chicago, and I'm sure he's going to be a great arbitrator, a nice guy, I like him, but $450 an hour, my client can't afford that.

We're planning on winning the arbitration, but under JAMS rules, if we lose, that arbitrator has the right to assess that $450 an hour against my client in the award. So all this talk about, you know, how much a consumer pays in arbitration, they can still be assessed at the end costs, which that wouldn't happen in court. You don't have to pay the judge. In fact, you get in a lot of trouble if you do. But those fees can be assessed at the end making that more expensive.

Just one point, and I've got a lot of stuff, if I can just talk very briefly on AAA's selection process. AAA's process is a little better. In their consumer arbitrations, you still -- it comes up with one name, and it has been my experience that if you dump that name, you'll at least get another one.

They are usually defense attorneys, which is a little problematic because it's probably somebody that you know that was on the other side of your case in the last 15 years of practicing law. So I've learned if we're going to go to arbitration, I've got to be really nice to defense attorneys because you never know when that person is going to show up deciding my case.

If you insist, in my experience with AAA and you have to ask for it, they'll give you five names or at least three names, and if you each strike one, and then you end up with another one. The problem with that is the pool. The pool is defense attorneys. As you can tell from these things, we have a little disagreement between -- I call myself a plaintiff's attorney even though I'm actually defending credit card stuff, there's a little bit of a disagreement between us.

It doesn't mean that the person is purposely biased. It doesn't mean that. It means that they see the world differently. Quite frankly, I just would rather have somebody who sees the world a little more differently than what Alan does. It's nothing personal with Alan. I just don't think he should decide my cases. So those are the kinds of issues that you end up with.

MR. PAHL: In the interest of time, let's try to move to talk about the bias or appearance of bias in the arbitration forums themselves. I guess one question that really comes up in light of recent defense rulings involving NAF is, to what extent are there ownership, contractual or other ties between parties of arbitration and arbitration providers, and should those be prohibited or disclosed to participants

in arbitration?

MR. BLAND: That is a great question, and I would love -- I would love to give you -- the greatest thing that would come out of these two days is if the FTC would undertake to answer what are the ties. I heard a little while earlier, you know, NAF is over, it's past, you know, we should move on. There are still tens of thousands of active cases in front of this entity, and there are hundreds of thousands of judgments which have been entered against people. There are people who are bankrupt and have their credit records ruined because this entity is still there. They were taking cases until about 10 days ago.

Now, what do we have when we're fighting against that? We have unsworn hearsay allegations in a complaint, and we have a consent decree in which no fault is accepted, and we have an entity that has not shown in places and is more secretive than, you know, the people who run the religious councils over in Iran.

So basically, unless one of these RICO class actions, somebody starts breaking out with depositions that come out publicly, we don't know whether everything that's set forth in the Minnesota complaint is true or not. If it is true, I think that a lot of these judgments that are out there are outrageous. I think a lot of the cases that are pending are legally

outrageous. I think some people who are pursing them are probably acting unethically and in a questionable manner, but I can't prove any of that's true right now.

I could go to Minnesota, which is pretty expensive for a lot of small cases, and take depositions. The private bar has a lot of difficulty getting discovery, and so there have been a lot of judges in Minnesota who denied any discovery. It's a secret. This is a great question. To what extent are there these ties between debt collectors and arbitration providers?

None of us know except the Minnesota Attorney General and their staff. That stuff is not public. The FTC could find that out, could nail that down, and the legal system would take place. If you read their website, well, you know, there were these charges, and we've dealt with it, and now we're OJ, and you don't find the real killers. You know, no. This is not over. There's still a whole lot of real human beings who have a lot of money at stake. So that's a question I would just love to see you all answer.

I would like to say one quick thing on the second question.

MR. PAHL: Sure.

MR. BLAND: Should there be changes in the law or industry with respect to bias? There is very little

clarity with respect to what ethical guidelines apply to arbitrators. There's a lot of clarity with respect to judges. I mean, in every state, there are clear ethical guidelines.

There are some law professors I know who know a lot about ADR. I know law professors who know a lot about ethics. There are very few law professors who will say that they consider themselves an expert in both. So as a consequence, there's some really -- there's some very -- in addition to the ownership links in the Minnesota complaint, there are a number of statements that NAF personnel supposedly said to potential client creditors.

Some of those statements, you know, like, Gee, the consumer knows and understands, and they just always cough up the money and send it in. We have seen it, and we have documented a whole bunch of statements like that from the NAF before, and I've had judges say to me, you know, I don't know if that's unethical or not.

I say, Well, Judge, if you went out and you wrote a letter to a plaintiff's lawyer and said bring your case here, again, or we're going to ring the bell, you're going to get punitive damages like you're going to think you're in the heydays of, you know, the bad days of Alabama or whatever. You know, you would be

disbarred and on the front page of the Wall Street Journal. You'd have like a face in pixels, you know.

But an arbitrator who makes these kinds of statements, is that unethical or not? There's no ethical standards, and there need to be.

MR. PAHL: I'd like to put it out there. Do people think there are ethical standards? Should they be clearer? Should there be more standards?

MR. NAIMARK: Yes. Just to that issue of ethical standards for arbitrators, there is a code of ethics that's jointly been authored by the American Bar Association and AAA. It's been around for a long time. It was recently revised and sort of updated. Not that it necessarily deals with every single question involved here, but there is a standard as a baseline.

MR. JOHNSON: It doesn't disclose common ownership.

MR. NAIMARK: Yeah, it doesn't -- it's a code of ethics for arbitrators. It doesn't deal with the institution.

MR. KAPLINSKY: Yeah, I think that's right. I guess what I would recommend, and I would support going forward, and I don't know -- it seems like a perfect thing for maybe the ABA to get involved in because, you know, all the constituencies are represented in the ABA.

But maybe there needs to be a code of ethics for arbitration administrators. I mean, the arbitrator code of ethics, I'm aware of, but it's not so clear, I don't think, at least I don't think there is any kind of a code giving direction to an administrator as to who can own them.

You know, do they all have to be nonprofit? Well, they're not all nonprofit. You have JAMS. That's for-profit. I believe they're owned by their neutrals or by their arbitrators. They don't have outside investments as apparently the NAF did. But I think there needs to be guidance here, and I guess in that sense, we probably all could agree.

MR. PAHL: Chris?

MS. JACKSON: And they should have a code of ethics, but who polices them? Is there a mechanism set up for policing? Is it self-policing?

MR. NAIMARK: Well, yes, in a sense. It's self-policing, but if cases go through the AAA, and we have an ethical violation, we remove arbitrators from that case. We remove them from the panel. It depends what it is. It certainly is situational, but yes, it's pretty active.

MR. CANTER: An arbitrator is certainly licensed to practice in any jurisdiction. It would seem to me the arbitrator under the specific rules for

professional conduct would be compelled to be nonbiased and neutral or else could be brought up on bar charges for conduct prejudicial to the administration of justice.

That being said, that's sort of an unlikely scenario perhaps. I think Alan's suggestion is well taken. Not only a code of ethics for the entities that perform -- that accept the arbitration, but also a separate provision for attorneys who act as arbitrators.

Now, that excludes from the universe nonattorney arbitrators, and that can probably be addressed maybe perhaps by some type of regulatory agency, or if the new bill passes which creates this omnibus consumer protection agency, that would appear to be under their jurisdiction.

MR. PAHL: Paul?

MR. BLAND: I'm not a big believer in self-regulation. I think that ethical guidelines that are set forward by bar -- that are enforced by bar counsel and that are set forth by state bar associations where people actually lose their licenses have a lot of force. I don't think that there's anything like that in place here, and what's particularly interesting is that things like these advertisements that the institution, the NAF was --

I'm talking about their going negative on AAA.

There were a bunch of advertisements they tried to put in front of congressional committees, they put in front of a whole bunch of people at the ABA, they put in front of judges, in which NAF would send out to creditors saying, you should dump the AAA from your agreements because they have the following practices, and they would set forth these very modest things that AAA supposedly did that were too friendly to consumers.

It was really clear that what they were saying was, Look, if you are in a battle that's between you, Party A, and Party B, we're on your side, and the AAA is in the middle. They're not. You know, you should go with us because we're going to be closer to your side, and it varies.

I looked at that, and it struck me, Gee, this seems unethical to me, but was there a set of rules you could point to and say to a judge, Judge, this clause is unenforceable because these guys are acting unethically? They are making promises aimed at the results, and they are attacking their competitors for supposedly being too neutral. Okay. Is that unethical? There was nothing that you could point to that was binding or meaningful that clearly nailed down that that wasn't okay.

What that does is it raises the bottom. It

raises the bottom when you reach the point where people can start advertising saying, you know, we're going to give you a better deal than other people. That is not -- to me, to my way of thinking, that is not okay; but to the ethical world, that's a very hard thing to nail down. It's a very hard thing to prove. There was no -- there's nothing. If there are standards, the standards that are there, they should be adopted by the ABA.

In terms of who should do this, and I don't believe the bar counsel -- I'm not in favor of the ABA. The last time I sat on an ABA committee, there was a 120 lawyers with four plaintiff's lawyers in the crowd. I got one question from a guy who wanted to know if I think the Truth In Lending Act should be repealed because it was worthless, and another guy who was telling me I was the Three Stooges of the plaintiff's bar and this kind of stuff.

I do not see the ABA as being a right down the middle neutral bias. The ABA tilts to defense overwhelmingly compared to -- there's certainly a few sections that are towards insurance practices that are more divided. You know, the ABA is going to set up neutral guidelines that we're going to count on, I don't buy it.

MR. JOHNSON: I have just a couple comments on

the -- I think that there needs to be transparency in the selection process of arbitrators. NAF, when they would pick an arbitrator, there is no clue who was picking that arbitrator, what standard was being used.

In Iowa we have a limited number of arbitrators available, and there was some question whether all of those people were actually available anyway, but I would feel more confident, never totally confident, but I'd feel a little more confident if I knew who was picking these arbitrators and how that selection was being carried out.

Another common thing that we see in arbitration clauses that should be prohibited one way or another, and that's requiring the specialization of the arbitrator. It's not so much concern with it being a judge or with it being an attorney with 10 or 15 years experience, although I assume that they wouldn't all be defense attorneys, but we saw these in the cell phone contracts. It was real common to require an arbitrator who had so many years of experience in the industry.

Well, translation, that's a defense attorney. I mean, you don't -- you just don't run into plaintiff's attorneys or other attorneys who have that. For example, if you require an arbitrator that has 10 years of experience in banking or whatever, that's not going to be an arbitrator that the consumer wants to

see on the other side of their arbitration. So arbitration clauses with those provisions are problematic.

That's all I'm going to say.

MR. PAHL: Okay. Josh?

MR. FRANK: On the issue of what ties should be allowed or what ties become issues, there is one tie that simply can't -- certain other ties, you know, financial ties, direct financial ties are always a problem, but there's always going to be in a mandatory arbitration situation an indirect financial tie with the places giving business to a forum and the places receiving business, and there's no getting away -- now, it helps to be a nonprofit. It helps -- there's certain ways to include that provision, but there's no getting away from the ongoing potential for bias when the arbitration forum is basically paid by the side -- by one of the sides that's determining the contract.

And, you know, when we talk about these things, we could go back and forth on which debtors are right and which debtors are wrong. In all areas of economics about this, you know, there's always some studies that have come in on how the wages affect how much people work and whether prices affect how much people buy.

There is not uniformity in the studies. The default assumption is incentives do affect them. Yeah,

there are going to be changes in behavior based on what the incentive structures are. So there's always going to be that potential in this kind of structure of arbitration.

MR. PAHL: Alan?

MR. KAPLINSKY: Yeah. Well, I think Professor Drahozal really already responded to your point, Josh, in the study that he did for AAA, where he established that there was no statistically different result in the case of consumer arbitrations involving repeat players and those not involving a repeat player.

But, yes, I agree with you. You know, there's an issue here that needs to be dealt with in terms of what the administrators can do. But let me tell you, we've got a more serious problem in the country that nobody is doing anything about, and it's the following; and that is, there are judges in state courts who are elected, you know, and they run for election, and their campaign manager is a lawyer in a local community, and he contributes a lot of money to the campaign, and the judge gets elected to the bench, and believe me, if you're on the other side of that case, that's not very fair either. And indeed, that's the experience that I alluded to this morning that got me thinking we need a better method to resolve disputes.

12 years ago -- I'm a Philadelphia lawyer -- I

was spending practically all of my time in Alabama in remote counties like Barbour and Bullock County and Marengo County, and representing the defendant, you could not get a fair hearing. You appeared in front of a judge who was beholden to the plaintiffs' attorneys and who was financed by them.

If you filed a dispositive motion or you filed a motion for summary judgment, it would never be granted. Every case went to trial, no matter -- it wouldn't matter if you had a good defense or not that a fair-minded judge would grant, and it wouldn't matter how trivial the case was. I had a lot of trivial cases that in federal court -- in the federal court in Alabama would have been thrown out. I mean, they were very, very trivial. They often involved, you know, minuscule amounts of damages. So that is, to me, something that is a lot worse than what we're talking about here.

In terms of NAF, to respond to Paul, the revelation by the Minnesota AG involving the conflict of interest, I think that's the only thing of note. Okay. That's the only thing that I don't think -- I don't think anybody was aware of other than the people who were managing the NAF. I doubt that the arbitrators who were on the panels knew about it. I doubt if any of the creditors knew about it. All the

other stuff is really a replication. It's a repeat of what was in the public -- I think it was the Public Citizen that did a report on the NAF, nothing new there.

Paul and other plaintiffs' attorneys have for the last 10 years been trying to attack arbitration provisions that designate the NAF based on these other things, and the courts I think quite properly concluded that that was not a basis for invalidating an arbitration provision. I would be interested in Professor Drahozal's comment on it because he's probably much more familiar with the way the law has developed under the Federal Arbitration Act.

But my understanding of the law is, absent a corrupting -- that is an arbitration provider that basically, you know, is a company that was established by one of the parties to the arbitration, absent something really extreme, the inquiry with respect to bias is whether or not the individual arbitrator is biased, not whether or not NAF in some advertisement was too aggressive than they should have been.

And, Paul, I agree. Some of the advertising was too aggressive.

MR. PAHL: I'd like to hear from Richard, and I have one question I'd like to pose to the entire panel about arbitration.

MR. NAIMARK: Just a quick statement, if you will. There has been some talk about the incentives, and I would like to posit that the dynamics of the incentive situation I think are dramatically different between a for-profit organization and a nonprofit organization. I need to say that.

As some evidence supporting that, the AAA put out consumer due process protocols about 10 or 12 years ago, and it's a fairly small caseload that we handle every year. We have turned away hundreds of consumer arbitrations where the business clause did not match the quality control protocols.

So this talk about raising the bottom and the concern about whether there is regulation needed, I think there is another model. It's very viable, and an organization like the AAA being around for over 80 years, our primary asset is our reputation, and we would do nothing to violate that.

MR. PAHL: One last question I'd like to pose to the panel and see if we have any questions from the audience, but the bottom line would be at the FTC, what should we at the FTC do, if anything, to deal with concerns about the bias or perception of bias in our professional contacts? I'd like to hear some thoughts about that.

MR. SORKIN: Well, I think the FTC needs to do

something or somebody has got to do something, or we'll have other providers enter the race to the bottom. It may be that most mainstream creditors won't incorporate an arbitration service in their agreements, but some of them will. Maybe they'll offer lower rates to consumers who are willing to take that. So I think there's certainly going to be companies that do what NAF did and worse unless there's some sort of transparency and disclosure process in the system.

MR. PAHL: Paul?

MR. BLAND: To be brief, I really think the FTC should look into the truth of the allegations in the Minnesota complaint. I think there should be an investigation brought. I think that leaving that hanging there is not all over.

There's a lot of people who have their livelihoods at stake in the outcome of that, and I can't express how strongly I admire Attorney General Swanson. That was an incredible piece of lawyering and great achievement that she has done. Consumer advocates everywhere applaud her, she will win awards, and she will be hated. But she has led the field of battle for a lot of people on both sides who are still alive, you know, and it's not over. It's not something that's going to pass.

I think that the agency should seriously

consider setting out some rules that would be a deceptive act or practice to engage in some of the things we've talked about, you know, not requiring substantiation of debts, not requiring any check to see whether -- in the debt collection, whether someone has a claim.

I think there needs to be some kind of rule that deals with how arbitrators are selected. I think that what Richard talked about as having a random selection, it would be great. Maybe that's even broader or further than the agency needs to go, but I think that would be terrific. But it's absolutely clear that what we've had was not that system, and Alan is right when he says that the courts let this happen despite a lot of complaints from people for 30 years, and that's true.

One of the things that we knew was that out of the 1500 arbitrators, the people who were deciding, along with their being bad, they're being -- there will be no more cases, and that more and more of the cases were being funneled to a small number of people. That's a system that's rife for abuse. I think it is a deceptive trade practice, and the way that I think of it, I think it is an abusive practice that encourages misbehavior to say to somebody, Gee, you know, the court stated the right person to look at is the

individual arbitrator, not the organization.

There was an incredible sickening false humility, if you don't mind my saying so, of the, Oh, we're just a court clerk. You know, we're an innocent, and we get no help. All we do is, we pick the judge. Well, that's not so little. Okay. Picking the judge means a lot. If I could pick the judge, I would be the Michael Jordan of lawyers. Okay. Picking the judge is enormously important.

So when they pick their 1500 people and they boil it down to a couple of dozen people who decide all the cases, that's exercising a lot of power, and that power showed up in the results, and it showed up in the unfair practices; and having a system which is a secret system for having picked the judges, and no one knows how they do it. All we can see from the outside is that they're all being funneled with a couple of reliable guys, probably Ray's two guys in Iowa, that's a deceptive practice.

A regulation that's set in place with some rules for how the neutrals are selected and took the courts out of it so that the courts can't sit back and say, Oh, gee, you know, all they do is they pick judges. That's not important. We'll just wait and see when we get the videotape of the arbitrator putting money into their pocket, but short of that, it's going

to be okay with us.

The courts were laying down on the job here. I think the agency could make sure that this never happens again by adopting some rules that require some level of fairness or accountability in picking who the judges are because what you have is a secret for-profit organization that gets paid from one side, it's picked by one side, picking the judges in a secret way with the abuses we've seen is evident, and I think that the agency has a lot of power to say something like that's not all right.

MR. PAHL: Start with Alan.

MR. KAPLINSKY: Yeah. Okay. In terms of what the FTC should do, with all due respect to the FTC, I don't think you need to do anything.

MR. PAHL: Yeah, we'll do that very well.

MR. KAPLINSKY: And for the following reason, first of all, with respect to the NAF, there are class actions that have been filed in the aftermath of their demise. In those class actions, you can be sure that the plaintiffs' attorneys will get discovery. The class actions are pending in federal court. So with limited resources, which I know you have, you know, it seems to me your focus should not be on the NAF.

Secondly, your focus should not be on adopting rules. I assume what Paul is referring to is under

Section 5 of the Federal Trade Commission Act. There's no need for it. You've got right now essentially one administrator out there that has a national reach with the potential capability of administering debt collection arbitrations. I'm referring to the AAA.

They've already announced that they are going to put together a panel representative of the various constituencies and stakeholders and that AAA is going to try to develop a protocol that's going to deal with all the issues that Paul is concerned about. And I'm not diminishing or belittling by any means the things that he has identified, but it seems to me that AAA, who has been in business for 83 years or so, has done this before.

They have put together a protocol dealing with employment arbitration. That also is a very controversial and contentious issue. Health care arbitration, they've done it before. They know how to do it. They know what people to put together to assist them to the extent that they don't have the knowledge.

I would say to you, give that a shot. Let's see because I am a believer in self-regulation, particularly when it's coming from an established nonprofit organization with as great a track record as AAA.

MR. PAHL: I'm going to start with Ron and then

Ray, and then I want to finish up.

MR. CANTER: I think the FTC has done a lot in putting this program together and getting the information exchanged and the views exchanged. I agree at this point with Alan. I don't think the Federal Trade Commission should do anything specific. Let this play out and see what happens. There will be litigation, and there is presently an antitrust case in Minnesota involving the MBNA and the lenders.

Another thing I don't think the Federal Trade Commission should do is to -- regardless of what, if anything, is going to be done about arbitration, is to write rules and regulations as to what a creditor or a lender has to produce to win an arbitration.

I know we discussed this yesterday, but I think it's important to point out that the perception, well, the arbitrator gives 100 percent of what the creditor says is owed. Well, that's the exact same 100 percent that the consumer got in his billing statement or her billing statement.

If the customer challenges that, there are federal rules. There are federal guidelines as to -- the Fair Credit Reporting Act, you can challenge charges, and the Truth In Lending Act, and believe you me, there are plenty of plaintiffs' lawyers who bring lawsuits because the financial institutions have not

crossed their t's and dotted their i's when they amended it or when they added a new figure or a new charge.

So the concept that something more must need to be given to prove the debt I think is illusory. The charge or a balance which is the amount that's due after six months of no payments is an extremely reliable figure.

Now, there was also mention, well, the debt buyers are adding interest on interest. Well, the Seventh Circuit said that the debt buyer can do that. Now, the argument whether they should or shouldn't is not for this panel. The argument is for perhaps Congress, and Congress, in fact, amended the credit card laws in 2009.

So I think one thing the Federal Trade Commission should not do is get into the nuances of what level of proof needs to be adduced in order to win a consumer credit arbitration.

MR. PAHL: I'd like to thank all the panelists. We are out of time. We are going to take a break now, and we'll be back at 3:00 o'clock.

Thank you very much.

(A brief recess was taken.)

TRANSPARENCY OF RESULTS; ROLE OF PRECEDENT

MS. BUSH: Thank you everybody who has stuck it

out. I know it's been a long two days, but I think we're learning a lot and getting good information out. So I really appreciate your participation.

Just a reminder to our webcast audience, if you want to send in a question, the way to do so is to email it to consumerdebtevents@ftc.gov. That's consumerdebtevents, one word, at FTC.gov.

So this session has to do with transparency, and I would like to please ask our panel what they think should be made public about any particular dispute that has been arbitrated.

Yes?

MR. KAPLINSKY: Well, number 1, I do think that if either party wants an opinion, a reasoned opinion from the arbitrator, they should be able to get it. And I think that's part of your protocol, too, part of the AAA protocol, and I think a fairly drafted arbitration provision would expressly provide for that. I think that's important for both parties to the arbitration.

I don't think that the results of individual arbitrations, however, ought to be made publicly available. The real concern that I have is one of the advantages that arbitration has over litigating in the court system is that it is private. People can't come in off the street and attend an arbitration. And there are a lot of consumers, not just companies, but

consumers who view that as an advantage over being caught up in the court system where if they're being sued in a debt collection matter, all their neighbors can show up there and listen to what's going on. All the dirty linen is there for everybody to see.

That can't happen in arbitration, and I think that's an important distinction between arbitration and the court system and one that ought to be honored, not one that we ought to tear down.

MS. BUSH: So you're saying a reasoned decision should be available to the parties to the dispute?

MR. KAPLINSKY: To the parties, yes.

MS. BUSH: But not publicly --

MR. KAPLINSKY: But not made publicly available.

MS. BUSH: Okay.

MR. KAPLINSKY: The only situation I'm aware of where -- and I don't have a quarrel with this at all, and that is in the class-wide arbitration area. AAA maintains a website where I think all of the awards involving class-wide arbitration are made publicly available, but there, you know, you're talking about a class action, not about an individual debt collection dispute.

In terms of should arbitration awards be precedential, I think the answer to that is no, they

should not be. Again, that's another feature of arbitration that makes it different than what goes on in the court system.

You know, usually a lower court, even if you're dealing with the court system, an opinion issued by a lower court judge isn't precedential anyway. I mean, sometimes you have written opinions and sometimes you don't, but to me that, again, is a difference between the court system and arbitration and something that I think, you know, makes it different, and they should not be precedential.

MS. BUSH: Thank you.

Okay. Chris?

MS. JACKSON: As a private practitioner, I would disagree with that specifically because it's the lack of transparency and the lack of having any precedent to know what is going to happen or could happen that gives you the perception of bias, that gives you the perception of -- like I said, that there's something to be hidden if it's not disclosed.

As a practicing attorney, I have trouble trying to go to arbitration because it's a roll of the dice with no review process. That person could make the decision according to the law, they could not, and you're kind of stuck with it. At least in the court process, I know that if the judge happens to make a

wrong decision, I have the option of appealing that to a higher court for review, with that same option available.

MR. KAPLINSKY: I mean, Chris, I wouldn't have that much of a problem -- I know my clients would, but I wouldn't have that much of a problem in making arbitration awards publicly available if they redacted the name of the parties because to me, I mean, my concern is principally a privacy concern, that I don't think -- I mean, that's part of the -- it's a feature of arbitration. It's private. It's not public. So I think, you know, if you redacted the information of the parties, much of my concern goes away.

MS. BUSH: Professor?

MR. SORKIN: I wanted to speak just real briefly as to the reasoned opinions and the publication of decisions. I think the role of precedent and the effects of arbitration on the legal system are also in there, but I'll put that off for now.

With regard to publishing decisions, Alan just made a point and a suggestion. I don't think there's any good reason not to publish the decisions except for consumer privacy, and publishing the decisions with, I would say, just the name of the consumer redacted. I don't see any reason not to publicize the name of the creditor, although that's not a critical point. After

redacting, I think it should be published. I don't see any downside other than small administrative costs to doing so, and it would certainly open up the entire system some.

Reasoned opinions are extremely rare in consumer arbitration and are rare in most forms of arbitration generally. In the consumer arbitration context, I think it's mostly because nobody ever asks for them. It's certainly not in the arbitrators' and the providers' interest to provide a reasoned opinion. It's more work, unless they get an additional fee for it, and it potentially opens up the award to somewhat more challenges. So there's no incentive for the arbitrator or the provider to publicize the option of a reasoned opinion.

Consumers rarely are represented by counsel, rarely understand all of the arbitration rules promulgated by the provider, so I think they simply don't know or don't realize that they can ask for a reasoned opinion or see if one just isn't worth the trouble, but I think reasoned opinions probably would also help make the system somewhat more transparent.

MS. BUSH: Yes, Paul?

MR. BLAND: I have two concerns with the lack of transparency that prevails under the current system. The first is that I think it harms the development of

the law. I think that having a law developed where you have written decisions that are searchable, that are findable, that are reported, let people -- let lawyers figure out what the language of the statutes mean when Congress passes a new law and there's vague language in it.

A number of years ago it used to be that a statute would be interpreted by several courts. If the courts were differing, there was a way of resolving that. You could learn something about it. If a statute was being interpreted in ways that were counter to the way Congress intended, you could come back and face that. I think that not having a written decision in some ways harms the growth and the development of the law in a public way.

Let me just give you one anecdote about this. I handled a case involving an insurance company and an individual. I represented the individual in an arbitration. It was a case in Maryland, and the arbitrator -- it was in the middle of the case, and the opposing counsel said, you know, sir, this case is just like this case I handled in front of you like 18 days ago.

I said, Well, what case are you talking about?

Well, I can't tell you. It's confidential.

And so I totally lose a gasket. I was like,

Wait a minute, you're telling me I'm supposed to lose this case because there was another case that was earlier decided that was supposed to be just like this, and I can't see what it is. I can't know what the facts were to try and distinguish it.

And the guy goes, well, you know --

Wait a minute. I thought I was in Maryland. I didn't realize that I had somehow gone to the People's Republic of China, and I ended up losing the case.

Anyhow, there was the feeling that there was a system in which there are legal rules that are known to one side and not to another that don't develop, and I think it's harmful.

I think the second concern is, I think that litigation frequently brings to light really bad behavior by powerful actors in America. Let me give you an example.

When Spitzer went after Merrill Lynch where -- and this is very serious stuff. Spitzer went after Merrill Lynch because there were people who were advising investors about what stocks they should buy, where at the same time that other people who were in charge of investment banking were trying to bring in business, and they were getting more money -- they were getting more investment banking after people who were recommending stocks made better recommendations.

There were emails that came out in discovery that Spitzer went after -- where, for example, ex parte language, but there was this guy who was recommending that tons of investors invest tens of millions of dollars in stock he called a gigantic piece of shit. Right. This is what he privately tells people in-house, but he's recommending it because there was so much money being invested in it.

Spitzer took that discovery, and, you know, the way that the brokerages operate, there was like, you know, within a fairly short time, there was legislation, there was litigation, there was a lot happening, but you got rid of this really ugly conflict of interest in which investors were being bilked, were being cheated in a very serious way. This litigation brought that out.

Now, that couldn't have happened if it hadn't been for the government getting involved because that was an industry and that was an area that was entirely subject to arbitration, and none of that stuff would have ever come out. It was only because it happened to be the Attorney General who took these emails, and the next thing you know, it's in the New Yorker, and then we have this broad societal change.

But I think the lack of transparency in arbitration in that kind of setting is really harmful.

If you look at something like Bridgestone, Firestone, car dealers didn't have arbitration clauses in 2007 in the State of Alabama. Now it's impossible to buy a new car that you finance without an arbitration clause. You know, we find out about -- that came out in the midst of the -- that came out solely through litigation.

So I think that having written opinions that are posted is great. Right now, you can get a written opinion if you pay for it, but it's not posted anywhere, and you can't find it. It's not searchable. It's not indexable. There's no way for me to find out what the written opinions are from other people's cases.

I think this would probably take legislation, although it's possible that the FTC could do something about it, but I think that the current system is really harmful to the society as a whole by having the law not develop in a public way and by having serious corporate malfeasance kept under wraps. I think that both of those things happen all the time in arbitrations.

MS. BUSH: Ron?

MR. CANTER: Bad things don't necessarily come out just in litigation. You know, I chuckle because I don't think the bad things about Mr. Spitzer came out in litigation.

But anyway, I have an objection. I have always had a problem with the National Arbitration Forum when we talk about transparency and results. They never wrote the award down. Yes, you could ask for a written opinion, and, you know, I'm not necessarily disagreeing that a written opinion should be entered if it's called for. But even in defaults, they wouldn't write it down. They wouldn't -- they gave you the total award, but they didn't say how much was in the fee, how much was for the principal and how much was for the interest.

Having tried collection cases in my past life of 20-some years, that is historically how we did it in the court system. Now this might seem somewhat trivial, but if you're doing debt collection, and it's going to arbitration, let the arbitrator say how much he or she has awarded for each amount of the claim.

I would certainly suggest if that's part of any due process protocol, that that be more specifically spelled out as to what you're allowing for in a particular claim.

MS. BUSH: Yes, Richard?

MR. NAIMARK: Just to note, about six years ago when California passed -- maybe it's a little longer -- it passed a disclosure law which required the reporting of a number of points of data on consumer unemployment

cases, which we complied with, and we decided at that time that we would simply report all of the consumer unemployment cases in the country. So, in fact, a lot of that data is already available.

MR. KAPLINSKY: That's aggregate data; right?

MR. NAIMARK: No, it's case by case. The claimant's name is expunged, but the other information -- some of the other information is there.

MR. KAPLINSKY: Okay.

MR. NAIMARK: You didn't even know that?

MR. KAPLINSKY: I didn't know that. Reasoned awards are public?

MR. NAIMARK: No, and there are very few in the consumer context. These kinds of cases were coming, and it's very rare to have an extensive written opinion.

MR. DRAHOZAL: What about debt collection arbitration, doesn't AAA make it available to the courts?

MR. NAIMARK: Yes, they're -- yes, they're published.

MR. DRAHOZAL: In a redacted format.

MR. NAIMARK: And that's the same kind of public policy considerations that we're talking about here because it comes as a result of those.

MS. BUSH: So where are these records, the

national records of AAA?

MR. NAIMARK: Well, if you look at our website, you'll see the data points. I forget them, there are too many debt collection cases, but they're available.

MR. KAPLINSKY: You know, and Paul's concern about harming the development of the law, come on. Let's be real, Paul. We're talking about routine, mundane debt collection cases where 99.9 percent of the time they're not defended. You know, we heard it's that way in courts. It's that way in arbitrations.

Once in a while you might have an interesting statute of limitations issue, but I don't think that by virtue of the fact that NAF has been administrating arbitrations for the last couple years, that that has had any impact on the development of the law. There is still plenty of cases that are in the courts. You heard it from the judges yesterday. They're inundated. They can't handle all the cases. They can't deal with all the cases just in Chicago alone. I mean, the statistics that we heard were mind-boggling.

So the idea that, you know, it's harming the development of the law, I mean, that's an attack on arbitration in general. That's nothing to do with debt collection arbitration at all.

Then in terms of litigation bringing to light nefarious practices, the example you gave couldn't be a

worse example. There was a situation where the Attorney General of New York brought the lawsuit against Merrill Lynch, and the Attorney General of New York is not subject to any arbitration provision, never has been, never could be.

And that's the same with all -- in light of the Waffle House decision of the Supreme Court, no federal or state government agency is subject to arbitration. So if there are nefarious practices, and they're systemic in nature, those practices are going to be uncovered pretty readily.

MS. BUSH: Chris?

MS. JACKSON: Several times you've mentioned the fact that because it's a problem in the court system, then that's kind of okay for it to be a problem in the arbitration system, and I think we can all kind of agree some of these problems do overlap, but just because it's also a problem in the court system doesn't mean it's okay in arbitration.

MR. KAPLINSKY: I don't disagree.

MS. JACKSON: Part of the lecture, too, with this, you know, most of the time they default, most of the time they're just, you know, cookie cutter, the problem is, is a lot of these things are being filed, and there's not even prima facie evidence of the case that is being defaulted.

So there does need to be some kind of transparency there. There does need to be, okay, here is what the creditor filed. It wasn't the decision, like, for example, of an arbitrator. It could be the court or the arbitrator making that decision. I just don't think that needs to be reported.

MS. BUSH: Yes, Josh?

MR. FRANK: In general, I think it's important to have as much transparency as possible for a number of reasons, and it's fine if the consumer's identity is left out. That should not be an issue.

I think it's important that companies are in there for purposes of study, or if there is things like repeat players or for purposes of understanding trends that certain companies are doing things in the process that they should not be. We talked about whether there was a lot of garbage fees and costs in there, in these awards. We don't know really because systematically we can't look at the data, and it's important that as much information as possible is out there.

The fact is, credit card companies, which is a big part of the problem we're talking about here or the issue we're talking about, have been under a lot of scrutiny, and I think the general consensus of the public is they have been doing a lot of things which are very questionable. Let's be real. Part of the

basis in these arbitrations is to kind of keep that balance there of what the practices are, of what's going on, so the trends and what they're doing are part of this stuff.

I think it's important that -- also that the consumer, if there is a choice of arbitration, consumers have some real ability, like a firm that goes repeatedly to the same arbitration forum, that consumers have some basis for making choices of an arbitrator. All these things are a form of transparency, but I think it needs to go further than even California law.

By the way, I tried to look at AAA data, and I am unable to do the kind of study, the analysis I did for NAF simply because some of the key fields in there about what -- you know, the award and so on are so frequently missing. I think it's important that the information be there on a consistent basis.

MR. NAIMARK: There's one question that's asked frequently, and that's who won? While we ask the arbitrators in every case to determine who won, arbitrators typically don't want to do that. Frequently, it's a question of -- a degree of responsibility for the final result.

MR. FRANK: Therefore, I think in a lot of cases, I could not substitute an award amount either.

MR. NAIMARK: I don't know. I would have to take a look.

MR. FRANK: That was my experience.

MR. NAIMARK: We also recently made changes to the Excel format because people said they were having trouble manipulating the data.

MR. FRANK: And that's a good point. That's another thing I was going to raise that does occur. It should be not just for a researcher like me, it should be for a consumer to be able actually if they did want to find out what was going on with the arbitrators and to make an informed choice, they should be able to go in there and not have to go through, you know, 10,000 .pdf files. So I think that is a good thing, some kind of mechanism in which the data is usable on a basis for somebody that can't put a ton of labor into it.

MS. BUSH: Before we go on, I just want to mention that the role of precedent is also an issue for consideration. Chris mentioned the perception that it was very unpredictable what the results would be going into arbitration.

There are also efficiency issues if the same case is effectively re-decided anew each time, and I'm wondering how people feel about whether there should be any role of precedent with respect to arbitration decisions.

Yes, Professor?

MR. DRAHOZAL: I just have a few thoughts. One is, and I think it's fair to say that we actually have a very good consensus on the transparency issue here, as opposed to -- as compared to the other issues we've been talking about, I think there's actually a little more agreement here that transparency -- that much of it is taking place and that there is clear value to doing so.

On the precedent point, there actually is one -- if you look at international arbitrations, there is a requirement that there be reasoned awards, and there's going to be increasing availability of those awards at least on a selective basis.

They do serve a role of precedents. I mean, they're not -- they're persuasive precedent, not binding precedent in the way that an appellate court decision would be because there is no appeal mechanism, but I think the nature of lawyers is to pick authorities and argue from them. If the authorities are there, they will tend to rely on them, and similarly, for arbitrators as a decision maker.

I do think there's a lot fewer cases in which you have these sorts of legal determinations that people would be interested in on a precedent basis, particularly debt collection cases, although I defer to

people who do that stuff. But I think if the awards are available, they will be used in some way, shape or form as precedent, that hopefully will make it more predictable, but it is different to some degree than the courts because you don't have an appellate court.

MS. BUSH: Yes?

MR. JOHNSON: I don't know if I depart here with Paul for the first time or not. I'm not sure I know what his position is on that, but I shudder, it literally will keep me up at night the idea that arbitration awards from NAF would be precedent for credit transactions.

You know, we're talking in arbitration about -- I'm all for transparency. I mean, I think that if we have transparency, it would be a lot easier, but we'd have to hear a lot of studies being cited. And a lot of the data that's going into those studies is simply not complete, and it was mentioned that sometimes in AAA, you can't tell who won, and I noticed that when I read a summary of the study that frequently you couldn't tell who won. It was a pretty high percentage, more than 10 percent or whatever.

If you're going to do a study to determine how consumers are doing in arbitration, obviously you need to know who won. Those kinds of things I think are fine, but, you know, I'm looking at -- and I do think

this is going to be a new race to the bottom, again, and I just shudder at the idea of where I'm denied discovery and where I can't go in and find out who owns the arbitration forum and whether Mann Bracken and who on the litigation list is involved with cases and whether they're actually deciding the case that I'm litigating with them. I just shudder that those become precedent for anything.

One brief comment on something else on the written finding. I'm all for written findings, but I can't remember -- I don't know if AAA charges for written findings. They may not. But NAF would charge for written findings when -- for example, there were cases in NAF, and I think we can all agree on that, that the forum shouldn't tell the arbitrator to change the award. I think the arbitrators actually have to decide the case and not the forum.

But I had a case where the forum -- with Mann Bracken, where the forum told the arbitrator to change the award and had the audacity to copy me in on the email. So you know how gutsy that is, and I complained about it, and then I got a thing from one of the arbitrators, well, if we reconsider the award, it's $250.

And NAF, you know, we talked a lot about the fees that a consumer pays. Those fees are really just

for the default fee or whatever. In NAF in particular, when you really get into litigation, arbitration there's a fee for everything. I mean, just boom, boom, boom, and you can have a study showing me that the average consumer only pays $90, but I can have my checkbook, and I can get it out and look at it, and that's not what's happening.

So if we're going to have a written award, it should be transparent. I don't like the idea of precedent. I really don't like the idea that my client might be advancing expenses that I would have to pay for that award.

MS. BUSH: Yes, Ron?

MR. CANTER: I think the role of precedent should remain as it is, and that is the state law or the federal law that governs the dispute. Now, I know Paul had mentioned a few moments ago about Delaware having a three-year statute of limitations, and when I hear of a case in any claim in a state that has a longer statute that because the creditor elected to use Delaware law, the three year applies. And they have challenged that argument, and it's won some and it's lost some.

But that's the type of precedent you're given. If you go to the state laws and because, in fact, these are contractual claims, and unless somebody tells me

I'm wrong, 100 percent of the contracts have a governing law provision. You look to the law of that state, or you look to the conflict of laws provision in the forum state, and you argue that, and you make your analysis, and you make your presentation to the arbitrator.

To the extent that it's an interesting or novel issue that someone would want an opinion on so that you may be able to show it to another arbitrator, that would be helpful, but I would think that any arbitrator decision obviously would be trumped by a decision of an appellate court in the state that you are arguing the principle of law about.

And, you know, even in these contested arbitrations, sometimes they become very factor specific, which is not really useful for precedent. I tried a two-day arbitration in Wisconsin in front of an NAF arbitrator who happened to be a consumer law professor with the University of Wisconsin law school, but the issue was whether the debtor was in default at the time that the action was filed. He had claimed that he was current based upon some novation, and it was a significant issue, but it was fact intensive.

I think precedent should stay -- the role of precedent is important in arbitration, but it should be focused on the law of the state where the contract

provides the remedy.

MS. BUSH: What about if certain kinds of cases are decided primarily in the arbitration context, does that prevent development of precedent in some areas of the law?

MR. NAIMARK: Can I make a comment about that?

MS. BUSH: Sure.

MR. NAIMARK: This is a concern I've heard expressed for many years. I have never seen an area where arbitration has become so dominant that they hampered the court's ability to make precedential decisions. I suppose there are arbitration organizations that wishes it were so, but it's clearly never happened. In the consumer debt collection area, there are many, many, many more cases outside of the arbitration process.

MS. BUSH: Yes?

MR. SORKIN: I think that's true, but I think it could change. In any context where most of the transactions involve a small number of participants and adhesion contracts, I don't think it's inconceivable to see arbitration clauses become so ubiquitous that all or almost all disputes in collection matters in that field suddenly are diverted to -- I don't know about suddenly, but are diverted to arbitration.

So I think that's the same effect. It

eliminates this role of the court in deciding the dispute, and obviously it eliminates the fact that there could be an appeal, and courts no longer have a role in rendering decisions and potentially precedents.

Now, I think the effect of arbitration primarily is not in the publication of awards and the lack of reasoned awards, but the fact that there's no appeal, that the parties have waived -- as a consequence of the arbitration agreements, generally, they have waived any right to appeal. There wouldn't be precedence coming off the small claims courts that would have addressed these matters either.

In some very small, maybe infinitesimal percentage of those cases, there might be an appeal taken from the small claims court to a higher court that would render a decision that would set a precedence, and that trickle of cases eventually might refer to the development of law, but mostly it would be laws in arbitration clauses. But unless we're talking about arbitration clauses being so ubiquitous that they crowd out litigation completely, I don't think that's likely to happen.

MS. BUSH: I'd like to return to the mention of the California statute which requires publication of certain information for arbitrations, and I'd like to ask the panel, who seem to have general agreement on a

pro-transparency stance, if that were to be brought in, what kinds of changes would you like to see in the systematic reporting of data about consumer arbitration?

Paul?

MR. BLAND: I think it's admirable that AAA made their data searchable, but the statute doesn't. So, for example, with NAF, they were literally setting it up so that the only way you could print it out would be -- it was set up in .pdf. Each case was separately reported on a separate page. So if you wanted to see the 34,000 cases, you had to have 34,000 pieces of paper in the printer, and then common data was sort of scrambled. So if you wanted to find out, you know, how a few arbitrators ruled, you know, start making piles on the floor. If you want to figure out how a particular case went, you know, it would be complicated.

Some computer whiz or whatever, at Public Citizen devised a spider that supposedly went through the .pdf and permitted them to do that study. I don't think that that's a technology that is readily available to many of us, even with teen-age children, and I think that making the statute searchable -- excuse me, making the data searchable would be helpful.

I think that having more information about the

claims that are being made in a case would be very helpful. I think that frequently the description of the claims are so vague that it is impossible to tell what they're talking about, but that's more of an issue outside of debt collection, I admit, but in some settings, it's very hard to tell what the claims are that are being made there.

I strongly agree with what Ron said before about the breakdown in the outcome. I think that that has been something that consumer advocates have been talking about and complaining about with respect to NAF for some time. It's very important on several different levels.

One thing, there was a lot of talk about how much cheaper arbitration is than court, and Justice Kennedy throws cases -- the case of Circuit City arbitration being cheaper, but you can't tell what the arbitration fees are, at least with NAF, it wasn't reporting them. They would say that, you know, that was ruled in the claim and sort of packaged in, and it was impossible to tell.

My understanding from a lot of litigants is that there actually are a lot of cases that were default cases which were essentially rubber-stamped with damages like $1500 of an arbitration fee. That's an interesting number. That's a number that should be

public and should be checkable.

The level of attorneys' fees is important because Ron was talking about the choice of law issues. I think Alan was right that some of the criticisms I was making of the lack of transparency are certainly more robust in other areas of the law than debt collection. There are a lot of debt collection cases that don't raise them, but there are debt collection cases in which there are thorny issues of choice of law issues, and they cut different ways in different settings.

For example, there were some times where the consumer wants the law of Delaware applied because it has the shortest statute of limitations, but they don't want the law of Delaware to apply because Delaware gives attorneys' fees that are -- that are princely compared to the laws of their state.

Now, under some states' choice of law argument laws, there's a good argument that allowing a debt collection lawyer to get attorneys' fees of $5,000 when they didn't do any work whatsoever in a case other than sending an email asking, here's the amount of our claim, you know, would be unconscionable, unethical or whatever of that state's laws. There's some interesting issues like that.

When there's no breakdown, when NAF just says,

claim, $10,000; award, $10,000, and there's nothing -- there's no way of telling how much of that is principal, interest, attorneys' fees, is arbitration fees, there's a lot that you can't tell from a public policy perspective.

And I also think that state laws, which do have -- states that do have limits on attorneys' fees, there are some cases there that could have been brought on the consumer's side where there was certain debt collection firms that I think were getting routinely -- I have a strong impression were getting very hefty fees that would be illegal under the state laws, and where the choice of law portion probably wouldn't stand up, but that data is buried, and it's not -- it's not something you can figure out.

So I think that the California data is great. I think that the -- you know, the stuff that the AAA has put up is very important. When the tragedy of Jamie Leigh Jones' employment case came out, you know, you would be able to go to their website, get every Halliburton case fairly quickly and look at them, and there was stuff that, you know, was used in congressional hearings. It was talked about in the press, and AAA did make that data searchable and something people could find out.

I don't think that Halliburton's arbitrations

were pretty -- but it was one thing that you could find. The information was made available and it was useful. If it's not searchable, you know, then it becomes completely useless to everybody.

MR. CANTER: I want to make you feel a little better. Even though the attorney fees were hidden, that hasn't stopped the lawsuits from being filed alleging that the attorneys' fees were excessive.

MS. BUSH: Yes?

MR. DRAHOZAL: I wish the court files were as searchable as AAA's files seem to be here. Going case by case through Oklahoma cases, which happens to be the one state where you can collect a bunch of cases rather than going through docket number by docket number.

So transparency is a great thing, and I'm not saying that arbitration shouldn't be transparent. There are sort of more general issues, costs and so forth, I think that slow down some of the ideals that we may have, but generally it's a good thing.

There are some complications in the data collection that I was surprised in going through some AAA consumer cases, that -- for example, more descriptions of claims. I figured it would be easy to look at the claim and see how much the claimant wanted to recover because, you know, arbitration fees are based on how much you're asking for and so forth.

I think for debt collection cases, it's fairly easy because it's nicely quantified, maybe too high, but it is nicely quantified.

When you're talking about consumer cases, it's much easier said than done because you have people who say, I want my car back, or I want to get rid of this car, or I want something more than $10,000 because that was the threshold.

So actually reporting some of those numbers is more complicated than it might seem, and it makes it harder to do things like figure out how much of what someone asked for they got because it's really hard to figure out how much they were asking for as a basis for comparison and just sort of warning that in some of these cases, they seem like they're really easy, and I thought they'd be much easier than they turned out to be.

MS. BUSH: The issue of costs has been alluded to a couple times, and I'm wondering about the cost and benefits of greater transparency to arbitration -- excuse me, to arbitration results to mandate reporting or voluntary reporting or what have you. So I'm wondering if the members of the panel could say where they feel the costs should be borne.

Yes, Ray?

MR. JOHNSON: I'll help you out so you don't

have to talk. I think I understand your question in terms of the cost of arbitration. I alluded to it a little bit, but arbitration can be extremely -- regardless of what people say, arbitration can be extremely expensive. It is not always a cheaper alternative to court; in fact, frequently it isn't.

MS. BUSH: No, I'm sorry.

MR. JOHNSON: Is that not the question?

MS. BUSH: No. I'm sorry if I was unclear. I'm talking about the costs of reporting additional data and also the cost to privacy, as was mentioned, to potentially of --

MR. JOHNSON: Never mind. Never mind.

MR. NAIMARK: In terms of building a system to report such data, it is quite expensive, and it can be considered a real burden. I mean, we pay for it. We're a nonprofit, so we have the luxury of just having to break even every year and not necessarily make profits.

But it was a tough -- when the California law was passed, and then we made the subsequent decision to expand reporting, to kind of build a whole data collections system, plus an IS system to process these things full-time and train an entire staff to make sure that they were feeding the appropriate stuff into the system. So it's not easy.

MR. DRAHOZAL: The federal government and the federal courts have very elaborate data collection data systems with cover sheets on complaints and the like. There has been a number of studies, and sort of from my own experience as well looking at federal court cases, there's a lot of mistakes in the data collection, and these are people who are trained to do it.

There are often -- maybe sometimes it's the parties who are required to fill out the forms, and that's where the data comes from, but even when you're talking about the court personnel who are filling out the forms, there's just some really obvious mistakes that you can tell just by looking at them, and they occur in 10 to 20 percent of the cases. It was much larger than I would have expected.

So, for example, you're supposed to report the numbers rounded to the nearest thousand. Okay. So then you start seeing numbers in student loan collection cases of 9,999, which if reported correctly means that the student had $10 million of student loans. That clearly is not right because someone recorded it without rounding it properly. Again, these are people who are court personnel who are paid and trained, one would hope, to do this, and there's problems.

So data is a great thing, but even if you have

people collecting it for you, there's always a question of how good the data is, and the court system has the same sorts of issues, I think, that arise in arbitration, and I wish there was a nice solution, but I don't have one unfortunately.

MS. BUSH: Yes?

MR. FRANK: I would just like to say that I've worked with the banking industry regulation long enough to have seen over and over again any request for data which is important be objected to on the grounds of the expense and burden involved.

No doubt there is some burden involved, but I actually come from a background within the industry at one time, information system, and I do know enough to say that relative to the cost, the amount that is in each claim -- I mean, the amount that is received for each arbitration case, the burden of a single form which can be made as a form that will automatically go in the data set, the cost of doing that is setting it up, and I realize there's a training cost and so on to create that. It's really not an excessive burden for a large arbitration forum.

MR. NAIMARK: I wouldn't quibble with the need to do it because we obviously decided to do that; but our consumer arbitration caseload, which we do every year, like the last 10 years, we've done 1200 cases a

year, so when you're talking about spreading the cost over it, it's a pretty small base.

MS. BUSH: Okay. So in terms of if there were to be changes to the law or industry practice to require systematic reporting of data such as was done in California, what kind of changes would people like to see?

Yes?

MR. BLAND: One thing that I think would be important would be for it to be done on a national basis. Maybe this is something that you're assuming in your question, but it's true that AAA is reporting its data on a national basis, and NAF was not.

One of the things that has become evident from some of the litigation around that is that there were tens of thousands, if not more than a hundred thousand cases involving the California consumer and then a credit card company that were labeled not California cases, and they wouldn't have to disclose them because when they -- through their experience of disclosing California information, they disclosed California information, published it in a study, and they reaped this enormous storm of negative publicity. So the next thing you know, everyone who is a California consumer doesn't demand an arbitrator in California. It's now officially, you know, a Minnesota or a Colorado or

something consumer arbitration case and not reported in the California data.

So in response to Richard of AAA, you know, when the son of NFA appears down the road, if David's prediction comes true, and there is some other entrant into the field, the possibility they would not disclose this information on a nationwide basis is very large.

I know in other state examples, Group Instruction Arbitration Services which produced an enormous amount of angry consumers, never disclosed anything. Although somebody actually told me that they have just shut down which is great.

But anyhow, the idea of nationwide disclosure should not be subsumed as -- the California statute arguably could be read that way, and it arguably can be read to only require California disclosures, and the absence of that data from the rest of the country for all of the other providers is a terrific gap.

MS. BUSH: Is there a role for the FTC with respect to these issues?

Josh?

MR. FRANK: I want to say no. An additional aspect of this is that there needs to be some accountability to make sure that there is follow through and that things are reported accurately and completely to the reasonable extent possible, and I

realize that there will be all kinds of documents at times with a data set like this.

But, you know, when you think about NAF and these sort of allegations, if they're all true, and with the kind of activities they were doing and saying one thing and doing another, it wouldn't be impossible for an organization with that mind-set to provide false or incomplete data or relaxed data; and so there is a role in doing a little bit of monitoring that the data is accurate and not -- you know, in a simplified way, and that it is complete, and that it truly reflects what's going on.

MR. KAPLINSKY: What is the -- I'm asking the question because I don't know the answer, maybe other people here do. If you don't provide accurate data under the California statute, are there any sanctions?

MR. BLAND: There is a private right of action to basically get injunctive relief and attorneys' fees. In the first year or so that NAF did not provide data -- so I represented a consumer group, Consumer Action, which has offices in D.C. and California, and I represented the former head of the house judiciary committee under Section 17-200, which is one of California's consumer protection laws and then also under this statute to try to force NAF to disclose the data.

Then in the interim, Governor Schwarzenegger got through the proposition which skirts the standing provisions of Section 17-200, and you suddenly had plaintiffs who did not have -- they did not suffer personal economic damages as a result of lack of disclosure, and the case was thrown out.

Then the city -- then the DA basically contacted him and said, okay, you've got the private plaintiffs, but you still have to follow this law, and then they finally made the disclosures that they did make as a result of that pressure.

But in California, essentially, on the statute itself -- now, you have to be able to show that the lack of disclosure has caused the clients themselves to suffer economic damage, which is a difficult jump. I mean, there's a lot of clients who could come in and say -- like, for example, in the clause that like gives you a choice of three arbitration forums, JAMS, AAA, or NAF, you've got clients, Well, I want to know which one is better for me in suing this company, so I'd like to see the data.

You know, they have to make that decision in a very short time, or the case is going to become moot or is not going to be ripe. You know, it's almost impossible at this point after Proposition 64 to bring a case, especially a written case under Proposition 64,

it's sort of strapped up.

So in theory there is a remedy that lets you get injunctive relief, but in reality today, the lawyer who brings one of those cases successfully should receive some award for cleverness because I think they're much more clever than I am. I think now the statute is unenforceable.

MR. KAPLINSKY: It's probably preempted by the FAA, too. I mean, I don't know if that ever got litigated, but I would think there would be a pretty good argument to the fact that it's preemptive because it is a state statute that is singling out arbitration for special treatment.

MR. DRAHOZAL: But it doesn't invalidate the arbitration agreement, so it's not disputed. It's not been litigated to my knowledge.

MR. KAPLINSKY: Yes.

MR. DRAHOZAL: The specific disclosure requirements for arbitrators in California have been litigated and held preemptive by the federal securities laws, but not by the Federal Arbitration Act. But the disclosure requirements, to my knowledge, haven't been litigated on a preemption theory.

And again, the argument would be, you still have to arbitrate, and so there are some theories under which it might be preemptive, but it's just not clear.

MR. KAPLINSKY: Julie, to answer your question directly, what should the FTC do in this area, once again, with all due respect, nothing. You have one, essentially, AAA as pretty much the only game in town these days, although you do have JAMS as well.

And they're already providing the data. They're doing it voluntarily. They're doing it nationally. So yeah, it's conceivable that a fly-by-night arbitration administrator may come on the scene, but it hasn't happened yet. So therefore, what I would say is, there's no need to do anything right now at all on this particular issue.

MS. BUSH: Yes?

MR. BLAND: First, with respect to just on whether or not this is preempted by the Federal Arbitration Act, there is a California court of appeals decision, the name of which eludes me, but I can email it to you, which found that the California disclosure laws were not preempted by the FAA.

And the argument from our side was brief, it never reached a head, is that the only thing that the FAA has been found to be preemptive is Section 2, which says that the clauses are enforceable. The disclosure statute does not render unenforceable an arbitration clause, so the idea that it would be preemptive, I think it's going to require new preemption law to be

invented.

With respect to what should the FTC do, it seems to me that -- I'm not a scholar in the Federal Trade Commission Act, but my understanding is that there is a notion built into when is the disclosure sufficiently incomplete as to be misleading, that if someone on the case has disclosed something, and you leave out material, important information that they are leaving out that could become misleading or deceptive, and I think that to that extent I really like Ron's point about that it should have a breakdown in debt collection cases because it does include information that is extremely important and that can be dispositive of people's rights.

And sometimes they're large sums of money that are really significant to people. I think that not having a breakdown in a debt collection case the way they have been doing really is taking away some information from people that would be material.

So you're getting a disclosure of a total figure. You know, MBNA gets $15,000, but you don't know how much of that is an arbitration fee. You don't know how much of that is attorneys' fees, which is maybe something you would be able to litigate.

Not knowing the breakdown of principal and interest prevents you from knowing whether there is

interest on interest in a way that you would be able to make a motion to vacate, or that somebody would subsequently be able to do a collateral litigation around like an FDCPA case the way there's sometimes collateral litigation.

I think that because some of these disclosures are so incomplete, I think there may be an argument that they are misleading and deceptive, and that would be something -- I think the FTC, if it agrees that Ron's idea is an important one, I think that's something that you would be able to do a sort of rule about, and I think that would be a great thing.

MR. KAPLINSKY: Once again, I think -- I don't think the FTC has to do it. I think it's something the AAA ought to take care of and JAMS can take care of. I mean, I agree with you, Paul, and with you, Ron, both of you, that there should be a breakdown. Absolutely, it should not be all bundled together into one figure, but I think AAA could require that, and JAMS could require that, and that's all that needs to be done.

MR. NAIMARK: Some of the consumer cases do already provide a breakdown. There's variables depending on the wishes of the parties. You have to bear in mind there are existing consumer cases that have a different profile than what we've been talking about today.

Most of those cases, I think the majority are filed by consumers, not businesses, so they're not collection matters per se. They're different issues. In a few of those, consumers will ask for a more extensive written opinion. I understand and hope to see those see the light of day, very carefully done if the arbitrators take the time to write a multi-page decision explaining to the parties what was happening to them.

MS. BUSH: Well, thank you very much for participating. Our next panel is coming right up.

Tom Pahl is leading the panel on Enforcing Awards and Contesting Awards, and then wrapping up the day's proceedings.

ENFORCING AWARDS; CONTESTING AWARDS

MR. PAHL: All right. I'm Tom Pahl, as Julie mentioned, and we are on to our last panel of the day. I'm going to try to keep this relatively brief and see if we can finish up at 4:30. I'm going to ask a couple of catchall questions, I think to finish up the program, and then finish with some very, very brief closing remarks.

The last topic that we're going to cover is enforcing and contesting arbitration awards, and the question that I would throw out for the panelists is how should a debt collector who wins an arbitration award be able to confirm that decision or convert that decision into an enforceable order or judgment? What should be the procedures to do that?

MR. JOHNSON: That's one of the major, major problems with arbitration. First off, when you go into this earlier service, and I mentioned there were two critical points where the consumer has to give notice. The first one is service that the notice was received,

but the second one is when the award is delivered because there are very important rights that are triggered by that.

Frequently, the arbitration clauses provide -- essentially, which allows the forum to proceed under the forum rules, and then the rules are frequently just to simply mail that by regular mail to the consumer, and as we mentioned, a lot of times there are default arbitrations. Even when the arbitration has been stayed or something, they can catch a consumer by surprise.

So anyway, there needs to be rules as to -- that needs to be at the very least certified mail or something other than regular mail, but the major, major problem is going to require congressional action. The FTC is not going to do it, but there are serious problems with the fact that the arbitrator -- that the consumer is supposedly supposed to bring their -- if there's a fraud, bias, any of those reasons for upsetting an arbitration award, that has to be done within 90 days of delivery of that ruling, where the creditor then has one year to go in and confirm the award.

What happens is, in consumer debt arbitrations, obviously, they just sit on it. They just wait until the 90 days pass, and then they go into court, and

we've got some really bad rulings at the Iowa Court of Appeals that say once that 90 days has passed, you not only cannot raise a lot of different issues -- I mean, there's just a whole laundry list in the FAA, and a lot of states like Iowa enacted these model arbitration acts that have similar provisions, and you lose a lot of rights if you don't attack that award during that 90-day period.

So congressionally, I think what we need to see is, if we're going to continue with this, I hope we don't, but anyway, those time periods need to be the same. What you see is the shenanigans of the players, somebody like NAF because they actually have a procedure requiring their arbitrators to destroy all their documents within 60 days. I think it's a requirement of the arbitrator. You have to destroy those documents within 60 days.

The reason why they have that -- in my opinion, the reason why they have that is because of this 90-day rule, and they know that the debt collectors are going to wait until 90 days to go in and confirm the award. I don't know that the FTC can do anything without congressional action on that, but it's a very serious problem.

MR. PAHL: Paul?

MR. BLAND: Yet I think that most scholars and

academics -- I know this is a controversial point, but I want to say it because I think it's true. I think that most people who really study this understand that the Act was originally passed for the true sophisticated commercial parties. Justice Breyer's insight in the Allied-Bruce versus Terminix case that this also to applies consumer cases came as a surprise to a great many people.

One of the upshots of that is that I don't think anybody when this Act was passed and when the 90-day period and the one-year period were written into law were foreseeing hundreds of thousands of debt collection cases involving consumers who may or may not have gotten notice.

So what happened is, what Ray said, is really something that I think calls out for legislative change. I don't think your Commission could do anything here, but I do think the Commission could advocate legislation that would be really important.

What's happened at a minimum is if you miss the 90 days, you can't raise any challenges in any court that I'm aware of in the country to things like the debt being way past the statute -- if you get a zombie debt that's 10 years old, you can't challenge that. No payments for 10 years, you still can't challenge that. You can have all sorts of junk fees thrown in, and it's

not challengeable.

Then there is a circuit split, if you can believe this, there's a circuit split on whether or not you can challenge it if it's not your agreement. Okay. The courts on sort of my side of it say, Well, one of the things you're supposed to do is when you go to confirm the award after the 90 days, and they also wait for the 90 days, then you're supposed to attach a copy of the agreement.

And we say, Well, you said attach a copy of the agreement, the actual agreement, so if there wasn't actually an agreement, it's identity theft, then how could you attach the agreement, and therefore, you shouldn't be able to do it. That argument is actually a loss concern, take the Fourth District, for example.

There's several courts out there that have said that if you don't go to vacate within 90 days, that you are then stuck with it even if you never had the card. Even if, you know, somebody went through your garbage, found your credit card statement, opened up an account in your name, ran up $30,000 in bills, you're stuck with an award against you because you didn't object within 90 days. Outlandish. The system is so unfair, it's unbelievable, and Congress should do something, and I think that would be great.

MR. KAPLINSKY: Isn't there a -- and showing my

ignorance of either the Federal Rules of Civil Procedure or state rules of civil procedure, but if a default judgment gets entered, isn't there a certain period of time that -- you know, that somebody would have to try to get that default judgment lifted?

MS. JACKSON: Yeah, in Indiana, you have definitely one year in certain circumstances and a reasonable amount of time beyond one year in different circumstances, depending on what your reasons are for not responding.

MR. KAPLINSKY: Right.

MS. JACKSON: It's much longer than 90 days.

MR. PAHL: Ron?

MR. CANTER: There's no question that the FTC really can't do anything because it's under the Federal Arbitration Act, and that for this point is the legal entity under which people's awards need to be enforced and challenges can be made to those awards.

I just have two other thoughts. Paul said, Well, you know, you get an award, and you have to act in 90 days after the award, and then you're stuck with it even if there were egregious facts.

I do want to restate the concept that before the award was entered, there was a service to the claim through a process server or some other mechanism on the debt, and then they got notice of the award.

Now, Paul is going to say, Well, they didn't get notice. Well, fine, if they didn't get notice of the award, then the 90 days doesn't run because they can come in and say they never got delivery of the award, and the statute says that the delivery -- it runs from the date of delivery of the award.

I would certainly suggest that there perhaps can be a consensus, not as to what the rules should be, but as to whether or not the statute should be modified in terms of allowing consumers to challenge consumer debt collection awards or consumer awards for a longer period of time. It may make sense to make it the same time period as the period for enforcing the award.

By the way, there's not unanimity as to whether the one year is mandatory or permissible because in the Fourth Circuit, it says it's permissible, and in the Second Circuit, I think it's mandatory.

I owe it to the creditor community to raise this. It's not going to be answered today. It's not something the Federal Trade Commission really -- well, maybe, according to Paul, you may have something to do with it, and that is, I guess the 800-pound gorilla in the room, and that is not something specifically to handling some arbitrations, but how are these NAF awards subject to enforcement, if at all.

You know, in my opinion, let me just articulate

my opinion and then stop, and that is, if, in fact, you have an award from an arbitrator like Mr. Sorkin or anybody who -- there's no indication of bias, I think the creditor can go into court and seek enforcement under the provisions of Section -- I forget what section, within the year and allege there was an award.

I think it's permissible, although I'm sure plaintiffs' attorneys and the FTC may disagree with me to alternatively allege that there was a subsequent proceeding where the NAF got out of the arbitration business. And to the extent the court refuses to rely on the award to be entered, ask alternatively for a judgment based on the debt.

But I think, you know -- and this is really something apart from what the FTC is talking about today, although I think it's on the legal landscape of enforcing consumer arbitration awards for many years to come.

MR. PAHL: Paul?

MR. BLAND: One of the things that's different between this and default judgments in court is that you have two time periods. I think they should be changed. I mean, the piece of legislation I think would make sense would be something that -- [phone rings] I guess that's on me. I thought I turned it off. I apologize.

Having two different time periods really

prejudices consumers in a significant way, in that consumers, even if the notice was sent to them, generally do not realize that they have gotten -- they just don't know what the -- they get something from the National Arbitration Forum. They don't open it. They don't understand it.

And so the 90 days doesn't actually trigger the consciousness the way that the court filing does, and so -- and our intakes are overwhelmingly in the last several years where we get somebody who, you know, search desperately on the Internet and googles it, and they come up with my name. They call up and say, Please help me get out of this.

Those people again and again and again and again and again have missed the 90 days, you know, even if they did get notice, but the court filing that there was something to be confirmed, and suddenly someone says they owe $20,000, that's what got their attention. So having this disparity in the time period does, in fact, hurt people.

With respect to the effect of the NAF awards that are out there and going to be continually entered since you have this -- there's a lot of rabbits going through the snake. Right. So there's a lot of cases that are still in the pipeline.

I think that the idea that you're going to do

this on an arbitrator-by-arbitrator basis seems crazy to me. I think that if the allegations in the Minnesota complaint are true, which is, again, something that I really think the Commission would be well within its -- would be well-advised to look into and take a hard look at. If the allegations of that complaint are true, I think it's outrageous.

I mean, I think that the idea that the people who are picking the judges -- I cannot -- I'll go back to it. You know, dispensing justice is an awesome function. It's extremely powerful, and it is a great responsibility. And yet here people are picking the judges supposedly to $42 million with basically a fund which includes, you know, the three largest debt collection firms in the country, and they're going to be deciding tens of thousands of cases brought by the law firms who also partly own them and have people on their board and have policy-making rules, and that those judgments are okay.

That seems just outrageous to me. It seems like a scandal to me, and the idea that there are tens of thousands of cases, and we're going to say that somebody who entered an award, that you actually lose all that money to real people, I think that that's dispensing justice in an extremely haphazard way.

I think the way to do it is to figure out,

well, is it a really good guy like Professor Sorkin, or is it one of these guys who did, you know, 68 cases in a day and 1500 cases in six months kind of thing. You know, we're going to depose Professor Sorkin, well, there's no procedure for that.

We can't figure out whether he's a good person from a piece of paper. You know, you can meet him and form a different view of him than you might have of the guy who does 68 a day, but there's no -- the legal process is not designed to cut things that finely. I think what needs to happen is that all of those awards, all of those awards need to be thrown out.

MR. PAHL: I'd like to hear from Richard and one thing that sort of relates to all of this and I would be interested to hear about is what should owners of debt, including debt buyers and credit contracts that say these disputes should be arbitrated before the NAF, what happens now in the future with the NAF and moving forward? I'm curious as a practical matter of what --

MR. NAIMARK: Excuse me, I just briefly want to go back to a previous point on the application of the FAA and the whole arbitration act on the consumer -- consumer matters.

If you look at Senator Feingold's version of the Arbitration Hearings Act, there's language in there

that suggests or provides for a new Chapter 4, Title 9, so that consumer employment law will have its own specific target law.

MR. PAHL: Alan?

MR. KAPLINSKY: I just wanted to add one thing to the prior discussion and then answer your question about what happens next.

I'm not sure that an amendment to the FAA will deal with the anomaly that's been identified here of there being a 90-day period to vacate an award, but yet a one-year period to confirm an award because I'm not sure that Section 10 of the FAA applies in state courts. You know, I think Paul would probably agree with me that at least the only thing that's completely clear is that Section 2 of the FAA applies to state courts.

So the problem to the extent it exists is more not a problem with the FAA, it's really a problem on a state-by-state basis, and maybe it's an issue that ought to be brought to the NCCUSL, the National Conference of Commissioners on Uniform State Laws. They recently went through the process of revising the Uniform Arbitration Act, and I don't know what they did with that issue, I don't know, but apparently, they didn't touch it, and maybe they should have, and that -- it seems to me, that would be a terrific issue

to vet with them.

Now, to answer your question, Tom, there are two kinds of issues here. One is the issue that Paul touched on. You know, what happens if you already have a NAF award? Can you go to court to try to get that confirmed? Should you go to court to try to get that confirmed?

I would respectfully disagree with Paul that just because there was a lawsuit filed by the Minnesota AG, that that answers the question. The jurisprudence under the FAA is actually quite to the contrary.

The issue is, was there arbitrator bias, not whether or not there was some issue with the administrator, and indeed, that issue has already been -- not the conflict of interest question, but other problems that consumer advocates have had with the NAF have been litigated over and over again, and the basic body of law is pretty well developed, other than in the West Virginia Supreme Court where the courts did not have a problem with, you know, basically the kind of allegations and charges that it made against the NAF.

Now, the other issue is the drafting issue. What happens if you have an arbitration agreement that only designates the NAF? The question is where do you go from there?

Well, if it's in an agreement that can't be changed, like in a closed-end loan, a mortgage loan, an auto finance contract, there's really nothing you can do about that. The question that the courts are going to have to deal with is -- and they'll have to look at it, the precise language of the arbitration agreement.

If the arbitration agreement specifically designates the NAF and says nothing more than that, there will be a question of whether or not the court has the right under Section 5 of the FAA, which may or may not apply in state court, but there are, I think comparable provisions in the uniform arbitration acts in the various states. Can the court fill that void, and I think that's an unsettled question.

If you're drafting an arbitration agreement today for a new loan that hasn't been entered into yet, I would be counseling my clients to, first of all, give -- you certainly want to take the NAF out, obviously, but you want to give the consumer the choice of selecting from between AAA or JAMS; and then I would go on to say that in the event that neither of them are available to serve, you know, you want to cover all the contingencies as a lawyer, and if the parties cannot otherwise agree on a substitute administrator or arbitrator, then the court shall be authorized to appoint a substitute administrator or arbitrator.

I think if you draft language in that fashion expressly in the arbitration clause giving the court the right to select the administrator, I think the court does have that right, and maybe even an obligation under Section 5. And, again, in the state courts you may be dealing with the state arbitration act, and you need to look at the precise language of that.

MR. DRAHOZAL: One more or two more quick comments on the timing of the appeal dispute.

I agree with Alan that it's really unsettled whether the Federal Arbitration Act applies, and there's a good argument that it doesn't apply in state courts in this respect.

That said, there are some states that basically apply Section 9 and 10 of the FAA, even though it's unclear whether they need to or not. So it's kind of a messy area.

I think the other point is -- Paul makes a very good case, I think that this applies in this sort of setting, this time limit, these differential time limits are problematic. But just to be clear, this is not something that's been singled out to consumers. This is the rule across the board; and if consumers win, then they can wait 90 days, and if the businesses don't move to vacate, the same thing happens.

So it makes it particularly problematic in the case where consumers lose because they don't realize they need to act, and that may justify some sort of response, but it's not like the system was set up in a way per se to be a disadvantage to the consumer because it is reciprocal. It's just reciprocal in the kind of cases we get. The reciprocation in this particular case is problematic.

MR. PAHL: Ray?

MR. JOHNSON: There have been several comments regarding NAF and what's going to happen to the arbitration awards, and I'm familiar with the case law that Alan is referring to regarding whether the arbitrator is biased or whether the forum is biased; but looking into the future, I think that -- I don't know if everybody would agree, but I think it's impossible to separate the acts of the forum from the acts of the arbitrator. The forum picked the arbitrator. The forum decided which arbitrators were going to get the cases. The forum set the rules that the people went under.

And we alluded to this earlier when we were talking about whether there should be standards for the forum, and there's a good reason for that. The forum has a lot of control over it. For example, one problem that I have with NAF and even to some extent AAA, and I

know they're going in for legitimate reasons, but the parties cannot contact the arbitrator. I'm not talking about an ex parte communication. I'm talking about whether you have -- just like you do with a judge, where two lawyers need to get the arbitrator on the phone and talk to them.

And I always had a real concern when stuff was going through NAF. You know, I would send in stuff to NAF, and I'd just have to cross my fingers and wonder what's going to that arbitrator, what's going along with my stuff to the arbitrator, and I would never know.

I think that part of the transparency is that the parties need to be able to directly communicate with the arbitrator and certainly not ex parte. Everybody knows that you're not supposed to be doing that. I don't want my opponent doing that, and I won't be doing that, but I think that that's something that we need to look at.

With respect to these NAF awards, I don't know what's going to happen to them. I'm sitting with arbitrations that I'm doing myself and with Mann Bracken on the other side, and, you know, we've got one -- you know, we all know that arbitration is a speedy way to resolve disputes. Of course, I have one from NAF that I filed over two years ago, and we don't

have an arbitrator appointed yet.

I've got another one with NAF that's been pending over a year. I have another one that -- and these are just simple unfair debt collection cases. You know, the cookie-cutter stuff that anybody should be able to resolve really quickly.

You know, I've got another one with NAF that was over a year-and-a-half, and my client died waiting -- literally died waiting for a ruling. So I don't know what's going to happen with all that stuff, but the idea that you can sort NAF out from this person in Texas who is a creditor's rights attorney who was doing the discovery on those disputes, I don't think you can.

I would -- Paul said it twice, and I'll join in. This cries -- I mean, I know there have been a lot of class actions filed and all that stuff, but this really cries out for the FTC to get involved and find out really what was going on here and find out what we're going to do with all these arbitration awards because, you know, for people like me and my clients, you know, I don't know what's going to happen with these class actions or what's going happen with them.

But all I know is they're sitting here with a $30,000 arbitration award that -- I used to joke that arbitration -- what people would say is that

arbitration is like your brother-in-law deciding the case, and I would joke and say, you know, they say that, but NAF arbitration is really like your mother deciding the case. Now, it even surprised me. NAF arbitration is like your opponent deciding the case for you.

So these are things that have caused real harm to real consumers. I can't -- I know we just talk about these things in the abstract, but you can't begin to believe what that does to a family with a $30- or $40,000 income to suddenly have a seven-, eight-, nine-10-year-old credit card debt that has been allowed to accumulate default interest rates over a seven-, eight-year period and to suddenly have that $30,000 judgment sitting against you with the changes that have happened in the bankruptcy law and sitting there and having to pay that off in Chapter 13, or you have your house, and you can't file and get rid of it in Chapter 7. They are real people who are caught up in this.

MR. PAHL: Okay. I think what I'd like to do is move on and ask sort of two catchall questions. I know all of you have been here all day engaged in a very vigorous debate and discussion about issues.

One thing I did want to check. This roundtable is the first of three roundtables that we are thinking about doing on this topic and just go around and see if

anyone thinks that there are any issues that we did not discuss today that relate to arbitration that we should have discussed or if there were arbitration issues that we didn't spend as much time on as you think we should have.

Does anybody have any thoughts about that?

MR. JOHNSON: I'm trying to keep to this -- the fee issue, I don't think that we did the fee issue justice. Fees, there's two major issues with fees, and I'll just hit them. I think I'm going to file some comments regarding that.

But in arbitration, you are constantly hit with fees. Like, you know, your initial filing fee may be cheaper, but you're constantly hit -- for example, with NAF, if you want a participatory hearing, that's two hours, two hours of a participatory hearing, and that includes opening and closing arguments, and, you know, as lawyers we can't even get opening and closing arguments done in an hour. So you have -- it's very limited. If you want more than that, you've got to pay additional money for that.

If you want to file a motion to compel because the guy in Texas didn't give me the documents that I wanted, it's $250. Every time you want to file one of those motions, it nickels and dimes you over and over and over.

We're going with JAMS, not to pick on NAF all the time, but $450 an hour for the arbitrator. There are no arbitrators in Iowa who do JAMS arbitration, so we have the guy from Chicago who is coming in. So you're hit with those fees all the time. Arbitration can be an extremely expensive process, and I think that people need to realize when they're looking at these studies that are done that they're talking about the typical default arbitration.

Also one thing with AAA, and I hope that we can change this, but we're talking about consumer arbitrations, and there's never any definition of that. Well, AAA takes the position that if it's a contract that's entered into by bargaining, that that's not -- that's not eligible for the consumer rules because you could have bargained the arbitration clause.

I have mixed results in the AAA arbitration. More than often, I get the letter saying that if I'm bringing a case on an auto deficiency or something like that, more than often I get the letter from AAA that it's not under the consumer rules. In fact, that's under the commercial rules.

The commercial rules are just way expensive, like thousands of dollars to do the arbitration. Sometimes if I whine and cry enough, your administrators will maybe look the other way and do it

under the streamlined rules, but I'd really like it if you could go back to AAA and dump that. I mean, those clearly -- deficiencies or anything on a car thing, it clearly is a consumer case.

You know, maybe if a consumer can negotiate on the price of the car, they probably can negotiate the arbitration clause, and those really need to be so that they're not under the commercial. I don't know whether that applies to real estate, whether you can negotiate that, but we really need to have a system that's totally where consumer arbitrations are affordable that they can do.

MR. NAIMARK: The basic fee structure in the commercial group -- I mean, in the consumer groups is a maximum of $125 for the consumer, if they want an in-person hearing, and a maximum of $375 to cover the rest.

The issue you're talking about is where the definition of consumer falls, and most of -- let me put it this way. When these issues originally started to arise about 10 years ago, there was a question of these adhesion contracts, these form contracts, and so it's essentially an application of that. Where there's negotiations on an individual basis, those weren't included in the consumer definition, but the contracts that were completely imposed, and there's no

opportunity for negotiation that will revert to the consumer.

MR. JOHNSON: But we spent a lot of time talking about credit card debt, and we probably should talk about home and auto, and those are certainly things that are run through the arbitration process, too. I think it's important that everybody know under the current -- I understand the current AAA rules because I have just done some arbitrations like that. One where the business didn't want to pay those kind of fees either, so we stipulated to do them under the consumer rules, and the case manager, I hope I'm not getting her in trouble, was nice enough to let us do it.

MR. NAIMARK: You may be surprised to know that they're trained to try and be responsive.

MR. JOHNSON: That needs to be given under the streamlined rules, but I think that that needs to be clarified, so that -- because, you know, a major purchase for a consumer is a home, the second one is the auto, and the third one -- or actually, I believe that's the first one -- is credit card debt; but those two major purchases need to be treated under the consumer -- under the streamlined rules because if they're not, then what we're talking about is just nonsense because the net effect to the cases that Paul

is involved in and others under AAA's commercial rules, it's just not affordable for the consumer.

MR. PAHL: Ron?

MR. CANTER: I think one thing to start with, I don't think that there is a great number of cases where the courts rule in post-claim or post-dispute arbitration. For example, in Pennsylvania, there is a mandatory arbitration in the court of common pleas and in the federal court, but it's not binding. If you go to court with three lawyers who make a decision and you go to trial de novo. I mean, at least that type of council should be explored, even though it's not your run-of-the-mill debt collection default case, it certainly plays into the whole process of, quote, unquote, arbitration and having an alternative mechanism to resolve the cases.

MR. PAHL: Yes?

MR. SORKIN: I think that's an excellent point. I also alluded to the point, I think it was also Ron that made the point much earlier, most of these cases aren't really disputes. Courts are good at resolving disputes. That's what they do. Arbitrators are good at resolving disputes. That's what they do.

Here, we're talking about tragedies in many cases that arise. We're talking about personal financial problems. We're talking about lack of

communication. We're talking about unequal power relationships, and sometimes in a few of these cases, there really isn't a dispute. Usually that's not what it's about.

So I think we need to step back and look at a little broader picture, and not just limit ourselves to a traditional court litigation process or a traditional arbitration process that copies most of that and tries to make it more efficient and maybe cheaper or maybe a little more bias for whoever is designing it or whatever, and I don't have the answer to that.

But I think we need to look at other alternatives, be they other methods of dispute resolution, the idea of having a nonbinding arbitration, for example. The idea of coming up with omnibus services, mediation services offered voluntarily, if they're made appealing enough by the industry for consumers to rationally accept them, maybe they will. But I don't think we should limit ourselves to the models that are in place now.

MR. PAHL: Paul?

MR. BLAND: When you asked are there other issues that should be addressed, do you mean just about debt collection arbitration or more broadly about arbitration?

MR. PAHL: Just debt collection arbitration.

MR. BLAND: No, because I think today we have covered every possible thing we could.

MR. KAPLINSKY: I have one idea about what the FTC could do.

MR. PAHL: Sure.

MR. KAPLINSKY: And that is you could become an arbitration administrator. You could handle -- you have even more credibility than the AAA. I mean, talking about that, and, you know, I don't think anybody would have a quarrel with that. I think that's something that would be very worthwhile.

MR. PAHL: Not that specific, but that also did raise the other question. We have a number of, you know, helpful suggestions about what FTC could do.

Is there anything else that the FTC should consider that comes to mind that people haven't raised in prior discussions today, just to make sure?

MS. JACKSON: I'll make a real quick point.

MR. PAHL: Sure.

MS. JACKSON: You know, we touched on this a little bit, and it's kind of like what's the future of arbitration, and what are you going to do with these new players? You know, we've always gotten back to, well, AAA is doing a good job, and JAMS is going to be stepping up.

But, you know, from the volume that I see, you

know, it's such a small volume of consumer cases, and JAMS has a small volume of consumer cases, but, you know, NAF, who just did not operate properly here, had a large volume of consumer cases, I wonder is this model even profitable for arbitration, which goes back to David.

I mean, is this even a proper forum to be handling these types of cases? It seems that, you know, there's some problems there. You know, it seems like the bad actor got all the cases, well, why is that? Is arbitration even an appropriate forum for this type of debt collection?

MR. PAHL: Okay. I'd like to give some closing remarks and hopefully, we can finish up a little early.

One thing I would note is that very shortly evaluation forms will be coming around. I would encourage folks in the audience and panelists to complete them if they can before they head on their way.

On behalf of the FTC, I want to thank the Searle Center here at Northwestern and Northwestern Law School for cohosting this event with us and allowing us to use these wonderful facilities here.

I also want to thank a number of the folks at the FTC and the Searle Center who worked so hard to put together our event today.

At the FTC in particular, I would like to thank Julie Bush, Bevin Murphy, Parrish Bergquist, David O'Toole, Tracy Thorleifson, and Julie Mayer, and also the Northwestern Law School intern who has been helping us out, Christine Chen.

At the Searle Center, also we've had Henry Butler, Geoffrey Lysaught, Derek Gundersen, Amanda Morrone, and Geoff Gatig working on the matter, and we've got one guy in particular I want to give some credit to is Joe, who is up-front and center, who has been handling all of the logistics for us today, including the lights and the cameras and the microphones, and he's been doing a wonderful job with that.

Finally, I want to thank all of our panelists for taking time out from their busy schedules to come and talk with us today and share your experiences with us. We definitely are in your debt. We try to collect them. You'd better call the FTC.

Anyway thank you very much, and for those of you who are traveling, have a safe trip home. Thank you.

(Applause.)

(Whereupon, at 4:35 p.m., the hearing was adjourned.)

C E R T I F I C A T I O N O F R E P O R T E R

DOCKET/FILE NUMBER: P094806

CASE TITLE: DEBT COLLECTION: PROTECTING CONSUMERS

DATE: AUGUST 6, 2009

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: 8/10/09

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JOANNE ELY, CSR-RPR

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