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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

DEBT COLLECTION:
PROTECTING CONSUMERS

Tuesday, September 29, 2009

9:00 a.m. - 3:22 p.m.

Workshop held at
San Francisco State University
835 Market Street, Rooms 675 and 676
San Francisco, California

Matter No. PO94806

Reported and transcribed by Susan Palmer, CERT 124

1 Panelists:

2

3 Nancy Barron

4 Irving S. Capitel

5 Gail Hillebrand

6 Jerry J. Jarzombek

7 David Melcer

8 Richard Naimark

9 Tomio B. Narita

10 Jean R. Sternlight

11 James C. Sturdevant

12 Christine Van Aken

13 Jerome M. Yalon, Jr.

14 Jay Welsh

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1 P R O C E E D I N G S

2 OPENING REMARKS

3 MR. PAHL: Good morning. If everyone could please take
4 their seats. I think we're going to try to get started promptly
5 at 9 o'clock.

6 Well, good morning, everyone. My name is Tom Pahl.
7 I'm an Assistant Director in the FTC's Division of Financial
8 Practices, and I'm thrilled that all of you are here today for
9 the second of our Debt Collection Litigation and Arbitration
10 Roundtables. I want to thank San Francisco State University for
11 helping us today by allowing us to use their space to host this
12 event, and we look forward to some animated and productive
13 discussions today.

14 Before we get started, I'd like to go through some
15 housekeeping and administrative details just so everyone is aware
16 of them before the events commence in earnest. First of all, the
17 bathrooms, for those of you who didn't notice them, are located
18 out in the elevator lobby and adjacent to the elevator banks.

19 In the case of an emergency, San Francisco State has
20 fire marshals who will come down the hallways and direct us to
21 safety. The one thing they did ask that we not do is try to take
22 the elevators in case of fire, or earthquake, or other kind of
23 emergency.

24 There are light refreshments over on the countertop to
25 my left. And please help yourself. There's coffee and some

1 palmiers and some Nutrigrain bars. So help yourself to light
2 refreshments throughout the day.

3 When we take a break for lunch, some folks have asked
4 about places to go eat. One thing that I would note, there is an
5 extensive food court that's attached to this building. To get
6 there, go out and take the elevators down to the C level, and
7 that will connect you directly to, as I said, an extensive food
8 court. There's a grocery store and some other stores down there
9 if you're interested.

10 Now turning to the events of the day and the workshop
11 itself, what we're going to do, the structure of this is there
12 are going to be panels up here. We're going to go through
13 various topics. There will be moderators who will try to keep
14 the discussion going.

15 What we're going to do is at the end of each panel is
16 try to pose questions from the audience here as well as the
17 audience who is participating through our website. If you're
18 here in the audience and you have a question that you would like
19 to have the moderator pose to the panelists, there are cards that
20 we are making available over on the table, right out -- and they
21 are in your packet as well. Write out a question, fold the card
22 up, someone will collect the cards, and pass them on to the
23 moderator. I can't guarantee that we'll be able to ask all of
24 the questions that people have. We'll do our best, but obviously
25 we are under pretty significant time constraints trying to cover

1 a lot of material.

2 For those of you who are on the internet, you can send
3 questions to ConsumerDebtEvents@FTC.gov, and those, again, will
4 be picked up by some of our staff folks who are helping putting
5 this event on. And they will, again, be forwarded to the
6 moderator, and we will ask as many of those questions as we can.

7 For those of you who are speaking and are panelists up
8 here, I would ask that you speak as directly as possible into the
9 microphones. The sound system folks have said that really is
10 important in order to broadcast the sound as well as for our
11 court reporter to record it.

12 I also would encourage you, I know we anticipate and
13 hope for a lively debate and encourage all of you though to try
14 to speak one at a time. That makes the stenographer's job just
15 that much easier, and so that's something I would ask you to be
16 mindful of and respectful of the other panelists.

17 Without further ado -- if any of you have cell phones
18 on, if you can turn them off or put them on vibrate, that would
19 be much appreciated, thank you.

20 Without further ado, I'm going to turn to our opening
21 speaker today. Our opening speaker is Chuck Harwood, who is a
22 Deputy Director of the FTC's Bureau of Consumer Protection. For
23 many years, Chuck was the Director of the FTC Seattle Regional
24 Office where he was responsible for managing a number of FTC debt
25 collection cases.

1 We're thrilled that Chuck is able to be here today and
2 provide us with some opening remarks.

3 Chuck.

4 MR. HARWOOD: Thank you, Tom. Well, good morning and
5 welcome to the San Francisco edition, in fact, the West Coast
6 Edition of the FTC's roundtable discussion entitled Protecting
7 Consumers in Debt Collection Litigation and Arbitration.

8 I am pleased, in fact, I am truly pleased that we were
9 able to entice so many experts to join us today for this program.
10 Your participation will help us better understand the issues and
11 identify the problems and brainstorm about possible solutions to
12 consumer protection concerns in debt collection litigation and
13 arbitration.

14 Now along with the audience we have in the room here
15 today, I'm also pleased that we've been joined by folks on the
16 internet through our webcast.

17 Now during the day, you're going to hear from a variety
18 of folks including some FTC folks, and I just want to add one
19 caveat regarding the FTC folks who will be participating. While
20 we are here primarily to collect information, we may occasionally
21 express opinions. To the extent that we do so, please understand
22 that those are simply our opinions and not those of the
23 Commission or any individual commissioner.

24 So this program is one of three roundtable events the
25 FTC is hosting this year as part of our ongoing effort to address

1 consumer protection in debt collection. We held our first event
2 in Chicago in early August, and the third and final event will
3 take place in Washington, D.C., on December 4th of this year.

4 Also, we know that there are many people with interest
5 and expertise in these areas who may not be able to participate
6 in one of these roundtables. For these folks, we would encourage
7 you to submit your comments, as Tom has already said, through our
8 online form or through other means. You have a couple different
9 ways you can comment. One is there are instructions for
10 commenting in your folders, and on the literature table, and then
11 also online there's information on how to comment. And if you
12 have thoughts, and you're not able to participate in one of our
13 roundtable events, please take a moment and submit your comments
14 through one of those means.

15 So these debt collection roundtables grew out of our
16 comprehensive review of consumer debt collection. Litigation and
17 arbitration are clearly important elements of the debt collection
18 process, and we want to build a more extensive record to guide
19 policy-making in this area.

20 The roundtable discussions are designed to help us
21 target critical issues, understand variations in jurisdictions,
22 and identify possible best practices and guiding principles. We
23 hope that our discussions will enable us to make well informed
24 and balanced policy recommendations as to debt collection
25 litigation and arbitration proceedings.

1 Now tomorrow, for those of you with the stamina to
2 stick around, and I hope many of you will, we'll be discussing
3 litigation. But for today our topic will be debt collection
4 arbitration.

5 Now as many of you are aware, in mid-July, the
6 Minnesota Attorney General's Office sued the National Arbitration
7 Forum or NAF, which was by far the leading arbitration agency for
8 consumer debt collection matters. The suit filed by the
9 Minnesota AG's office alleged that NAF had engaged in consumer
10 fraud, deceptive trade practices, and false advertising through
11 holding itself out as an impartial dispute arbitrator, despite
12 having a complex web of affiliations with key members of the debt
13 collection industry.

14 After the suit was filed, indeed within a matter of
15 days after it was filed, NAF and the Minnesota AG's Office
16 entered into a settlement that requires NAF to, in fact, refrain
17 from arbitrating consumer debt collection disputes. Responding
18 to a request in the Minnesota's AG's Office, the American
19 Arbitration Association also choose to refrain from arbitrating
20 consumer debt collection disputes. After those two events, Bank
21 of America announced that it would cease using binding mandatory
22 arbitrary clauses in its credit card agreements.

23 Thus, at the moment, and I stress that, at the moment,
24 there are many uncertainties surrounding the potential
25 arbitration of consumer debt disputes, but we believe there

1 remains a large demand among creditors for arbitration services.
2 And, in fact, the Federal Arbitration Act favors enforcing
3 mandatory pre-suit arbitration clauses that creditors include in
4 their contracts. Therefore, it seems likely that arbitration
5 providers will appear in the future to arbitrate consumer debt
6 collection disputes.

7 So how should arbitration operate in the domain of
8 consumer debt collection disputes and what principals should be
9 operative if consumer rights are to be protected without unduly
10 burdening industry? Today's roundtable discussion will focus
11 prospectively on how to construct a consumer debt collection
12 arbitration system that treats consumer participants fairly.

13 First, we'll discuss how arbitration proceedings should
14 be initiated in a manner that makes consumers better aware of
15 them and their potential serious consequences. As a part of
16 this, we will explore the need for improvements in consumer
17 notification. Next we'll examine the rule of consumer choice in
18 debt collection arbitration including what could be done to
19 enhance such notice. This discussion will address what
20 information consumers might need to make more well-informed
21 choices about whether and when to arbitrate their disputes. We
22 will also examine whether changes in the law or in industry
23 practice might lead to higher consumer participation rates or
24 more appropriate consumer choice with regard to arbitration
25 disputes. Then we'll have lunch.

1 After lunch, we'll examine what procedures ought to be
2 adopted to provide for a fair resolution of consumer debt
3 collection disputes. In part, we'll examine biases or in some
4 cases perception of biases in consumer debt collection
5 arbitrations. What ties ought to exist between arbitration
6 providers and debt collectors, for example, is a key question,
7 and what sorts of ties should be disclosed or prohibited.

8 But we'll also consider whether arbitration proceedings
9 could be more transparent and whether arbitration results and
10 reasoning could serve as a precedents. In connection with this
11 inquiry, we will discuss the desirability of requiring systematic
12 reporting of data about consumer debt collection arbitration.

13 Finally, we will explore how arbitration decisions
14 ought to be enforced or contested. In particular, we will ask
15 whether any change in law or in industry practice should be
16 implemented with respect to collectors converting awards into
17 judgments or consumers contesting awards.

18 I trust that by the end of the day we will have a
19 clearer idea of how to design a fair and effective consumer debt
20 collection arbitration system. Also I should say, I'm looking
21 forward to a lively and informative discussion, and I hope we
22 will learn more from each other's ideas.

23 Finally, let me thank you again, to each of you in this
24 room and online who are participating and are willing to assist
25 the FTC in this important inquiry and help us as we move forward

1 in this area.

2 So with that, I will turn it over to our first panel.

3 And what's the (inaudible). I turn it back over to Tom. Okay.

4 Thank you.

5 (Applause.)

6 INTRODUCTION OF PARTICIPANTS

7 MR. PAHL: Thank you.

8 I'd like to ask all of the panelists to come up and
9 take their seats, and if everyone could bear with us for a moment
10 while they do that, I would appreciate it.

11 (Panelists seated.)

12 MR. PAHL: All right. Thank you. We are thrilled to
13 have such a wonderful collection of representatives for our
14 panels today. They represent a broad spectrum of legal
15 experience and a broad spectrum of interest: debt collectors,
16 consumer advocates, debt buyers, et cetera, people with a lot of
17 experience in arbitration on both sides of the issues. So we're
18 pleased to have such a fine group of people here.

19 In the folders that you've received is a detailed
20 biography of each of the panelists, but I'm going to go around
21 and in a very short form give a brief introduction of each
22 panelist so that those of you who are in the audience will be
23 able to connect up the names with the faces that you see before
24 you.

25 Beginning here -- and we have seated the panelists in

1 alphabetical order. So there is no particular rhyme or reason as
2 to where people are sitting.

3 Our first panelist, starting here on my right is Nancy
4 Barron, who is a partner in the San Francisco law firm of
5 Kemnitzer, Anderson, Barron, Ogilvie & Brewer where she
6 represents consumers in debt collection matters.

7 Immediately to her left is Irving Capitel, who is a
8 Senior Counselor for ADR at the BBB in Chicago.

9 Continuing around, we have Gail Hillebrand. Who is a
10 -- I have to pull out Gail's biography. She is the Financial
11 Services Campaign Manager and a Senior Attorney at the West Coast
12 office of Consumers Union, the nonprofit publisher of Consumer
13 Reports magazine.

14 Immediately to her left is Jerry Jarzombek, who is a
15 solo practitioner whose primary focus is on consumer law.

16 Next to him will be David Melcer who is a banking and
17 consumer finance lawyer with specialties in bankruptcy and
18 collection.

19 The next person is Bevin Murphy who is an FTC Staff
20 Attorney who will be moderating our first panel today.

21 Immediately to Bevin's left is Richard Naimark, who is
22 a senior vice president at the American Arbitration Association
23 and the International Center for Dispute Resolution.

24 Continuing around to his left, is Tomio Narita who is a
25 partner with the San Francisco law firm of Simmonds and Narita

1 where he defends debt collection law firms, debt buyers,
2 collection agencies, and creditors.

3 Continuing around, our next panelist is Jean Sternlight
4 who is the Saltman Professor of Law and Director of the Saltman
5 Center for Conflict Resolution at the University of Nevada Las
6 Vegas Boyd School of Law.

7 To her left is Jim Sturdevant who is a practitioner
8 here in San Francisco who represents plaintiffs in class actions
9 involving consumer protection, financial fraud, and insurance
10 fraud.

11 Continuing around after Jim, we have Christine Van Aken
12 who is a Deputy City Attorney in the office of San Francisco City
13 Attorney Dennis Herrera, where her primary practice is the
14 litigation of consumer protection cases.

15 Immediately to her left is Jerry Yalon who is an
16 attorney who focuses on consumer debt collection issues for the
17 law firm Mann Bracken.

18 And last but certainly not least is Jay Welsh, who is
19 the Executive Vice President of JAMS, which is the largest
20 private provider of ADR services in the world.

21 So I'd like to thank all of our panelists for being
22 here today to share their thoughts about debt collection
23 arbitration.

24 Without further ado, we will start off with our first
25 panel, which will be moderated as I mentioned by Bevin Murphy who

1 is an attorney in the FTC's Division of Financial Practices, and
2 our first panel today will be Initiating Proceedings and Consumer
3 Participation Rates.

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1 INITIATING PROCEEDINGS AND CONSUMER PARTICIPATION RATES

2 MS. MURPHY: Thanks, Tom.

3 We have a lot to cover and, unfortunately, a short
4 amount of time to cover it. So I guess I'll just start out by
5 echoing again our thanks for everyone for making the trip out
6 here and for helping us with these important issues. And because
7 we do have a lot to talk about in a short amount of time, if I
8 have to, unfortunately, cut anyone off or if I don't get to
9 anyone's hands or questions, that's, unfortunately, what we're
10 going to have to do to get through all of our topics.

11 So as Tom mentioned, we're going to start out with how
12 proceedings are initiated and especially what consumers
13 understand about these processes in terms of the consequences
14 that it has for them and how important arbitration can be to debt
15 collection.

16 Our approach is going to be two-pronged. We want to
17 hear about all of your experiences out there in the field in your
18 jurisdictions and also prospectively what can be done to the
19 extent there are problems, what ideas we have for solving those
20 problems.

21 So the general sub-topics we're going to go through are
22 Notice: How are consumers informed about arbitration proceedings?
23 Are they informed about arbitration proceedings? Once we get to
24 the arbitration proceedings stage, what has to be shown, you
25 know, what is the burden of proof to show that a consumer

1 actually did receive notice? And, again, thinking prospectively
2 of how normatively how should consumers be informed of
3 proceedings, and how should the burden of proof work.

4 So we are going to open up the mics. We can take those
5 in order, starting with notice. What is everyone's experience:
6 How are consumers informed about arbitration proceedings, and I
7 guess even before that, are consumers receiving notice about
8 these proceedings? Who would like to start?

9 MR. STURDEVANT: I'd be happy to start.

10 MS. MURPHY: Okay. Thank you.

11 MR. STURDEVANT: I think that the way that consumers
12 generally find out about arbitration is they retain a lawyer.
13 They file a lawsuit, and after a complaint is filed, there's a
14 motion to compel arbitration that's filed by the defendant; and
15 presumably their lawyer communicates that to them. They don't
16 know before that, that there is an arbitration clause in the
17 agreement.

18 To give you an example of agreements, if you look at
19 credit card agreements, as Senator Dodd said at a hearing in
20 February, the average length of every credit card agreement in
21 the United States exceeds 30 pages.

22 If you look at the deposit side of banking, facts
23 booklets at Wells Fargo Bank and Bank of America, are near or
24 exceed, in different years, 100 pages. And buried somewhere
25 within the 100 pages is a small provision about arbitration.

1 The same is true with employment agreements, or
2 stuffers, or other kinds of retail installment form contracts
3 that people have with propane suppliers, telecommunications
4 services, long distance providers, cell phones, cable, et cetera

5 So I don't think that there is any general level of
6 awareness by consumers about arbitration. I don't think it comes
7 to their attention in connection with an agreement, and, as I
8 said, most of them find out about it, i.e., there is something
9 called arbitration-in response to a lawsuit that they file.

10 MR. YALON: I would respectfully disagree that that's
11 when consumers first find out about the arbitration process.

12 Let's think about what's involved in the most typical
13 consumer transaction, which today is the credit card. There may
14 be an application for a credit card, that may be electronic on
15 the internet; that may be in writing. It may be in response to
16 an invitation from the credit card issuer that they'll issue a
17 credit card if you'll just sign here. When the credit card
18 comes, there's a written agreement that comes with it. You're
19 asked to sign the back of the credit card. The back of the
20 credit card generally says signing this agrees to the terms of
21 use of the account. When you go and use your credit card at the
22 typical merchant, most merchants are still having you actually
23 sign a slip for your transaction, and the slip says I agree to
24 the terms of the account, or otherwise say I agree to pay this if
25 it's not honored by the account.

1 So this is a very broadly used transaction that
2 virtually almost every household in this country now has. This
3 is not a new thing. The fact that there's a long agreement is to
4 meet the requirements of the law that there be disclosures.
5 There isn't a question that's been raised that there is an
6 improper disclosure. The question is are people reading the
7 agreement and are they intending to agree to all of it.

8 Well, in using the credit card, under the law, even
9 under common law, using the credit card is agreeing to its terms.
10 Where are the terms? Are they available to the consumer? Yes.
11 Has the consumer read it? Very possibly not, but that is a
12 choice by the consumer. That's not a matter of it being hidden
13 from them or there being any trickery. And I think it's
14 important to think in terms of the fact that responsibility lies
15 with both parties to a contract.

16 Consumer contracts, perhaps, we should have a higher
17 standard. I don't have an issue there with consumers to be
18 protected, but we're not dealing with an issue here where
19 something is being hidden from the consumer.

20 Generally speaking, the credit card companies issue an
21 annual restatement of the terms, and I don't know if most people
22 read those or not. Most of the time when I get those from my
23 credit card issuers, I admit I usually don't, but I think that's
24 the fact.

25 MS. MURPHY: Now if we were going to move beyond

1 perhaps the initial notice that a consumer might have of
2 arbitration being out there and binding them, if we go to -- in
3 fact, let's assume, although it's certainly disputed that
4 consumers are not particularly aware of what arbitration is or
5 what are the consequences, what about when an arbitration
6 proceeding is initiated? If we assume that perhaps they aren't
7 as aware of what arbitration is and what it means for them, what
8 can be done in terms of the first notification they get that an
9 arbitration proceeding has commenced against them?

10 Ms. Van Aken.

11 MS. VAN AKEN: So I can speak about what I've seen in
12 connection with the National Arbitration Forum's processes, and
13 we know that -- that's not a forum that requires personal
14 service. There are many ways under the rules to make service
15 including, you know, delivery via carrier, registered mail, UPS.
16 And I think that there are some serious issues with that because,
17 you know, when you leave a -- when you give a package to the care
18 of UPS to deliver it, it sometimes goes to your neighbor or
19 somebody signs for it who answers the door.

20 So it doesn't necessarily mean that the person to whom
21 it was addressed received it. And that's certainly what I've
22 seen a lot of in confirmation proceedings because once the
23 creditor receives an award and wants to go to court and confirm
24 it, then we're in the world of using service of process as
25 required by a court. And many, many cases that I've seen

1 consumers do allege that they never received notice and that --
2 that's why they defaulted in the arbitration.

3 Now I certainly haven't investigated all of these cases
4 individually, but it's an allegation that consumers frequently
5 make under penalty of perjury. So that's one issue.

6 I think another issue that arises is whether the
7 addresses that are used are good, and I think this particularly
8 occurs when you have a downstream debt purchaser and it's been a
9 while since the debt was incurred and since the consumer was in
10 touch with the company with whom the consumer allegedly incurred
11 the debt. And so, you know, I'm aware of companies that don't go
12 back and seek information about the consumers current whereabouts
13 but simply use whatever address they've been provided in the file
14 that they purchased from the original issuer of the debt. So I
15 think that's another issue is the currency of that information.

16 And then we get to later on, well what's the check on
17 those practices, and the check, of course, is the individual
18 arbitrator, which I think is something that we'll -- the flaws in
19 that check are something that we'll I'm sure address later in
20 this conversation today.

21 MS. MURPHY: Mr. Narita.

22 MR. NARITA: Yeah. I think one thing to keep in mind
23 is that the creditors and the debt collectors have a very strong
24 interest in making sure that the consumer gets actual notice of
25 an arbitration proceeding. I mean, I know from my experience

1 that, you know, one of the biggest nightmares of any case is
2 where you go through the whole process; you give the notice
3 that's required by the contract; you have an arbitration hearing;
4 you get an award; you then go and you're unable to, you know,
5 negotiate any kind of a settlement; you go and try to confirm it,
6 and then that's the first time that you hear from a consumer that
7 there was no notice.

8 So my clients certainly have a strong interest in
9 having, you know, a methodology of showing that consumers were
10 served. They want them served. They're not trying to collect by
11 means of subterfuge. In fact, it's in their interest to have the
12 consumers participate in the process and be notified of the
13 process.

14 But generally speaking, the way that you notify a
15 consumer in an arbitration proceeding is set by the contract.
16 The contract might say that you do it by registered mail with a
17 signature. The contract might not specify and you might use, you
18 know, a process server. But by the time it makes it to the
19 collection industry, we really don't have a dog in that fight.
20 It's my clients' job just to follow whatever rules apply and
21 serve by the method that's provided for in the forum.

22 MS. MURPHY: Ms. Sternlight.

23 MS. STERNLIGHT: I think Mr. Narita is right obviously
24 that the terms of service are set in the contract, but I think
25 that's what we're here to talk about is whether those terms are

1 good terms or not good terms and to the extent, as Ms. Van Aken
2 was speaking about, that services are allowed in the arbitration
3 context that wouldn't pass muster in the court context. I think
4 that's a concern that we're here to talk about today.

5 Ms. Van Aken has already given, you know, a good
6 explanation of a lot of the problems that occur when service is
7 attempted in the arbitration context, and I just wanted to add
8 one more piece to that, which is I don't actually litigate
9 anymore. I used to a long time ago, but I do spend a lot of time
10 speaking to law students who, one would presume are actually a
11 lot more educated than the typical member of the public because
12 they're going to law school. And yet I can tell you from
13 speaking to hundreds and hundreds of law students and even law
14 professors over the years, they don't even know what arbitration
15 is. You know, I mean, it's beyond just was a document served to
16 them. Even if people get served with a document that says
17 arbitration, they have no concept; even law students, even law
18 professors have no concept of what arbitration is. They don't
19 realize that it's a binding process. They don't realize it's
20 actually in many ways more binding than a court proceeding. So
21 that it's understandable, I think, that many consumers when
22 served, if served with a piece of paper that says something about
23 arbitration, they don't understand the seriousness of that and
24 they don't behave, therefore, as they might if they would receive
25 a document stamped with a court's address and so on.

1 MS. MURPHY: I see some hands to my right. You and
2 then you.

3 MR. JARZOMBEK: One of the things that I have found in
4 my practice is when people find out they've been summoned to
5 arbitration is when they thought they were getting something from
6 the FedEx or the UPS guy, and now they've got an envelope and
7 they don't know what to do with it. And in the context of when
8 that comes really to the forefront is during the confirmation
9 proceeding.

10 I had a particular situation where a client came in and
11 said, "I didn't ever sign for this. I wasn't ever served." And
12 when you looked at the signature that was on the service, it was
13 clearly not hers because it started with a "C" and her name
14 didn't. And when I asked her if someone in her house was named
15 Connor, she said, "Sure. That's my 11-year-old son." And so the
16 11-year-old signed for it, and did mom and dad know about it?
17 Probably did. But certainly that wasn't service, and in the
18 confirmation proceeding there was an affidavit that swore that
19 the respondent had properly been served. Obviously that wasn't
20 true because when it went back, the UPS guy didn't notice it, and
21 it went back to the person who initiated the arbitration; and
22 they didn't notice that -- that name didn't match, or perhaps
23 they thought that, hey, somebody signed for it. That's good
24 enough.

25 But it wasn't until we got there to the confirmation

1 attempt that we noticed that this isn't even the right person.

2 So if there's one thing that, starting with what notice
3 needs to be given, it has to be a better notice than UPS or a
4 better notice than something in the mail that would be more
5 equivalent to service of process so people can have an idea that
6 the documents that they received requires some type of action.

7 Certainly, there needs to be some type of a check that
8 the right person who claims to or purports to be the respondent
9 in one of these cases is actually served with the documents that
10 are intended for them.

11 MS. MURPHY: Ms. Hillebrand.

12 MS. HILLEBRAND: Thank you.

13 I think there are three different issues in notice
14 here, and I want to parse them out really briefly. The first one
15 is the choice. The best form of notice about arbitration is when
16 you choose it yourself after a dispute arises, something
17 Consumers Union has endorsed since the mid-90's that that's the
18 time that both parties should make the arbitration decision
19 rather than having it forced upon them.

20 I've got thousands of complaints about credit card
21 practices in our database from real consumers, and many of them
22 are complaining about things that are, in fact, allowed by the
23 contracts, at least as those contracts existed before Congress'
24 recent reforms, or when they go into effect.

25 Consumers believe the big print on the promises, and

1 they don't always see all the fine print. So with respect to
2 arbitration or other things, our empirical evidence suggests that
3 people do not expect all of those 30 pages to undermine the deal
4 that they struck with their credit cards.

5 When you get into the issue of delivery and service, it
6 seems to me that if arbitration is taking the place of the court,
7 the service ought to be as good as the court process, and let me
8 say after the improvements that we're going to be talking about
9 tomorrow because there certainly are issues with service in
10 courts as well.

11 There's an interesting proposal from the Working Group
12 in Massachusetts on Small Claims. I think it's in your record,
13 the 2007 Massachusetts Working Group. We'll talk about it more
14 tomorrow, but the concept there is before you take a default,
15 there ought to be some confirmation that the service and the
16 address that was served were good, an independent verification.
17 This could deal with the issue of the old address in the debt
18 file in an efficient way because you'd only have to do it if
19 there's a default. If the person shows up, they got served.
20 They heard about it one way or another.

21 And I think that those recommendations might have
22 similar usefulness in the arbitration context to say, "don't take
23 a default until you've taken that extra step to make sure the
24 person was served, and was served in the right place, in the
25 right manner."

1 And finally, I think that there's an extra problem in
2 debt collection, both in court and in arbitration, which relates
3 to the content of the notice. The judges in Chicago I think
4 referred to it as the "who are you" problem. When you receive a
5 legal paper or an arbitration paper from a person you've never
6 heard of and never borrowed money from, the debt buyer, without
7 information about the original debt, it's much more likely that
8 -- that paper will be ignored regardless of how it's delivered.

9 MS. MURPHY: Mr. Welsh.

10 MR. WELSH: Yeah. I want to go back a step because
11 we're referring to this as 'arbitration', and really what it
12 seems to me is it's a private collection program which was
13 designed by the industry and a provider. And the rules were
14 designed in a way which is far different than normal arbitration
15 rules, and I think one of the things that the Federal Trade
16 Commission has to deal with is, if there is going to be a private
17 program to assist in the collection of debts and credit cards
18 let's say, then I'd want to know some information about why the
19 public small claims court isn't used. One reason I heard today,
20 and I asked some people who are in the business, and they said,
21 "Well, attorneys can't appear in small claims court." Well maybe
22 in debt collection that should be changed so that companies can,
23 in bulk, file because we know that 98 percent of the time the
24 person bought the television and didn't pay for it. It's not an
25 issue of whether the debt was -- was normally valid or not.

1 What percentage of these awards that are reduced to
2 judgment are collected? Is this about collection of money, and
3 what percentage is it? Is it a large percentage or a small
4 percentage, or do these just go into the wastepaper basket of
5 people who can't afford to pay the cost of the item that they
6 bought?

7 But you can't have a private collection program that's
8 designed by one side and the provider, and that's what I hope
9 these hearings are going -- you're going to end up with -- the
10 industry is going to end up, if indeed a private program is
11 acceptable, then you're going to have a program that's designed
12 so that it's fair, and just, and equitable and is not just a
13 stream of paper being stamped by somebody who somebody is called
14 an arbitrator. I wouldn't call them an arbitrator.

15 MS. MURPHY: Mr. Naimark.

16 MR. NAIMARK: Yes. I think in many respects, I
17 certainly agree with a lot of the comments that have been made so
18 far. In many respects the issue of notice in these arbitration
19 programs may be the most significant issue.

20 Jay is correct. These are arbitrations that are not
21 like other arbitrations. The AAA did for a short time one of
22 these debt collection programs and found that one of the most
23 striking differences between these arbitrations and even other
24 consumer arbitrations is the extremely high rate of no-show by
25 the consumer. Well over 90 percent of them never show, never

1 participate, never respond in any way, and that's something we
2 had not experienced before.

3 So in answer to your question about how much
4 understanding the consumers have about the arbitration process,
5 the real answer is we don't know.

6 MS. MURPHY: And actually, on that note, how much of
7 that 90 percent do you think is because they did not receive
8 notice versus they chose not to appear?

9 MR. NAIMARK: I don't know.

10 MS. MURPHY: Does anyone have a thought?

11 MR. WELSH: I would measure that against how many show
12 up in small claims and collections proceedings, and I think it's
13 probably about the same. But I don't know if they know.

14 MS. MURPHY: Ms. Barron.

15 MS. BARRON: A number of studies have been done on the
16 difference in default rates, but I think it's extremely dangerous
17 for us to be speculating on the reasons people don't show up
18 before we have identified what the problems with notice are.

19 And I want to reiterate one of the good points that Ms.
20 Hillebrand made and that is that we need to have the best notice
21 possible if an arbitration award can be confirmed in court.
22 There's a reason that a number of our panelists today have said
23 that the first time consumers find out about arbitration is at
24 the confirmation proceedings. That's because there's a
25 fundamentally higher standard of notice being given then.

1 I don't think arbitration is going to find a
2 credibility that this panel is seeking if, in fact, arbitration
3 is appropriate at all in these circumstances, unless at least as
4 good notice is required in arbitration as one would find in
5 court, and that is personal service.

6 MS. MURPHY: Mr. Capitel.

7 MR. CAPITEL: Costs have always been a significant
8 issue. Who pays for it? How does it get reimbursed? Where does
9 it come from? And obviously personal service is a much preferred
10 way.

11 We at the Better Business Bureau encourage the
12 voluntary participation of all parties that are involved with any
13 kind of an arbitration, and there are costs involved; and some of
14 those costs are born by the Better Business Bureau. Some of
15 those costs are born by the businesses, and sometimes they're
16 born by the other party, the consumer.

17 The idea is to create an attitude of fairness, and from
18 my point of view, we have a serious cultural problem with respect
19 to a consumer culture and what the consumers expect and how it is
20 that the providers of money will generate the kinds of revenues
21 that they do from a lot of these people.

22 It's really unconscionable to the industry, to the
23 court system, to all the administrators of arbitration and ADR
24 programs that 95 percent of the people who are involved would not
25 participate.

1 And it probably won't happen for 20 years, but there's
2 got to be some kind of a thought process as to what our culture
3 really needs to do to allow people to have a credit card. Some
4 people I know would refer to that as perhaps socialism. I'm not
5 labeling any of these things. It's a matter of how we will move
6 towards obtaining a methodology that will result in people
7 participating in good faith.

8 Good faith is a very, very hard thing to handle,
9 especially when you have people who want to give out money, and
10 you have other people with a piece of plastic in their hand who
11 can go out and buy whatever they want to buy until somebody tells
12 them, "I'm sorry. This piece of plastic is no good any longer."

13 But the due process of fairness that is required here
14 to both sides is absolutely necessary to be looked at, and
15 because as far as I know all of the courts in this country have
16 looked at arbitration processes as voluntary between the parties,
17 whether they are by post-dispute or pre-dispute agreements.

18 The voluntary nature is essential, but the banks and
19 the credit card companies who are seeking the participation of
20 these other people really need to understand -- not that they
21 don't, and I don't mean to be patronizing -- but they need to
22 understand that the most effective manner of service on
23 especially a statistic of 95 percent that don't show, is very
24 significant. And if that takes personal service, then that's
25 what needs to be done.

1 The people involved in the stream of commerce need to
2 cooperate. Otherwise the stream gets so bumpy that it causes
3 lots of problems for lots of factions in the industry, and our
4 whole economic culture really requires that we have a methodology
5 of dealing with these kinds of problems.

6 A society as complex as ours must have stability
7 associated with it, and this is an activity that assaults the
8 stability of the economic program because the defaults perhaps
9 result in non-collected debts that people really know that they
10 owe. And somebody is going to have to pay those debts, either in
11 higher charges, higher fees, in terms of people doing what might
12 be antagonistic to other factions in the process.

13 So the idea really needs to come as to what kind of a
14 standard needs there to be in order to effectuate good service.
15 That's the linchpin of this whole process. Without the good
16 service, I don't care how well you prosecute a case, if you don't
17 have good service, it's going to generate problems for you. And
18 hopefully elimination -- as Albert Einstein once said, "A smart
19 person can solve a problem. A genius can avoid one." So the
20 idea is to create a set of circumstances here that will hopefully
21 avoid these problems and encourage people to participate.

22 MS. MURPHY: Do we have any geniuses with a response?

23 (Laughter.)

24 MS. MURPHY: Mr. Narita.

25 MR. NARITA: I won't take the genius role, but to pick

1 up on Irv's point about cost, I think cost of service is a big
2 issue and probably one of the reasons that creditors are
3 attracted to arbitration is the reduced cost, you know. It's the
4 promise of arbitration or some people say the myth of arbitration
5 that it's supposed to be faster, and cheaper and final, right?

6 And so cheaper is a big part of that, and, of course,
7 if you're going to require personal service of the consumers for
8 every arbitration, that's going to be more expensive. That's
9 ultimately going to be a cost that's going to be tacked on top of
10 the award likely. And so it's going to be, you know, passed onto
11 the consumer ultimately in terms of -- you know we had to spend
12 extra money to serve you with these papers, and your agreement
13 says that we recover those. So, you know, I think everyone has
14 some interest in keeping the cost of arbitration low.

15 One idea that I would throw out there is most states
16 and federal courts have a system of doing what's called a waiver
17 of service of summons, and maybe something like that is already
18 being used in arbitration forums; and maybe if not, it could be
19 considered. Where you send a notice of an arbitration claim out
20 by registered mail, or FedEx, or something, and you ask the
21 consumer to sign that they've received it and that becomes your
22 service.

23 If they don't do that, then you hire the process server
24 with the additional cost, and that becomes something that gets
25 tacked on at the end. But it's an extra step to, again, ensure

1 that they do get notice that this is a real proceeding, and that
2 their rights are going to be adjudicated if they don't get in
3 there and participate in it.

4 MS. MURPHY: Mr. Yalon.

5 MR. YALON: We should talk about the procedure for
6 service of process in the court system for a moment just to
7 remember what we're comparing this to.

8 There is no requirement that every lawsuit be
9 personally served on the defendant. Substitute service in
10 California law is delivery to the home, or to the business place,
11 or to that Mail Boxes, Etc. location where they have a PO box and
12 mailing by regular mail an additional copy. Under the Federal
13 Bankruptcy Court System, which is a very large system and
14 generates notices galore, even a summons can be served by regular
15 mail.

16 So we're not talking about a system in these private
17 contracts where they've chosen something far outside the norm,
18 and I think there is an intent to provide actual notice.

19 I think actual notice is the best, but I don't know
20 that personally serving, which is a very high cost process in
21 comparison to any other means of service -- I don't know that
22 the number of consumer participants is substantially higher than
23 in other forms of service if actual notice occurred.

24 MS. MURPHY: Ms. Van Aken.

25 MS. VAN AKEN: I just wanted to respond to that. You

1 know, substitute service is allowed in California, and I know
2 we're going to be speaking tomorrow about the court system and
3 the successes and failures of that system for debt collection.
4 But there is some diligence that's required before you can resort
5 to substitute service, and a declaration of diligence is
6 required. I have never seen one of those filed in an arbitration
7 matter.

8 The other issue is that in many cases what I have seen
9 in these files that are confirmed is simply a statement that
10 service was made, no statement of how it was made or whether it
11 was adequate, nothing to allow the arbitrator to independently
12 test the adequacy of that service, simply a signed statement by
13 the attorney that service occurred. You know, in a court system
14 that would simply not fly and for good reason. I mean, there's
15 not even a statement that the attorney has personal knowledge
16 that -- that's what happened. It's not evidence, but it's
17 permitted under arbitration systems or has been permitted.

18 So, you know, I think there may be issues with court
19 service, and there are different standards; but it still seems to
20 me that where the rubber meets the road it's quite different in
21 arbitration.

22 MS. MURPHY: Let's actually talk about that.
23 Regardless of what form of service is being used, what sort of
24 proof is being offered in these proceedings that the consumer
25 was, in fact, served in some way?

1 Mr. Jarzombek.

2 MR. JARZOMBEK: We had a problem in my county with that
3 because so many of the times the courts were hearing
4 confirmations and no one showed up. I think a 98 percent no-show
5 is conservative based on that.

6 So one of the judges at one point decided that he would
7 no longer confirm arbitration awards by default. He was a
8 minority position in the county courts, but it caused all the
9 county courts in Tarrant County, Texas to sit down and devise a
10 weight that they would then give a default judgment in the
11 context of an arbitration confirmation. And they came out with
12 three steps, and they said from here on -- and they wrote this
13 letter to 14 people; 13 of them were lawyers who worked for the
14 collection industry who confirmed arbitration awards. I was the
15 14th. So I wonder who poisoned the well I guess.

16 But the thing that they required was a certified or
17 authenticated copy of the award, an authenticated copy of the
18 agreement to arbitrate, and if it wasn't signed by the debtor, an
19 explanation in an affidavit about how the debtor was notified of
20 the agreement and the steps the debtor took to acknowledge or
21 ratify the agreement. And the last thing was a sworn
22 verification that the debtor had made no payments on the award;
23 that was what the courts then adopted as what they would use to
24 confirm an arbitration award.

25 Now that's way past any state rule of procedure of what

1 you need for a default judgment, but that's what they were doing
2 or what procedure they adopted because of the high incident of
3 default and when people did come to court they were saying:
4 Well, I've never see this agreement. I don't know anything about
5 it. I don't know how this came to pass. I wasn't notified.

6 So when you couple the fact that the consumers often
7 said they didn't know how they got there, why they were being
8 arbitrated, where this stuff happened, who these people were who
9 signed this award, any of those things, couple that with the fact
10 that somebody didn't show, that's what led to this, I guess,
11 policy that the courts adopted for defaults.

12 What happened as a result of that -- this was in
13 October of '07 that the courts started doing this. The county
14 courts at law in my county have a \$100,000 limit on jurisdiction,
15 so they're kind of in the middle of where you'd go to file a
16 lawsuit. After that many of the confirmation proceedings were
17 being taken to the district courts, which have unlimited
18 jurisdiction, just to get out of this requirement because these
19 things, so many of the times, couldn't be met.

20 So that's what happened in my county where the judges
21 got to be a little more proactive, I guess, and taking a step to
22 see that somebody really did know about what was going on before
23 they would confirm an award against them.

24 MS. MURPHY: Ms. Sternlight.

25 MS. STERNLIGHT: I think that the program that Mr.

1 Jarzombek is describing is a very interesting one, but it's also
2 important to put this in the bigger context, as I think he did,
3 which is, you know, this is a real minority of judges. This
4 isn't the norm remotely in this country. And I think, you know,
5 Jay Welsh said it very well, what's going on here is that, you
6 know, debt collectors, and credit card companies, and so on are
7 setting up their own private collection system and writing their
8 own rules for how to do service.

9 And, with all due respect, I mean, Mr. Narita says,
10 well, he thinks that the debt collectors have the incentive to do
11 really good service. I'm not sure that's true because, you know,
12 what happens is if they don't do really good service in the ways
13 that has been described and things go to old addresses and so on,
14 they nonetheless were getting their default judgments like crazy
15 through NAF and will, again, if another entity comes in and sets
16 up a similar program. And then they take those defaults,
17 judgments obtained through arbitration to courts, which by and
18 large do nothing remotely like what Mr. Jarzombek describes.
19 Instead most courts simply confirm, confirm, confirm without
20 taking any kind of close look at the type of service that was
21 done in the arbitration context.

22 So, you know, really what's going on is that the
23 incentives are not appropriate. The collection companies don't
24 necessarily have an incentive to do good service nor do the
25 credit card companies who write the agreements and make the

1 arrangements with the arbitration provider to do service.

2 It's correct, as several people have said, that doing
3 good service will be more expensive, but I think, you know, it's
4 the old saying, "you get what you pay for." I mean, it's true.
5 Yeah. You're going to have to, someone is going to have to pay
6 more to do good service, but I think that's worth it. We can't
7 have a system, a private system, where people can be found to owe
8 money that maybe they never owed and they never heard about the
9 claims being brought against them.

10 MS. MURPHY: Mr. Welsh.

11 MR. WELSH: I've been connected with the ADR industry
12 for like 18 years, and when we began to see the NAF program on
13 arbitration for collection, I couldn't understand the value
14 proposition for companies. I couldn't understand -- you got to
15 pay a filing fee to NAP. You got to pay an arbitrator. Then you
16 get an award, and then you got to go pay a filing fee in court to
17 confirm it.

18 So there has to be a reason why companies are doing
19 this if, indeed, they are saving money. They're saving money at
20 some point that I don't understand. I was talking with people
21 before, and I asked them this question and they said, "The
22 service of process may be one area where there is a savings to
23 justify this two-tiered system."

24 But I think if the FTC learned more about why, then
25 maybe certain changes could be made in the public system to

1 permit -- I mean, look, there is an interest in companies being
2 able to effectively collect debt -- you don't want to shut down
3 credit; and there has to be an effective way of doing that giving
4 consumers protections that they have in the public courts. But I
5 think you got to find out why companies are doing this in the
6 first place.

7 MS. MURPHY: Mr. Sturdevant.

8 MR. STURDEVANT: Well I think that Irving Capitel hit
9 the nail right on the head. What we need is a system of
10 voluntariness, a system of consent which will serve to guarantee
11 participation in the system, and that's the root problem here.
12 There is no voluntariness. There is no knowledge. There is no
13 consent.

14 In 1925, when Congress passed the FAA, it basically
15 designed a system to enable commercial parties at arms-length to
16 resolve disputes in ongoing relationships and move on. And an
17 example I've used time and time again is the Bay Bridge, whether
18 we're building it, or retrofitting it, or whatever the heck we're
19 doing to it. There's a dispute that comes up in the third month
20 about what size of screws we need to use or whether they should
21 be flatheads or Philips. Neither party really cares, but they
22 want somebody to resolve the dispute so they can keep building
23 the bridge and maintain the relationship that the contractors and
24 the subcontractors have.

25 That is not the situation when we come to consumer and

1 employment disputes. The relationship has ended by and large.
2 So we don't have any participation. The debtor, the alleged
3 debtor doesn't know what arbitration is. He doesn't know what
4 the package is. It's very different than the notice that comes
5 from a court. People know what court notices are, and they tend
6 to respect that far more than if it comes from company A or
7 provider B. We just don't have that, and that's necessary for
8 the system to work.

9 Now the reason that companies use providers like the
10 National Arbitration Forum is because the forum, and it's very
11 well known publicly, solicited companies to be their clients,
12 guaranteed them particular results. Guaranteed them there would
13 be no class action ever administered by the National Arbitration
14 Forum. If you don't collect the money, you have the *in terrorem*
15 effect in the credit card situation of an award that you can
16 circulate to any number, you know, Equifax or Trans Union, or
17 whatever. There's the *in terrorem* effect and people's credit
18 rating plummets, and then they can't get a loan, can't buy a car,
19 can't get a lot of things. So even if they don't collect the
20 money, they have *in terrorem* effect of ultimately getting the
21 money from people who have money, which distinguishes them from
22 people that don't.

23 MS. MURPHY: Ms. Hillebrand.

24 MS. HILLEBRAND: Thank you.

25 I wanted to make part of the point that Mr. Sturdevant

1 made which is -- I think Jay Welsh put his finger on it when he
2 said, "As a matter of policy, should there be a private,
3 non-judicial system for creating judgment," essentially. That's
4 not the theory and purpose of arbitration. Whether you agree or
5 disagree with arbitration, the theory and purpose behind the FAA
6 favoring it was parties could get together and do things without
7 a lot of process and, frankly, without a lot of law. And some of
8 the state arbitration acts are even more specific about the
9 absence of a duty of the arbitrator to follow the law.

10 When one side doesn't show up, the idea of facilitating
11 parties getting together makes no sense at all. I think we also
12 need to be careful not to think there's got to be a way to turn
13 every small debt into a judgment. If you have to go to court,
14 you have to stop and think, is this debt worth it in terms of the
15 filing fees, the process, *et cetera*, and I have seen legal
16 services, files, and stories, and complaints where the judgment
17 is two and three times the size of the debt. And any sensible
18 person who was simply trying to collect would not have turned
19 that into a judgment. You turn it into a judgment because it's
20 good for 20 years. It's good for 10 years in my state. It can
21 be renewed, so it's good for longer. You turn it into a judgment
22 perhaps because you can get a higher price when you sell a
23 judgment to a debt buyer than just the debt itself. And we
24 really need to stop and think about whether that's something that
25 should be facilitated, and I think it's not.

1 MS. MURPHY: Mr. Capitel.

2 MR. CAPITEL: George Washington, an individual that I
3 assume everyone is familiar, in his will -- and anybody who wants
4 to go on George Washington's will and find it on the computer can
5 find a copy of it -- required that any disputes that existed with
6 respect to the distribution of his property be resolved through
7 arbitration, and Mr. Washington died in, I think, 1799.

8 And he said that the actions of the arbitrators should
9 be as though they had been reviewed by the Supreme Court of the
10 United States. He placed a tremendous value on eliminating the
11 acrimony that is generated by disputes.

12 I don't think anybody here would disagree that we have
13 a system of commerce that should not encourage people not to
14 participate in the enforcement of these obligations. Somehow
15 this entire method of operation needs to be accepted by all
16 parties, and people cannot use it as a threat, or as a bat, or as
17 a weapon. They need to use it in good faith. I use the term
18 good faith a 100 times a day because it always comes up, and
19 there's so many places that good faith is not even considered.

20 I've even talked about everybody in this land who
21 drives an automobile has a driver's license. You can't drive a
22 car without a driver's license, and you can't get insurance to
23 drive a car without a driver's license. We've been talking about
24 putting forward a concept of getting a credit card license. It
25 sounds laughable, I understand. But the educational system in

1 the country has been so devoid of teaching people how to handle
2 their personal credit.

3 And personal credit can be dangerous. It's almost like
4 a drug. Your personal financial health is a reflection on the
5 character that you present to the general world, how you handle
6 your debts and your obligations is a very, very important aspect
7 that we have reduced to a series of numbers called a credit
8 score. You know, what does a credit score mean? How is it
9 determined? But we condone sending these credit card
10 applications out to everyone and encouraging their use,
11 advertising their use, talking about how wonderful it is to use
12 them and never, as the FDA requires in drugs, do we ever put any
13 kind of a warning on there that says use credit responsibly.

14 And I'm not advocating in any sense of the word that my
15 position is in favor of the consumer or my position is in favor
16 of the credit card companies and the banks because I have taken,
17 almost, an oath to neutrality in what I do. I cannot function
18 and my organization cannot function unless they are in fact
19 neutral at all times, and that's what we spend a lot of time in
20 trying to do.

21 MS. MURPHY: Thank you.

22 Mr. Naimark.

23 MR. NAIMARK: Yes. I think to a certain extent we're
24 circling around the issue of what constitutes a proper service or
25 notice. I think we'll hear more of the comments we heard today

1 so far about two more problems in the court and the
2 inconsistencies state to state. In fact, I don't think a perfect
3 system exists, and I think we need to think whether this is for
4 arbitration or for the litigation process, how the process can be
5 improved. And one modest suggestion is I think we need to think
6 sort of in terms of the last comment of imbuing the process, at
7 least to a degree, with a certain amount of education, instead of
8 just legal notice to people, trying to capture their attention
9 about what is the significance of notice, what the process is,
10 how they might access what their rights are, how they work the
11 process, what to expect, and perhaps at various stages from the
12 initial agreement all the way through to the point of service,
13 making sure that there's easy access to that information in
14 attempting to draw in at least some more of the people so they
15 participate in the process.

16 MS. MURPHY: Thank you.

17 And, actually on that note, looking at making sure a
18 consumer is notified, even beyond process, which we've had some
19 good comments about that this morning, any thoughts on what
20 exactly a consumer should receive when they are notified that a
21 proceeding has been commenced against them? I mean what should
22 this notice look like to adequately inform them?

23 Mr. Narita.

24 MR. NARITA: I know there's been some suggestion that
25 the notice of arbitration that they get should be more

1 conspicuous and I think that's fine. One thing that we have to
2 keep in mind though is that the collection industry is regulated,
3 and unless we're going to modify the FDCPA, Section 6092(f)(8)
4 prohibits a collector from saying anything on the outside of an
5 envelope or any other debt collection device that indicates it's
6 about debt collection. So if you have a FedEx man or a process
7 server waiving around some brightly colored object that says, you
8 know, debt collection, arbitration material is enclosed, you're
9 going to light up the FDCPA.

10 So if we're going to talk about conspicuously notifying
11 the consumer on the outside of a notice of arbitration, I think
12 that's a great idea as long as we're also going to take about
13 exempting that standardized notice or envelope from the FDCPA.

14 MS. MURPHY: Ms. Hillebrand.

15 MS. HILLEBRAND: I think the notice in addition to
16 saying this is arbitration, here's what it is; here's what you
17 have to do and by what time, really has to give the consumer
18 information about why they're being sued. Who was the original
19 creditor? What was the date of the last payment or charge on the
20 debt? Who is this person who now has it?

21 The National Consumer Law Center recommended in their
22 '07 comments a very specific list of things that ought to be in a
23 litigation complaint for debt collection, and I think that same
24 list would apply here.

25 People have to get enough information to know should I

1 show up? You know, was it the television that I bought, and now
2 I owe them money? Is it the wrong amount? Is this the creditor
3 I had the dispute with? Is this the one where it was an identify
4 theft problem, and now it's been resold to another debt buyer and
5 we're starting over again?

6 And without that information about what was the
7 original debt; who's now trying to collect it; how much was the
8 original debt for and how much has been added since, it's
9 impossible for a consumer to make a sensible judgment should I
10 show up or not.

11 MS. MURPHY: And that we actually have a question from
12 the audience regarding class action suits and how that fits in,
13 and I think that actually points to a broader question that's
14 been brought up of incentives. How can we incentivize this
15 process so the consumers will receive better notice? Does anyone
16 have any thoughts?

17 Mr. Sturdevant.

18 MR. STURDEVANT: I wanted to add on to what Gail
19 Hillebrand said. I think it's been pointed out that generally
20 speaking consumers don't know anything about arbitration, but
21 they know about small claims court because they've watched Judge
22 Judy, or Judge Carl, or whatever. They know how that generally
23 works, and they've seen court proceedings on television. But
24 they don't know anything about, generally, arbitration. And
25 there are very significant differences between arbitration and

1 the public justice system.

2 So in addition to whatever the seven provisions are
3 that Gail talked about, consumers ought to be told at the outset
4 what the basic differences are. For example, the arbitrator
5 isn't bound by the rules of evidence. The arbitrator doesn't
6 have to give you any discovery. The arbitrator doesn't have to
7 explain the award. The proceedings are private. The award is
8 final and binding even if the arbitrator was manifestly wrong on
9 the facts, or the law, or both. You know, those are the
10 essential differences.

11 There may be several others, but those would certainly
12 provide instant information to a consumer or an employee about
13 the sharp differences between arbitration and regular litigation.
14 And the reason for those differences, historically, as many here
15 know, is that arbitration was supposed to be final and binding.
16 It was supposed to reduce costs and be faster. It was designed
17 to enable people to move on in their relationships and get over
18 the hurdles like the one I identified before. It really wasn't
19 designed in 1925 to be a substitute for litigation.

20 MS. MURPHY: Mr. Melcer.

21 MR. MELCER: Yeah. I think, speaking as we do in the
22 debt collection industry, the least sophisticated consumer, I'm
23 wondering how many of them really understand whether or not they
24 have the rules of evidence, whether or not the judge is really
25 bound by the law, whether or not any of these things are true.

1 If you want to use as a comparison, Judge Judy, well, you know,
2 Judge Judy isn't bound by the laws of evidence. Judge Judy isn't
3 bound by any of those things. Arbitration is probably very
4 similar to Judge Judy, at least in my experience.

5 As far as, you know, being notified, I think we're
6 talking about service here. You know, I think that you could
7 probably design some sort of language on the outside of the
8 envelope that would be fair debt compliant and still make people
9 open up the envelope. Something like there is a claim against
10 you. You're rights may be, you know, you may lose rights,
11 something like that. I think you can find language without
12 saying on the outside of the envelope we're suing you over a
13 debt.

14 So I think once you get it open and they realize that
15 there's a proceeding against them, I don't see that, you know,
16 these consumers are going to have any difference appearing before
17 an arbitrator or before a small claims judge. To them, and if
18 they're not represented, it's all going to be the same.

19 MS. MURPHY: Mr. Welsh.

20 MR. WELSH: They don't appear before either, so it
21 really doesn't matter, does it? I mean, I talked to an
22 arbitrator. It turned out that the 75-year-old, which in my
23 business is not necessarily old, brother of a colleague of mine,
24 was doing NAF arbitrations. And I said, "What is it? What
25 happens?"

1 He said, "I get a box. I get a box of files, and I
2 open them up. And I go through them." And he's a good honest
3 guy.

4 And I said, "Do you ever not grant?"

5 And he said, "Well sometimes it just is a little
6 flakey, but most of the time what I'm doing is there's a box; and
7 I go through, and I stamp the awards and send it back; and that's
8 it."

9 Now that is not arbitration. That's nothing. What
10 we're dealing here with is some -- is the industry obviously
11 wants for some reason, which you have to find out why, they want
12 an administrative process to get something, to get a piece of
13 paper -- we're calling it an award, but I don't care what you
14 call it -- to go to court and say here give me another piece of
15 paper. And I'm trying to find out why they just don't go to
16 court and get the one piece of paper, and until somebody finds
17 out why there is some kind of savings or what the reason is, you
18 know, we're kind of dealing around the edges.

19 MS. MURPHY: Ms. Barron.

20 MS. BARRON: I think implied in this discussion is an
21 underlying assumption that I don't see born out in my practice
22 and that is that these debts are all valid. The people that come
23 to me have real defenses to debts. And I'll give an example in a
24 minute. It may be that a more streamlined process or process
25 that doesn't give adequate notice, a process that does not

1 actively encourage people to open an envelope avoids that messy
2 business of defense to the debt.

3 So I would like today for us to just set aside the
4 notion that debtors that are sent to arbitration are all a bunch
5 of deadbeats. Let me give you an example that happened last
6 week.

7 A woman was sued, not in arbitration, but she was sued
8 and defaulted in court on a debt. She owed something, but she
9 didn't know that amount that was claimed. And it involved a
10 deficiency after her car was repossessed. So we looked at the
11 documents and noticed that the post-repossession statutory notice
12 was woefully defective. We sought to get the default judgment
13 set aside, and this week we filed a class action where she is the
14 representative plaintiff. And we will wait and see how many tens
15 of thousands of people got that same defective notice.

16 Many people have a real defense to these stats that
17 they don't know about and will never know about if they don't get
18 proper notice; they don't open the envelope; they don't know they
19 can see a lawyer, which is some advice that should most certainly
20 be inside that envelope, and they don't know that they don't have
21 to pay, not only some debt, but the amount that is claimed is
22 owed. That's why the seven factors that Ms. Hillebrand mentioned
23 that NCLC requires are very important as a part of the notice
24 that's given in the first instance.

25 MS. MURPHY: Thank you.

1 And with that we're actually going to break for 15
2 minutes. If everyone could return at 10:30, we'll be focusing on
3 consumer choice.

4 Thank you very much.

5 (Recess taken from 10:15 a.m. to 10:30 a.m.)

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

3 MR. HARWOOD: So welcome back to everyone. This is our
4 second panel of the morning. My name is Charles Harwood, and I
5 have difficult shoes to fill having to follow Bevin's moderating;
6 but I will try to do what I can.

7 On this panel we are going to be talking about choice
8 of provider, choice of location, and role of consumer choice with
9 regard to arbitration. And we have set out three or four
10 discussion questions, and then I have some additional questions
11 that I will ask the audience or the panelists rather as we go
12 along.

13 We have essentially the same panelists we had before.
14 Again, they're in alphabetical order, and nobody has seemed to
15 move around. So that's a good thing. In fact, the order they're
16 in signifies nothing other than that's the way we -- that's
17 outfitted, that's how we set them down.

18 Let me just tell you briefly what our discussion
19 questions are, and then we'll go from there.

20 So we set out three discussion questions. First, to
21 what extent do consumers have a choice as to whether disputes
22 regarding their debt are sent into arbitration?

23 Second, are arbitration proceedings faster or cheaper
24 than court proceedings for debt collection?

25 Third, and I'm shortening these, but third, should

1 there be changes in law or industry practice regarding consumer
2 choice about where and when to arbitrate?

3 And I lied, there are actually four questions. Here's
4 the fourth: What should the FTC and other public or private
5 sector actors do to bring about any changes in the law or
6 industry practice that are needed?

7 So let's begin with the first question, which is to
8 what extent do consumers have a choice as to whether disputes
9 regarding their debts are sent into arbitration? And let's see
10 if we can get a volunteer to start out here.

11 Okay. Mr. Naimark.

12 MR. NAIMARK: About 10 years ago the AAA, American
13 Arbitration Association, developed, with a diverse group of
14 advisors, a set of due process protocols for consumer cases that
15 were not specifically designed for these debt collection cases,
16 which I think are a special case. But one aspect of the due
17 process protocols provided for opt-out to small claims court
18 where there was an arbitration clause in a contract of adhesion.

19 It is striking that in the consumer debt collection
20 caseload that we did for a short period of time, even though our
21 initiating letter advised consumers that they had that option --
22 they could opt out to small claims court -- very, very few took
23 that option, which I think goes back to an extent to the original
24 discussion we had this morning, about whether people are even
25 reading these, or getting proper notice, or understanding what

1 the process was about. But to that extent, at least it may not
2 be the choice that some would be looking for, but it provided for
3 a certain degree of options for the consumers.

4 MR. HARWOOD: Other comments on whether consumers have
5 choice and, I guess, going one step further where they are
6 exercising it?

7 Yes, Mr. Narita.

8 MR. NARITA: Yeah. I think consumers do have choices.
9 There are opt-outs in their credit card agreements, which we
10 talked about already. And one thing that I found in my practice
11 is that you cannot make a consumer read their credit card
12 agreement. Every consumer that I've had any interaction with,
13 and that includes one who was an Ivy League educated lawyer and
14 that goes all the way down the spectrum to folks that have
15 trouble speaking English, they all understand one basic thing
16 about credit cards, which is that when you use a card, you're
17 bound by the terms of the agreement. They all seem to get that.

18 Notwithstanding that, they don't read their agreements,
19 and so I think it rings a little hollow to say that they weren't
20 aware that there was an arbitration clause or they don't know
21 what this means when they don't read their agreements. I think
22 most of us can probably agree that they don't read their credit
23 card agreements notwithstanding that they're bound by them. As
24 far as a post-dispute opt-out, which I think what Richard is
25 talking about, I think that makes sense. That's fine as long as

1 we make sure of two things, one, I think that Jerry mentioned
2 this earlier: If you're going to allow consumers to opt out of
3 arbitration once a dispute has arisen, the question is where do
4 they opt into? Where do they go, and what effect does that have
5 on the party's rights?

6 You have to preserve the creditor's rights, and if
7 you're going to allow a consumer to opt out of arbitration into a
8 forum where the creditor cannot be represented by counsel, I
9 don't think that's a balanced situation. And that's what we have
10 here in California. If an arbitration claim is actually going to
11 go to small claims court, get kicked out of arbitration into
12 small claims in California, then an out-of-state creditor cannot
13 be represented by counsel and would have to, you know, fly
14 someone out to the state to handle it, a non-lawyer. So that's
15 not a balanced system either. So I think you have to know where
16 you're opting into once you opt out.

17 MR. HARWOOD: To Ms. Sternlight, Mr. Sturdevant, and
18 then Mr. Welsh.

19 MS. STERNLIGHT: I'm just going to focus on the
20 question as to what extent do consumers have a choice with
21 respect to whether their debts are subject to arbitration. And I
22 think it's really a pretty easy answer that, you know, obviously
23 if you define the word choice in any kind of remotely meaningful
24 way, consumers do not have a choice because all or certainly
25 virtually all credit card companies currently require consumers'

1 debt to be sent to arbitration. Now there have been a few
2 companies that have changed that very recently.

3 To the extent that there are companies that don't
4 require arbitration, consumers don't know which companies those
5 are because they don't, as Mr. Narita said, read their
6 agreements, and the social science shows that they don't; and
7 they won't; and that's just a fact. So they're not aware of
8 which companies do or don't require arbitration.

9 To the extent that some of the credit card companies
10 have these opt-out provisions in their credit card agreements,
11 again, consumers don't read it, so they don't know that they have
12 a right to opt out.

13 Even in those very, very rare situations where they do
14 read the opt-out, very often they're afraid to opt out. My own
15 mother, in fact, received an opt-out, and asked me, "Should I opt
16 out?"

17 And I told her, "Yes."

18 Maybe it reflects on the mother-daughter relationship,
19 but she didn't take my advice because notwithstanding the clear
20 wording of the clause, she said, "Well, I'm afraid they're going
21 to cut off my credit card, and I don't want to go through the
22 hassle of getting a new one." And this is someone who is a
23 highly educated person, in fact, has a Ph.D. from the University
24 of Michigan.

25 So if somebody like that whose daughter is in the

1 business doesn't opt out, I think we can be pretty clear that,
2 you know, the opt-outs aren't meaningful, and the people don't
3 read the terms. So if a credit card company chooses to have a
4 clause that requires a consumer to have their debt processed
5 through arbitration, the consumer has no meaningful choice.

6 MR. STURDEVANT: Okay. I wanted to talk about this
7 issue of reading and everybody's bound. If it's true, and nobody
8 on the panel this morning had disputed it, that the average
9 credit card agreement exceeds 30 pages; that the average checking
10 account facts booklet, which is the agreement, exceeds 80 pages;
11 the Comcast agreements exceeds 6 or 7 pages in the panel, and I
12 hope I don't have to go on to talk about the propane tank, and
13 the preschool agreements, and the telecommunications, and the
14 cell phones, and everything else we use as a consumer. The
15 notion that each of us or any of us should read all of this stuff
16 is just nonsense.

17 And if we did read it all, what would we find? We
18 would find that every participant in the industry has a clause
19 with very few exceptions, they have the same abusive provisions
20 with respect to fees, charges, you know, universal default, *et*
21 *cetera, et cetera, et cetera.*

22 So where are they going to go? They can't go across
23 the street and get a different deal or a better deal. It doesn't
24 exist. The same thing is true, you know, with Comcast or PG&E.
25 These are regulated utilities. They're effectively monopolies.

1 There is no other place you can go. So even if you had time,
2 even if you were intelligent, you wouldn't do it for that reason
3 because you would have the intelligence to know that it didn't
4 matter.

5 Let me just talk about two cases that I tried in which
6 this issue of trying to get notice to people, you know, came up.
7 In 1992, Bank of America decided to impose pre-dispute
8 arbitration on their 12-odd million credit card and consumer
9 customers, and they did so by means of a standalone insert. And
10 they chose that method after they had an internal readership
11 survey from their own customers that said no more than six
12 percent of their customers even looked at, let alone read,
13 standalone inserts. They do what most people do. They throw
14 them away because it's like go to Hawaii, use your credit card,
15 get a few points, you know.

16 People don't have money, or they already decided not to
17 go to Hawaii. They throw those things away. And that was the
18 only notification in -- well that's not true. They issued a
19 press release on the day of the primary election in California in
20 June because knowing that of course the next day nobody cared
21 about any other news, except who won and who lost the various
22 elections in California. So there was no public notice that
23 referred back to the press rules.

24 In 2001, I litigated a similar case against AT&T, and
25 like how cartoons are created with a 100 different images that go

1 very slowly from point A to point Z in a whole cartoon
2 production, AT&T went through an entire set of documents in which
3 they changed the wording and the position of the notice of the
4 arbitration clause in these new agreements that the FCC was
5 requiring all telecommunications companies to have with their
6 clients. And they put it in the middle of the third paragraph.
7 It was the middle sentence in the third paragraph, and the last
8 sentence was in bold which said: Don't worry, nothing has
9 changed. Okay.

10 Now we tried the case. We got the evidence. So the
11 upshot of this to a neutral federal judge was that there was no
12 intent by AT&T to tell the truth, to come clean, you know, with
13 nearly seven million of their long distance customers in
14 California, and even when somebody broke through and actually saw
15 that and called, we got a set of e-mails: They were told by the
16 company that it doesn't matter because everybody in the industry
17 is requiring arbitration with all these bells and whistles in the
18 clause, so you might as well stay with AT&T. It wasn't true. At
19 that time Verizon didn't. But AT&T didn't, at that point, even
20 say that.

21 So there are these very fundamental issues about
22 knowledge, and consent, and notice. I mean, the opt-out stuff is
23 usually buried at the end of the arbitration provision, and in
24 many of the credit card agreements it says: You don't have to be
25 bound by arbitration as long as you notify us within 15 days of

1 the date of mailing of this agreement. If you take the burden of
2 doing that, then you can opt out.

3 And since nobody reads it, nobody will do it. But even
4 those that do read it, they probably don't get to it immediately
5 because it's more than 30 pages, so they're too late. Again,
6 it's not a reasonable provision. It's not a fair system. It's
7 not a fair practice.

8 MR. HARWOOD: Mr. Welsh.

9 MR. WELSH: I want to go on record, not defending, but
10 we have trashed the Ivy League for not reading these agreements
11 and now Jean has trashed the Big 10, Michigan, for not reading
12 these agreements. I think we can agree that nobody reads these
13 agreements.

14 One of the things that Tomio said that was interesting
15 is that one of the reasons why it appears the industry prefers
16 arbitration to small claims is that attorneys can't appear in
17 small claims.

18 The other thing that has come up is the fact that there
19 are 50 jurisdictions, states dealing with these kinds of issues,
20 and debts are aggregated. They are sold in the marketplace. The
21 people who are collecting them may be secondary or third party
22 owners of the debt.

23 Isn't this all crying out for what happened in
24 bankruptcy, that you can't have different rules pertaining to
25 these issues and that maybe there has to be some uniformity,

1 either done through federalization, or, if indeed debts are
2 aggregated and sold and then they have to be collected, does it
3 warrant looking at having a single system, so that lawyers can
4 appear? I mean, if that's the difference for industry, then
5 let's look at those things and address -- this goes back to what
6 the value proposition is and why they're trying to do arbitration
7 in the first place.

8 MR. HARWOOD: I'm going to go around, and then I've go
9 more questions.

10 So go ahead, Mr. Melcer.

11 MR. MELCER: All right. I would like to put a little
12 bit different perspective on this, and that is a little bit of a
13 history lesson I suppose as to why arbitration agreements came
14 into credit card agreements in the first place and why major
15 creditors did that.

16 My background, for those of you who don't know me, I've
17 been in-house for major creditors pretty much all my career until
18 just last year when I came into private practice. And basically
19 it was a response to two different things, runaway awards in
20 various parts of the country; and, secondly, the way that
21 litigation costs could be used by a plaintiff's attorney to run
22 up dollars and, therefore, get settlements that probably the
23 consumer and certainly the attorney was not entitled to.

24 The first part of it, if we all remember Alabama back
25 in the late 80s, early 90s, a good example there is Barbara

1 County, Alabama where an enterprising lawyer elected his partner
2 judge and went off to the races in Barbara County. His chambers
3 became an extension of the law firm, and this particular attorney
4 was able to get multi-million verdicts against creditors after, I
5 don't know, half an hour trials, 45-minute trials and about 5
6 minutes for jury deliberations.

7 Secondly, and this I can speak to myself in cases that
8 I have been involved with, litigation costs can skyrocket in the
9 hands of a clever plaintiff's counsel. I can give you one or
10 actually two different examples that I personally dealt with.
11 One was a lawsuit over a technicality. Specifically it was the
12 fact that my client took 95 days instead of 90 days to respond to
13 a billing error, even though there was absolutely no harm to the
14 customer, and there was absolutely no interest charges or
15 anything that were accruing during that period.

16 The attorney that took that one made an outrageous
17 demand. We went ahead. We decided we were going to try it, and
18 next thing I know I'm in a deposition that should have taken
19 about an hour, maybe two tops that was stretched out into an
20 all-day deposition by the attorney questioning literally every
21 word in the account notes that are written specifically stream of
22 consciousness to the point where they even asked why this person
23 said and instead of or at one point.

24 Secondly, right here in California, and this is perhaps
25 one of my favorites, again, this one had damages, and we made a

1 reasonable offer. The reoffer apparently wasn't reasonable
2 enough. We went to trial.

3 The plaintiff's attorney was able to get a deposition
4 of a high-ranking member of my company who had many better things
5 to do. It was scheduled for 9:00 a.m. We're ready at 9:00 a.m.
6 and all of a sudden there happen to be some sort of a delay, so
7 it couldn't happen until 12:30. Okay. Fine. We'll take that.
8 We came in 12:30. We had our lunch and everything.

9 About 10 minutes of questions were asked, and then the
10 plaintiff's attorney said, "Well time to break for lunch. We
11 haven't eaten yet."

12 So they skipped out of the room with smiles on their
13 faces, knowing that I'm paying \$350 and up for my counsel, that
14 my particular client has wasted a day, that he really didn't have
15 the time to spare. Basically, that's what brought about
16 arbitration on the part of creditors. Creditors were responding
17 to these costs and responding to these runaway awards.

18 In my experience, defensive arbitration, and that is
19 arbitration in defense of claims has been fair. I've won cases
20 and I've lost cases. Where I've lost, I deserved to lose. But
21 the resulting damages actually paid for the person's damages. It
22 wasn't a jackpot.

23 Once those arbitration clauses got into the contracts,
24 well then, you know, for a number of reasons I think Mr. Welsh
25 alluded to, they began being used for collection suits.

1 Rightly or wrongly, I'm not sure too many collection
2 lawyers would be real angry if arbitration went away from
3 collection suits. Credit card companies might be for one or
4 another reason. But, you know, the whole idea behind arbitration
5 was a defense, not offense.

6 MR. HARWOOD: Ms. Hillebrand and then we'll go around.

7 MS. HILLEBRAND: Thank you.

8 Arbitration gives a choice, but not to consumers. It
9 gives the company that's doing the collecting in this case the
10 choice to avoid the law, and consumer laws are detailed and
11 specific for an important reason. I always think of the
12 compliance problem in consumer law is like an iceberg, and it's
13 just the tip that ever shows up and gets contested because good
14 lawyers like Ms. Barron and others look at those and say, "Well
15 this isn't what the law allows and what the law requires."

16 And when those -- arbitrators don't have to follow the
17 law, so we may not get enforcement at all. They don't have to
18 publish. You lose a tremendous deterrent effect that polices the
19 marketplace when those defenses are not brought, and not
20 considered, and in arbitration are really designed not to be
21 considered because the arbitrator isn't bound if he thinks it's
22 just a technicality.

23 So I think there's an extra adverse public impact on
24 the choice that is given by the contract drafter rather than to
25 the consumer. I'm not going to repeat what has already been said

1 about consumers not having choice. I would just remind you it's
2 not even as simple as if I read every credit card contract, I
3 could pick one that doesn't have it. Many of them you don't get
4 a choice. But also you're receiving those terms at a time where
5 you've already been approved for the credit. If you reject, and
6 do that three or four times, you're going to depress your credit
7 score, which is economically bad behavior.

8 And finally, consumers agree to things in contracts,
9 read or unread, when they have a pressing need for services. And
10 I'm reminded of an adult member of our family who agreed to an
11 arbitration clause last year because he had a broken leg, and we
12 couldn't wait several weeks to get back on the surgeon's schedule
13 at a different hospital, even if we could have found one in the
14 Bay Area that didn't have an arbitration clause. So there's a
15 real impact on consumers of not having that choice.

16 MR. HARWOOD: Thank you.

17 MS. BARRON: A very brief comment. We've talked a lot
18 about opt-outs today. I think if providers are really intended
19 to offer choice to consumers, it would be phrased in terms of an
20 opt-in instead of an opt-out. That would shift the burden to the
21 person drafting the procedurally unconscionable clause to
22 actually encourage the consumer to read something, that today's
23 discussion has reaffirmed for most of us, it simply doesn't
24 happen.

25 So I would suggest that if we are going to actually

1 offer a choice to consumers, it be framed in terms of an opt-in
2 for arbitration or arbitration is not part of the contract.

3 MR. HARWOOD: Okay. So Mr. Capitel, we'll do you, and
4 then I'm going to start with another question. Go ahead.

5 MR. CAPITEL: How would the consumer determine if they
6 can't read or understand the agreement what the choices would be?
7 And even if they read the full agreement, how would they make the
8 decision about what choice that they would have?

9 Again, and I hate to harp on the whole system, but the
10 consumer understands arbitration just about as well as it
11 understands litigation, just about as well as it understands the
12 court system. The consumer is probably less of the problem than
13 are the people who are administering the system.

14 And, unfortunately, the law firms that you mentioned
15 earlier are a serious problem, and the businesses, the banks, the
16 credit card companies know who these organizations are and how
17 they comport themselves during time allotted for the dispute
18 resolution process to happen.

19 There's really got to be some kind of a methodology
20 which looks at the whole system in a very practical nature and
21 allows a relevant source of dispute resolution to exist, whether
22 that's a Federal Trade Commission resolution, whether it's a JAMS
23 resolution.

24 There's just got to be some understanding about what
25 the realities of the system are. We could argue about whose

1 rights are invaded, and we could argue about technicalities all
2 day and all night, but it really doesn't get to the resolution of
3 the problem.

4 MR. HARWOOD: So let me ask a couple more specific
5 questions. First, does anyone know of any evidence that would
6 tend to show in fact arbitration is faster and cheaper than other
7 alternatives? I mean, does anybody know if any studies have been
8 done that shows arbitration is cheaper, or faster, or to be a
9 better outcome?

10 MR. NAIMARK: Well, it's a yes and no answer. If we're
11 talking specifically about the debt collection arbitrations, no.
12 The Searle Center did a study of our other consumer arbitrations,
13 which showed pretty significantly good results, reasonably
14 balanced. They're now doing a study trying to compare it to
15 court cases to see if they're comparable in that way.

16 MR. HARWOOD: I didn't look through the sections. So
17 in that case you're talking about wide range of arbitrations.

18 MR. NAIMARK: Yes.

19 MR. HARWOOD: Anybody else?

20 Mr. Melcer.

21 MR. MELCER: Well, all I can give you is anecdotal
22 evidence from my own experience, and I can tell you that
23 arbitrations are cheaper than going to court against, you know,
24 in some of these situations.

25 MR. HARWOOD: I'm trying to move beyond that. I mean,

1 if we're trying to report on this, we'd like to be able to say
2 here's why we think it's faster and cheaper. So how would we go
3 about going beyond just sort of the anecdotal evidence? We all
4 have that. We have both sides. Any thoughts?

5 MR. NARITA: I think you need to go to the creditors
6 actually. I mean, they would have the data on, well, we put
7 similar types of accounts in the litigation track, and if we put,
8 you know, a batch in the arbitration track, do they go faster?
9 Do we spend more? How are the results? That's where you'd go.

10 MR. HARWOOD: All right. Ms. Van Aken, do you have an
11 idea, and then I guess we'll go on.

12 MS. VAN AKEN: Yes. One is that there is information
13 that the National Arbitration Forum has about this that I can't
14 share with you. And so you might want to think about your other
15 options for obtaining information.

16 MR. HARWOOD: Why can't you share it?

17 MS. VAN AKEN: I have a protective order. I've been in
18 discovery and have a protective order in place.

19 MR. HARWOOD: We'll find a way.

20 MS. VAN AKEN: Yeah. But you've got many options.

21 MR. HARWOOD: Thank you.

22 MS. VAN AKEN: But the second piece I wanted to say is
23 that creditors are using arbitration, and that seems to me to say
24 something about it. I mean, presumably with knowledge -- they
25 are making a choice.

1 MR. HARWOOD: Good point.

2 Okay. And then I know there was Ms. Sternlight and
3 then I think Mr. Sturdevant.

4 MS. STERNLIGHT: I think that's a good question for the
5 FTC to ask, and I think it's good to get that information. But
6 once you get information, then I think you have to put it in the
7 context of faster and cheaper for whom, and why is it faster, and
8 what does that mean?

9 Because, yeah, I mean, it must be that it's cheaper for
10 the credit card companies or they wouldn't be doing it. That's
11 very, very good evidence.

12 Does that mean it's there for better? No. I mean,
13 just because it's cheaper or even faster, the reasons that it's
14 faster and cheaper, I'm guessing, is because instead of having
15 live hearings we have these paper hearings, and the consumers are
16 not showing up even as much as they would show up in court. And
17 so, yeah, faster and cheaper at what cost?

18 MR. HARWOOD: Yeah. I intentionally left out the
19 better part of that question.

20 MS. STERNLIGHT: Right.

21 MR. HARWOOD: Mr. Sturdevant.

22 MR. STURDEVANT: I think that Public Citizen has done a
23 study which begins to get at this question. Second, there is a
24 well known published decision in California called *Engalia v.*
25 *Kaiser Permanente* in which Mr. Engalia was subjected to mandatory

1 arbitration because Kaiser negotiated something with his
2 employer, and every time he wanted to move the arbitration along,
3 he had to go to court to get an order issued to require the
4 provider, which happened to be Kaiser, to move forward in the
5 arbitration. And he didn't make it. He died before they could
6 even get to arbitration.

7 Third, there's this issue that is just simply not well
8 known, which is people think that the cost of arbitration
9 compared to the cost of the public justice system is the filing
10 fee. It's not. The biggest cost in arbitration is the cost of
11 the arbitrator, and in almost all of these situations the
12 agreement provides that the parties share the cost equally. So
13 if you go to Mr. Welch's provider group with JAMS or you go to
14 Mr. Naimark's AAA, or any others. In California you're paying
15 \$250, \$300 an hour up to I think the highest at JAMS, now correct
16 me if I'm wrong, Mr. Welsh, is somewhere between \$10,000 and
17 \$15,000.

18 MR. WELSH: You're wrong, Jim. The consumer pays
19 nothing.

20 MR. STURDEVANT: Can I finish? Ten to fifteen thousand
21 dollars. Now, here, there are provisions with some providers
22 that consumers don't have to pay that. But we're talking about
23 all sorts of providers in this country that don't have those
24 provisions. And there are all sorts of reported cases where the
25 protocols that AAA has and JAMS has, have been disregarded in

1 reported cases.

2 So I think that in terms of the information that you're
3 after, it's only in the incipient stages of being recorded as is
4 a corollary, which is the repeat use.

5 MR. HARWOOD: So if Mr. Welsh wanted to respond just
6 briefly -- real brief, then I think Ms. Van Aken had more
7 comments. Do you have a comment too?

8 MR. WELSH: Well, no. I just wanted to make sure that
9 -- one of the reasons I wanted to be here is so that the broad
10 brush wouldn't be too broad. JAMS doesn't do debt collection
11 arbitration, never has. And although I've been getting a lot of
12 calls lately from banks asking if we would be willing to do it,
13 my response is that it's like asking somebody who doesn't drink
14 whether you're going to start drinking.

15 (Laughter.)

16 MR. WELSH: But we have had consumer protections since
17 the mid to late 90s where, in consumer cases, one of the
18 requirements is that consumers don't pay. They just pay what
19 they would pay if they filed in court. They don't pay the
20 arbitrator's fees in debt or in consumer arbitrations, as that is
21 defined.

22 So the cost of the arbitrator, and I believe even NAF's
23 everything was paid by the company. I don't think that's a
24 reason in these kinds of debt collection cases. I think that's
25 getting us off the track.

1 MR. HARWOOD: All right. Ms. Van Aken.

2 MS. VAN AKEN: Yeah. Just two factual points. So in
3 NAF if the filing fees are paid by the company, but in most cases
4 the creditor seeks that filing fee under the agreement. So
5 there's a fee shifting provision, and it does end up getting
6 allocated to the consumer. NAF never disclosed that in its
7 California required disclosures. It always listed the company as
8 paying those fees, but ultimately they were allocated to the
9 consumer.

10 The second point is that in comparing costs of
11 litigation and costs of arbitration, one important point is what
12 is the baseline that we're comparing? Because under the NAF
13 rules at least the document hearing was not -- you could simply
14 respond to a claim and do a document hearing without paying a
15 cost. If you wanted a participatory hearing before the
16 arbitrator, that was an additional cost. If you wanted a
17 statement of reasons why the arbitrator decided the way he or she
18 did, that was also an additional cost. So whereas in court, you
19 know, generally these things are free.

20 MR. HARWOOD: Okay. Last question, last comment, and
21 then we'll go onto the next one.

22 Ms. Hillebrand.

23 MS. HILLEBRAND: Thank you. I just wanted to get into
24 this discussion about the consumer arbitration rules. I'm sorry
25 to hear from Mr. Sturdevant that they're not always followed, but

1 they generally do have a cap. So it's up to a certain dollar
2 amount. And over that amount, when you're under the regular
3 rules, it's important not to rely just on the fee waiver
4 provision because that decision is made by the arbitrator at the
5 end of the process. So to ask an individual to incur that
6 potential liability right up to the end and then seek a waiver,
7 puts them in a terrible position in terms of decision whether to
8 go forward or not.

9 MR. HARWOOD: So, let me ask another question then.
10 What about the idea of simply prohibiting mandatory binding
11 arbitration conditions? So in other words you can have them, but
12 the consumer has to agree to them.

13 Mr. Melcer, you want to start with that? And that's
14 arbitration as not mandatory.

15 MR. MELCER: Well, I would actually. Again, you know,
16 if we can also ban runaway jury awards and we can also ban the
17 use of litigation as a cudgel, yeah, sure. Let's do it. But
18 when you're having to defend the kinds of suits that I had to
19 defend, we need mandatory arbitration. Something has to keep
20 people in check and basically grounded on the planet Earth in
21 some cases.

22 MR. HARWOOD: So I've got some followup questions, but
23 let me just briefly touch on what people want to comment on
24 banning mandatory. Let's kind of go around this way.

25 MR. NARITA: I agree with David, but as far as the

1 collection industry specifically, and that's what I think we're
2 here to talk about today, they just want to follow whatever the
3 rules are that are set by the creditor and the consumer. And if
4 it's arbitration, then they're going to arbitrate. If there's no
5 arbitration, if some ban is passed, I know there are some bills
6 that are kicking around right now that would ban mandatory
7 arbitration, then so be it, you know. If they can't resolve the
8 case, then the consumer is going to get sued. But whatever the
9 rules are, I don't think the collection industry in particular
10 has a stake.

11 MR. HARWOOD: So let's come back to that towards the
12 end.

13 Go ahead, Ms. Sternlight.

14 MS. STERNLIGHT: I mean, I certainly do believe that we
15 should ban mandatory arbitration. I believe we should ban it
16 generally with respect to consumers and employees, and I believe
17 we should ban it specifically in the debt collection context.

18 I hear very much what Mr. Melcer is saying, which is
19 that consumer arbitration was a response to what the industry saw
20 as problems with the litigation system, and certainly many other
21 people in the industry have discussed that before.

22 There's a very famous article by a guy named Alan
23 Kaplinsky who I know spoke at the Chicago roundtable, and the
24 title of his article is *Who's the Predator?* And it made that
25 same point that Mr. Melcer made, which is that actually it's the

1 companies that are getting victimized by consumers, and
2 plaintiff's lawyers, and so on and so forth.

3 My main response to that is that, you know, I would
4 never say that the litigation system is perfect. I know that
5 it's not perfect, but to the extent the litigation system isn't
6 perfect, we ought to reform that through Congress. We ought to
7 reform that in a public way rather than giving companies the
8 right to do what I've called do-it-yourself tort reform where
9 companies have the right on their own to set up their own system
10 that they think works well for them. That's not a good way to
11 set up a justice system to allow one of the parties to design a
12 system that they think works well for them.

13 MR. HARWOOD: Okay. So let's move around to Mr.
14 Sturdevant and then to Mr. Yalon, and then we're going to come
15 back around this side.

16 MR. STURDEVANT: I agree with Professor Sternlight on
17 the need for the passage of the legislation. But let me just
18 respond to Mr. Melcer's point about these so-called runaway
19 verdicts or whatever.

20 You know, in the public justice system, unlike
21 arbitration, you have a trial court, an intermediate appellate
22 court, a supreme court in each state, and then if there's a
23 federal issue like the size of the punitive damages, if there is
24 such an award, you have the United States Supreme Court.

25 The United States Supreme Court has reduced punitive

1 damages to a factor in the most egregious case of nine kinds of
2 compensatory award, so that cap applies across the board, you
3 know, under the 8th and 14th Amendments now to all courts in the
4 country.

5 When I tried the B of A case in the early 90s, '93, '94,
6 the architect of the system, who was himself a retired appellate
7 justice, Winslow Christian, said, "Look, I decided to do this
8 because bottom line it's just cheaper for the bank. We're going
9 to lose more cases involving customers, so, you know, they'll
10 win, but the damages will be smaller, and we'll avoid the class
11 actions."

12 So one more point. So how many class actions are there
13 involving then the second largest financial institution of the
14 world in California? Four. Four. So it changed the entire
15 system because there were four cases in the entire state
16 involving 16 million customers.

17 MR. YALON: I want to make it clear. I file litigation
18 cases, collection litigation cases in the State of California
19 every month, and every month I receive at least one motion from a
20 consumer defendant to stop the litigation and to instigate
21 contractual arbitration. This is a right of both parties. This
22 is not a right solely of the creditor. And in the current form
23 both sides are using it.

24 I think the creditors use it because they find it to be
25 useful. So taking this mandatory arbitration system away from

1 the creditor is to reduce the right of the creditor. It may be
2 to reduce the right of the consumer who doesn't want to go to
3 court.

4 Speaking, however, as a collection attorney, as the
5 term has been used before, I have no dog in this fight, and I
6 think that the attorneys will try to apply the rules, which is
7 what we're hired to do to, is to apply the rules.

8 MR. HARWOOD: Okay. Anybody over here want to comment?
9 Let's start with Ms. Barron first, and then we'll come back.

10 MS. BARRON: Okay. I think that when arbitration --
11 first of all let me say that I think that the bill before
12 Congress should be passed, but short of that and long before that
13 may happen, I think that if the FTC takes steps using it's
14 rule-making authority to declare certain existing practices
15 deceptive, short of barring mandatory binding pre-dispute
16 arbitration, we can have a voluntary system that people would
17 actually agree to; but we are a very, very long way from that.

18 California has a Supreme Court case called *Armendariz*,
19 which you're probably familiar with at 24 Cal.4th 83, which sets
20 out minimum standards of fairness. And I think that if an
21 arbitration provider -- if the administrator of an arbitration
22 system fails to meet the standards of *Armendariz*, which are
23 neutrality of the arbitrator, provision for adequate discovery, a
24 written decision that permits a limited form of judicial review,
25 limited costs of arbitration, notice, and no unlawful damages

1 limitations, we will come closer and closer to a system that
2 perhaps the FAA originally intended that would, in fact, be so
3 fair to both sides that you wouldn't have to be arguing about
4 making it mandatory against one party or the other.

5 MR. HARWOOD: Great. And hold that case because I do
6 want to come back to talking about transparency, and fairness,
7 and bias after lunch too. So we'll talk about that.

8 MS. BARRON: Thank you.

9 MR. HARWOOD: Okay. Ms. Hillebrand.

10 MS. HILLEBRAND: The short answer is yes.

11 Consumers Union since the mid 90s has endorsed the move
12 away from mandatory binding arbitration. We're not against
13 arbitration, but we think each party should have the ability to
14 choose it and to agree upon it after the dispute has arisen and
15 you know what's at stake.

16 In addition to the repeat player inherent bias
17 question, we're worried about the impact on the law and lack of
18 precedent, the lack of deterrence. This point that Professor
19 Sternlight made about one party designing its own justice system
20 and then getting the public justice system to approve it, and
21 enforce it, and then give it the same status of a judgment is
22 problematic.

23 And finally, it's a marketplace issue. The best way to
24 make sure we have arbitration rules that actually do work for
25 people who are in them is to make sure both sides have to choose

1 it, and that includes consumers.

2 MR. HARWOOD: Okay. So, first of all, I have a
3 request. We have a request by a webcast viewer that we please
4 make sure to speak close to the microphones so they can hear us,
5 so I'm saying that to all of you.

6 Mr. Capitel, I just wonder if I can ask you, doesn't
7 the BBB's arbitration system involve mandatory but not binding
8 arbitration, and how does that work?

9 MR. CAPITEL: What I think you're referring to is the
10 Auto Line, as it's called, method of doing arbitration with
11 Magnuson Moss complaints against auto manufacturers. That is a
12 format which is comprised of a conditional arbitration where the
13 manufacturer will pay for the arbitration, all the costs of the
14 arbitration, and the complainant has the right to opt out.

15 MR. HARWOOD: At the final result?

16 MR. CAPITEL: As a final result. And that actually
17 becomes a requirement before a suit can be filed, as I understand
18 the concept. Those kinds of concepts are great in terms of
19 dispute resolution, focusing on the resolution concept rather
20 than the dispute concept. It provides a mechanism that allows
21 people to look at one another, to talk to one another and to
22 explain to each other what their positions are. And the
23 arbitrators are trained in that particular area, and we do
24 hundreds of thousands of those.

25 MR. HARWOOD: Okay. As you know, this is a second of a

1 series of events that we've done on this. In Chicago we heard
2 about an interesting idea that I wanted to ask some of you about.
3 For lack of a better word, I'll call it the, "One cuts, one
4 chooses concept." You know, you remember when you were a kid and
5 you and your brother were arguing about who was going to get
6 which piece, and your mom said, "Well you get to cut, and then
7 your brother gets to choose which piece he wants," right? So
8 it's an approach to fairness.

9 So here was the concept as described to us in Chicago:
10 If creditors are allowed to make the cut, that mandatory
11 arbitration clause will be included in a consumer credit
12 contracts, to ensure fairness should consumers then be allowed to
13 choose the arbitration provider, the individual arbitrator,
14 and/or the arbitration location? So we'll start with you Ms.
15 Sternlight.

16 MS. STERNLIGHT: I'd love to talk about that. I have
17 two perspectives. It's a nice metaphor. All of us who have kids
18 know that one cut, one chooses can work well in that context, but
19 it's not an apt metaphor here, and I'll give you two other
20 metaphors so that you can understand why it's not a good one.

21 One is -- you know I come from Las Vegas. We have lots
22 of magicians there, and we have lots of dealers. If the dealer
23 says, you know, "I'll shuffle and you choose," that might be one
24 thing. If the magician says, "I'll shuffle the deck and now you
25 choose," that's a funny system. That's not necessarily giving

1 you any kind of meaningful choice. So one cuts and the other
2 chooses isn't necessarily going to work where one company is
3 designing the process and then giving the consumer quite possibly
4 a very limited range of choices.

5 The other metaphor for those of you who aren't into the
6 magic would be the school cafeteria. You know, there might be
7 plenty of choice in a sense in a school cafeteria, but if all the
8 choices are, you know, watery spaghetti, horrible, you know, fish
9 chips, or sirloin steak that's, you know, about as tender as a
10 piece of shoe leather, that's not much of a choice. So I think
11 we need to be careful of applying that metaphor in the wrong
12 context.

13 MR. HARWOOD: Okay. Ms. Van Aken and then I'm going to
14 come back around.

15 MS. VAN AKEN: Sure. I don't think it's a substitute,
16 you know, meaningful procedural rules, -- coming close to the
17 microphone.

18 And I wanted to share that there are a couple of
19 federal district court cases, unpublished, where groups set
20 themselves up and then talk to consumers and got consumers to
21 write letters to credit card companies saying, "I've now chosen
22 this, you know, whatever, whatever arbitration provider as my
23 provider. If you don't reject this provider within 15 days, then
24 this is who we're going to arbitrate in front of. I'm amending
25 our agreement." And then when there were disputes about payment,

1 the consumer would take this dispute to this provider, and the
2 provider would issue a decision exonerating the consumer from the
3 debt.

4 And so it's sort of the opposite difficulty that many
5 consumers faced before the National Arbitration Forum. But I
6 think it indicates that, you know, consumer choice isn't
7 necessarily the system we want either in the absence of other
8 standards about how the arbitration needs to take place and what
9 the standards are going to be.

10 MR. HARWOOD: Okay. So I'll just work back around. So
11 Mr. Welsh and then we'll go to Mr. Naimark.

12 MR. WELSH: It's like saying do you want the firing
13 squad, or do you want to take a pill, you know. It doesn't
14 attack the problem because that issue relates to probably, what,
15 one-tenth of one percent of the cases that we're dealing with
16 under debt collection.

17 So, you know, you got to deal with the 99.8 percent of
18 the cases and not the three people who have read the thing and
19 say, oh, I'll pick, you know, I want Joe to be my arbitrator.

20 MR. HARWOOD: Okay. Mr. Narita.

21 MR. Narita: Yeah. I mean, I think Christine really
22 hit it on the head, which is arbitration, private contractual
23 arbitration is a matter of contract, and you cannot force someone
24 to arbitrate in front of a venue that they haven't agreed to
25 arbitrate; that's what all the consumer attorneys are saying in

1 the room, and I think that would go for the creditors as well.

2 So you can't have an arbitration provision that says,
3 you know, whoever you decide to arbitrate with, that's who we'll
4 go with. It's a matter of consent. We've already talked about
5 whether there should be a ban; and if there's a ban, there's a
6 ban. But right now these are enforceable agreements.

7 The parties are deemed to have selected the forum or
8 sets of forums that are permissible. Each one of those forums to
9 my knowledge has a methodology for challenging arbitrators. In
10 the first instance, the arbitrator is suppose to disqualify
11 themselves if they see a conflict, and then a party has an option
12 to challenge an arbitrator, which they should -- they have that
13 right -- in the court system as well. So there is choice there,
14 but as far as letting a consumer or a creditor, you know,
15 randomly pick a forum that they didn't agree to in the first
16 place, I think that fundamentally goes against what arbitration
17 is about.

18 MR. HARWOOD: Okay. I'm going to move around here, but
19 we'll let Mr. Naimark go.

20 MR. NAIMARK: Yeah. I agree with Ms. Van Aken's
21 comment that in any event there should be standardization of the
22 due process requirements. The case you mentioned, *Armendariz*,
23 the specific criteria come fairly close to AAA's consumer due
24 process protocols which attempt to provide for adequate due
25 process all the way through.

1 I will say, however, for the consumer debt collection
2 caseload, it looks like the due process protocols aren't
3 adequate, and you would need some kind of addendum; and I think
4 they really should be universal, whether by law or regulation.

5 MR. HARWOOD: Okay. I've got like three more questions
6 I want to ask, but we don't have time. But does anybody else
7 want to comment on this issue of one cuts, one chooses?

8 Go ahead.

9 MS. HILLEBRAND: There's another problem with it. I
10 mean, is it better than what we have now? Yes. Is it good
11 enough? No. And that problem is what happens in a default
12 situation. If the provider is still being chosen by the creditor
13 in over 90 percent of the cases because the consumer doesn't
14 know, they can say, "No, I want this other one instead," then
15 it's not going to work.

16 MR. HARWOOD: Okay. Next question. So we've been
17 addressing this idea sort of generally that arbitration concepts
18 generally, and then we've also talked about terms of the -- to
19 some extent, terms of debt collection. Should we instead be
20 talking about this more as a front-end issue and not as a debt
21 collection issue in terms of arbitration? I'm reading an
22 audience question. So, again, I can't clarify too much, but the
23 audience question is, "Why are we addressing this as debt
24 collection process rather than a front end process? Are we
25 missing the point here and should be looking instead to the front

1 end?" So we'll start with you, Mr. Jarzombek.

2 MR. JARZOMBEK: Well, that's because that's when it
3 comes up. No one knows that they had arbitration as something
4 that they were being required to participate in until the UPS guy
5 brought some package to their house that wasn't what they ordered
6 on Ebay.

7 (Laughter.)

8 MR. JARZOMBEK: And then they know they have
9 arbitration. Now, how do you get there is, I think, the rule
10 making authority. It is something that we need to look at.

11 Where do we go from here? And in Texas we have a home
12 solicitation statute, and it came into being because of the
13 aluminum siding salespeople and whatever that sold you a real
14 bill of goods. But it required certain things, two signatures, a
15 certain size type so that you didn't have, "Nothing has changed
16 in this agreement," like I think Mr. Sturdevant talked about
17 earlier. You had to sign if the sales presentation was any
18 language other than English. If it's Spanish presentation, you
19 had to sign a Spanish acknowledgment of the release. That would
20 be a good, I think, foundation from which to work for an opt in
21 arbitration agreement.

22 MR. HARWOOD: All right. Does somebody over here want
23 to comment further before I go to the next question?

24 Okay. Ms. Hillebrand.

25 MS. HILLEBRAND: I would say, yes, it's a bigger issue,

1 but that's not a reason for the FTC to wait for all the
2 arbitration problems to be solved before tackling the special
3 problems in debt collection.

4 MR. HARWOOD: Okay. Let's see, next one. Could
5 somebody clarify -- this is a question from the audience -- in
6 which states attorneys are barred from appearing in small claims
7 court? Is that true of most states, some states, specific
8 states?

9 MS. HILLEBRAND: California.

10 MR. JARZOMBK: In Texas you can't bring a collection
11 action in a small claims court at all. So --

12 MR. HARWOOD: It's not just attorneys.

13 MR. JARZOMBK: They do it in the justice court, same
14 guy, different court.

15 MR. HARWOOD: Okay. All right. Other states where
16 attorneys are barred for appearing?

17 MS. BARRON: California.

18 MR. HARWOOD: California.

19 MR. MELCER: It's California and I think there's one or
20 two others. It's a distinct minority.

21 MR. HARWOOD: Okay. All right. Okay. This is another
22 question. Should creditors be required to include in consumer
23 credit contracts arbitration provisions that allow consumers to
24 arbitrate as a class? So, in other words, in class consumers
25 could arbitrate. Any thoughts on that idea? Does that make

1 sense?

2 Ms. Sternlight.

3 MS. STERNLIGHT: I have a lot of thoughts about the
4 class action issue, but I think that goes well beyond this debt
5 collection context. So I don't know if we really want to get
6 into that or we don't. I mean, you know, one of the main reasons
7 that creditors and companies more generally have required
8 consumers to go to arbitration is because they want to avoid
9 class actions. So many companies put class action prohibitions
10 into their agreements, so called, so that consumers will not be
11 able to proceed in class actions.

12 That's a major reason why I and many others think
13 mandatory arbitration in general is a bad thing. I think we
14 aren't talking about it more today only because we're so focused
15 on the debt collection, but that is a major, major problem.
16 Occasionally courts will strike down those kinds of class action
17 prohibitions, but often times courts don't strike them down. And
18 the fact that companies are using arbitration as a means to avoid
19 class actions is one of the reasons why, outside the debt
20 collection context as well as sometimes within it, arbitration
21 can be very problematic.

22 MR. HARWOOD: Okay.

23 And then Mr. Sturdevant.

24 MR. STURDEVANT: Yes. They should be allowed, but as
25 Justice Scalia asked to one of the lawyers in the oral argument

1 in the Bazzle case in which there was no prohibition there was
2 just silence, what company in its right mind would agree to a
3 one-shot deal in a class action with no appellate review?

4 (Laughter.)

5 MR. STURDEVANT: So maybe the question ought to go to
6 some other members on the panel about whether, if that were the
7 case, they would agree to allow class-wide consumer arbitrations.

8 In the Bazzle case, the case came up to the court from
9 two different arbitral awards, each 20 million in separate class
10 actions against a company called Conseco, which was then bought
11 by another company. So there are situations in which, just like
12 in judicial arbitrations, the consumer can prevail under the
13 right set of circumstances.

14 MR. HARWOOD: Okay.

15 Mr. Narita.

16 MR. NARITA: Yeah. I would be very concerned about
17 litigating a class action of any kind in the context of an
18 arbitration. I just think, you know, are we going to have enough
19 qualified arbitrators that are going to be familiar with this to
20 handle it? How is it mechanically? How are things like notice
21 going to be handled? Is state or federal law going to be
22 followed or respected?

23 It's a mess, and as a litigator I would be very
24 concerned about jumping into any arbitration forum, even one like
25 the AAA in that context.

1 MR. HARWOOD: All right. So I've got two more
2 questions here. We're running out of time for our answers.

3 Go ahead.

4 MR. NAIMARK: Yeah. Just very briefly, just a point of
5 information regardless of the merits or how you feel about that,
6 we, in fact, have a fairly substantial class action arbitration
7 caseload right now, over 200 cases have been filed and moving
8 along. The process pretty much mirrors the federal process with
9 a couple of additional safeguards built in, but seem to be moving
10 along.

11 MR. HARWOOD: Okay.

12 Ms. Barron.

13 MS. BARRON: I am opposed to any class action ban, and
14 I think it's not a coincidence that class action bans are found
15 embedded in the arbitration clauses. And, in fact, we're seeing
16 many contracts which state that if the class action ban is held
17 unenforceable, it cannot be severed, and the industry-drafted
18 contract says the entire arbitration clause will then be
19 unenforceable. That I submit is a deceptive practice, and I'd
20 like to have it defined as such.

21 MR. HARWOOD: Okay. Let me ask a couple more
22 questions. We're just about out of time. These are questions
23 from the audience.

24 One of the questions was: How could consumer notices
25 be designed so that consumers would read the portion that notes

1 that arbitration would be used in disputes?

2 That's actually a question we sort of addressed during
3 the first panel, but to close that let me just ask, does anybody
4 got any ideas about how to write a good notice if you're worried
5 about notices and making consumers read these notices?

6 MR. NARITA: I think the idea of a standardized notice
7 to the consumers is a great one, and maybe you could even refer
8 to the FTC's website. I know in California we have a state Civil
9 Code; I think it's 1812.700 that when collectors put out notices
10 to consumers, they're required to give them some basic
11 information on top of federal law, and it refers them to the FTC
12 website. I think that's fine. Again, by using that notice, your
13 collector is not going to run into some FDCPA claim. There needs
14 to be a safe harbor. But I think -- you know, I'm all in favor
15 of that.

16 MR. HARWOOD: Okay. Other thoughts about notices, how
17 to make sure consumers read them?

18 MR. STURDEVANT: The industry knows how to do it quite
19 well. Let me just give you an example from a piece of litigation
20 I have now. I have a client who had different credit cards with
21 Chase. He had three credit cards he wasn't using. They were
22 dormant, and he had one that he was using. And Chase sought to
23 add an additional fee and increase the minimum payment by 150
24 percent, and if you didn't see that, then the interest rate would
25 go from 3.9 percent to 29.9 percent.

1 So with respect to the active credit card, there was
2 nothing on the envelope that indicated that the communication
3 from Chase, you know, was anything material. With respect to the
4 cards that he wasn't using, there was bold language on the
5 envelope. There was underscoring in red, "Important new change
6 in terms." That's an example.

7 MR. HARWOOD: Okay. Any thoughts on notice? Anybody
8 else? Okay. I have some other questions, but I'm afraid that
9 we're probably out of time. So maybe we can get to some of them
10 later today, and with that though I'll thank the panelists for
11 their time.

12 And we're now going to take lunch until one o'clock.

13 Thank you very much.

14 (Lunch break from 11:28 a.m. to 1:01 p.m.)

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1 BIAS AND TRANSPARENCY

2 MR. PAHL: I'll ask everybody to take their seats so we
3 can begin as soon as possible.

4 All right. Welcome back, everyone. I look forward to
5 turning to our next panel this afternoon. I'm Tom Pahl, Director
6 of Division of Financial Practices with the FTC, and I'll be
7 moderating this panel.

8 And our topics for this panel are Bias and
9 Transparency, and I think really this breaks down into three
10 different sub-topics that we need to talk about. The first is
11 whether there is bias in the arbitration forum itself. The
12 second is whether there is bias in the individual arbitrators,
13 and lastly, turn and look at the issue of is the arbitration
14 process and the results of that process sufficiently transparent?

15

16 I guess I'd like to start by focusing on whether
17 there's a bias or perception of bias in arbitration forums, and I
18 guess start by asking folks are there standards out there for
19 evaluating this question, and if there are not, what standards
20 should be applied and who should come up with them?

21 Anybody have any thoughts on those questions?

22 We'll start with Mr. Sturdevant.

23 MR. STURDEVANT: Yes. I think there is substantial
24 bias in the process. I think in terms of statistics gathering in
25 the incipient processes of being done, first in the brokerage

1 field, which was the first industry to go for pre-dispute
2 arbitration, then in the employment field.

3 And the issues of bias in the repeat player phenomenon
4 is the phrase where arbitrators are more likely to decide in
5 favor of those repeat players, like the companies that put the
6 clauses in the contracts. NAF is obviously notorious. There's
7 enough public information out there to convince, I think, most
8 fair and reasonably minded people.

9 And one of the things today was, well, you know, if you
10 don't like the provider, if you don't like the arbitrator, then
11 the consumer can challenge. The problem is that the consumer
12 doesn't know anything about arbitration as we talked about this
13 morning, and the consumer doesn't have access to information
14 about individual arbitrators. To be sure, some lawyers do, but
15 individual consumers and employees simply do not. They don't
16 know the track record, which law firms, plaintiffs and defense
17 keep with respect to judges and retired judges.

18 The question of who ought to do that, information is
19 being tracked by a number of law professors now who have written
20 articles or are in the process of writing more to ferret out this
21 issue.

22 There are rules in California by statute in terms of
23 arbitrator disclosure and, you know, the required disclosure if
24 they know a party, if they know counsel for a party. But that
25 comes, unfortunately, at the end of the process. And the problem

1 is that it's not a public forum like a civil proceeding, and so
2 there's no record if there's a challenge. There's no oversight
3 of the disclosures that I know of. There is some tracking by --
4 I guess it's the judicial council. If Jay Welsh were here he'd
5 know because his organization has to provide some record keeping.
6 But I haven't heard any public presentation of those reports by
7 the judicial council in California as of yet.

8 MR. PAHL: Okay.

9 Mr. Naimark.

10 MR. NAIMARK: Yes. Well, obviously I don't feel there
11 is necessarily a bias. One of the unfortunate aspects of this
12 subject is the recently disclosed news of NAF, which is and was a
13 for-profit, which had some practices which have been called into
14 question. And, unfortunately, and particularly in the consumer
15 area, this has tended to cause people to paint with a broad brush
16 and to characterize an industry or an area of activity.

17 AAA, by contrast, is a not for-profit organization.
18 We've been around 83 years, and we've developed over time a
19 number of standards to ensure fairness, lack of bias, fair play
20 from the consumer due process protocols, employment due process
21 protocols, healthcare due process protocols, code of ethics for
22 arbitrators, which was co-authored with the American Bar
23 Association, which is increasingly becoming standard around the
24 world.

25 So it really depends on which forum you're talking

1 about I think. And the standards of fair play and the disclosure
2 process that AAA uses has been really appreciated by courts
3 around the country for many years.

4 I will say the California disclosure standards are
5 standards that we apply across the country. They require
6 significant disclosure by arbitrators on every single case, and
7 we built in other safeguards. I won't go into some of the
8 specifics, but, for instance, for consumer cases so that parties
9 are assured of having unbiased arbitrators.

10 MR. PAHL: Well, let me follow up on that and just ask
11 one of the points that Mr. Naimark had made was drawing a
12 distinction between nonprofit and for-profit status of
13 arbitration forums. I guess I would ask people whether being a
14 nonprofit is necessary for the arbitration forum to be both
15 unbiased and perceived as not being biased.

16 MS. HILLEBRAND: I think it's helpful to be nonprofit,
17 but as we know in some of the areas, for example, in the debt
18 counseling area where the IRS had to crack down, it's possible to
19 be a nonprofit that operates like a for-profit or that is in
20 close business association with a for-profit. So nonprofit
21 status is not a panacea.

22 I think that the bias risk we need to separate out.
23 We're not talking about individuals who are purposely being
24 unfair. We're talking about the economic bias risk. The risk of
25 knowing that one party is going to be more informed about making

1 a future choice to use your company again or to use the
2 arbitrator again. So it's an inherent problem in the system
3 rather than a weakness of the individuals, but that makes it
4 harder to solve.

5 I wanted to draw our attention to the standards for
6 disclosure in California, Code of Civil Procedure 1281.96, which
7 are results-based disclosures that the arbitration provider has
8 to make, and they're quite specific. They protect the privacy of
9 the parties by requiring a disclosure of the prior arbitrations
10 with the parties in this case, and then the other party can be
11 identified as business or consumer, plaintiff or defendant so you
12 don't have to name all the people who have nothing to do with the
13 current case.

14 They require indicating both type of dispute, how much
15 was claimed, how much was awarded, not just who won and who lost
16 but a little more information to give a sense of what's going on,
17 and that is separate and additional to the disclosure that the
18 neutral arbitrators have to make. Essentially, arbitrators have
19 to disclosure things that would disqualify them if they were
20 judges, and that's a good standard; but I would emphasize that we
21 were engaged with the legislative process to pass these, and it
22 was really clear that what the legislature actually wanted to do
23 was to go farther and address the issue of consumer choice but
24 was not able to do so because of the Federal Arbitration Act. So
25 these were a second step to address.

1 MR. PAHL: Let me bring it back to the arbitration
2 forum itself. One of the questions that comes up in the
3 aftermath of NAF, and this was something that figured prominently
4 in our discussions in Chicago, was are there any circumstances
5 under which either the parties or law firms representing the
6 parties, having an ownership interest in the arbitration forum
7 would be appropriate in terms of not creating bias or appearance
8 of bias. Is an ownership interest per se improper?

9 MS. HILLEBRAND: Yes.

10 (Laughter.)

11 MR. PAHL: Okay. That's what we heard in Chicago
12 almost uniformly as well, but I just wanted -- just making a
13 record on that point.

14 Yes, Ms. Van Aken.

15 MS. VAN AKEN: Yes. Just to underscore that point, I
16 think there's a lot that happens with the arbitration provider
17 that's very important. I know that what NAF's position has been
18 is that these cases go to a neutral arbitrator who is paid by us
19 regardless of how they decide and so on, and so that is what
20 insulates. It doesn't matter the arbitration provider being
21 owned -- having this complicated joint ownership scheme
22 -- but there is so much that happens in the case management
23 process in those cases.

24 What we learned is that case managers have control over
25 the schedule. They have control over deeming a response

1 sufficient or deficient such that it goes into different piles
2 and to different arbitrators. They have control over amendments,
3 and, you know, at the end of the day they submit the whole file
4 to the arbitrator. So nominally the arbitrator could undo any of
5 these decisions that have already been made. But, for instance,
6 you know, a customer requesting a participatory hearing is
7 something where a case manager decides that in the first
8 instance, and then if the arbitrator, in my understanding,
9 decides that request should have been granted, the case leaves
10 the arbitrator. And so the arbitrator has very little incentive
11 to make a decision like that.

12 So there's just a lot of, there's the idea that a
13 neutral decision-maker who is not affiliated with the company at
14 the end of the day is going to protect from that is really not a
15 satisfying solution.

16 MR. PAHL: Okay.

17 Mr. Narita.

18 MR. NARITA: Sure. I think the real issue in all this
19 NAF mess is whether any particular arbitration award was
20 impacted, whether any particular arbitrator decided a case one
21 way or another because of some alleged relationship or
22 investment, and to my knowledge there's been no proof that any
23 decision went the way it shouldn't have because of some
24 relationship that's been alleged in these cases.

25 I think it's wrong to assume that just because the

1 creditors have a very high percentage win rate in these cases
2 that -- that necessarily means that the forum itself is biased
3 or that any particular arbitrator is biased.

4 I would expect a near 100-percent win rate for
5 creditors in these cases for a couple of reasons. One is they're
6 not particularly complicated. This not a situation where you're
7 arbitrating a patent infringement suit and you've got to get into
8 questions of prior art. This is not some really complicated
9 personal injury case where you have battling experts. These are
10 fairly simple claims where, you know, a debtor has incurred a
11 debt. You submit proof of that, and the creditor should win.

12 Also there's a number of ways that cases get weeded out
13 of the arbitration track before they ever get there. You know,
14 creditors are calling these consumers directly. They're sending
15 them notices that they're delinquent. A lot of times they'll
16 hire collection agencies or have in-house collection channels
17 trying to reach out to these consumers to see if there's a
18 problem, if it's not really their debt, if it's identify theft.
19 You know, a lot of these will go out to collection agencies after
20 they charge off, and the same process will happen. Then they'll
21 go to law firms maybe, and the law firm is going to give them
22 notice.

23 So there's multiple opportunities along the way to weed
24 out cases where there's a real problem, where this is the wrong
25 debtor, this is ID theft, this is fraud. And by the time it gets

1 to the point of where it's going to be arbitrated, I would expect
2 it to be, you know, trending towards a near 100-percent victory
3 rate for the creditors. And I don't think that reflects on bias
4 of anyone.

5 MR. PAHL: Mr. Sturdevant.

6 MR. STURDEVANT: I just wanted to hit a couple of
7 things. There is a published decision by a federal district
8 judge in Kansas -- and I can't remember if the decision was 2006
9 or 2007 -- in which an arbitrator from AAA had agreed to preside
10 over a class action. And the defendant in the case was AT&T
11 represented by one of the largest commercial law firms in the
12 country. And the decision said that there was a communication
13 from AT&T to AAA saying we want you to reverse this preliminary
14 decision of the arbitrator, and if you don't, we will do to you
15 what we threatened to do to JAMS. And there was a challenge to
16 the arbitration as unfair, and the judge said well, under the
17 provisions of the FAA, he couldn't interdict the process, but he
18 was keeping his eye open to see how the case proceeded in
19 arbitration.

20 And what had happened at JAMS was that in November of
21 2004 the organization issued a press release saying that they
22 would not administrator any arbitrations in the consumer context
23 in which there was a clause that prohibited class actions, and
24 shortly after the issuance of that several very large companies,
25 represented by several very large commercial law firms met with

1 represents of JAMS on the east coast and threatened to withdrawal
2 all mediation and arbitration business if they did not rescind
3 that policy statement. And JAMS rescinded it publicly by March,
4 and the original statement has disappeared from the website.

5 So, you know, I would ask anybody in the audience or
6 anyone who is watching this cast, if that happened in the public
7 justice system and a company came in and threatened the system to
8 basically withdraw all of its business from the public system
9 unless the judges did what they were told to do, would anybody
10 think that was a fair system of justice? Would anyone say,
11 "Well, wait a minute. We don't know that Judge Smith is biased."
12 I mean, even if the entire system has knuckled under and if
13 judicial administrators and judicial counsel in California as the
14 presider over the judicial function as, you know, co-opted
15 itself, we have no information to believe that Judge Smith is
16 biased or would necessarily follow what the judicial oversight
17 people say. I would dare say that there's not a fair-minded
18 person that would think that's a fair and neutral system in which
19 he, she or it could obtain justice.

20 MR. PAHL: Okay.

21 Mr. Naimark.

22 MR. NAIMARK: Yeah. I'm not familiar with that
23 individual case. I just want to say that just because threats
24 are made doesn't necessarily mean that the system leans in one
25 direction or another. In fact, one of our references is we have

1 repeatedly refused caseloads in a variety of ways because we
2 didn't think that they were either balanced enough or ethically
3 based enough.

4 One prime example is the consumer caseload. Each
5 consumer case that's filed with us is reviewed for compliance
6 with the due process protocols. If the company-written clause is
7 not compliant with the protocol, we refuse to handle his
8 arbitrations, and we've refused hundreds of them.

9 So we're not in the business of weakening our
10 reputation for integrity and for lack of bias by throwing a case
11 in one direction or another, and we don't knuckle under to that
12 kind of pressure.

13 MR. JARZOMBEK: One of the things when we talk about a
14 near 100-percent win rate, well, in my humble opinion, and I
15 speak to the things that originated with NAF, it is because NAF
16 sort of designed the system. It's their system crafted with
17 their code of procedure, and these are the rules that you have to
18 follow that most people don't understand anyway.

19 And one example of that is I had an arbitration award
20 show up for confirmation in my office, and I always check to see
21 where in the world this arbitrator's office is. This
22 arbitrator's office was in Louisiana, but she had a Texas Bar
23 card, and I'm wondering how did you manage to -- it says entered
24 in Texas. Somebody may have called her office and asked if she'd
25 ever been to Texas recently, and she hadn't been. But,

1 nonetheless, she had managed to enter an arbitration award
2 against a client of mine in Texas or so it said. There's no
3 proof at all in the context of a NAF arbitration that the
4 consumer ever made the charges. They have a bunch of statements.
5 It's a bunch of bills. It doesn't say who made anything.

6 And I had the opportunity one day of sitting on an
7 airplane next to a NAF arbitrator who saw what I was doing, asked
8 me if I was a lawyer. I told him I was and said he was too and
9 he did a bunch of NAF arbitrations. And I said, "Really? You
10 ever find in favor of the consumer?" He says, "Hardly ever." I
11 said, "Why?" He said, "Well they owe it anyway." "How do you
12 know?" He said, "Well, I got the statements." And I said,
13 "Well, do you ever, if you didn't like what you saw on the
14 statements, do you ever run the risk of not having anymore
15 arbitration files sent to you in the event you found on behalf of
16 the consumer?" And after that question he had to go to the back
17 of the airplane to review his notes for the talk he was going to
18 give and he never did answer that for me.

19 So whether or not it's a biased system, I can't speak
20 that I've got evidence of it, but in talking to that man and
21 seeing the things that I've seen in the arbitration confirmations
22 that have come to me, it certainly looks pretty fishy when
23 somebody isn't even in the right state yet it's been blessed by
24 somebody in Minnesota who says "entered this day," just as though
25 it was all on the up and up; and it clearly isn't. I mean, they

1 admitted they weren't even in the state on those days, yet that's
2 what it says. So that's a problem, and that's why I think there
3 has to be something that makes the process be a little less
4 obscure to the consumer.

5 MR. PAHL: Yes.

6 Mr. Yalon.

7 MR. YALON: I think it's appropriate that it be an
8 unbiased system, but I also think it's appropriate to consider
9 what constitutes bias, and what is a meaningful bias, and what is
10 an innocent bias.

11 I worked in the federal and state court system.
12 Attorneys that are well known locally get better treatment than
13 attorneys that come from afar and have not been in a courtroom
14 before. So would that be likely to happen in arbitration setting
15 too? Sure.

16 An attorney's office that regularly files things in the
17 Clerk's Office and knows the names of all of the filing clerks is
18 going to get better treatment than someone who mails it in from
19 across the country. And that's going to be true in an
20 arbitration system too.

21 And I think that there's got to be a distinction, and I
22 think it's got to be carefully crafted how this is done. An
23 institution, whether it's AAA, JAMS or NAF that has an ongoing
24 business relationship with an entity because it is regularly
25 sending business to them is going to be treated differently than

1 someone who has never been there before. It's human nature, and
2 we must be careful in what we do.

3 And we're talking about the federal government system
4 here. So we're talking about a big player. We have to be
5 careful that we don't try to solve all the problems of the bias
6 of human nature when we're trying to solve a particular area's
7 problem, and I think there's somewhat of a tendency in some of
8 the discussions to try and solve problems that are not really
9 this sector. They're really basic human nature.

10 MR. NAIMARK: I appreciate the discussion about bias.
11 One of the things you learn early on when you're involved in
12 being a neutral provider is you not only must deal with the
13 substance of bias but the appearance of bias.

14 So one needs to be extremely conservative in any
15 rulings you make and in any system design you build that way so
16 that you not encourage people to get the impression that there
17 may be biased built into the system.

18 One of the things we tried to do to combat some of that
19 in our short-term debt collection caseload was have an assignment
20 system for the arbitrators with automatic rotation. Essentially,
21 you got the next name on the list. That arbitrator got 10 cases,
22 and then you went to the next arbitrator. There was no
23 individual assignment, so there couldn't be any playing of
24 favorites.

25 And then we had a policy about rulings on disclosures.

1 Every arbitrator, of course, had to make disclosures, including
2 whether they'd had an arbitration with those parties before. And
3 our rule was if the consumer objected, it was automatic removal
4 of the arbitrator. If the business objected, we would not remove
5 the arbitrators, so that there couldn't be any stacking of the
6 pool of arbitrators. And I don't pretend that's a 100-percent
7 solution, but I think it goes a long way towards ensuring the
8 neutrality of the process.

9 MR. PAHL: Yes, Ms. Barron.

10 MS. BARRON: I was glad to see that you placed bias and
11 transparency together on the agenda because I think they do go
12 hand to hand. There are other aspects of transparency we should
13 examine.

14 But in the discussion here about NAF, which is the big
15 empty chair at this table, I understand the concern of the other
16 providers in not to paint this with too broad a brush. And so
17 apart from the specific issue of bias, I think we do need to
18 paint with a very big brush the overall absence of transparency
19 in a system, and it was precisely that secrecy and absence of
20 transparency that allowed a bad actor to arise and develop a very
21 lucrative practice here.

22 It would be a terrible mistake to think that because
23 NAF isn't here now, there's no opportunity for a similar provider
24 to arise, and I think the FTC and we all involved in this process
25 at this table have a historic opportunity now to avoid an

1 unpleasant Phoenix rising; and I think we should take that
2 opportunity. In the bias area, we should see whether policy and
3 actual practices can be devised to ensure that transparency.

4 So with respect to specific proposals I think the
5 California statute is a beginning. I don't think it goes far
6 enough. I don't think it is adequately observed, and I certainly
7 don't think it's adequately enforced.

8 MR. PAHL: Just one followup question. What, in
9 addition to what the California statute requires be disclosed, do
10 you think should be disclosed?

11 MS. BARRON: Well, that's a good question, and there
12 are two aspects. One is what is disclosed and the other is how
13 to make sure that when a provider doesn't comply with that,
14 there's some sort of enforcement mechanism because it's actually
15 very frequent that you can't access that from the website.

16 With respect to what should be disclosed, I think the
17 track record of individual arbitrators should be disclosed. Mr.
18 Naimark mentioned that there is an automatic rotational system.
19 I don't think there's any transparency with respect to how many
20 are in the rotation.

21 A rotational system, whether it's computer generated or
22 human generated, is not terribly effective if there are three
23 arbitrators that are rotated. If there's 150, maybe we're
24 talking about a different thing. Similarly, if within that 150
25 rotation you have an equal number of consumer lawyers as you have

1 industry lawyers, that would be something that could be
2 disclosed, at least by name in the public eye.

3 MR. PAHL: Mr. Capitel.

4 MR. CAPITEL: The integrity of the dispute resolution
5 provider is something that the public is going to have to look to
6 to make a decision as to whether or not to use the process of
7 arbitration.

8 Much of what happens today, I think, is that the public
9 perception, especially when they read newspapers about some of
10 the more nefarious things going on in the industry, is probably
11 depressed. And those people in the public that might ordinarily
12 generate a better feeling about the arbitration situation where
13 things could be done positively, are really in the hands of the
14 provider groups, the AAA. And I'm involved with this on a daily
15 basis with the Better Business Bureau to make sure that the
16 integrity of the organization is preserved, and there is no
17 exception.

18 And when the public becomes aware of those kinds of
19 things, they have a certain amount of confidence, or a higher
20 degree of confidence in selecting a particular organization
21 because they feel that they're going to get a fair deal. And we
22 always say that somebody is going to win, and somebody is going
23 to lose. That is the nature of a dispute. That's what is going
24 to happen in the court system; that is what's going to happen in
25 arbitration and anywhere else. Somebody is going to win, and

1 somebody is going to lose; but there has to be a confidence level
2 that is generated with -- this may be a sappy thing -- with an
3 open heart so that people really believe the truth of what the
4 organization is trying to do.

5 There is no person in this room or who is watching that
6 doesn't have some bias about something or some prejudice. We
7 can't go through life without developing that. And I try to
8 teach our people in Chicago that you need to recognize what those
9 biases are. You need to understand how your triggers to those
10 biases work and what they make you do. And you need to get into
11 a set of circumstances that will allow you to understand that and
12 do the best that you can in order to avoid that.

13 When we see somebody that is working in a biased
14 environment in one way or the other, that person is no longer on
15 the pool. And that's an absolute rule, and there's no exceptions
16 to that rule. And maybe I can get criticized in my own
17 environment for that, but we don't live in a perfect world. And
18 we have to do the very best that we possibly can.

19 But it's the overall perception of the integrity of the
20 organization that is absolutely paramount to how the public will
21 perceive getting involved with this process. If the public
22 doesn't believe it and the public doesn't use it, then these
23 kinds of conferences are great for the exchange of information,
24 but how are they going to do something positive in terms of the
25 dispute resolution.

1 MR. PAHL: Yes, Professor Sternlight.

2 MS. STERNLIGHT: Well, I think we're tending in this
3 discussion to blur together two types of possible bias which,
4 although they're related, probably ought to be discussed
5 separately. One is the bias or perceived bias of the provider,
6 and two is the biased or perceived bias of the individual
7 arbitrators. And those two are related, but they also have very
8 separate aspects.

9 As to the bias or perceived bias of a provider, I would
10 think that everybody in the room would agree or perhaps has
11 agreed that, you know, the minimum has to be that the provider
12 cannot have financial ties to parties that appear in front of it,
13 as at least was alleged to have been the case with NAF. I mean,
14 that would seem like the bare, bare minimum.

15 Beyond that it does though get trickier, and, you know,
16 there are a set of ethical rules that were once written. They
17 didn't come into effect. I don't think they were largely
18 adopted, but two entities, CPR in New York and Georgetown,
19 drafted a set of ethical rules that were designed to apply to
20 providers. I think those were drafted more than five years ago,
21 and they exist. To some degree, I think those proposed rules
22 were uncontroversial, and other aspects of those rules were more
23 controversial because what those draft rules tried to get at was
24 the extent to which providers ought to be permitted, essentially,
25 to solicit business from particular companies and what their

1 links could be to those companies; and that's, you know, a
2 difficult issue.

3 I mean, providers want to be able to market themselves
4 to companies and yet, obviously once that has happened, that may
5 create, at a minimum, a perception of bias. And so that's a, you
6 know, a difficult issue that I think it would be good if the FTC
7 could try to wade into.

8 The separate but related issue is bias or perceived
9 bias of individual arbitrators, and that's where things like the
10 California-style disclosure requirements can be helpful so that
11 at least people will have some sense of the record of this
12 particular arbitrator.

13 But those disclosures, while potentially useful, are
14 certainly not going to be the cure-all. The more you move into
15 the field of mandatory arbitration, the less useful, probably,
16 the disclosures are. The more necessary they are but the less
17 useful they are because the people who are forced into
18 arbitration may not have the knowledge or the wherewithal to even
19 find out about the disclosures much less do anything useful with
20 them.

21 By contrast, when you have, you know, two big companies
22 who voluntarily enter into arbitration, or when you have a labor
23 group and management enter into arbitration in the collective
24 bargaining context, because it's voluntary arbitration they're
25 much more able on their own to figure out which kinds of prior

1 knowledge on the part of the arbitrator might actually be
2 desirable to both parties or which one side or the other might
3 think would be inappropriate bias.

4 MR. NAIMARK: I do think what's really developing in
5 our society is in the areas of consumer and employment disputes
6 and perhaps healthcare as well, there is a need for increased
7 transparency. California really started that.

8 At that time both our organization and JAMS elected to
9 not just report the cases in California. Our report includes all
10 our consumer cases and employment cases around the country. And
11 I think it's inevitable that in playing a role of dispute
12 provider for employment and consumer cases that there will have
13 to be increasing amounts of transparency so people can see who
14 are the panel of arbitrators, what's the track record, *et cetera*.
15 That's part of the reason we've been trying to provide
16 information to groups like the Searle Center, hand them raw files
17 and let them develop a lot of the data, which doesn't exist in
18 any other collected format.

19 MR. PAHL: Do other panelists think that it would be
20 useful to have a nationwide system of reporting rather than just
21 in California for arbitrations?

22 MR. NARITA: Reporting of what?

23 MR. PAHL: Basically taking the California model and
24 expanding it nationwide. Would that be something that would be
25 beneficial?

1 MS. HILLEBRAND: Yes.

2 MS. VAN AKEN: I think it would be, but I think it's
3 worth noting that, you know, it was not a statute with any
4 enforcement mechanism built into it here in California.

5 And so, for instance with NAF, well, the Judicial
6 Council ethic standards require disclosure of any significant
7 relationship between an arbitration provider and any lawyer or
8 party that appears before it. And, you know, none of the
9 allegations made by the Minnesota Attorney General were disclosed
10 if true.

11 Additionally, the disclosures required under the Code
12 of Civil Procedure 1281.96 were, you know, NAF has now stated
13 publicly that they were 100,000 California consumer arbitrations
14 when what's disclosed in those disclosures are about 34,000. So,
15 you know, there were simply two-thirds that got left out.

16 So I think it's not really useful without some
17 mechanism because there's very little check that individual
18 consumers or participants can have on the integrity of those
19 disclosures absent some larger -- I don't know what the regime
20 would be -- but some sort of regime to control those.

21 MR. PAHL: Mr. Melcer.

22 MR. MELCER: Yeah. I think that probably, you know, it
23 would be useful to have a reporting system, but, you know, again,
24 going back to what you're comparing this to, which is the court
25 system, I mean, how many people when they're sued in front of a

1 judge bother to look up what that judge's prior opinions were,
2 what that judge's prior record was in terms of collection suits,
3 and how many that particular judge, you know, found in favor of
4 the consumer? I mean, you know, yes, we can report, but is it
5 really going to have any more effect than the current system is
6 in litigation?

7 MR. PAHL: Yes, Ms. Hillebrand.

8 MS. HILLEBRAND: Well, judges of course are responsible
9 to the public, can be tossed out the next election and the like.
10 There are other checks and balances on the court system we don't
11 have with private arbitrators.

12 I wanted to make a different point. As we look at the
13 California statutory model, it's important to look at it along
14 with the arbitrator ethics judicial council rules, which go into
15 more detail and are more specific about what one has to do to be
16 an ethical arbitrator.

17 I do agree that there would have to be an enforcement
18 mechanism, or perhaps it's as simple as saying if these have not
19 been complied with -- whatever the standards are -- you know, the
20 other side is released from the mandatory binding arbitration on
21 that I think would create a lot of incentive to comply.

22 You'll have to come back to me on my last point 'cause
23 I don't remember it.

24 (Laughter.)

25 MR. PAHL: Mr. Capitel.

1 MR. CAPITEL: We teach our arbitrators that if it's
2 something you think should be disclosed, it should be disclosed.

3 I had an arbitration two weeks ago, and one of the
4 lawyers involved in the arbitration had the last name, which was
5 spelled the same as the last name of a cousin of mine that I
6 hadn't seen in 20 years. And I disclosed that because I, in my
7 own mind, thought what would happen here if I didn't disclose it.
8 And it's absolutely imperative that if an arbitrator or anybody
9 in that position of power thinks of anything that should be
10 disclosed, it should be. It's not even -- as far as we're
11 concerned, it's not even an issue. You disclose it.

12 MR. PAHL: Ms. Hillebrand.

13 MS. HILLEBRAND: Thank you. Yeah. The disclosures
14 don't do anything without accompanying right to disqualify. And
15 so it's not just I disclose. It has to be you disclose and then
16 something can happen, and I think it's not -- shouldn't be just
17 you disclose and if the party doesn't show up and hasn't
18 objected, no disqualification. There are some things that ought
19 to be automatically disqualifying, and the ethic standards talk
20 about that as well.

21 MR. PAHL: Yes, Professor Sternlight.

22 MS. STERNLIGHT: The other thing about disclosure which
23 is good is that to the extent additional disclosure requirements
24 are imposed, thought ought to be given to making that information
25 really useable for people who want to use it. So the California

1 disclosure requirements are good in the sense that they're a lot
2 more than we had before and they're better than nothing. But
3 I've attempted as a researcher to use some of that California
4 data and have been very frustrated by the fact that it's very
5 difficult to search. It's hard to compare provider to provider.
6 They've complied in different ways. Individual providers have
7 had problems providing all the data that they're supposed to
8 provide.

9 So it's important to think about the format of the
10 disclosures and to provide the information in ways that will
11 actually be useable, both by researchers and by disputants.

12 MR. PAHL: All right. Well, one thing that I want to
13 make sure that we do move on to and cover is the issue of
14 transparency of particular arbitration awards and results. And,
15 I guess, one thing that we had heard in Chicago is that there are
16 a number of people who have problems with arbitration awards
17 because there is not an itemization of what goes into the amount
18 that the arbitrator has awarded.

19 And I guess I would be interested in people's thoughts
20 as to whether arbitrators should be required to itemize, you
21 know, for example, principal and interest fees in the awards that
22 they give, and if so, why and is that a real problem we're seeing
23 right now with arbitration awards?

24 MR. NAIMARK: I think probably. I think it probably
25 makes sense to have a breakdown that has not always been the

1 historical standard. Arbitrators in many cases have given sort
2 of one line awards, but I think with increasing scrutiny,
3 particularly of the consumer caseload and questions about whether
4 the right rate of interest is being applied and all that, it
5 probably makes sense to require a breakdown.

6 MR. PAHL: Yes, Ms. Barron.

7 MS. BARRON: I'll take that on because I think this is
8 one of the most problematic aspects of the arbitration system.
9 And this is one of the aspects of the arbitration system that
10 deters capable lawyers from seeking to represent people in
11 arbitration proceedings that have meritorious defenses.

12 If the standard for review of an arbitration award upon
13 confirmation is very, very high threshold of a manifest disregard
14 for the law, then there absolutely must be a statement of
15 decision coming out of the arbitration proceedings that can build
16 a record for that delicate review process. If you don't have a
17 jury trial, if you have a court trial, you still get a statement
18 of decision.

19 In a case we had that became a reported decision on
20 arbitration, *Gutierrez v. Auto West*, which I argued and is often
21 cited in California for prohibition against unaffordable costs,
22 when that case went back down to the trial court to determine
23 whether that arbitration clause could be severed or not, the
24 trial court found that it couldn't even be severed because it was
25 inserted in that way.

1 We then went to trial on that case and won, and it
2 resulted in a 74-page statement of decision because there were
3 many new issues of law. The case has since settled on appeal.
4 The defendant appealed, and they had a record. We had a record
5 that we could carry forward.

6 This issue of precedential value and that sort of thing
7 came up and was discussed in some detail in Chicago. That's a
8 separate issue. It's important to precedent but it's a separate
9 issue.

10 Fundamentally, if arbitration is going to be a system
11 that people will look to in the future at all, there must be a
12 statement of law, application to the facts sufficient that a
13 reviewing court can determine whether the arbitrator was within
14 his jurisdiction to decide that matter or whether he, in fact,
15 exercised a manifest disregard for the law. Thank you.

16 MR. PAHL: Thank you. I guess just to ask more
17 generally, ask the panelists whether they think that a written
18 decision along the lines, as Ms. Barron has laid out, should be
19 required or perhaps should it be required only upon the request
20 of one of the parties. I'm interested in people's thoughts about
21 that.

22 MS. HILLEBRAND: It should be required. If you tie
23 something this fundamental, this important to a request, you're
24 going to have a situation when an unrepresented party -- the time
25 when you know you need it is when you were trying to figure out

1 if that judgment needs to be set aside because of defect in the
2 process, and that's too late to go back and get a detailed award
3 that explains what went on.

4 MR. PAHL: Mr. Melcer.

5 MR. MELCER: Well, I think my experience has been that
6 is available right now from the various arbitration panels and,
7 in fact, even NAF. Some of them, you know, you have to pay extra
8 for it, but it is available on request. So I'm not sure there
9 would be any change there.

10 MR. PAHL: Mr. Narita.

11 MR. NARITA: I'm not sure in this specific context, the
12 consumer debt collection context whether the opinions would be
13 particularly robust. But if they're desirable, then they should
14 put in there. I think it probably helps everybody. It helps the
15 collection industry as well, you know, when they're negotiating
16 with consumers, or if they get themselves in litigation, later
17 defending, so I'd be in favor of it.

18 MR. PAHL: Ms. Van Aken.

19 MS. VAN AKEN: Just to speak to that point about them
20 being available now, I know in the NAF system they were available
21 on request if you paid a fee and asked within a certain period of
22 time, and then once that time past -- so that was shortly after,
23 I believe, the consumer received a second notice of arbitration,
24 and that was a very short window to ask for a hearing, to ask for
25 a statement of reasons, and then the opportunity disappeared.

1 And also I've seen cases where the consumer didn't ask
2 in a format that the case management coordinator thought was
3 appropriate, and so, therefore, it was denied for that reason.
4 You know, sort of an informal request was not good enough.

5 So I think if it's going to be meaningful, I think
6 Gail's point was a good one about the need for -- that a lot
7 falls through the cracks when you place the onus on the consumer
8 like that.

9 MR. PAHL: Okay. Well, assuming that a written
10 decision is prepared, should that be made available only to the
11 parties, to the public, and if to the public, should there be
12 some redaction of names of either the consumer, the creditor, or
13 both?

14 Mr. Capitel.

15 MR. CAPITEL: Most of these proceedings are, by
16 agreement or otherwise, deemed to be confidential, and any
17 disclosure of the results of the proceeding would need the
18 consent of both of the parties in our jurisdiction. That would
19 be a nice thing to standardize across the country so that these
20 kinds of cases that are coming from big companies that are
21 sending thousands of cases for one reason or another could have
22 some form or uniformity associated with it.

23 MR. PAHL: Yes, Mr. Sturdevant.

24 MR. STURDEVANT: I don't understand why anything should
25 be confidential unless there is a specific showing to an

1 arbitrator or a court that there is something highly sensitive
2 about a particular case.

3 For example, there is a legitimate -- not just an
4 alleged -- trade secret at issue, which wouldn't happen in these
5 debt collection cases, or there are claims of sexual harassment,
6 which are upheld, and the employee in that situation was a third
7 party, who is being harassed does not want his or her disclosed.

8 But otherwise the awards ought to be public so that
9 professors like Jean Sternlight can get access to them and find
10 out if the decisions make any sense, and from whatever evidence
11 that exists whether the decisions seem rightly decided or wrongly
12 decided.

13 I hope there will be an opportunity today, as there was
14 in Chicago, to talk about the need for, you know, public written
15 precedents and its benefit to millions of people in society both
16 contemporaneously and going forward, because I think that's a
17 very important issue and one that the FTC ought to consider.

18 MR. PAHL: Well, I guess we can make a nice segway to
19 that point. Assuming you have a written decision that's been
20 rendered by an arbitrator and assuming that it's publicly
21 available, what role should these written decisions in a debt
22 collection arbitration have in succeeding arbitrations?

23 Mr. Narita.

24 MR. NARITA: Well, if you're litigating -- just by way
25 of example, if you're litigating at the trial court level, the

1 decision of one trial court judge in state court or federal court
2 doesn't have any precedential effect on the man or the woman in
3 the robe next door. So there's no precedential effect there. In
4 the litigation context, of course, we have courts of appeals that
5 were mentioned before and the Supreme Court and the whole gamut.

6 One of the benefits of arbitration is its simplicity
7 and supposedly its finality, so I don't see any benefit to having
8 particular, basically trial court arbitrators or trial court
9 decisions having any kind of precedential effect, unless you're
10 going to build in some, you know, incredibly cumbersome appellate
11 system right into the arbitration forum, which, you know, gets
12 you going down the road of replicating a court system, which is
13 supposedly what you're trying to avoid.

14 MR. PAHL: Well, even if they don't have precedential
15 value, could they have persuasive value to the next arbitrator.

16 MR. NARITA: It might. But most of these, again, in
17 the particular circumstance that we're talking about today, it's
18 consumer debt collection. So whether or not one particular
19 consumer did or did not pay their entire debt or whether or not
20 some portion of it was improperly calculated, or whether they
21 were the victim of fraud or identify theft, isn't really going to
22 have, you know, a heck of a lot to do with the circumstances of
23 some other consumer's case. They're going to be very
24 fact-specific. Principles of contract law maybe will be applied,
25 but we can all look that up. So I'm not sure what the value

1 would be.

2 MR. PAHL: First Mr. Sturdevant and then Mr. Naimark.

3 MR. STURDEVANT: Well, I took contract law in the first
4 year of law school, and we, you know, studied the issue by
5 reviewing snippets of appellate decisions. We never looked at
6 the trial court, so we never knew what happened there. But we
7 did look at the snippets from the appellate cases.

8 Look, in fair debt collection practices cases, in Fair
9 Credit Reporting Act cases, in Truth in lending cases, in
10 identify theft cases, in all sorts of cases where the statutes
11 are based on technicalities, as some would say, where there's
12 line drawing between the different rates of interest or different
13 numbers of days, whether it's calculated on 360 or 365 days, lots
14 of decisions have been made on those variances, and lots of
15 appellate decisions have been written, which, depending on the
16 calculation, resulted in illegal acts or legal acts.

17 So there is a lot to be said for written opinions that
18 are accessible. Of course the facts are important in the
19 individual case, but that's true in almost every type of case
20 that I can imagine from aviation, to employment discrimination,
21 to consumer fraud, zoology, antitrust, facts do matter. But
22 decisions come out that are tied to the facts but apply,
23 hopefully, a consistent set of legal principles.

24 MR. PAHL: Mr. Naimark.

25 MR. NAIMARK: Yeah. Perhaps I'm a bit of a

1 traditionalist. I think laws should be made by the courts, and
2 you don't want arbitrators' decisions to have precedential value.
3 I mean, it seems that in Congress that a certain amount of
4 mistrust of what's going on in the arbitration system that we
5 might be advocating now that the arbitrators' decisions shall
6 shape the law.

7 I think we want the guidance consistently from the
8 courts. The courts give guidance to arbitrators in making
9 decisions as to what's legal and what's not. And that's a good
10 healthy system.

11 MR. STURDEVANT: If I could just add one other thing.

12 MR. PAHL: Sure.

13 MR. STURDEVANT: If we're already at the point where 70
14 percent of all form agreements are subject to arbitration, we
15 won't have any courts deciding. And the importance of courts
16 deciding issues just should not be overlooked. And let me just
17 give two examples, and I'll do so briefly.

18 Everybody here is probably familiar with the name Lilly
19 Ledbetter, and the reason is -- is because her case was tried;
20 and it went to the United States Supreme Court, which decided 5
21 to 4 that every check she received was not a different act of
22 discriminatory pay, and, therefore, because she waited more than
23 60 days or 180 days -- I've forgotten which -- from the initial
24 act of discrimination, her lawsuit came too late. That resulted
25 in a piece of legislation cosponsored by more than 75 United

1 States senators and became the first bill that President Obama
2 signed after he became president. If Lilly Ledbetter's claim had
3 been forced into arbitration, no one would have known about Lilly
4 Ledbetter or her case, including all of the other employees who
5 worked for the employer.

6 Let's take another case that happened in California in
7 the 90's, Rena Weeks against Baker & McKenzie. Baker & McKenzie
8 just happened to be the largest law firm in the United States.
9 And Weeks filed a lawsuit complaining that she had been sexually
10 harassed repeatedly by one of the most significant rainmakers for
11 the company. She won at trial. Fortunately, Baker & McKenzie
12 appealed, which resulted in a published decision recounting all
13 of the virtually undisputed facts about the nature and extent of
14 the harassment and the company's response or non-response to the
15 claims of harassment. As a result of that, companies large and
16 small, legal and otherwise, in California and throughout this
17 country implemented an instituted internal policies to establish
18 procedures for employers to follow when there was a claim by an
19 employee of harassment. So the precedent value of just those two
20 cases is dramatic.

21 Every time in the last 150 years that somebody went to
22 a jury trial because they lost a digit or an arm, where the wrong
23 leg was removed, okay, by a motorboat without a protective
24 shield, by a lawnmower, every time every child got thrown in a
25 washing machine or a dryer, somebody got thrown in the trunk of a

1 car, and suffocated or was injured, there was a lawsuit, and
2 there was a jury determination. And as a result of that, we have
3 all of these safety devices now that protect all of us, our
4 children, our spouses, our relatives, and our friends that didn't
5 exist and would not have existed if there were mandatory
6 arbitration clauses. Companies wouldn't have done that. That's
7 another reason why this course of public decision-making has led
8 to important societal benefits, you know, for all of us sitting
9 in this room.

10 MR. PAHL: Ms. Hillebrand.

11 MS. HILLEBRAND: Mr. Sturdevant made the point more
12 eloquently than I had in mind, so I'll just add to it. I think
13 that we have to draw -- precedent in a way is the wrong question.
14 Should it be precedential in terms of -- we need precedent. We
15 need that from the courts. How are we going to get it from the
16 courts if everything goes to arbitration is a tough question.
17 But whether or not the next arbitrator has to follow, "should it
18 be public," I think is the first question we have to ask.

19 And part of the reason the answer has to be "yes" is
20 the deterrent fact, the compliance effect, the effect of all
21 those companies that have a general counsel whose job it is to
22 tell them what they can't do. If general counsel gives you an
23 opinion inside the company saying, oh, you can't do that because
24 it might violate Truth in lending, you have a hard time, but if
25 general counsel says you can't do that because it violates Truth

1 in lending and here's who said so, whether it was an arbitration
2 decision, or another company had to pay or couldn't enforce its
3 debts or a court case, that's going to make a difference.

4 So the public nature of the results do matter, and the
5 example that was given over here about, you know, if it's
6 identify theft it's a one off, well maybe not. Maybe it's the
7 company's response to be compliant if it's identify theft, which
8 is not going to be one off. It's going to be a process problem
9 that many companies might share. And certainly if it's a
10 calculation of interest or charges issue, it's very likely that
11 the one consumer who raised it, in fact, it's going apply in
12 many, many files and ought to be exposed in a public way so
13 people, within that same company and in other companies that use
14 the same practice, can evaluate the business process for change.

15 MR. PAHL: Mr. Naimark.

16 MR. NAIMARK: Yeah. I really pretty much agree with
17 the last two comments. I think that they demonstrate the role
18 and the effectiveness of the court setting precedent and giving
19 guidance as to what the law is and what laws should be followed.

20 In fact, the AAA recently instituted a policy of
21 reporting the employment case arbitrator's decision so that it's
22 publicly available. We've taken that step, so it's not something
23 that we would resist.

24 In terms of the arbitration becoming so pervasive that
25 the courts are deprived of the opportunity to opine on what the

1 law is, that's an often cited concern. I've heard it for many
2 years. I have never seen a situation where there was such a
3 saturation of arbitration clauses in any field that the courts
4 were deprived of that. For instance, the AAA's regular consumer
5 caseload every year is about 1500 cases and JAMS does fewer than
6 that. Our employment caseload is about 2000 or so a year; that's
7 it. So the idea that the arbitration process is entirely taken
8 over the field and choked off the access to the courts is not
9 true.

10 MR. STURDEVANT: Well, it hasn't happened yet, but
11 that's because all the arbitration clauses have all these other
12 bells and whistles, shortening the statute of limitations,
13 prohibiting class actions, even if you win, the arbitrator can
14 award the fees and costs against you, reducing the amount of
15 damages that you can get in court, *et cetera, et cetera*.

16 And those cases have led to repeated challenges that
17 the clauses are unconscionable, but if you simply got down to
18 substituting arbitration, okay, for the judicial forum, most of
19 those challenges would not be successful; and all of those cases
20 would go into arbitration.

21 So it's the attempt by large entities, or large and
22 small entities, not simply to change the forum but to add all
23 these other bells and whistles which courts have repeatedly held
24 to be unconscionable under the laws of various states.

25 MR. NAIMARK: Well, I agree with you, and other than

1 the class action issue, all those others are violations of the
2 due process protocol, and we certainly wouldn't proceed with
3 those cases.

4 MR. PAHL: Mr. Yalon.

5 MR. YALON: I wanted to go back to we're dealing with
6 trial court rulings here. Arbitration rulings are the equivalent
7 of trial court rulings, and the real value of the limitation of
8 not making this precedential, not making this public, other than
9 by agreement of the parties, is because in the court system there
10 is an appellate process. And if there is a bad ruling at the
11 trial court that has a wonderfully public ruling, the McDonald's
12 coffee case with the huge damage award, that got corrected on
13 appeal. But I'm sure McDonald's right away issued a memo to all
14 of it's locations to turn down the coffee pots.

15 It didn't require that it be publicized for that to
16 take place, and the trial was public; and the arbitration is not.
17 So people could go in and watch the trial happen. They can't go
18 in and watch the arbitration happen.

19 So there are too many differences between the settings.
20 And it would be better to keep a contractual matter a contractual
21 arbitration between the parties and have the public setting for
22 the public court system deal with precedent and publicity.

23 MR. PAHL: Ms. Barron.

24 MS. BARRON: We're talking about two things here. One
25 is secrecy and one is precedent or lack of precedent, and I think

1 that we need to keep those separate.

2 I do not think that arbitrations should be secret in
3 the debt collection field anymore than they should be secret in
4 the field of defective pharmaceuticals. If we have a toxic pill
5 that is the subject of an arbitration proceeding, that should be
6 something that in the public interest should not be kept secret.
7 But similarly, if we have documents that so violate Truth in
8 lending that they are themselves toxic assets to someone, those
9 too should be the subject of a transparent proceeding. So that's
10 the issue of secrecy.

11 With respect to precedent though, I want to get back to
12 a very good remark I think Mr. Naimark made actually that the
13 court system and the various layers of appellate review do work
14 well in establishing precedential value for litigation. However,
15 that does not mean there can be no basis for appellate review
16 arising out of an arbitration setting. And I think the way to
17 deal with that is to make sure that not only do we have a written
18 statement of decision but that written statement, as I mentioned
19 earlier -- but I'd like to just elaborate a little bit if I may
20 -- that statement contained very specific things. I don't think
21 it's enough to have a rule that says you need a written decision;
22 that can be a number, you know, with dollars and cents.

23 If we're going to have something coming out of an
24 arbitration proceeding that really gives meaningful review in the
25 courts, which then, if reviewed in turn for errors of law in the

1 appellate system, layer upon layer as our litigation system
2 allows, we need to have contained in that arbitration statement
3 of decision notice of the arbitration -- did it comply with due
4 process -- a statement of the law. So if it's a debt collection
5 case, perhaps it's a contract. What's the evidence of a debt,
6 and is that debt owed to the claimant? If it's a downstream debt
7 collector, a third party debt buyer, how do we know that debt, if
8 valid at all, is owed to the person claiming in this arbitration?

9 We need to know the evidence of the breach. We need to
10 have somebody do the math. And that very much is not being done
11 now. The award then in its final form should include the amount
12 of principal, the interest, the penalties, and the attorney's
13 fees separated out. That is the kind of statement that could
14 come out of arbitration and have meaningful review in the trial
15 court.

16 MR. PAHL: Yes, Mr. Narita.

17 MR. NARITA: One of the issues with having a
18 precedential effect or impact of an arbitrator's decision is --
19 arbitrators, and I think people have eluded to this before,
20 they're not required necessarily to follow the law. And
21 personally as a litigator I would love to have all arbitration
22 contracts say that the arbitrator must follow the law of some
23 particular state because there's nothing more nerve-racking than
24 having to tell your client that, you know, we're going to
25 arbitrate this case; and this person is your judge, jury, and

1 executioner, and, no, he or she does not have to follow the law.

2 I mean, that makes me nuts as a litigator. So I'd be
3 in favor of that, but that's not necessarily the way that parties
4 are contracting. And one of the perceived benefits of
5 arbitration is that it's informal, and it's not bogged down by
6 all the ins and outs of the law.

7 So before we rush out to publish all of these
8 decisions, we have to first, I think, look -- are they, you know,
9 was this particular arbitrator required to follow the law? And
10 if he or she wasn't, then I question what value that opinion
11 should have.

12 MR. PAHL: Okay. I think that exhausts the questions
13 that I have on this topic. So I think what we're going to do to
14 keep the program moving for the afternoon is we are going to
15 switch moderators. If all the panelists could stay where they
16 are, Julie Bush will come up here. And she is moderating the
17 next panel, and we will move directly onto that.

18 So thank you all very much.

19 (Applause.)

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1 ENFORCING AWARDS; CONTESTING AWARDS

2 MS. BUSH: Hi. My name is Julie Bush. I'm also a
3 Staff Attorney at the Division of Financial Practices with the
4 Federal Trade Commission. And I'm happy to be with you today to
5 talk about Enforcing Awards and Contesting Awards.

6 We've gone through other stages of the arbitration
7 process. We've talked about how notice and the initiation of
8 arbitration proceedings takes place. We've talked about aspects
9 of the arbitration itself. After an arbitration has taken place,
10 there is some sort of decision. We've talked about how it may be
11 a total sum, or it may have a breakdown of attorney's fees, and
12 principal and interest, and so forth. Then the parties to the
13 dispute are interested in what's going to happen with that
14 decision.

15 Among the questions we're going to address are: How
16 should a debt collector who wins an arbitration award be able to
17 convert that decision to an enforceable judgment? And how and
18 when should a consumer be able to contest an arbitration
19 decision? And I'd like to take comments on those issues now.

20 Yes, Ms. Van Aken.

21 MS. VAN AKEN: So I'd like to put something else on the
22 table, if I may, that I think is related to contesting awards and
23 is an important issue that we've encountered in the National
24 Arbitration Forum case that the San Francisco City Attorney's
25 Office has brought, and that is the issue of arbitral immunity.

1 You know, in both California law and under the Federal
2 Arbitration Act, there are ways for a consumer to try to vacate
3 an award. And that is an action against the party who obtained
4 the award.

5 But the question of how the business practices of the
6 arbitration provider are regulated is not addressed at all in
7 that process, except as it impinges on the fairness of that
8 award. And Mr. Narita asked the question during the last
9 session, you know, is there any evidence that any particular case
10 was affected by this relationship between NAF and people in the
11 debt collection industry, and that's the question that gets asked
12 when a consumer tries to overturn an award is how did it happen?
13 What happened in your case?

14 Well, if you have a thumb on the scales in every case,
15 it may not be that that consumer can show that particular
16 connection, but it's still a very, very important issue. And,
17 you know, the way it gets played out in practice is some
18 consumers and some litigants do try to take on an arbitration
19 provider, and they're met with this doctrine of arbitral immunity
20 that says that generally you can't sue the provider [sic] the way
21 -- you can't sue the arbitrator the way you can't sue a judge.
22 And it's not that I think that -- that doctrine is necessarily
23 problematic. I see the relationship between that and court
24 cases, and I think there is -- you know, if we're going to have
25 an arbitration system that is supposed to have an element of

1 finality, then that's an important element. But the problem is
2 there's nowhere else for that issue to go. There's no other
3 avenue for systemic bias on the part of a provider to be
4 challenged. And that's, that's a real issue. And until that's
5 resolved, you know, people are going to keep bumping up against
6 this arbitral immunity and those claims are not going to have
7 anywhere to go.

8 MS. BUSH: Okay. Thank you.

9 Would anyone like follow up on that?

10 MR. NAIMARK: Yes. To a certain extent, I understand
11 your frustration, but I think the San Francisco lawsuit and the
12 Minnesota Attorney General lawsuit are evidence that -- that's
13 not a bar to going after apparently biased providers.

14 MS. VAN AKEN: I mean, it took a long time before.
15 There were many, many cases.

16 MR. NAIMARK: It did.

17 MS. VAN AKEN: And those judgments are final and -- you
18 know.

19 MR. NAIMARK: It did. Well, we'll see. Apparently
20 there have been a lot of class actions filed against them, so
21 we'll see.

22 MS. VAN AKEN: Yeah, yeah. We'll see.

23 MS. BUSH: Okay.

24 Yes, Mr. Jarzombek.

25 MR. JARZOMBEK: I have a practice of not ever going to

1 the arbitrations but rather contesting the awards when they come
2 for enforcement. We've been relatively successful. I guess
3 we're about 50 and 0 in doing that.

4 So my answer to the question that, first of all, should
5 they be confirmed; in the context of a NAF award, I think never.
6 But not to look like I'm so one-sided, there are some things that
7 should happen or should be brought to court. For example, there
8 ought to be some kind of proof of service. It shouldn't be like
9 the one I talked about this morning where the 11-year-old child
10 had signed for it, and despite the fact that three, or four, or
11 five people may have touched it; and they could have seen that
12 the respondent never signed for these documents and at least
13 questioned that, it never happened all the way until it got to
14 the confirmation level. So service is one thing that needs to be
15 part of it, some proof of service.

16 Next, there should be some sort of evidence that was
17 provided to the arbitrator that comes forth on the confirmation.
18 The one page NAF award always said the arbitrators considered the
19 evidence, don't know what the evidence is. If you had an
20 arbitration, many times the evidence, as put on by the claimant,
21 they wouldn't even be there. They would be on the phone, and
22 they would FedEx things to the arbitrator. So, very unlike
23 court, nobody can attest to the true and correct copy of
24 anything, but that's how the arbitration is handled. So some
25 sort of evidence.

1 The FAA requires a contract. The contract for
2 arbitration should be attached. What I find to be unique is so
3 many times in these confirmation proceedings you will have a
4 contract attached to it that will have a print date not remotely
5 close to any date that was part of the set of dates that might be
6 in the award or that might be in reality. Somebody opened the
7 credit card in the 1980's, but they defaulted in 2005; and they
8 have a 2007 contract for arbitration. That's not relevant to
9 anything if that's what the arbitrator considered, well, they
10 probably shouldn't have. If it was in default in '05, why are
11 they considering an '07 agreement?

12 What's particularly unusual is when you challenge that
13 in court often you will get an affidavit from the provider. I
14 have a couple of them that I've saved that I thought were just
15 noteworthy things to have around the office that talked about how
16 the consumer opened this credit card agreement in 2004. And then
17 in the next paragraph it will say, "The arbitration agreement was
18 mailed to the consumer in January of 2001." I thought, "Well
19 that's pretty good. They can do it three years ahead of time and
20 know this guy was going to open a credit card with them." The
21 affidavit was false. If that's the agreement that was there,
22 there was no agreement for arbitration. Certainly a court can
23 look at that and say if that's the agreement, there is no
24 agreement. And you are entitled to judicial review of that, and
25 it shouldn't be confirmed.

1 And in the context of a debt buyer, there ought to be
2 some evidence of the assignments, real evidence of the
3 assignments not forward flow agreements that say we bought this
4 in 2001, and we've got this blanket agreement; and now we've
5 attached some piece of paper to it that was from accounts that we
6 bought in '08 to arbitrate a default a '04. So that you can't
7 possibly envision how those things could fit together in a
8 timeline.

9 NAF awards in the case of a debt buyer -- I just have
10 to go say this: I've never seen one that's correct yet, never,
11 not once, ever have I ever seen one that's correct because they
12 all have the same statement in every one of them. And they say
13 the parties entered into a written agreement on or before some
14 date. The parties entered into a written agreement to arbitrate
15 their disputes, and that's never true in the context of a debt
16 buyer, never.

17 It doesn't say this is a contract that was entered into
18 and there's a successor in interest. It doesn't say that. It
19 says the parties entered into this agreement. So if that's true
20 then there's no agreement for arbitration, and the award
21 shouldn't be confirmed. And if you send them discovery, you can
22 send them one admission, admit that there is no written
23 agreement. If you get it admitted, then you're done.

24 And the last thing they should have the components of
25 the award, which is what Ms. Barron talked about earlier. It

1 ought to say what constitutes principal, interest, penalties, all
2 those extra fluff charges, fees, expenses, because some of these
3 awards had some flat fee for the attorneys' fees that were being
4 built into it. It would be at 15 percent or 20 percent.

5 So the same work in generating out the paper for a
6 \$1000 award was, you know, 10 times more valuable for a \$10,000
7 award because they were doing a percentage just like a
8 contingency fee arrangement. And so you ought to be able to find
9 that too.

10 So those are the things that I think, from what I've
11 seen, should be part of what constitutes an application for
12 confirmation of an arbitration award.

13 MS. BUSH: Can I just ask a clarification question? If
14 any of those things that you just mentioned are the grounds on
15 which you contest arbitration --

16 MR. JARZOMBK: Some of them are, yes.

17 MS. BUSH: -- awards at the confirmation stage?

18 MR. JARZOMBK: So many times when you -- these
19 arbitration confirmations are filed greater than 90 days out, and
20 anybody who's done any kind of this work at all probably can
21 envision what it's like for the consumer lawyer who picks up this
22 file from this person, who's never participated in any part of
23 the process until they come to you. And it's after 90 days and
24 you don't have time to vacate the award because that's gone. And
25 the only thing you can attack is -- for a judicial review, is

1 whether or not there was a contract for arbitration. And in very
2 few times have I ever had somebody produce a real arbitration
3 agreement because the card had been open so early that nothing in
4 that first agreement could tie or relate to an amendment that
5 would allow arbitration some later time or there won't be an
6 agreement between a debt buyer and a consumer. And those are
7 always reasons to set it aside.

8 MS. BUSH: Thank you.

9 Mr. Melcer.

10 MR. MELCER: Well, that makes a lot of sense if you're
11 going to affirmatively challenge the arbitration award, but to
12 make that part of the application, you're building in an
13 automatic judicial review into the process, which the process, as
14 it is and as it's intended to be, shouldn't happen unless of
15 course there is a challenge.

16 I agree with you that all of those things, you know,
17 are important. All of those things should have been looked at by
18 the arbitrator. And whether or not they did, the question is,
19 you know, are you going to subject every arbitration award to an
20 automatic second review which -- or an automatic judicial review,
21 which basically is not what the process is; that's not what the
22 process is intended to be.

23 MS. BUSH: Yes, Mr. Narita.

24 MR. NARITA: Yeah. I'm glad to hear that Jerry is
25 having such success in challenging confirmation proceedings

1 because I think that shows that the system works. There are a
2 very narrow set of challenges to confirming an arbitration award,
3 and there's a reason for that. That's because one of the
4 benefits or myths of arbitration is it's supposed to be final.
5 That's supposed to be the end of it, and you're supposed to very
6 narrowly restrict the court's ability to second guess what the
7 arbitrator has done. Notwithstanding that, it sounds like Jerry
8 has had success in setting aside or avoiding confirmation of
9 awards. And that's what should happen.

10 We have a system in place, federal and state law that
11 governs how to confirm awards, and how to challenge
12 confirmations, and how to challenge the awards, and it doesn't
13 need to be messed with or tinkered with. It's out there and the
14 law should be followed.

15 MR. STURDEVANT: I think Jerry's experience in Texas
16 may be different than the rest of the lower 48. It certainly is
17 in California.

18 MR. JARZOMBEK: I'm sorry.

19 MS. HILLEBRAND: You first.

20 MR. JARZOMBEK: One of the things that I have to tell
21 you about that is the appellate cases that I've handled for
22 others who haven't been so fortunate. And they bring forth a
23 record that you can read in the time it takes to watch a
24 commercial during your favorite TV show; that's the record. The
25 attorney who is there on behalf of the claimant who went to

1 confirm the award isn't the attorney of record. He's the
2 attorney du jour who's making his \$25 or \$50 as an appearance
3 counsel for that day. And the argument consisted of, "Judge, we
4 have an arbitration award. They didn't vacate it in 90 days. So
5 it's mandatory you have to confirm it. That's what the FAA says,
6 Your Honor. I have an order." That's the record. That's it.
7 That kind of defies logic in most places where you think of
8 typical things in a case, because if that were the case, that's
9 an analogous to a default judgment. What difference did it make
10 that anybody filed an answer? There's certainly been no proof.

11 Pleadings aren't proof in Texas, even if they're
12 verified. So you have offered no evidence. You say confirm it,
13 and the judge says: You bet you. Here you go. Here's your
14 award. Have a great day. And that, in my mind, is just wrong
15 because you ought not to have a victory without some modicum of
16 evidence, not on a pleading, not because you've asked for it.
17 And the only way you're going to get there, one, is educate all
18 the judges, but there's only one of me; and I can't do them all.

19 So the next thing is to have a requirement for what
20 they have to read. And if they have to maybe look at something
21 that's not just a blank award that somebody says, "Give it to me,
22 judge, we deserve it." And the poor consumer is standing there
23 not knowing what's going on, and they say, "Well, do you have a
24 defense?" And sometimes they grunt. Sometimes they say no and
25 then they leave. And they lost, and they don't even know what

1 happened. But there were no witnesses and one lawyer talking
2 about a pleading that ought to get him into a judgment, and it
3 happens.

4 So that's why I say that all those things that I
5 mentioned earlier, that mostly I wrote down after Ms. Barron said
6 them, are the things that need to be there, the components for
7 somebody to look at something. And it's going to start by a rule
8 or a procedure that is a requirement to get confirmation. And I
9 think that's where it has to start.

10 MS. BUSH: Ms. Hillebrand.

11 MS. HILLEBRAND: I agree with what's just been said,
12 and I would just add that this is the step that turns the private
13 process into a public judgment. This is the step after which it
14 is just as if it had happened in court. And there needs to be
15 enough in that file to show the court process is not being
16 abused. That should include, if it was taken by default,
17 something to show that there was a real service to the proper
18 person and the proper address, the elements that Ms. Barron
19 mentioned, but I would add one more and that is something to show
20 the debt wasn't time barred at the time of suit. And enough
21 detail to show both that this was the buyer; the plaintiff was,
22 in fact, entitled to enforce that debt. We're seeing this now in
23 mortgages where nobody can show that they were even entitled to
24 bring the foreclosure actions that they're bringing. And enough
25 detail to show, you know, the account record is the best

1 evidence. It's going to show when the debts were incurred, when
2 the charges went on, when the payments were made. If there's a
3 dispute about an amount, it's going to show there.

4 All of these things would be best brought and required
5 to be brought in when the arbitration is filed and be described
6 in the judgment. But they ought to also be available on the face
7 so the Court can have a look at them at the confirmation state.

8 MS. BUSH: Okay. I'm going to pick up on the 90-days
9 requirement. But first I wanted to hear what Mr. Yalon was
10 waiting patiently to say.

11 MR. YALON: Thank you.

12 If you want to litigate the case, then you have to
13 litigate the case. If you want the arbitration presentation to
14 the court to be a relitigation of the case, then you have
15 violated the purpose of the arbitration. You want proof that
16 there was an arbitration award that granted an award in a
17 specific amount in favor of one party against another party, I
18 think a copy of the arbitration award does that.

19 The individual issues that the arbitrator had to
20 consider to get there are presumed to have been done for the
21 award to be entered just as they would be in a trial court if you
22 appealed from a trial court ruling that simply gave a ruling
23 without going through all of the specifics. On appeal, there
24 would be a presumption all those things were done.

25 So I think that having a rule that specifies what's

1 required to be contained in an arbitration award is a reasonable
2 type of rule to create. But to say that the arbitration awards
3 that are being issued now are a piece of fluff and unmeaningful,
4 it is not a fair statement.

5 And if counsel is choosing in 50 out of 50 cases that
6 he then prevails in court to not participate in the arbitration
7 process, I would question whether that was really meeting the
8 purpose of arbitration either.

9 The arbitration award process in the state court is
10 taken seriously by the judges. There are entire counties, at
11 least one of them here in the Bay Area, that will not grant
12 confirmation of an arbitration without proof, some of which has
13 been cited, but it's not within the law that that be done.

14 If we want to change the law about what's required and
15 have a uniform system across the country, that would be great.
16 But we already have a system where there is federal law about
17 what the requirements are. And we already have state court
18 judges, even appellate court level judges in other states, where
19 they've simply said they're not going to follow the federal law
20 because they feel there's a public policy in the state.

21 So one of the things to be careful with in the FTC
22 adopting a policy which is not part of the legislative process,
23 is that we have, again, come to a state's rights and federal
24 preemption issue. And it's going to be there no matter what rule
25 is adopted. But if a rule is adopted that attempts to go too far

1 into the state right to review and consider, it's going to have
2 political problems getting passed and being successfully
3 implemented.

4 So I suggest that we do need a fairly uniform procedure
5 so that there will be more trust in the system about what's
6 contained in an arbitration award, but the state courts where
7 these are brought for confirmation because they're not big enough
8 in consumer cases to go into federal court is still going to be
9 subject to the state process. And let's not suggest adoption of
10 something that will preempt the right of the state to determine
11 what's in the best interest of its citizens.

12 MS. BUSH: Among the questions on the agenda are
13 whether there should be changes to the law or to industry
14 practice on behalf of the FTC or other persons with respect to
15 confirmation of awards or challenging of awards, and I throw that
16 out to the panel whether people think there should be changes to
17 law, or to practice, or to neither.

18 MR. YALON: Can I just follow through with my thought?
19 State of California is a pretty big state. A lot of people here
20 in California. In the State of California in the most recent
21 statistical reporting period, the rate of case filings went up
22 one percent. But that's the overall rate of filing. In the
23 field of civil litigation, in one year it went up 7 percent. And
24 the majority of that 7 percent is in the field of contracts and
25 collections. Collection really being a subcategory of contracts

1 generally.

2 The State of California has found it necessary with its
3 budget issues to reduce its staffing in every court in the state
4 and close one business day per month. So what we see is an
5 increase in demand for judicial services, a decrease in
6 availability of judicial services. It suggests that there is a
7 need for an alternative process to the court system so that
8 parties can resolve things, but at the same time it suggests that
9 the process that the court has to do things also needs to be more
10 efficient. So we should be careful again about proposing
11 requirements that are hyper-technical in nature and not
12 substantive to the rights of the parties, which is really the
13 important thing.

14 MS. BUSH: Mr. Sturdevant.

15 MR. STURDEVANT: I thought what we were trying to talk
16 about for the balance of the day was fairness to the parties and
17 in particular to add more fairness to the party who didn't ask
18 for arbitration in the first place and didn't know that it was
19 part of the agreement. But with respect to the increased
20 statistics you mentioned, it's reasonable to assume that contract
21 in collection cases would increase by a reasonable percentage in
22 a state which now has reported unemployment exceeding 12.2
23 percent.

24 And I don't think the FTC, for all of its
25 jurisdictional capabilities, can handle the vagaries of the

1 California budget process, which in the course of a serious
2 recession or a mild depression, you know, has led us to the brink
3 of constitutional collapse. That's an issue that's going to have
4 to be solved politically here in California, partially through
5 the initiative process.

6 But regardless of how, you know, difficult it is with
7 the unemployment problems and with the closure of courts one day
8 a week, you know, this too will pass. And, you know, the economy
9 will improve. The budget in California will improve because the
10 unemployment rate will go down hopefully within the next year,
11 and the statistics that you're pointing to are going to go down
12 as well.

13 So then we get back to the core issues that we've been
14 addressing today, which is what should the FTC do, how should it
15 do it, and when should it do it? And I guess the issue about,
16 you know, compliance with federal law will depend on whether or
17 not Senator Feingold's bill or Representative Johnson's bill gets
18 passed in the House or the Senate.

19 MS. BUSH: Yes, Mr. Jarzombek.

20 MR. JARZOMBEK: The changes that I would want to be
21 persuading the FTC to consider in their rule-making authority, I
22 certainly don't look upon those as hyper-technical. And the
23 reason I get around to that is something Mr. Sturdevant just
24 said, "This procedure involves consumers who didn't ask for the
25 process."

1 What I described to you in reading a record was exactly
2 that, nothing that takes longer than the TV commercial. But what
3 was said this morning, and I think Mr. Welsh said it was -- what
4 NAF had was a private procedure that they've turned into a public
5 judgment. And there's not a lot that goes into any kind of
6 scrutiny that happened. Ms. Barron mentioned, and I think Gail
7 did too, that the standard for operating within that 90 days is a
8 manifest disregard of the law, not a mistake, not a mistake of
9 fact, but manifest disregard.

10 If you read an NAF award, you can't find anything in it
11 that amounts to a manifest disregard of the law. So was it done
12 that way by design? You can draw your own conclusion on that.
13 But there's nothing in there that you can challenge when you get
14 a single statement that an award in the favor of the claimant for
15 a total amount of X is their finding. There's nothing there, and
16 until you have the components to know if there has been a
17 manifest disregard -- you know, another thing that Mr. Welsh
18 said, "You have to wonder why somebody would go through this
19 process." It's not just a simple process.

20 If it you wanted to litigate every one of them because
21 you're going to have to pay a filing fee to confirm the award
22 anyway, why not just pay one filing fee and litigate the case.
23 But instead you pay a filing fee to NAF. You pay an arbitration
24 fee to NAF, and then you file again. And why is that? Well it's
25 so that you can have the \$25 or \$50 appearance lawyer that says,

1 "Here we go, judge. It's an award, just confirm it." And it's
2 the shortest way to a judgment that there is because you've taken
3 a private process that no one has any input in, probably didn't
4 have any participation in, and now they've got it for the first
5 time, and they're trying to do something about it, and they can't
6 because they've got a judge who has no documents to read and a
7 copy of an award stapled to a pleading with a photocopy of an
8 arbitration agreement that's been copied so many times they
9 couldn't read it if they wanted to to even find out that it had
10 the word arbitration in it. And upon that they render a
11 judgment.

12 And that's why I think there has to be more things in
13 there to make it something substantive for a judge to look at and
14 not just merely reading a pleading and making a decision.
15 Because if that were the case, then there shouldn't be any
16 judicial procedure for confirmation because filing an answer
17 wouldn't matter. It didn't matter in the case that I did the
18 appeal on. Just file and be done with it. Don't even serve
19 them. Because it wouldn't make any difference because that's
20 what's really happening out there.

21 And until you give the judge something more to read,
22 and it's going to have to happen by rule-making authority and
23 legislative changes, that's the only way we're going to make a
24 difference.

25 MS. BUSH: Let's talk a moment about what you're giving

1 the consumer to read once an arbitration decision has been
2 rendered. If the consumer has 90 days after delivery of notice
3 to move to vacate an award and the creditor may ask the court to
4 confirm the award for up to one year after the consumer receives
5 delivery, does that create any problems, or is that a workable
6 set of time constraints?

7 Yes, Ms. Van Aken.

8 MS. VAN AKEN: Mr. Narita actually has been trying to
9 say something for awhile. Let me yield to him, and then we can
10 come back to me.

11 MR. NARITA: Well, I think the answer to the question
12 you just posed is that we have a system already, and we have a
13 system that sets out timelines. And I'm not sure that it's for
14 anybody in this room, including those of us who are from the FTC,
15 to monkey with it.

16 The same thing goes with Jerry's observations earlier.
17 I mean, no one in this room can go down to a state court judge
18 right now who's presiding over a debt collection case and tell
19 that judge what quantum of evidence is right for he or she to
20 rule in favor of one party or the other. We can't do that. And
21 no one in this room can go, or should be able to go to an
22 arbitrator and say, "Hey, thou shall not enter an award unless
23 this quantum of evidence is present or not." You can't regulate
24 that, and you shouldn't be able to.

25 And for the same reason, after an award is entered, no

1 one should be able to go to a state court judge who is evaluating
2 whether or not to confirm that award under state or federal law,
3 or both, and tell that judge what he or she ought to do in
4 connection with doing that. It's not for the folks in this room
5 to be doing. It's a matter of state law or federal law, and it's
6 already covered.

7 MS. BUSH: Okay. And with respect to the question of
8 should there be changes to the law, you're position is there
9 should not be?

10 MR. NARITA: No. I think the laws we have are there.

11 MS. BUSH: The laws work.

12 MR. NARITA: And the consumers that are participating
13 are already participating. Notice, obviously, is an important
14 issue, and I don't think many people disagreed with that, now I
15 certainly didn't. But once the consumer is notified of the
16 process and they understand that something is going to be
17 adjudicated here, the consumers that have a defense or have an
18 issue are participating. Those that aren't are not, and they're
19 not going to participate when they, you know, accept their credit
20 card. They probably won't when they get behind. They probably
21 won't during the arbitration process. And they probably won't
22 during the confirmation process. If they do have a problem,
23 they're going to find someone like Jerry who is going to go 50
24 and 0 in opposing the confirmation, and, you know, so the system
25 ain't broke.

1 MS. BUSH: Okay. Ms. Van Aken, did you have something
2 to say?

3 MS. VAN AKEN: Yeah. I mean, I think the point is that
4 if we're going to have an arbitration system where arbitrators
5 issue awards based on, you know, a statement by the attorney that
6 service was made and that the consumer owes the money, which is
7 what claims often consist of, then we need to have some sort of
8 judicial review. And the law doesn't currently accommodate that
9 and needs to be modified to accommodate that.

10 On the other hand, if we want to have a system where
11 the award, once entered by an arbitrator, is final, except in
12 certain extraordinary circumstances, then there has got to be
13 more at the front end. I mean, it's simply not a satisfactory
14 answer to say the law is what it is, and, you know, has
15 considered that. I mean, there's an unfairness within the
16 system, and there's got to be a give at one point or another.

17 And I think this notion that, you know, people can go
18 find Jerry Jarzombek, you know, to get their awards overturned
19 and that's what proves the system works, is really problematic
20 because for most people that doesn't happen at all. And it's
21 very unusual, looking at the run of these cases to see that
22 happen, and so that I think is not an answer either.

23 MS. BUSH: Okay.

24 Mr. Sturdevant.

25 MR. STURDEVANT: Well, I would second that because it

1 just doesn't exist in the State of California. Texas sounds like
2 a place where a lot of consumers ought to move to.

3 But I really disagree with Mr. Narita. I mean, of
4 course you can go into any judge and tell him what the standard
5 of evidence is. The standard in the civil case is there has to
6 be a preponderance of the evidence, and the appellate standard
7 with respect to evidence is very simple, and it's uniform, and
8 it's nationwide.

9 And as long as there is substantial evidence supporting
10 the jury's verdict or the trial court judgment, it must be upheld
11 on appeal. In other words, appellate courts can't weigh facts,
12 but I just read this morning, from the most current weekly
13 addition of Law Week, that in one of these runaway cases in which
14 a jury awarded 500 million against Microsoft in an infringement
15 suit, it was sent back for reconsideration because although there
16 was a patent violation, the Court of Appeals in the Federal
17 Circuit said that the jury heard insufficient evidence concerning
18 how to calculate in a meaningful way the value of any of the
19 running royalty agreements to arrive at the lump sum damages
20 report.

21 So whether it's, you know, a collection case involving
22 the cost of a television that may or may not have been purchased
23 by the person who is sued or involved in an arbitration, or
24 whether it's a patent infringement case, there has to be
25 sufficient evidence to sustain the award.

1 And I think what some people are talking about here is
2 some means of culling out from the award itself what the evidence
3 was -- a summary of what the evidence was that led the arbitrator
4 to conclude, in addition to whatever the law is in the particular
5 jurisdiction, that there was sufficient evidence to convince him
6 or her that the claimant, the creditor, should prevail, and then
7 to itemize the elements of the award.

8 MS. BUSH: Okay. So it's your position that an
9 itemization is called for or that greater information is called
10 for?

11 MR. STURDEVANT: Right. I mean, it's one of the ways
12 that if we're going to have this system -- and I don't think we
13 should. I've made that clear. If we're going to have a system,
14 then there has to be a way to assess, you know, its fairness
15 overall, and so the only way to do that, since there's no record
16 of these proceedings, and it's private, at least to the extent
17 that we don't allow the public in, there has to be some means of
18 allowing researchers and people who write law reviews and other
19 kinds of articles to do some kind of statistical assessment from
20 something. And you can't do that if the award just says, you
21 know, Black Acre loses to White Acre, and Black Acre shall pay
22 \$500. So ordered. You can't do it.

23 MS. BUSH: Thank you.

24 Ms. Hillebrand.

25 MS. HILLEBRAND: Yeah. I wanted to answer the narrow

1 question you posed and then comment on some of these other
2 points. I think the first question you asked is should the times
3 match up between the time to seek to vacate on behalf of the
4 individual --

5 MS. BUSH: Or is any problem created by the mismatch?

6 MS. HILLEBRAND: Is the problem created by the
7 non-match? Yes. If the time period to confirm is still running
8 after the time to raise objections about the arbitration has
9 passed, that mismatch is going to create difficulties.

10 There's an additional problem that is even harder to
11 address and that is that legal services lawyers fairly regularly
12 tell me, "My client found out about the judgment when their bank
13 account was frozen and their wages were garnished."

14 So even after the time has passed and there is already
15 a confirmed arbitration where there became a judgment, or a
16 judicial judgment that becomes a judgment, people are finding out
17 for the first time they have been sued when they are in the
18 collection process, and that I think is something else to be
19 thought about and addressed.

20 I wanted to respond also to this point about you can't
21 tell a judge how much evidence is enough. Judges have a public
22 duty to make sure they're not issuing judgments that aren't based
23 in evidence. And so in a way you don't have to tell them in
24 every single case exactly how to do it.

25 But we should take a look at California Code of Civil

1 Procedure 116.222. It's a small claims court statute here in
2 this state. It doesn't address the collection issue directly,
3 third party collection, because third party collectors aren't
4 allowed in our small claims court. But even when it's the
5 original creditor enforcing a debt, the legislature made a
6 judgment that it was so important that the information be there
7 on the front end at filing, that this statute requires in an
8 action in small claims to enforce the payment of the debt, there
9 has to be a statement of calculation of liability. It has to
10 separately state the original debt, each payment credited to the
11 debt, each fee and charge added to the debt, each payment
12 credited against those fees and charges, and all the other debits
13 and charges to be counted with an explanation of the nature of
14 those debits, charges, and fees, and credits by source and amount
15 so that the person who is being sued on a debt can see. Here's
16 what the creditor says is going on with my account. Do I agree
17 with it? Should I defend? Is it right? What evidence do I need
18 to bring in, and so forth? And I think we ought to be looking at
19 something similar in both debt collection litigation and debt
20 collection arbitration.

21 MS. BUSH: Okay.

22 MR. NARITA: It sounds like California is doing a good
23 job without us.

24 MS. BUSH: Ms. Barron.

25 MS. BARRON: Yes. Thank you. First, the narrow

1 question. Ms. Hillebrand has identified the problem. The dates
2 must match up. If they're not 90 days, you're going to have
3 problems with notice and an opportunity to be heard in that
4 regard.

5 Secondly, I do also disagree with Mr. Narita on the
6 evidence thing. As a litigator, I spend my life talking about
7 the burden of proof, the preponderance of the evidence, the
8 difference between 51 percent and 49 percent, and on appeal
9 talking about the standard of review and what it means to have
10 presented substantial evidence in the trial court.

11 But beyond that we talked a lot today about the fact
12 that the arbitrators don't have to follow the law, and there's,
13 in fact, I have sensed a consensus that this panel, people on
14 both sides of the question and in the middle, would like to have
15 the system where the arbitrators had to follow the law. Not
16 having to meet this higher standard of a manifest disregard for
17 the law, which frankly is pretty offensive in the civil justice
18 system.

19 The standard of review for an error of law is de novo,
20 and that should be the standard that the trial court should be
21 allowed to look at in confirming a contested arbitration award.
22 That is the standard that then would be carried on into the
23 appellate courts.

24 Finally, I don't think we do have a system that is
25 running along so smoothly for both sides. I think we have a

1 system that's broken. And as I've said earlier, I think this is
2 a historic opportunity to make some strides in improving that
3 broken system. And I urge the FTC once again to take a look at
4 *Armendariz v. Foundation Health Psychcare Services*, 24 Cal.4th
5 83, which gives a laundry list of fair practices.

6 I disagree also with the suggestion that the FAA
7 somehow authorizes shortcut or slipshod justice. I do not
8 believe that is the intent of the FAA. I believe the intent of
9 the FAA has been articulated in the case law is to provide an
10 alternative dispute mechanism for the resolution of claims. And
11 in order to have a system that has credibility in order to
12 satisfy those intentions of the FAA, the consumers have to be
13 able within that forum to vindicate their nonwaivable statutory
14 rights. That is the very basis of the civil justice system.

15 MS. BUSH: Thank you.

16 Mr. Melcer.

17 MR. MELCER: On the narrow question of the time
18 periods, I think it's absolutely imperative that the creditor
19 have more time to confirm a judgment than the debtor has to
20 challenge it. Because the creditor can't confirm it until he
21 knows he has a good judgment, right, which is going to be 90
22 days. Okay. So you make it 91 days. That means that the
23 creditor has exactly one day on which that judgment can be
24 confirmed. Should it be a year? You know, that can be debated,
25 although, you know, if you want to take a look at it cynically,

1 the longer the creditor takes the more time the money stays in
2 the debtor's hands. So I don't suppose that having a year is
3 necessarily a problem.

4 On the more general question that we've been debating,
5 as Tomio has said, arbitration, like litigation, is an
6 adversarial process, and those people who have a defense in
7 arbitration and those people who have a defense in litigation are
8 going to be bringing it or should be bringing it. Assuming that
9 they have notice, which is the, you know, the first question that
10 we had. And I agree. Yeah. They have to have notice. We have
11 to have some way of knowing that they had notice. But once that
12 happens the same adversarial process kicks in, you know, in terms
13 of being able to present a defense.

14 And so, you know, I'm not sure that it makes sense to
15 automatically have an appeal, if you will, from an arbitration
16 award because you don't automatically have an appeal from a
17 litigation award. I mean, that's the standard.

18 MS. BUSH: Okay.

19 Ms. Van Aken.

20 MS. VAN AKEN: Just to respond. I disagree that a
21 creditor needs more time to confirm an award than a debtor has to
22 vacate it. There's no reason why the respondent can't vacate an
23 award at the same time and there can be cross petitions to
24 confirm and vacate, and all of that can be litigated at once.
25 And what happens in practice seems to be that debt collectors

1 wait until after the 90 days, and then they know that the
2 debtor's rights are limited.

3 Also, as I mentioned in the first panel, it's very
4 often the case that consumers allege in court, in confirmation
5 proceedings, that being served with this award is the very first
6 that they've learned of it, and if that's the case, then, you
7 know, I have seen instances where the Court said, "Well, it's
8 past 90 days, you know. There's nothing that can be done about
9 that." And that's blatantly unfair.

10 MS. BUSH: But in those cases are you assuming that the
11 consumer was delivered the award and just didn't read it?
12 Because doesn't the 90 days run from the date of delivery?

13 MS. VAN AKEN: Assuming a notice -- if you're using a
14 bad address to serve the original notice of arbitration, then
15 every piece of mail in the course of that arbitration, including
16 the award, is also going to be sent to that bad address. That
17 service is going to start the 90 days ticking. So it certainly
18 has been alleged in cases I've looked at that, you know, there
19 were issues so that the consumer never learned of the beginning
20 of the 90-day clock.

21 You know, whether those allegations are true, I don't
22 know, but I know they were made in cases that I've seen.

23 MS. BUSH: I'd like to ask creditors' attorneys sitting
24 here how they would feel about this. This is an issue that did
25 come up in Chicago about when the clock starts running if, for

1 example, service was made to a bad address and the consumer
2 didn't receive delivery.

3 Does anyone have a comment?

4 MR. YALON: I'd comment on that if I may.

5 Notification is important in every stage of the
6 process. But notification rights change in the different stages.
7 They certainly do in litigation, and I don't know that
8 arbitration should be different in that way.

9 If the initial notice was provided to a valid address
10 under the terms of the arbitration, and the final notice was sent
11 to a -- notice that is valid under the arbitrations, there isn't
12 a reason why that shouldn't be accepted.

13 If the address was invalid to begin with, under the
14 terms of the arbitration, which is what we're asking about here
15 -- this is a contractual matter -- then that should be a
16 potential issue to be raised in the confirmation process. And I
17 find in the state court of California that that is raised when it
18 is available by some of the parties, and the judges do consider
19 that issue.

20 MS. BUSH: Ms. Sternlight, Professor.

21 MS. STERNLIGHT: I think Mr. Yalon's point really is
22 that what we discussed this morning very much ties in with what
23 we discussed this afternoon, which is, you know, in the morning
24 many of us were arguing that we had to change the service
25 requirements and that what was provided for in the contract might

1 not necessarily be, in some of our minds, enough. And I still
2 think that's true. And then obviously if service were to have
3 been allowed under the contract to what's been called a "bad
4 address," then many of us would say, "Well, you shouldn't be able
5 to serve for that same bad address the actual arbitration
6 decision and then require the consumer to have taken their appeal
7 from that when they didn't actually get notice."

8 So I think it's just the two points really tie
9 together. If we're going to require better notice, as we
10 discussed in the morning, similarly we're going to need better
11 notice as to the decision itself.

12 The other point that I wanted to make had to do with
13 some of the discussion this afternoon has been premised on an
14 idea that currently consumers or others can challenge an
15 arbitration award with the argument that -- that arbitration
16 award did not comport with manifest justice or was manifestly
17 unjust. And it used to be assumed that that was the grounds for
18 vacating an arbitral award, but since the Supreme Court's
19 decision in *Hall v. Matel* about a year ago, quite a few Courts of
20 Appeal and other courts have said that, in fact, maybe that isn't
21 even a grounds of appeal.

22 So it may be actually even a harder standard of review
23 than Ms. Barron and others were talking about because perhaps in
24 some jurisdictions, even showing that the arbitrator's award was
25 manifestly unjust, might not be grounds for in fact vacating that

1 award.

2 MS. BARRON: I completely agree with you. It's a
3 threshold that's getting harder and harder. So, yes.

4 MS. BUSH: I assume we don't have questions from the
5 audience at this point. In that event, I'd like to move to the
6 closing section, which will again be handled by Tom Pahl.

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1 CONCLUSION

2 MR. PAHL: Thank you, Julie, and thank you, everyone
3 for your insights and your patience throughout the day.

4 What's labeled on the agenda as "Conclusion" I think is
5 probably better labeled as "Final Word." And so what I'm going
6 to do is try to ask all of you just two questions to finish up
7 our discussions today.

8 And the first question is the question that is the most
9 relevant I think for those of us at the FTC, and that is what
10 should the FTC do, if anything, to improve the debt collection
11 arbitration system? I know I've heard a lot of ideas throughout
12 the day, but if there's one thing that you could send as a final
13 message to the FTC that you think we should focus on, what would
14 it be.

15 I think I'll start with Mr. Yalon and go around and ask
16 each of the participants to comment on that question.

17 MR. YALON: I think the FTC should show constraint.
18 There is law on this issue. There is a lot of law on this issue.
19 And I don't think it's the place of the FTC to replace the court
20 system and its rulings.

21 I think that to have guidelines published would be
22 appropriate, and then I think that you will see changes take
23 place; and that would be my suggestion. Specifically, I think
24 that a decision, in writing, that breaks out the elements of the
25 award would be valuable to everyone, and I would certainly

1 recommend that.

2 MR. PAHL: Thank you.

3 Ms. Van Aken.

4 MS. VAN AKEN: I think that the most productive thing
5 the FTC could do now would be to issue guidelines for minimum
6 standards for due process in consumer arbitration proceedings --
7 and to determine that other practices are unfair because, you
8 know, what we've heard about it is shoddy notice requirements.
9 We've heard about arbitrators who are simply rubber stamping, you
10 know, boxes of awards as Mr. Welsh described. We've heard about,
11 you know, evidence submitted to an arbitrator that is an alleged
12 agreement that predates the time when the consumer is also
13 alleged to have taken out the card.

14 So throughout the day we've heard over and over of
15 these repeated abuses, and so standards for evidence, standards
16 for notice, standards for how arbitrators are selected and
17 assigned, standards for transparency, these are all -- if we're
18 going to have a system that we're asking public courts to place
19 their imprimatur on, there must be a guarantee of integrity at
20 some point. And what we've learned is that the contractual
21 agreement is not providing that.

22 MR. PAHL: Thank you.

23 Mr. Sturdevant.

24 MR. STURDEVANT: I said from the outset this morning
25 and I say again this afternoon that the system is plainly broken

1 and doesn't work. The system was originally designed almost 100
2 years ago, as I said this morning, was for generally large
3 commercial firms who sit across the table and who negotiate
4 contracts and who agree between themselves that their method of
5 dispute resolution should be a final and binding arbitration is
6 one thing, so that they can go on with the relationship.

7 But corporate entities in the last 20 plus years have
8 decided to take that framework and lay it over everything. And
9 as a result we have case after case challenging arbitration
10 clauses as unconscionable, some with evidentiary records, some
11 without. And we have a huge number of decisions now in consumer
12 and employment arbitration.

13 Legislation needs to be enacted to prohibit mandatory
14 pre-dispute clauses in consumer and employment contracts period.
15 That being said, I second everything that Christine Van Aken said
16 about the necessity, not only to have due process standards but
17 to have them enforced. Guidelines are not enough.
18 Pronouncements are meaningless.

19 We've seen that with respect to the credit card
20 industry. I mean, just before they knew the legislative bell as
21 going to ring, the four biggest credit card holders in the United
22 States instituted mammoth changes to skyrocket interest rates, to
23 impose new fees, to take every dime off the table through
24 December 31, 2009, okay, before the legislation became effective
25 the next day.

1 So pronouncements, rules that aren't enforced are
2 meaningless, so there needs to be an enforcement mechanism. And
3 I also want to endorse what Nancy Barron said, the place for the
4 FTC to start is the five minimum requirements set forth by the
5 California Supreme Court in the *Armendariz* decision, which will
6 begin to, you know, change and alter the playing field with
7 respect to consumer arbitrations.

8 MR. PAHL: Thank you.

9 Ms. Sternlight.

10 MS. STERNLIGHT: I would hope that the FTC would issue
11 a really thorough and strong report, putting out its findings as
12 to the gross unfairness that has occurred in the past in this
13 field of mandatory debt collection. We all know that has been to
14 date primarily the work of NAF, which is no longer in that
15 business, and yet I fear that another provider may come into
16 existence that will continue some if not all of those unfair
17 practices.

18 So I think it's very important for the FTC to document
19 the unfairness that has happened. And I think that -- that
20 report, based on these three round tables and an independent
21 investigation that the FTC will have done, may be an important
22 document that will be used perhaps legislatively, I would hope,
23 to altogether eliminate mandatory arbitration in this context.
24 But even if that kind of legislation isn't passed, that report, I
25 would hope, would also contain the kinds of recommendations that

1 Christine Van Aken has already discussed along the lines of
2 setting out the FTC's recommendations for what would be at least
3 fairer notice, and service, and requirements as to arbitrator and
4 provider neutrality, and more transparency, all of the issues
5 that we've discussed today.

6 MR. PAHL: Thank you.

7 Mr. Narita.

8 MR. NARITA: Thanks. Well, again, we're talking about
9 arbitration in the consumer collection arena. And so I think
10 when the FTC is deciding what it wants to do, it should remember
11 that the collection industry, to a large extent, does not have a
12 stake or a vested interest in whether these matters are pursued
13 through arbitration or through the courts. They're just doing
14 their job. They're trying to collect money for their clients,
15 and they're trying to follow rules that hopefully have some
16 clarity in whatever state or federal jurisdiction they're in, or
17 if they're in arbitration, the rules of the arbitration provider.

18 So I guess I would say remember that's the collection
19 industry's interest here. Let's not demonize them. It's very
20 easy to do, you know. Collection professionals deal in a very
21 uncomfortable space in life, and no one likes to owe money and be
22 behind. And no one likes that moment when you're asking someone
23 to pay something that they might not be able to afford to pay or
24 don't want to pay. So it's easy to demonize the collection
25 industry. Their industry isn't often something that people like

1 to think about.

2 But you're charged with helping consumers, and I think
3 the best way to help consumers -- and I don't know the solution
4 -- is to get them more educated on what arbitration is about; and
5 that it's serious, and that's it's going to be an adjudication of
6 their rights and to get them to participate. And I don't know
7 the solution to that, but more forums like this, you know, more
8 work with publicizing information on your website and through
9 other venues to consumers can help. So they know what it's
10 about, and so they know how to participate because the only way I
11 think you're really going to help consumers is if you get them
12 involved in the process.

13 MR. PAHL: Thank you.

14 Mr. Naimark.

15 MR. NAIMARK: Yes. Thank you. This has been really
16 quite interesting and informative. I've learned a lot of things
17 today. What I found personally particularly useful was the
18 discussion about -- and a discussion that should continue --
19 about notice issues, which I think are key for the process, both
20 at the beginning and the end, and also the specific lists about
21 content and format of awards. I think they're thought provoking.
22 I think they present some fertile ground for us to plow.

23 The Chicago forum was staged a little differently. The
24 first day was litigation, was the courts, and the second day was
25 arbitration. And the significance of that for me is that you --

1 and we'll be able to see again tomorrow -- very many of the
2 issues are repeated in arbitration or in court. And a lot of
3 them are systemic to the consumer debt collection activity. And
4 that's not to minimize them. They are substantial problems. But
5 I think sometimes in our discussion there's a little danger in
6 debating old history.

7 I think Ms. Barron is right. This is sort of a
8 historic moment where we have an opportunity to be creative and
9 realistic at the same time. Like it or not, these cases that
10 we're talking about are largely high volume caseloads, low dollar
11 amount, often less than \$2,000, and quite often with a
12 non-participating consumer. So I think we need to keep that
13 context in mind and see what we can do to improve the entire
14 process.

15 MR. PAHL: Thank you.

16 Mr. Melcer.

17 MR. MELCER: Well, I think that Mr. Yalon said pretty
18 much everything that I would have said with one exception, and
19 that is the point that I tried to make earlier; and that is let's
20 not throw the baby out with the bathwater here.

21 Arbitration has a place in consumer contracts in terms
22 of being able to control the types of awards and the types of
23 expenses that creditors are being put through. Those get passed
24 right along to consumers. As Mr. Sturdevant pointed out a couple
25 minutes ago in response to the CARD Act, all the creditor card

1 issuers jacked up their fees, jacked up their rates. And I guess
2 my question is did anybody expect anything different? That
3 really is, you know, -- and I'm not defending it. I'm not
4 defending it. I'm not saying that's the right thing to do. But
5 it certainly is something that I expected anyway. I mean, when
6 you take away the ability to price for risk, which the CARD Act
7 does, well, you've got to price up front for risk, and that's
8 pretty much what's been going on.

9 So my general take on this is that restraint should be
10 shown, and frankly in the debt collection industry, as Mr. Narita
11 said, just tell us what to do. I don't think we have a
12 particular bias or preference one way or another for arbitration
13 or litigation. Just let us know where we're going to do it.

14 MR. PAHL: Thank you.

15 Ms. Jarzombek.

16 MR. JARZOMBEK: We've called the system broken. I
17 don't know if it's broken as far as all arbitration goes, but it
18 certainly, with respect to consumer credit card matters, it's
19 certainly very sick.

20 The symptoms of that sickness were brought out in a
21 California lawsuit, were brought out in a Minnesota lawsuit, and
22 I don't think the symptoms would have ever been manifest but for
23 NAF consumer credit card arbitrations. And with the NAF ceasing
24 to take anymore of those, this is a good time to take a step back
25 and say how can we fix it; how can we make it better so this type

1 of thing doesn't happen again. Because I don't think anybody
2 could sit here and say that all of the things that NAF did were
3 okay.

4 So how do we make it better? We start by making
5 perhaps some rule-making and starting with the service to
6 initiate arbitration awards that we talked about this morning.
7 That makes it better so that people have the information that
8 they need properly presented to them. And we make it better by
9 having rules for confirmation proceedings. Rules that maybe
10 require some evidence, real evidence. Not something that says,
11 "Here, Judge, we win." Evidence of service, evidence that there
12 is an arbitration agreement. The FAA says that should be
13 included as part of it, but there should also be evidence of
14 assignments in the context of somebody else who claims to be a
15 subsequent owner, and the elements of the award because if we're
16 going to have a burden higher than a manifest injustice, then we
17 ought to be able to have something upon which to make that claim.
18 And if that needs to be, then perhaps there should be evidence
19 that -- or at least a summary of it used to get to where we are
20 or get to where the arbitrator was in making the award. And
21 those things at the confirmation should be something that would
22 be thought of in the rule-making process.

23 MR. PAHL: Great. Thank you.

24 MS. HILLEBRAND: The FTC, the Minnesota Attorney
25 General case, the San Francisco case have all built a strong

1 record that the use of private arbitration in debt collection
2 doesn't work and is not fair to consumers. And I would like to
3 see the FTC move forward with an actual unfair acts or practices
4 rule that says the use of private arbitration in this context is
5 not appropriate.

6 I think that we can look at the fact that now there is
7 no legitimate national arbitration provider that is providing
8 debt collection arbitration; there's a reason for that. AAA
9 couldn't figure out how to do it right or for another reason
10 decided to stop doing it, at least temporarily. JAMS has said
11 they're not doing it.

12 We don't need or want you to wait until there's a new
13 NAF to say this is a bad idea. There would be a second best way
14 to go about this, but it's not as clear, or simple, or as
15 protective as saying it's been tried. It didn't work. It was
16 unfair for these reasons and in its an unfair practice, and we
17 think really you should stop there.

18 If you take the second best approach, you have to look
19 not only at notice and service but at what prove-up needs to be
20 in the file and before the arbitrator and reflected in the award
21 if there's a default. You've got to look at the question of what
22 ought to be in front of the arbitrator, and I would refer you to
23 CCP 116.222. You got to look at this question about the debt
24 buyer and the original creditor, which is not covered in that
25 California statute because it was dealing only with original

1 creditors. You've got to look at the time barred debt issue and
2 then all the other things that have been discussed by many of my
3 colleagues about the process, the *Armendariz* issues, and the
4 issues of awards, contents and confirmation. It's cleaner. It's
5 simpler.

6 The collectors are not begging to use arbitration. The
7 major credit card issuers are now saying, "Opps, maybe we'll stop
8 doing it." I suspect they will ease back into that if something
9 isn't done.

10 But now is the time where the FTC can say there was a
11 record of abuse. One provider has withdrawn. Others have made
12 an appropriate business decision; this not the right place, and
13 we're going to close this door before it gets opened again. And
14 we urge you to do that.

15 MR. PAHL: Thank you.

16 Mr. Capitel.

17 MR. CAPITEL: I'm somewhat conflicted by the things
18 that I have heard today from the very negative comments against
19 arbitration. I have seen for many, many years all of the really
20 substantially good things that happen through arbitration. I've
21 seen the expense savings. I've seen the time savings. And if
22 the FTC could encourage, in some fashion, the participation of
23 the debtor in some form or another. The debtors don't really
24 know about these kinds of things, but they have the same issues
25 with respect to the arbitration as they do with respect to

1 litigate. And at some point somebody is trying to collect some
2 money from them, and at some point either they don't want to pay
3 it or they can't pay it.

4 I think that the Federal Trade Commission should
5 encourage the credit card companies that on every credit card, on
6 every piece of plastic that goes out there should be a phone
7 number, and that phone number should have a human person at the
8 other end to which somebody who is a consumer who has
9 difficulties can call. They can say, "I lost my job." "My wife
10 died." "My children are sick." "I don't have any money." "I
11 can't pay." "I don't want to file bankruptcy." "What can I do
12 to work this out?"

13 I look at arbitration in that kind of a sense of a
14 convenient methodology of bringing people together for the
15 purposes of generating a resolution. I say 50 times a week, I'm
16 focusing on resolution rather than on dispute. Although we call
17 it alternative dispute resolution. And resolving the problems
18 are very, very important. And whatever the FTC can do in order
19 to encourage people to participate in that resolatory process
20 would be terrific.

21 MR. PAHL: Thank you.

22 Ms. Barron.

23 MS. BARRON: Yes. Just to sum up, I would like the FTC
24 to use the full extent of its rule-making power in this context
25 to declare as an unfair and deceptive practice the administration

1 of arbitration proceedings that do not meet the guidelines that
2 we have iterated here today. And that I hope the FTC will
3 examine in detail and issue, but in that process I hope the FTC
4 does not make the assumption I started with earlier today, I
5 think it's a false assumption that all of these debts are due.

6 The FDCPA, the Truth in Lending laws, the Fair Credit
7 Reporting Act, other important consumer protection legislation at
8 the federal and state levels provide real defenses to many of the
9 debts that are being collected in default and otherwise through
10 arbitration proceedings today.

11 So as you go forward, as the FTC goes forward, I would
12 hope that the people involved in the discussion can set aside the
13 false notion that this great body of debt is just due, owing, and
14 should be paid. Some of it is and some of it is not. And the
15 importance of a dispute resolution system must separate out which
16 of those claims are meritorious and which are not. And I think
17 what we found today is that the arbitration system is simply not
18 functioning properly to determine which are meritorious and which
19 are not.

20 So my colleagues have discussed the various guidelines.
21 The rights that the statues provide -- the consumer protection
22 statues provide, are there in order to allow consumers, debtors,
23 and those who don't owe debt to bring proper defenses and to
24 vindicate their statutory rights. In order to do that the
25 guidelines should consider neutrality of the arbitrator and the

1 transparency of a system that can possibly determine whether the
2 arbitrator is, in fact, neutral, the provision of adequate
3 discovery, a written decision that will prevent a limited form of
4 judicial review, which will include a statement of the law, a
5 finding of fact, and the basis in itemization for the different
6 elements of damages.

7 Limitations on the costs of arbitration, which we just
8 very briefly touched on today and was discussed in Chicago, and
9 for which there's a great deal of case law, transparency in
10 public reporting, and prohibition on damages limitation that is
11 contrary to public policy. Finally, those guidelines should
12 consider the due process requirements of service, notice, venue,
13 and an opportunity to be heard in -- a real opportunity that is
14 within the ability of the consumer to attempt.

15 Thank you very much.

16 MR. PAHL: Thank you.

17 As many of you know, we have one more of these
18 roundtables that we will be holding in Washington, D.C., probably
19 in early December, and one question -- and I won't poll everyone,
20 just throw it out to the group -- is there any topic that relates
21 to debt collection arbitration that we didn't touch on today that
22 people think we should talk about in December? Is there anything
23 that we missed?

24 Okay. Well, thank you.

25 (Laughter.)

1 MR. PAHL: We're done. No.

2 I have two announcements before we're finished for the
3 day. The first announcement is that, as was mentioned earlier by
4 Chuck Harwood in his opening remarks, we are accepting public
5 comments in connection with these roundtables. So that if
6 there's anything that folks in the room, folks on the panel,
7 folks that are joining over the internet, have heard today that
8 they'd like to comment on, feel free to submit comments to the
9 FTC.

10 And the last announcement is that at 5 o'clock today
11 many of us are convening at Annabelle's Bar and Bistro at 68
12 Fourth Street, which is right around the corner. So if anyone
13 would like to join us there at 5 o'clock, they are welcome to do
14 so.

15 There are evaluation forms in the folder that talks
16 about the events that occurred today. If people could complete
17 them and leave them in the box in the back of the room, we would
18 appreciate it.

19 Well, thank you all very much. I would like to ask
20 people to give a nice round of applause for our panelists, to our
21 stenographer, and to our sounds people who have been here with us
22 all day. And with that we're adjourned. Thank you very much.

23 (Whereupon, the Roundtable was recessed at 3:22 p.m.,
24 to continue September 30, 2009 at 9:00 a.m.)

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CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER:
CASE TITLE: FTC
HEARING DATE: September 29, 2009

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the digital audio recording transcribed by me on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: September 29, 2009

SUSAN PALMER

CERTIFICATION OF PROOFREADER

I HEREBY CERTIFY that I proofread the transcript for accuracy in spelling, hyphenation, punctuation, and format.

STEVEN PALMER