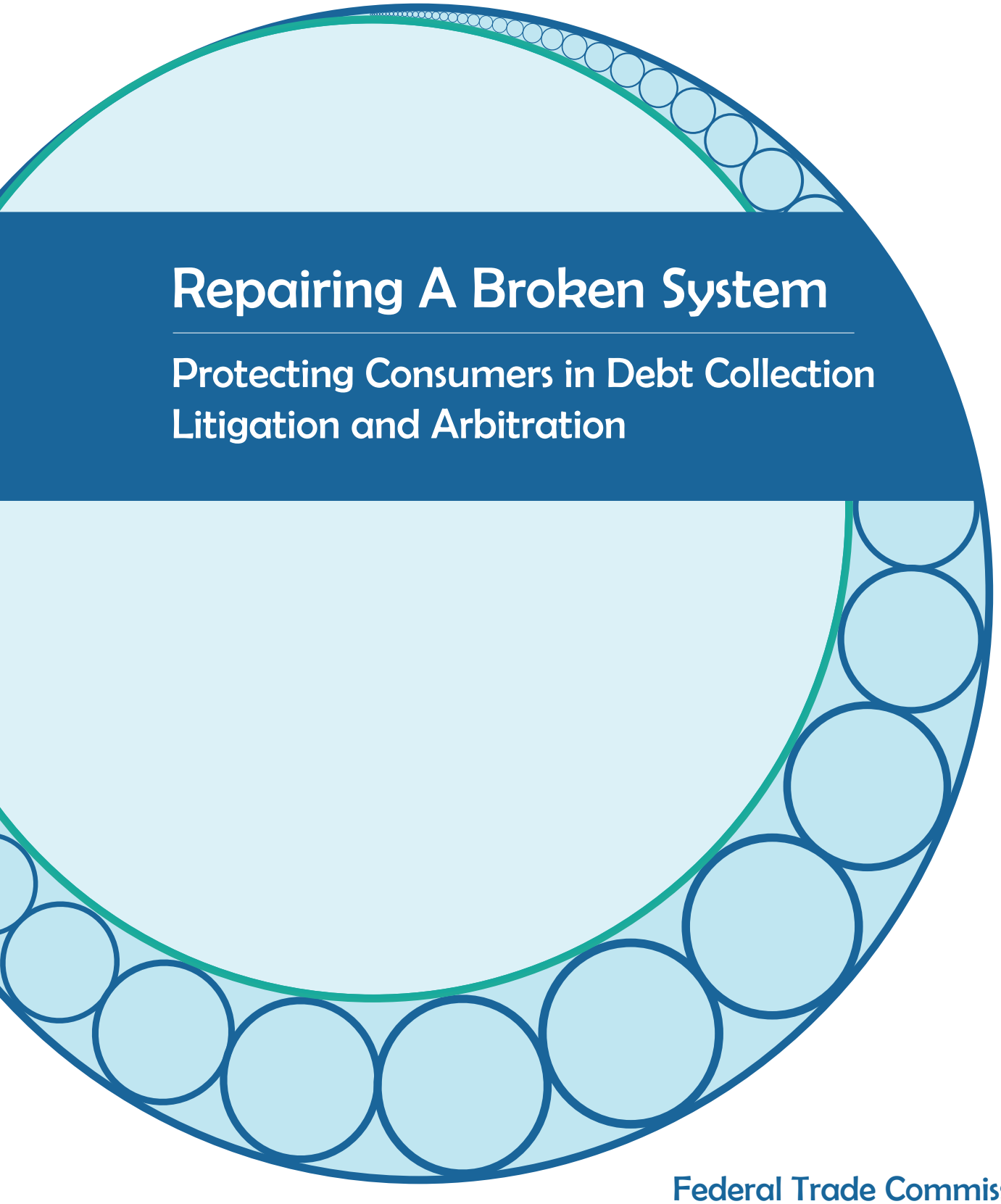

Repairing A Broken System

Protecting Consumers in Debt Collection Litigation and Arbitration

Federal Trade Commission
July 2010

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Protecting Consumers in Debt Collection Litigation and Arbitration

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This report also is available on the Internet. The online version of this report contains hyperlinks to news releases, reports, articles, transcripts, brochures, policy statements, and other information referenced in this report. You can find the report at ftc.gov/os/2010/07/debtcollectionreport.pdf. You can also access the Internet page for the roundtable discussions, with links to many related documents, at ftc.gov/bcp/workshops/debtcollectround/index.shtm.

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Executive Summary

Creditors and collectors seek to recover on consumer debts through the use of litigation and arbitration. Based on its extensive analysis, the Federal Trade Commission ("FTC" or "Commission"), the nation's consumer protection agency, concludes that neither litigation nor arbitration currently provides adequate protection for consumers. The system for resolving disputes about consumer debts is broken. To fix the system, the FTC believes that federal and state governments, the debt collection industry, and other stakeholders should make a variety of significant reforms in litigation and arbitration so that the system is both efficient and fair.

Credit benefits consumers by allowing them to obtain goods and services without paying the entire cost at the time of purchase. This lets consumers make purchases they might not otherwise be able to afford, and allows them to benefit from goods and services immediately while paying for them over time. Because consumers sometimes fail to pay their creditors, debt collection plays a vitally important role in the consumer credit system. Debt collection benefits individual creditors, of course, who are repaid money they are owed. More importantly, however, by providing compensation to creditors when consumers do not repay their debts, the debt collection system helps keep credit prices low and helps ensure that consumer credit remains widely available.

Sometimes consumers are unable or unwilling to pay their creditors. Such payment problems often worsen during times like the recent economic downturn. When consumers do not pay their debts, creditors and collectors may decide to commence proceedings against consumers to compel payment. Debt collection proceedings are an important means through which creditors and collectors can collect amounts they are owed.

Collectors use two types of proceedings to compel payment on consumer debt. They may file an action in court alleging that a consumer has not paid and seeking a judgment from the court that he or she owes the debt. Alternatively, if permitted by the credit contract or other agreement between the creditor and the consumer, the collector may commence an arbitration proceeding. In the proceeding, the collector may claim that the consumer has not paid and seek an arbitration award stating that the consumer owes the debt. In that situation, the collector would then ask a court to confirm the arbitration award and enter a judgment against the consumer. Collectors may seek to recover on judgments against consumers through garnishing bank accounts and wages, or through other means.

As part of a comprehensive assessment of the debt collection system, in late 2007 the FTC convened a public workshop to identify consumer protection problems and possible solutions

to those problems. In a February 2009 workshop report, the Commission concluded that the debt collection system is in serious need of reform and set out concrete proposals to improve the system. With regard to debt collection litigation and arbitration, the Commission concluded that "certain debt collection litigation and arbitration practices appear to raise substantial consumer protection concerns." Among the concerns relating to litigation were: (1) filing suits based on insufficient evidence; (2) failing to properly notify consumers of suits; (3) the high prevalence of default judgments; (4) improperly garnishing exempt funds from bank accounts; and (5) suing or threatening to sue on time-barred debts. The concerns relating to arbitration included: (1) binding consumers to resolve disputes through arbitration without meaningful choice or awareness; (2) bias or the appearance of bias in arbitration proceedings; (3) procedural unfairness in arbitration proceedings; and (4) requiring consumers to pay substantially more to participate in arbitration proceedings than in comparable court proceedings.

Although it identified these concerns, the FTC concluded that it needed more information before recommending specific solutions. To obtain more information, during the latter part of 2009 the FTC convened public roundtables in Chicago, San Francisco, and Washington, D.C. These events brought together representatives of the debt collection industry, consumer advocates, private attorneys, academics, government officials, arbitration providers, judges, and others. To supplement the information gleaned from the discussions at these roundtables, the Commission also solicited and received public comments.

During the time that the FTC was conducting its roundtables, there were major developments in the use of arbitration to resolve debt collection disputes. In July 2009, the Minnesota Attorney General ("Minnesota AG") filed suit against the National Arbitration Forum ("NAF"), the leading debt collection arbitration forum, alleging that NAF had engaged in consumer fraud, deceptive trade practices, and false advertising. NAF purportedly held itself out as an impartial arbitration forum when in fact it had financial ties to key members of the debt collection industry. Days after the suit was filed, NAF entered into a settlement with the Minnesota AG, which required NAF to cease providing debt collection arbitration services. In the wake of the settlement with NAF, the American Arbitration Association, which had handled some debt collection arbitrations, imposed a moratorium on conducting such arbitrations. A number of large banks also announced that they would discontinue the use of mandatory pre-dispute arbitration provisions in their credit card contracts.

At this critical juncture, the FTC believes that articulating its views would be helpful in reforming the system of debt collection litigation and arbitration. Based on the record from the roundtables (including the associated public comments) and its experience in debt collection

matters, the Commission's principal findings, conclusions, and recommendations with respect to debt collection litigation are:

- **States should consider adopting measures to make it more likely that consumers will defend in litigation.** Very few consumers defend or otherwise participate in debt collection litigation, resulting in courts entering default judgment against them. States should take steps to ensure that: (1) consumers receive adequate notice when actions have been commenced; and (2) the costs to consumers of participating in such actions are not prohibitively high.

- **States should require collectors to include more information about the debt in their complaints.** Complaints often do not contain sufficient information to allow consumers in their answers to admit or deny the allegations and assert affirmative defenses. To assist them in doing so, states should consider requiring that debt collection complaints include: (1) the name of the original creditor and the last four digits of the original account number; (2) the date of default or charge-off and the amount due at that time; (3) the name of the current owner of the debt; (4) the total amount currently owed on the debt; (5) the total amount owed broken down by principal, interest, and fees; and (6) the relevant terms of the underlying credit contract, if the contract itself is not attached to the complaint.

- **States should take steps to make it less likely that collectors will sue on time-barred debt and that consumers will unknowingly waive statute of limitations defenses available to them.**

  - In circumstances where it is difficult to determine the correct statute of limitations, it would be advantageous if states developed more clear and uniform statutes of limitations.

  - Consumers do not understand that in many states a statute of limitations constitutes an affirmative defense which may preclude collectors from successfully suing to collect, so they rarely assert this affirmative defense. These states should assign to collectors the burden of proving that debts are not time-barred and require that they include the date of default and the statute of limitations in their complaints.

  - Consumers are not aware that collectors cannot lawfully sue to recover on time-barred debt. To prevent deception, collectors who seek to collect debt they know or should know is time-barred should disclose that they cannot lawfully sue the consumers. Consumers likewise do not know that in many states making a

partial payment on a time-barred debt revives the entire debt for a new statute of limitations period. Collectors in these states should disclose to consumers that making a payment will revive such debt.

- **Federal and state laws should be changed to prevent the freezing of a specified amount in a bank account into which a consumer has deposited funds that are exempt from garnishment.** When banks freeze the accounts of consumers who receive government payments such as Social Security (which are exempt from garnishment), it may result in significant hardship for consumers, including many who are indigent. To alleviate such hardship, federal and state laws should be changed to limit the amount that banks can freeze in accounts receiving exempt funds.

The Commission's principal findings, conclusions, and recommendations relating to debt collection arbitration are:

- **Consumers should be given meaningful choice about arbitration.** Consumers currently have little, if any, choice regarding mandatory pre-dispute arbitration provisions in contracts. Creditors should draft their consumer credit contracts in a way that ensures consumers are aware of their choice whether to arbitrate, and provides consumers with a reasonable method of exercising that choice. The public and private sectors should increase efforts to educate consumers, so that they have a basic understanding of arbitration and its consequences. They should evaluate whether, and under what conditions, options beyond the initial choice about arbitration must be offered in consumer credit contracts.

- **Arbitration forums and arbitrators should eliminate bias and the appearance of bias.** Especially in the wake of serious concerns relating to the conduct of NAF, arbitration forums should take significant and concrete steps to prevent bias and the appearance of bias. Forums should develop, adopt, and vigorously enforce standards prohibiting bias and the appearance of bias for themselves and their arbitrators. Forums should diversify their rosters of arbitrators, rotate matters randomly among arbitrators, and limit the number of matters each arbitrator handles. Forums should make the process and procedures they use for selecting arbitrators as transparent as possible.

- **Arbitration forums should conduct proceedings in a manner which makes it more likely consumers will participate.**
  - Consumers frequently do not appear in arbitration proceedings. While it is not clear to what extent notification problems cause low participation rates, arbitration forums should adopt measures to increase the likelihood they have valid addresses for consumers, track and document delivery of notices, and use envelopes which make it clear that their contents are important while not disclosing consumer debts to third parties. Arbitration forums and arbitrators also should conduct a closer assessment of consumers' assertions that they did not receive adequate notice.
  - Arbitration forums should establish rules that limit the total cost to consumers of arbitrating a dispute to the cost that they would pay to defend against a similar proceeding in court.
- **Arbitration forums should require that awards contain more information about how the case was decided and how the award amount was calculated.** Arbitrators rarely accompany awards with an opinion setting forth a statement of the law and an application of the law to the facts, which makes it difficult to understand the basis for the award. Arbitration forums should require that arbitrators issue reasoned opinions setting forth: (1) the law applied; (2) how the law was applied to the facts; and (3) how the amount of the award was calculated, including how the amount of principal, interest, and fees awarded was determined.
- **Arbitration forums should make their process and results more transparent.** For the public to assess the costs and benefits of arbitration, and for consumers to decide whether to agree to arbitration, the process used and the results reached must be more transparent. To promote such transparency, Congress should consider creating a nationwide system requiring arbitration forums to report and make public arbitration awards and decisions.
- **The Commission will continue to closely monitor debt collection arbitration, and evaluate whether creditors and arbitration forums provide consumers with meaningful choice and fair process.** As appropriate, the Commission will report its views on new debt collection arbitration models to policymakers, industry, consumer groups, and the general public.

The Commission believes that reforms such as those discussed in this report should be undertaken to ensure that the debt collection litigation and arbitration systems adequately protect consumers without unduly burdening legitimate debt collection. The agency is interested in continuing to work with interested parties on implementing these recommendations and taking other steps to improve debt collection litigation and arbitration.

Chapter 1
Introduction

In February 2009, the Federal Trade Commission issued a comprehensive report with findings, conclusions, and recommendations concerning consumer protection issues related to debt collection. Among other things, the Commission's report, *Collecting Consumer Debts: The Challenges of Change – A Workshop Report*,[1] concluded that "certain debt collection litigation and arbitration practices appear to raise substantial consumer protection concerns."[2] The report, however, also concluded that the FTC needed more information to formulate recommendations as to how these concerns should be addressed.

To obtain this information, during the latter part of 2009 the FTC convened public roundtables in Chicago,[3] San Francisco,[4] and Washington, D.C.[5] These events brought together representatives of the debt collection industry, consumer advocates, private attorneys, academics, government officials, arbitration providers, judges, and others[6] to discuss potential consumer protection problems arising in debt collection litigation and arbitration as well as possible solutions to those problems.[7] To supplement the information gleaned from the discussions at these roundtables, the Commission also solicited and received public comments.[8]

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1. Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change – A Workshop Report (2009), *available at* http://www.ftc.gov/bcp/workshops/debtcollection/dcwr.pdf (hereinafter Challenges of Change).
2. *Id.* at i-ii.
3. *See* Transcript I, Aug. 5, 2009, *available at* http://www.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90805.pdf; Transcript II, Aug. 6, 2009, *available at* http://www.ftc.gov/bcp/workshops/debtcollectround/090805-CHIL/transcript-90806.pdf. Citations to the transcripts in this report will follow the format "Tr. X at a," where "X" indicates the roman numeral of the transcript cited and "a" denotes the page number of the transcript on which the reference can be found.
4. *See* Transcript III, Sept. 29, 2009, *available at* http://www.ftc.gov/bcp/workshops/debtcollectround/090929-SANF/90929ftc.pdf; Transcript IV, Sept. 30, 2009, *available at* http://www.ftc.gov/bcp/workshops/debtcollectround/090929-SANF/90930ftc.pdf.
5. *See* Transcript V, Dec. 4, 2009, *available at* http://www.ftc.gov/bcp/workshops/debtcollectround/091204-DC/transcript.pdf.
6. A list of roundtable participants is set forth in Appendix A to this report. A list of FTC contributors is set forth in Appendix B to this report.
7. The agendas for each of the roundtables are included in Appendix C to this report.
8. A list of the individuals and entities that submitted public comments is included in Appendix D to this report. Comments can be found at the following three locations: http://www.ftc.gov/os/comments/debtcollectroundtable1/index.shtm; http://www.ftc.gov/os/comments/debtcollectroundtable2/index.shtm; and http://www.ftc.gov/os/comments/debtcollectroundtable3/index.shtm.

Based on the information received at and in connection with the roundtables as well as the Commission's extensive experience in debt collection matters, this report makes findings and conclusions as to debt collection litigation and arbitration and their effect on consumers. The report also makes a variety of recommendations concerning how changes in law, court procedures, and industry practice could improve the system of debt collection litigation and arbitration.

Chapter 2 addresses debt collection litigation, nearly all of which occurs in state courts. The report finds very few consumers defend or otherwise participate in debt collection litigation. The Commission therefore recommends state and local governments consider making a variety of reforms to service of process, pleading, and court rules and practices to increase the ability of consumers to defend or otherwise participate in debt collection litigation. The report also finds complaints and attachments in debt collection cases often do not provide adequate information for consumers to answer complaints or for judges to rule on motions for default judgment. The FTC therefore recommends that courts more rigorously apply existing rules to require that collectors provide adequate information and that jurisdictions consider adopting rules mandating the information which must be included in or attached to the complaint. The report additionally finds that state statutes of limitations on filing actions to recover on debt are sometimes variable and complex, and generally not understood by consumers. The Commission suggests that states consider modifying their laws to make it simpler to determine the applicable statute of limitations, and to require that collectors provide consumers with important information about their legal rights when collecting debt they know or should know is time-barred. The report further finds that consumers suffer significant hardship when funds in consumer bank accounts exempt from garnishment under existing law are frozen pending a state court determination of whether the funds are subject to garnishment. To prevent such hardship, the Commission recommends that federal and state governments change the law to limit the amount that banks can freeze in accounts receiving exempt funds.

Chapter 3 addresses debt collection arbitration. The report finds that consumers are not given meaningful choice whether to enter into arbitration and that the debt collection arbitration process is fundamentally unfair to them. Creditors, collectors and arbitration forums should adopt changes to ensure that: (1) consumers are given a meaningful choice about whether to arbitrate and a reasonable method of exercising that choice; (2) neither arbitration forums nor arbitrators are biased or appear to be biased; (3) consumers are given adequate notice of the commencement of arbitration and their costs of participating in arbitration are limited to the costs the consumers would have incurred to defend against similar proceedings in court; (4) arbitrators issue reasoned, written decisions to support their awards; and (5) arbitration and its results are

sufficiently transparent to instill confidence in use of arbitration as alternative to the public court system. The FTC will continue to closely monitor, evaluate, and report, as appropriate, on whether debt collection arbitration models are providing consumers with meaningful choice and a fair process. Chapter 4 provides a brief conclusion.

Chapter 2
Litigation Proceedings

I. The Legal Framework of Debt Collection Litigation

Every debt collection action begins with a consumer credit obligation. If a consumer credit account appears not to be paid timely, the creditor will usually attempt to obtain payment from the consumer. This usually entails a series of letters and telephone calls from the creditor to convince the consumer to pay.

If the creditor is not able to collect on its own, it may contract with a contingency collection agency to collect the debt. The creditor also may resell the debt to a "debt buyer" for some fraction of the amount the creditor is owed. Selling debt of all types (*e.g.,* credit card debt, telecommunications debt, medical debt, or utility debt)[9] has become an increasingly common industry practice during the past decade. Debt buyers may then collect on the debts they purchase, employ contingency collectors, or resell the debt to other debt buyers. Indeed, much purchased debt is resold one or more times as it moves through the debt collection system,[10] often making it more difficult for consumers to recognize the debt being collected because the owner of the debt is not the original creditor.

If collection efforts are unsuccessful, the debt may be referred to a collection attorney to file a lawsuit to collect on the debt.[11] The number of collection cases on court dockets has increased in recent years.[12] Collectors may also employ litigation more quickly than in the past; industry sources "have noted that the growth of the debt-buying industry has resulted in increases in collection lawsuits because entities that purchase delinquent debt often use collection law firms as their primary tool for recovery."[13] A collector may obtain a court order requiring the consumer to pay the debt, either through a judgment in litigation or through an arbitration proceeding

9. Challenges of Change, *supra* note 1, at 13 (citing DBA, Inc. comment).
10. According to the U.S. Government Accountability Office, as many as half of all credit accounts purchased directly from original creditors eventually are resold. U.S. Gov't Accountability Office, Credit Cards: Fair Debt Collection Practices Act Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology (Sept. 2009), *available at* http://www.gao.gov/new.items/d09748.pdf (hereinafter GAO Report).
11. Depending on the terms of the contract giving rise to the debt, collectors may commence private arbitration proceedings rather than lawsuits in court. These issues are discussed extensively in Chapter 3.
12. *See*, *e.g.*, Challenges of Change, *supra* note 1, at § VI.C.1; *see also* sources cited in GAO Report, *supra* note 10, at 41.
13. GAO Report, *supra* note 10, at 41 (citing Kaulkin Ginsberg and the National Association of Retail Collection Attorneys).

followed by a court proceeding to confirm the arbitration award and reduce it to a judgment. Once collectors obtain a judgment, they have additional, powerful tools at their disposal – wage garnishment and property garnishment – to collect on the judgment.

Debt collection lawsuits almost invariably are filed in state courts, where state law is the main source of the applicable substantive and procedural standards. Each state generally sets its own substantive standards governing the rights and obligations of creditors and debtors with regard to debts. Each state also applies its own rules of civil procedure and evidence and uses them to determine whether service of process was adequate, the pleadings contained appropriate and sufficient information, and judgments should be granted. These substantive and procedural standards may vary considerably by state and, in some instances, within a state depending on the local jurisdiction or whether they are used in small claims court or civil court.

Although debt collection litigation is primarily a matter of state law, the conduct of collectors in these cases is also subject to federal law. The Fair Debt Collection Practices Act ("FDCPA")[14] prohibits debt collectors[15] from engaging in unfair, deceptive, and abusive acts or practices and identifies specific conduct that is banned. The FDCPA sets forth some standards to which collectors must adhere in connection with debt collection litigation in federal or state court. For example, as interpreted by numerous federal courts, the FDCPA prohibits collectors from threatening to sue or suing on a debt on which the applicable state statute of limitations has run.[16] Many states have enacted their own statutes similar to the FDCPA which govern the conduct of debt collectors.[17]

II. Consumer Participation in Debt Collection Litigation

Fundamental fairness dictates that the legal process afford consumers a reasonable opportunity to defend themselves. To ensure that consumers have such an opportunity, they must receive adequate notice of the commencement of a lawsuit and have a method of defending

14. 15 U.S.C. §§ 1692-1692p.

15. "Debt collectors" are persons engaged in the collection of debts owed to another, with certain exceptions. Creditors collecting on their own debts generally are not "debt collectors" for purposes of the FDCPA. Debt buyers – persons who collect debt on their own behalf that they have purchased from creditors or debt collectors – are covered by the FDCPA if the accounts were in default at the time the debt buyers purchased them. FDCPA §§ 803(4), 803(6); 15 U.S.C. §§ 1692a(4), 1692a(6); *see also Ruth v. Triumph P'ships*, 557 F. 3d 790, 796-97 (7th Cir. 2009); *FTC v. Check Investors*, 502 F. 3d 159, 171-72 (3rd Cir. 2007). Section 5 of the FTC Act, 15 U.S.C. § 45(a), broadly prohibits unfair or deceptive acts or practices, including those of creditors.

16. *See Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1489 (M.D. Ala. 1987); see also cases cited *infra* at note 106.

17. *See*, *e.g.*, Cal. Civ. Code §§ 1788-1788.33; Fla. Stat. §§ 559.55-559.785; Ill. Comp. Stat. 425/1-25.

themselves that is not unduly costly. Most alleged debtors fail to answer complaints or otherwise defend themselves in debt collection actions.

There was a broad consensus among roundtable panelists that relatively few consumers who are sued for alleged unpaid debts actually participate in the lawsuits. Although no empirical data were presented or submitted, panelists from throughout the country estimated that sixty percent to ninety-five percent of consumer debt collection lawsuits result in defaults, with most panelists indicating that the rate in their jurisdictions was close to ninety percent.[18]

Roundtable panelists and commenters differed widely on why there is such a high default rate in debt collection litigation. In general, industry representatives asserted that most debtors who default do so because they owe the debt and therefore recognize that disputing it would be futile. Consumer advocates, on the other hand, generally attributed the low participation rate to debtors not receiving notice of the action or to procedural hurdles that make it difficult and expensive for debtors to defend. The Commission is unaware of any empirical data bearing on this question, making it difficult to draw definite conclusions as to why consumers do not participate. Nevertheless, given how few consumers appear and the risk of adverse consequences from not appearing, the Commission believes that the public would benefit from efforts to increase consumer participation in debt collection litigation.

18. *See*, *e.g.*, Abrams, Tr. V at 18 (well over 60%); Buckles, Tr. I at 24 (85%); Domestic Policy Subcommittee Minority Staff Report of the House Oversight and Government Reform Committee (Domestic Policy Minority Staff) Comment, 3-4 (80% in New York City and Massachusetts, citing Urban Justice Center, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor*, 1 (Oct. 2007), *available at* www.urbanjustice.org/cdp); Evans, Tr. V at 19 (70-80%); Fisher, Tr. V at 193 (70%); Groves, Tr. V at 22-3 (80-90%); Lipman, Tr. I at 21-2 (85-90%); MFY Legal Services (MFY) Comment at 1-2 (90% of New York City debtors fail to answer in suits filed by seven largest debt collection law firms, citing MFY's 2008 report, *Justice Disserved: A Preliminary Analysis of the Exceptionally Low Appearance Rate by Defendants in Lawsuits Filed in the Civil Court of the City of New York*, *available at* http://www.mfy.org/Justice_Disserved.pdf); Moiseev, Tr. I at 21 (85-90%); Moore, Tr. IV at 18 (80% based on California Creditors' Bar Association informal survey); Neighborhood Economic Development Advocacy Project (NEDAP) Comment at 2 (75% default rate in New York City and 90% rate of failure to answer collection suit); Redmond, Tr. V at 22 (percentage is "certainly very high"); Surh, Tr. IV at 55 (95%); The Legal Aid Society, Neighborhood Economic Development Advocacy Project, MFY Legal Services, and Urban Justice Center – Community Development Project, Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers (May 2010), 8, *available at* http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf (hereinafter Debt Deception) (finding among 336 collection cases brought by the 26 most litigious debt buyers in New York City that 81% of cases initially resulted in default judgments for the debt buyers); *but see also* Moore, Tr. IV at 151 (95% of cases that go to judgment are by default).

A. Notice to Consumers of Debt Collection Litigation

When a collector files an action against a consumer, it must serve a copy of the summons and complaint on that individual. Jurisdictions vary in their requirements for who may serve process and how they must do so.[19] In some cases, service requirements depend on the court in which the action is filed, such as a small claims court or a court of general jurisdiction.[20] Typically, process servers are required to complete an affidavit attesting to the fact that they made service on a specific individual at a particular time and place.

Service of process informs defendants that an action has been commenced and permits them to exercise their rights to defend the action. If a defendant does not receive process, she is unlikely to know of the lawsuit, typically leading to the entry of a default judgment.

Service of process may be inadequate or improper for many reasons. For example, process may fail to reach the consumer if it is delivered to an old or otherwise incorrect address or it is delivered to the wrong person, such as someone with a similar name.[21] Some process servers may simply not serve the consumer but falsely assert that they have done so.[22]

Roundtable participants differed as to whether inadequate or improper service is prevalent. Many consumer advocates and judges who adjudicate debt collection cases stated that

19. *See*, *e.g.*, Buckles, Tr. I at 29-30, 74-75 (Michigan); Edelman, Tr. I at 47 (Illinois – substitute service); Leibsker, Tr. I at 26 (Cook County, Illinois); Lipman, Tr. I at 28-29 (Iowa). For state-specific rules, *see generally* NAPPA Membership Directory and Civil Rules Guide, Fall 2009, *passim*; Feerick Center for Social Justice at Fordham Law School (Feerick Center) Comment, *passim*.

20. *See*, *e.g.*, Iowa R. Civ. P. 1.302(3); V.R.C.P. 3. *See also* Mass. Ann. Laws Unif. Small Claims Rule 2(b).

21. *See, e.g.*, Edelman, Tr. I at 47-48 (wrong person is served either at old address or with name similar to intended defendant).

22. This is sometimes referred to as "sewer service" – the server throws the documents "down the sewer" and then falsifies its affidavit of service. *See*, *e.g.*, *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970); *see also*, *e.g.*, Coffey, Tr. V at 24 ("predominantly, the reason that people are not showing up [in court] in these kinds of cases is because of sewer service"); Faulkner, Tr. V at 25-26 ("Sewer service is a big problem" such as when service in a collection case purportedly took place at the consumer's home after that consumer was evicted following foreclosure, and the home was obviously empty); NEDAP Comment at 2 (sewer service is the primary reason most defendants do not appear in court).

inadequate or improper service occurs frequently.[23] One local official reported that her agency's comprehensive investigation of process servers in New York City revealed that "many are not performing service. They are filling out false affidavits of service. They are not going to the addresses. They are not sufficiently checking the addresses."[24] A Chicago judge explained similarly that one of his colleagues had conducted a "spot audit" of one process server and found that he "claimed to be in areas thirty miles apart in the Chicago-land area within minutes . . . . And we [asked,] 'Is he Superman?'"[25]

In contrast, collection industry representatives at the roundtables generally asserted that inadequate or improper service is not prevalent in debt collection cases.[26] According to some, service problems are rare and play a very small role in the failure of consumers to appear and defend.[27] Similarly, representatives of professional process server organizations maintained that many or most process servers do serve properly, but acknowledged that not all do so.[28]

Most of the information available as to problems with service of process is anecdotal or relates to particular local jurisdictions, specifically, large metropolitan areas. The Commission

23. *See*, *e.g.*, Appleseed, Due Process and Consumer Debt: Eliminating Barriers to Justice in Consumer Credit Cases (Feb. 2010), 12, *available at* http://ny.appleseednetwork.org/LinkClick.aspx?fileticket=dFHdRj22CXY%3d&tabid=252 (hereinafter Appleseed Report); Brown, Tr. I at 23 (many consumers who come in at garnishment stage after default judgments have been entered against them claim they never received service of summons and complaint); District Council 37 Municipal Employees Legal Services (DC 37) Comment at 6-7 (of 238 New York City debt collection defendants represented by the DC 37 legal services from January 2008 through June 2009, 65 defendants, or 27.3% of the total, first learned of the lawsuit when their wages were garnished or their bank accounts restrained); Donnelly, Tr. I at 35, 45 (fraudulent service detected upon "spot audit"), 79-80 ("I'm not sure how big the problem [of improper service] is. I suspect that it's larger than we as judges know, and the New York lawsuit brings that to bear."); Hillebrand, Tr. IV at 42-43 (familiar with numerous instances of consumers who first discovered they had been sued and a default had been taken when wages or bank accounts were garnished); Maurer, Tr. IV at 73-75 (when consumers with defenses to debt collection cases claim not to have been served and to have first learned of suits at garnishment stage, Maurer's clinic seeks evidence including the original proof of service in the underlying case and has found numerous instances of improper service); MFY Comment at 1; Moiseev, Tr. I at 33, 37 (instances of faulty claims by process server of "simultaneous service"); Debt Deception, *supra* note 18, at 9 (finding that 71% of collection suit defendants who called a New York City legal hotline were either not served or served improperly, and more than half received no notice of the lawsuit at all); *see also* Gargano, Tr. IV at 35.

24. Tepper, Tr. V at 47 and 64.

25. Donnelly, Tr. I at 35.

26. *See*, *e.g.*, ACA International (ACA) Comment at 10-11; Needleman, Tr. V at 34-35.

27. *See*, *e.g.*, Gagnon, Tr. V at 35 (only 0.02% percent of her law firm's consumer defendants file motions to vacate judgment claiming lack of service); Leibsker, Tr. I at 62 (only about 1% of people at most are not served; "in general, people are getting served"); Needleman, Tr. V at 34-35 ("the percentage of nonservice is extraordinarily small . . . I don't think that's the main issue of why [consumer defendants] are not coming [to court]").

28. *See*, *e.g.*, Certified Civil Process Servers Association of Texas (CCPSA Texas) Comment at 2; Estin, Tr. IV at 38; National Association of Professional Process Servers (NAPPS) Comment at 2; Tamaroff, Tr. IV at 56-58; Yellon, Tr. V at 61-63, 69-70.

is not aware of any reliable, nationwide empirical data on the prevalence of service of process problems, including whether the problems found in some jurisdictions are present throughout the country. Nevertheless, the very high rate at which consumers do not appear and the service of process problems documented in some jurisdictions give the Commission a sufficient basis to conclude that efforts to improve service of process in debt collection litigation would benefit consumers in many locations.

The FTC believes that service of process problems should be addressed at the state and local level. The nature and scope of service of process problems likely vary by jurisdiction and process servers ordinarily are regulated and overseen at these levels, through state law and court procedural rules. Further, the Commission recommends that state and local jurisdictions consider adopting four types of measures that some jurisdictions have already undertaken.

First, randomly conducted audits would be useful in determining the nature and extent of the service problems, if any, that exist in debt collection cases filed in specific jurisdictions. An audit by a judge in Cook County, Illinois, for example, revealed more extensive and serious service of process problems than some of his colleagues thought existed.[29] Audits also could reveal individual process servers or agencies engaging in unlawful practices. The New York Attorney General's office conducted such an audit and, finding a variety of unlawful servicing practices, criminally prosecuted the process server.[30]

Second, jurisdictions should also consider amending service of process rules to require greater verification. Some jurisdictions have modified these rules to make it more likely that the correct consumers are served.[31] For example, in response to the efforts of a working group of judges, consumer advocates, and creditor representatives, Massachusetts recently changed its small claims court rules to require that collectors in most debt collection cases verify the

29. Donnelly, Tr. I at 35.

30. The records of the process server, American Legal Process, revealed numerous instances in which process servers claimed: to be at two or more locations at the same time; to be at two locations in sequence when physically impossible in light of the time required to travel the distance between them; to have served documents at times before those documents were received; to have attempted service at times before the court index number had been purchased; and to have notarized signatures when physically impossible to do so. *In re Hon. Ann Pfau v. Forster & Garbus et al.*, Index No. 2009-8236 (Erie County Supreme Court), Attorney Affirmation of James M. Morrissey (July 2009).

31. *See*, *e.g.*, Appleseed Report, *supra* note 23, at 13-15 (New York City Civil Court Uniform Rules § 208.6 requires a new notice to be mailed by the court to each consumer debt defendant as a second notice mechanism, and default judgment may not be granted when notice is returned to court as undeliverable); Tepper, Tr. V at 63-65 (New York City Department of Consumer Affairs) (service of process can improve by: (1) ensuring process servers are paid enough to motivate them to do their jobs properly; (2) using new technologies to monitor the location of process servers throughout the day; and (3) promulgating laws or rules requiring enhanced bookkeeping and record keeping). *See also* Mass. Ann. Laws Unif. Small Claims Rule 2(b); State of Connecticut Judicial Branch, Report of the Bench/Bar Small Claims Committee 3-4 (2009).

current addresses of consumers by consulting reliable sources (such as municipal or motor vehicle records) and attest, under penalty of perjury, that they have engaged in such verification efforts.[32] Likewise, a bench and bar working group in Connecticut recently recommended that debt collectors consult two reliable sources to verify a consumer's address and attest, under oath, that they consulted such sources.[33] The requirements adopted in Massachusetts and under consideration in Connecticut may be useful models for other jurisdictions.

Third, some jurisdictions now require, in addition to regular service of process, use of the United States mail to provide consumers with supplemental notice of debt collection lawsuits. For example, North Carolina requires debt buyers to provide consumers with written notice of their intent to file suit thirty days prior to initiating suit; the notice must include relevant debt-related information such as an itemized accounting of amounts sought and proof of ownership of the debt.[34] New York City requires that collectors prepare a notice about the lawsuit, which the court clerk sends to the purported debtor by United States mail, and local law provides that the court may not enter a default judgment if the notice is returned as undeliverable.[35] These supplemental notice mechanisms can be an important backstop if ordinary service efforts are problematic or unsuccessful. In New York City, following the adoption of these mechanisms, more consumers are appearing in court and many of the consumers who do appear explain that the clerk-mailed notices were their only notice of the pending legal action.[36] Other jurisdictions may benefit from implementing similar supplemental notice requirements.

Finally, law enforcement actions and judicial sanctions could help deter fraud by process servers. Some states recently have taken action against bogus process servers. The New York Attorney General, for example, filed civil and criminal actions against process servers who had engaged in widespread misrepresentations and "sewer service" in debt collection litigation

32. Mass. Ann. Laws Unif. Small Claims Rule 2(b).

33. State of Connecticut Judicial Branch, Report of the Bench/Bar Small Claims Committee 3-4 (2009). *See also* Connecticut Rules Committee for the Superior Court, proposed practice book revision § 24-9, published in Connecticut Law Journal, 58C-59C (May 19, 2009) (version of Bench/Bar Committee's recommendation that was proposed by the Rules Committee).

34. N.C. Gen. Stat. §§ 58-70-115(5) and (6).

35. N.Y. City Civ. Ct. Unif. Rules § 208.6 (2009); *see also* N.Y. City Civ. Ct. Chief Clerk's Memorandum CCM-176 (Apr. 1, 2008).

36. Appleseed Report, *supra* note 23, at 13-15.

matters.[37] These suits allege over 100,000 instances of faulty service in New York State which resulted in default judgments against consumers.

B. Costs of Defending in Debt Collection Litigation

Assuming that consumers have been properly served, roundtable participants suggested additional reasons that they may not answer or otherwise defend against debt collection suits. Representatives of the collection industry generally asserted that the primary reason is that consumers know they owe the debts and do not have any viable defenses, although some industry representatives conceded that consumers' trepidation about the legal process and inability to retain counsel may also play a role.[38] Consumer advocates said that consumers may not answer or otherwise defend because they cannot take time off work without pay, are afraid of courtroom processes and unfamiliar with their options, have complex and multiple demands in their lives, have transportation difficulties, or cannot obtain effective representation.[39]

37. *See*, *e.g.*, *People v. Zmod Process Corp. DBA Am. Legal Process & Singler,* Index No. 2009-4228 (Erie County Supreme Court) (Apr. 2009) (civil suit); *People v. Singler & Zmod Process Corp. dba Am. Legal Process, Inc.* (Apr. 2009) (felony complaint). *See also In re Pfau v. Forster & Garbus et al.*, Index No. 2009-8236 (Erie County Supreme Court) (July 2009) (civil petition to vacate default judgments obtained against consumers in debt collection cases, filed against numerous attorney collectors who used American Legal Process to serve process and obtained default judgments in New York).

38. *See*, *e.g.*, Asset Acceptance, LLC (Asset) Comment at 2; Buckles, Tr. I at 24 ("[M]ost of the people, in my opinion, don't file an answer because they have no defense."); Leibsker, Tr. I at 62 (consumer fear of court, lack of representation, and lack of money to repay debt are reasons for high default rate); Portfolio Recovery Associates (PRA) Comment at 2; Needleman, Tr. V at 33 ("some of them . . . owe the money, and . . . they're not sure . . . what to do"); Zezulinski, Tr. V at 50 (consumers don't appear because of "helplessness and hopelessness. . . . They owe the debt. They just don't know what to do about it."). *See also* Donnelly, Tr. I at 62 (very few consumers at garnishment hearings raise claims they were never served); *but see also* Groves, Tr. V at 23 (transportation or getting off work may play a part); Needleman, Tr. V at 33-34 (consumer priorities, hardships, fear, and misinformation from debt settlement companies and the internet advising consumers not to respond are among the reasons for the high consumer nonappearance rate); Redmond, Tr. V at 46 ("it's certainly true that the biggest reason [for consumer court nonappearance] is . . . just the human nature of not wanting to go through [the court] experience").

39. *See*, *e.g.*, Abrams, Tr. V at 17-18, 57 (numerous problems may be affecting consumers, such as housing emergencies, medical bills, lack of transportation, and other more high-priority complexities; consumers commonly exercise their "natural inclination . . . to try [to] ignore [the lawsuit] and hope it will go away"); Appleseed Report, *supra* note 23, at 21; Bragg, Tr. I at 25 (lack of representation and advice is a cause of consumer non-appearance); Coffey, Tr. V at 24 (sometimes consumers do not appear because they do not recognize the entity suing them, have other things going on in their lives, or do not want the stress of a court appearance); Evans, Tr. V at 19 (difficulty getting off work due to finances, fear of the system, and hopelessness because consumers don't have representation on their side are among the causes of nonappearance); Hillebrand, Tr. IV at 43 (some consumers don't appear from misunderstanding the court papers they receive); Rosmarin, Tr. V at 38-41 (fear and unfamiliarity, lack of legal representation, misunderstanding the summons, not recognizing the entity suing them, not understanding that they need to appear, and believing it's a case of mistaken identity are among the reasons that consumers who receive service may not appear in court).

Although no empirical data were submitted bearing on which, if any, of the many possible explanations are correct, the FTC believes that it is worthwhile to encourage measures that could increase consumer participation in debt collection litigation. Roundtable participants suggested a number of measures to reduce the costs to consumers or otherwise encourage them to defend. If lack of understanding and fear about the litigation process is deterring some consumers from appearing in court, then jurisdiction-specific consumer education materials[40] explaining the debt collection litigation process in clear and concise terms could encourage participation. In addition, if counsel assisted consumers in connection with debt collection litigation, it might demystify the process and help consumers understand their rights and assert defenses.[41] In some jurisdictions, pro bono attorneys, legal services attorneys, or students from law school clinics appear in court to offer such assistance.[42] State and local courts, bar associations, law schools, and others should consider measures to increase the availability of counsel to assist consumers in debt collection litigation.

Other roundtable participants stated that the costs of appearing in court to defend debt collection lawsuits may deter some consumers from participating. Consumers may lose income if they are absent from work, or they may lack reliable transportation to and from the courthouse. To reduce such costs, roundtable participants suggested increasing the use of technology and making available alternative ways to communicate and participate.[43] For example, holding hearings by telephone or Internet might enable consumers to lose less time from work and spend less money on transportation.[44] Likewise, online exchanges of information about the debt, such as evidence of indebtedness, might eliminate the need for, or reduce the length of, a hearing.

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40. The Commission engages in extensive consumer education on a wide variety of topics, including debt collection. Because the procedures and rules related to debt collection litigation are jurisdiction-specific, state and local officials would be better placed than the FTC to develop accurate and helpful consumer education for particular jurisdictions. *See also* Appleseed Report, *supra* note 23, at 22-23 (discussing court website, public access terminals, *pro se* resources, and forms available at New York City courts, including a check-off list and explanations of available defenses in consumer debt collection actions).

41. *Accord* Rosmarin, Tr. V at 50-51.

42. *See*, *e.g.*, Appleseed Report, *supra* note 23, at 33-34; Drysdale, Tr. V at 206; Drysdale Comment at 1; Loftus, Tr. V at 206-07; MFY Comment at 3 (CLARO programs in courthouses in 4 of the 5 New York City boroughs). Some other courthouse-based programs to assist consumers in debt collection matters include CARPLS in Chicago (www.carpls.org) and an incipient Fair Debt Collection "Attorney for the Day" program run by the Boston Bar Association Volunteer Lawyers Project. *See also* Rosmarin, Tr. V at 50-52; *but see* Debski, Tr. V at 29 (claiming that such programs may unethically involve "poaching clients or soliciting clients at the courthouse steps while they're in an emotional state").

43. Such technological measures should be made available to consumers who are able to access and use them, but their use should not be required of consumers who are unfamiliar with or lack access to them.

44. *See*, *e.g.*, Debski, Tr. V at 29-30 ("I think that a lot of times . . . the consumer or debtor should be allowed to appear by telephone . . . . They wouldn't be missing work. They would be able to . . . maybe take a break from work and appear at the court.").

State and local jurisdictions thus should consider whether there are lower-cost methods of adjudicating collection disputes.

Participating in litigation is particularly costly for consumers if collectors are unprepared to proceed when consumers appear in court. Collectors often seek continuances or dismissals without prejudice; when courts grant such requests and set a new hearing date, the consumer is required once again to bear the costs of taking off work and coming to court.[45] To discourage collectors from engaging in these practices, courts should consider awarding consumers the costs of preparing for and attending the canceled hearing, including their lost wages and transportation costs.

III. Evidence of Indebtedness in the Debt Collection Litigation Process

A. Debt Collection Pleadings and Related Information

1. Complaint Information

Most states have adopted notice pleading requirements for civil litigation, including debt collection litigation, although some states continue to use more elaborate code pleading requirements.[46] Many state notice pleading systems are modeled on the notice pleading requirements included in the Federal Rules of Civil Procedure ("F.R.C.P."). Under F.R.C.P. 8(a), the complaint must include: (1) a "short and plain statement" of jurisdiction; (2) a "short and plain statement" of the claim; and (3) a demand for judgment.[47] The United States Supreme Court recently explained that F.R.C.P. 8(a) requires that a complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests"[48] by making a "claim to relief that is plausible on its face."[49] In such a claim, "the plaintiff pleads factual content that

45. *See also* Appleseed Report, *supra* note 23, at 27, 30 (recommending that New York state courts should limit adjournments as repeated court appearances create hardship for consumers and suggesting that plaintiffs may sometimes "use repeated adjournments strategically" to encourage settlements or default judgments if the consumer cannot continually appear).

46. Code pleadings require more detailed factual pleading than notice pleadings. Code pleadings state the "ultimate facts" making out each element underlying a cause of action. *See* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 Nev. L.J. 354 (2002); Charles Alan Wright & Arthur R. Miller, 5 Fed. Prac. & Proc. Civ. § 1218 (3d ed. 2010). Some examples of code pleading states include Florida, Illinois, Louisiana, Nebraska, and Pennsylvania. Z.W. Julius Chen, Following the Leader: *Twombly*, Pleading Standards, and Procedural Uniformity, 108 Colum. L.R. 1431 (2008).

47. Fed. R. Civ. P. 8(a).

48. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal cites omitted). *See also* Berman, Tr. V at 141; Berman Comment at 2.

49. *Twombly*, 550 U.S. at 570.

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"[50] and allows the court to infer "more than the mere possibility of misconduct."[51] In answering the complaint, F.R.C.P. 8(b) requires only that the defendant admit or deny every element of the plaintiff's claims, and F.R.C.P. 8(c) requires that the defendant state any affirmative defenses he or she wants to assert. If the complaint is "so vague or ambiguous that the [defendant] cannot reasonably prepare a response," the defendant can move the court to order the plaintiff to file a more definite statement.[52]

Many roundtable participants expressed views as to the nature and quality of information collectors should be required to include in their complaints. Numerous consumer representatives asserted that debt collection actions too often are filed against the wrong consumer, seek the wrong amount, or both, or are otherwise based on erroneous information.[53] To address these concerns, most consumer advocates favor complaints that set forth detailed debt-related information[54] including: (1) the name of the original creditor and redacted original account number;[55] (2) the amount owed to the original creditor;[56] (3) the date of last payment;[57] (4) the cause of action;[58] (5) the governing state law;[59] (6) the amount the consumer currently owes, broken down by principal, interest, fees, and other charges;[60] (7) information about the

50. *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937, 1949 (2009) (internal cites omitted).

51. *Iqbal*, 129 S. Ct. at 1950.

52. Fed. R. Civ. P. 12(e).

53. *See*, *e.g.*, Bromberg, Tr. V at 163; DC 37 Comment at 3; Edelman, Tr. I at 123, 135-37, 151-53, 171-72; Elder Comment at 1; Martin, Tr. V at 155; Maurer, Tr. IV at 156; NEDAP Comment at 3; Pittman, Tr. V at 187.

54. *See*, *e.g.*, AARP Comment at 11-15 (emphasis on information possessed by the creditor prior to initiating suit); Appleseed Report, *supra* note 23, at 23-26; Consumers Union Comment at 2, 4 (emphasis on information possessed by collector and shared with consumer prior to initiating suit); Edelman, Tr. I at 136-37, 171-72; Flory, Tr. IV at 170; Greater Boston Legal Services (GBLS) Comment at 2-3; Hillebrand, Tr. IV at 163, 172-73; Kinkley, Tr. IV at 159, 163; Lyngklip, Tr. I at 143; Maurer, Tr. IV at 156; National Consumer Law Center (NCLC) Comment at 5 (emphasis on information possessed by collectors prior to initiating suit).

55. *See*, *e.g.*, Appleseed Report, *supra* note 23, at 25; Consumers Union Comment at 2; Hillebrand, Tr. IV at 163, 172-73; Kinkley, Tr. IV at 163.

56. *See*, *e.g.*, Consumers Union Comment at 2; Hillebrand, Tr. IV at 163; Kinkley, Tr. IV at 163.

57. *See*, *e.g.*, Appleseed Report, *supra* note 23, at 25; Consumers Union Comment at 2; Edelman, Tr. I at 136; Hillebrand, Tr. IV at 163; Kinkley, Tr. IV at 163.

58. *See*, *e.g.*, Hillebrand, Tr. IV at 163; Kinkley, Tr. IV at 163.

59. *See*, *e.g.*, Lyngklip, Tr. I at 143-44.

60. *See*, *e.g.*, Appleseed Report, *supra* note 23, at 25; Consumers Union Comment at 2; GBLS Comment at 2-3; Hillebrand, Tr. IV at 163; Kinkley, Tr. IV at 159, 163.

applicable statute of limitations and from when it runs;[61] and (8) information as to the full chain of assignments of the debt.[62]

Several judges who participated in the roundtables expressed concern that the information in many debt collection complaints appears to be inadequate.[63] They reported that the most common question of consumer defendants in debt collection cases is, "Where is this from?"[64] That is, consumers are often puzzled by the allegations that they owe a debt to an entity they do not recognize,[65] and they are puzzled about the timing and amount of the alleged debt. Some judges stated that more information should be included in debt collection complaints so that consumers can understand who is suing them, on what basis, and for how much.[66]

Some collector representatives emphasized that, although they regularly provide more information in their complaints, in a notice pleading system they are only required to provide limited information.[67] Most collector representatives favored including enough information in the complaint itself to enable the defendant to easily recognize and understand the debt on which the complaint is based.[68] Other collector representatives, however, favored including more information in their complaints, such as: (1) the name of the original creditor and a redacted version of the original account number for purchased accounts, perhaps accompanied by a statement that the account was transferred from the original creditor to the current owner;[69]

61. *See*, *e.g.*, GBLS Comment at 2-3; Kinkley, Tr. IV at 159.
62. *See*, *e.g.*, Appleseed Report, *supra* note 23, at 25; GBLS Comment at 2-3; Edelman, Tr. I at 136; Lyngklip, Tr. I at 143.
63. *See*, *e.g.*, Donnelly, Tr. I at 146; Moiseev, Tr. I at 113.
64. *See*, *e.g.*, Donnelly, Tr. I at 89; Fisher, Tr. V at 150; Moiseev, Tr. I at 91; Nordlund, Tr. V at 146.
65. See discussion about the growth of debt buying, *supra*, at Chapter 2, § I. When debt is purchased by a new entity, in some instances consumers may mistakenly believe that their lack of familiarity with the entity indicates that they never incurred the alleged debt.
66. *See*, *e.g.*, Donnelly, Tr. I at 146, 154-55; Fisher, Tr. V at 150, 164, 167; Moiseev, Tr. I at 155-57; Nordlund, Tr. V at 146.
67. *See*, *e.g.*, ACA Comment at 15; Asset Comment at 4; Bender, Tr. V at 159; Buckles, Tr. I at 108-09; Moore, Tr. IV at 186; NARCA Comment at 7-8; Newburger, Tr. IV at 191-92, 198; PRA Comment at 3; Sinsley, Tr. I at 102-03.
68. *See*, *e.g.*, ACA Comment at 16 (complaint should contain sufficient information to evaluate the claim for indebtedness); Bender, Tr. V at 159-60 ("Responsible collection attorneys want there to be sufficient information attached to a complaint so that a consumer is fully informed regarding what his or her responsibilities are alleged to be."); Moore, Tr. IV at 153 (through pleading "I'm also trying to give the consumer enough information so that they know why I'm suing them"); Myers, Tr. V at 198; Newburger, Tr. IV at 154-55 (some firms are "careful about pleading in a way that the consumer can identify what the account is that's being sued"); Olshan, Tr. V at 189 ("We need to find ways for there to be transparency through information in the pleading."); Ray, Tr. IV at 169-70.
69. *See*, *e.g.*, Buckles, Tr. I at 133; Moore, Tr. IV at 153; Newburger, Tr. IV at 154-55; Olshan, Tr. V at 145, 154; Ray, Tr. IV at 169; Sargis, Tr. IV at 175.

(2) the date of default or charge-off and the amount of the debt at that time;[70] and (3) the amount of interest demanded and the basis for how the interest amount was computed, perhaps accompanied by a statement of fees and other charges incurred since the time of charge-off.[71]

The function of debt collection complaints in a notice pleading system is to provide sufficient information so that: (1) consumers can determine whether to admit or deny the complaint allegations and assert affirmative defenses in their answers; and (2) judges can determine whether to grant a motion for a more definite statement or enter a default judgment. To ensure that sufficient information is provided, the Commission believes collectors generally should include the following information in complaints: (1) the name of the original creditor[72] and the last four digits of the original account number; (2) the date of default or charge-off and the amount due at that time; (3) the name of the current owner of the debt; (4) the total amount currently due on the debt; and (5) a breakdown of the total amount currently due by principal, interest, and fees.[73]

Based on the evidence gathered in connection with these proceedings, the FTC believes that many debt collection complaints do not provide this information to consumers. The Commission recognizes that the rigorous application of existing rules in individual cases could mitigate this problem, but some jurisdictions may want to consider more systematic solutions. Several jurisdictions now require that all debt collection complaints include the kind of information the Commission believes is appropriate.[74] The FTC recommends that jurisdictions consider adopting such requirements to the extent that application of existing rules does not result in sufficient information being set forth in debt collection complaints.

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70. *See*, *e.g.*, Berman, Tr. V at 141-42; Moore, Tr. IV at 152, 164; Newburger, Tr. IV at 154, 164-65; Olshan, Tr. V at 145, 154. *See also* Naves, Tr. IV at 87 (creditor account record information "is inherently reliable from our perspective, because [creditors] are using that to conduct their business. The dates that we get for a charge-off, the dates that we get for date of last payment, the dates that we get for original default are the dates that are provided by the companies that have a responsibility to keep those records and they are indeed the records by which they manage their businesses.").

71. *See*, *e.g.*, Moore, Tr. IV at 152; Newburger, Tr. IV at 164-65; Olshan, Tr. V at 145.

72. In its February 2009 workshop report, the Commission advocated requiring more information be provided to consumers under the FDCPA's validation notices. This included the name of the original creditor and an itemized breakdown of a debt into principal, interest, and other fees and charges. Challenges of Change, *supra* note 1, at § VI.A.2.b.

73. As explained below in Part IV, the FTC recommends for other reasons that debt collection complaints include: (1) the date of default or last payment on the debt, and (2) the applicable statute of limitations on the debt.

74. *See*, *e.g.*, Mass. Ann. Laws Unif. Small Claims Rules 2(a), 2(b); Michigan Court Rules 3.101; N.C. Gen. Stat. §§ 58-70-115, 58-70-145, 58-70-150, 58-70-155 (2009); *see also* Fairfax County, Virginia General District Court Best Practices: Default Judgments/Debt Buyers and Purchased Debt-Default Judgment Checklist (2009); State of Connecticut Judicial Branch, Report of the Bench/Bar Small Claims Committee at 4, 10 (2009).

2. Complaint Attachments

Roundtable participants expressed widely varying views as to the information that collectors should be required to include as attachments to complaints. Consumer advocates tended to favor extensive attachments to complaints, such as the underlying contract giving rise to the debt[75] or evidence of the underlying contract (including the applicable terms and conditions and the signed account application), copies of account statements or other records of the debt, and the chain of title showing how the collector came to own the particular obligation.[76] Consumer group representatives emphasized that some states require certain complaint attachments including a copy of the contract giving rise to the cause of action,[77] or a summary statement with the precise amount of the claim and any interest and a bill showing services rendered and sold.[78] Other states require even more extensive attachments. In cases involving credit card debt, one state requires that the plaintiff attach "the actual documents, including evidence that the consumer was the one who signed the account application, a copy of the account agreement, and a copy of billing statements."[79]

Some judicial participants said that the inclusion of attachments with debt collection complaints would be useful. Other judges, however, expressed reservations about imposing such a requirement because the additional paper filed would add to the difficulty the courts already have in managing the documents they receive.[80]

75. Consumer advocates recently supported proposed legislation in Massachusetts that would require the contract be attached as part of a debt collection complaint. *See* Mitchell-Munevar, Tr. V at 156. Likewise, a bill pending in Minnesota would require debt buyer plaintiffs to attach the original contract, an affidavit setting forth the date and amount of the last payment, and written proof that the plaintiff does, indeed, own the debt. *See* Minnesota S.F. No. 2689 (2009-2010). Similarly, New York's proposed "Consumer Credit Fairness Act," Assem. B. 7558/S. 4398, Leg. 232 Sess. (N.Y. 2009), would require that the contract or other instrument on which the action is based be attached to a consumer debt collection complaint.

76. *See*, *e.g.*, Barry, Tr. I at 138; Bromberg, Tr. V at 162 ("you have to have copies of the cardholder agreements, amendments, chains of assignment, proof of assignment . . . [and] copies of bills"); Brown, Tr. I at 171-72; Edelman, Tr. I at 136-37; Kinkley, Tr. IV at 159, 194; Mitchell-Munevar, Tr. V at 190 (supporting "an up-front submission of more documentation" because no discovery is ordinarily permitted in Massachusetts small claims courts); Wu, Tr. V at 147.

77. *See*, *e.g.*, Carpenter, Tr. V at 148 (Pennsylvania); Coleman, Tr. IV at 178 (California: either attach the contract or state its relevant terms); Drysdale, Tr. V at 171 (Florida); Lyngklip, Tr. I at 131 (Michigan); Mitchell-Munevar, Tr. V at 156 (a proposal before the Massachusetts legislature would require contracts be attached to complaints); Myers, Tr. V at 200 (North Carolina's new statute as to debt buyers).

78. Md. Rule 3-306. *See also* Bender, Tr. V at 142.

79. Wu, Tr. V at 147 (describing Arkansas law); *see also Danner v. Discover Bank*, 99 Ark. App. 71, 72 (Ark. Ct. App. 2007).

80. *See*, *e.g.*, Fisher, Tr. V at 167; Surh, Tr. IV at 193.

Collectors and creditors raised concerns about including documentation with the complaint. One collector representative stated that collectors should be required to include information about contracts in complaints but not to attach the contracts to complaints, in part because "in the 21st century, contracts are not always in writing."[81] A debt collection attorney from California (a state where the contract must be attached *or* the relevant terms of the contract must be stated in the complaint) objected that "to require [the contract itself be included as] an attachment would be to change California law."[82] Similarly, one collection attorney from Michigan (a state which requires attaching the underlying contract) disfavored attaching copies of the contract *assigning* a debt to its present owner.[83] In discussing whether the chain of title for a purchased debt should be attached to the complaint, another collector representative maintained that attachment should not be required, and that the chain of title should not be produced unless the consumer contests the claim that the plaintiff owns the debt.[84]

As with information in the complaint itself, the information contained in attachments to the complaint needs to be sufficient for consumers to determine how to answer the complaint allegations and for judges to decide motions for a more definite statement or for a default judgment. Although some consumers and courts would benefit if they knew more about the debt, including information about the underlying contract and transaction history, mandating the attachment of extensive documentation about the debt (such as contracts and account statements) would result in increased costs to collectors and court systems. The Commission therefore recommends that courts rigorously apply current court rules to require that contracts or other documentation be provided with complaints only if they are necessary for consumers to answer the complaint or for courts to decide whether to grant motions for more definite statements or for default judgments. Jurisdictions should also consider specifying documents (or explanations in lieu of documents) that must accompany complaints if judicial application of existing rules in individual cases would not be sufficient to change the information set forth in complaints.

B. Default and Summary Judgment Checklists

If a defendant does not answer or otherwise defend a debt collection action, a default judgment may be entered against the defendant. First, the clerk of the court must enter a default if "a party against whom a judgment for affirmative relief is sought has failed to

81. Olshan, Tr. V at 153-54.

82. Coleman, Tr. IV at 178.

83. Buckles, Tr. I at 132-3. Note that some Michigan consumer advocates interpret the requirement of attaching the contract giving rise to the suit to extend to a requirement that the assignment contracts be attached. *See* Lyngklip, Tr. I at 131.

84. Ray, Tr. IV at 194. *See also* Berman Comment at 15-16.

plead or otherwise defend" and the failure to plead or defend has been "shown by affidavit or otherwise."[85] Second, unless the claim is for a sum certain or a sum that can be made certain by computation, the plaintiff must apply to the court for a default judgment after the clerk has entered a default. In considering a motion for a default judgment, the court may: (1) conduct an accounting; (2) determine the amount of damages; (3) establish the truth of any allegation by evidence; or (4) investigate any other matter.[86] After considering the available information, the court has discretion in deciding whether to grant a default judgment.[87]

As discussed above, the Commission recommends steps to increase consumer participation in debt collection litigation to help decrease the prevalence of default judgments. In an effort to address this problem in another way, some court systems have adopted measures to encourage judges to apply appropriate and consistent standards – including legal standards and court rules – in deciding whether to grant such judgments.[88] Massachusetts developed a checklist for magistrates setting out the elements that must be shown to grant a default judgment in a debt collection case.[89] The Commission recommends that other state court systems consider

85. Fed. R. Civ. P. 55(a).

86. Fed. R. Civ. P. 55(b)(2).

87. "In determining whether to enter a default judgment, the court is free to consider a number of factors that may appear from the record before it. Among these are the amount of money potentially involved; whether material issues of fact or issues of substantial public importance are at issue; whether the default is largely technical; whether plaintiff has been substantially prejudiced by the delay involved; and whether the grounds for default are clearly established or are in doubt. Furthermore, the court may consider how harsh an effect a default judgment might have; or whether the default was caused by a good-faith mistake or by excusable or inexcusable neglect on the part of the defendant. Plaintiff's actions also may be relevant; if plaintiff has engaged in a course of delay or has sought numerous continuances, the court may determine that a default judgment would not be appropriate. Finally, the court may consider whether it later would be obliged to set aside the default on defendant's motion, since it would be meaningless to enter the judgment as a matter of course if that decision meant that the court immediately would be required to take up the question of whether it should be set aside." Charles Alan Wright & Arthur R. Miller, 10A Fed. Prac. & Proc. Civ. § 2685 (3d ed. 2010). *See*, *e.g.*, *Wright v. Liguori*, 2009 U.S. Dist. LEXIS 93840, *6-*7 (D. Del. 2009); *Fanning v. Permanent Solution Indus., Inc.*, 257 F.R.D. 4, 7 (D.D.C. 2009).

88. *See*, *e.g.*, Mass. Ann. Laws Unif. Small Claims Rules 7(d) (*see also* Small Claims Default Judgment Checklist provided in Trial Court of the Commonwealth of Massachusetts District Court Department Memorandum from Hon. Lynda M. Connolly, Chief Justice (Sept. 11, 2009)); Fairfax County, Virginia General District Court Purchased Debt-Default Judgment Checklist (2009); State of Connecticut Judicial Branch, Report of the Bench/Bar Small Claims Committee at 10-11 (2009) (*see also* proposed Connecticut Small Claims Judgment Checklist for Magistrates at Appendix E, Judicial Branch, Report of the Bench/Bar Small Claims Committee (2009)); *see generally also* N.C. Gen. Stat. §§ 58-70-145, 58-70-150, 58-70-155 (2009). See Appendix E for examples of such checklists.

89. Mass. Ann. Laws Unif. Small Claims Rules 7(d); Small Claims Default Judgment Checklist provided in Trial Court of the Commonwealth of Massachusetts District Court Department Memorandum from Hon. Lynda M. Connolly, Chief Justice (Sept. 11, 2009).

adopting similar checklists, to promote the application of proper and uniform requirements for determining whether to grant a default judgment.[90]

Some jurisdictions also have adopted specific checklists for granting judgments in actions brought by debt buyers. North Carolina recently enacted a statute requiring courts to use a special checklist of elements a debt buyer must meet to be awarded default or summary judgment in a debt collection action.[91] Fairfax County, Virginia, also provides a checklist for judges to use in determining whether to grant a default judgment to a debt buyer.[92] New York City requires debt buyers to present special affidavits showing the chain of title to obtain a judgment.[93] The rationale for mandating that courts follow a checklist or review special affidavits is that, if debt buyers sue to collect, the debts at issue have changed hands more often and are older than other debts. The FTC has not reached any conclusions as to whether different standards should apply to debt buyers than to other owners of debts,[94] but jurisdictions concerned about the validity of the debts on which debt buyers are suing may want to adopt one of these models.[95]

C. Unnecessary Litigation Costs

A number of roundtable participants stated that the litigation practices of collectors have imposed unnecessary costs on consumers. At times, according to these participants, collectors, particularly debt buyers, are not ready to proceed to trial when consumers appear to defend.[96] Given how infrequently consumers appear and defend, some collectors may decide not to expend the costs necessary to be ready to proceed to trial on the off chance that the consumer might appear. Because they are not prepared to go to trial, such collectors reportedly often seek continuances or dismissals without prejudice so that the cases can be pursued or re-filed at a later

90. See Appendix E for examples.

91. N.C. Gen. Stat. § 58-70-155 (2009).

92. Fairfax County, Virginia General District Court Purchased Debt-Default Judgment Checklist (2009).

93. N.Y. City Civ. Ct. Directives and Procedures DRP-182 (May 13, 2009).

94. In December 2009, the Commission commenced a comprehensive study of the debt buying industry by ordering the production of information from nine of the largest debt buyers in the United States. Once the FTC has reviewed and analyzed this information, the agency will be able to offer better-informed views as to the conduct of debt buyers and the standards that should apply to them.

95. Legislation aimed at scrutinizing debt buyer evidence was recently introduced in the Minnesota legislature. It would require such plaintiffs to provide contract copies, affidavits of last consumer payment date and amount, and written proof of ownership, among other features. *See* Minnesota S.F. No. 2689.

96. *See*, *e.g.*, Barry, Tr. I at 105, 112; Donnelly, Tr. I at 108; Flory, Tr. IV at 170; Lipman, Tr. I at 107, 149; Nepveu, Tr. I at 106; Pittman, Tr. V at 187; *but see also* Donnelly, Tr. I at 112 (collectors may decide "it's not worth it" to fight the consumer); Sinsley, Tr. I at 112 (same).

date.[97] In addition to the burdens this practice imposes on the court system, it is inconvenient and costly to consumers who have appeared in court, and then must re-appear in court when the case is rescheduled.[98] Some courts have acted to deter this practice. For example, according to a judge of the Blair County, Pennsylvania "Credit Card Court," if the plaintiff does not appear at an initial mandatory conciliation conference, the case is dismissed with prejudice.[99] Courts also may impose sanctions on parties or their counsel to deter this practice, or order that they pay the costs of the consumers who have appeared for trial. To the extent that judges conclude that a collector has engaged in this practice, they may want to consider taking similar measures.

IV. Statutes of Limitations

States usually establish a particular period of time, known as the statute of limitations, to set the duration during which an action to compel payment of a debt may be brought. Statutes of limitations help ensure that consumers can defend themselves in collection actions and that courts will have the evidence they need to resolve these disputes.[100] Statutes of limitations also provide a bright line for collectors and consumers as to the date after which the collector should no longer file an action to collect on a debt.

In most states, the running of the statute of limitations does not extinguish the consumer's underlying debt.[101] But if the collector files a legal action to recover on the debt, the consumer can raise the running of the statute of limitations as an affirmative defense.[102] The running of the

97. *See* sources in *supra* note 96; Appleseed Report, *supra* note 23, at 27, 30; Pittman, Tr. V at 187 (describing his experience with a debt buyer with no access to documentary media: "If [any consumer] comes to court, [the debt buyer is] going to dismiss, because they can't get the proof.").

98. *See* Donnelly, Tr. I at 146; Weinberg, Tr. I at 158.

99. Carpenter, Tr. V at 183. *See also* Mass. Ann. Laws Unif. Small Claims Rules 7(c) (requiring that a judgment for the defendant, rather than a dismissal, must be entered if the defendant is present for the scheduled trial, the plaintiff does not appear or is not prepared to proceed to trial, and there is no good cause for a continuance).

100. *See United States v. Kubrick*, 444 U.S. 111, 117 (1979) (statutes of limitations "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise").

101. In Mississippi and Wisconsin the expiration of the statute of limitations legally extinguishes the debt. Miss. Code Ann. § 15-1-3 (2009); Wis. Stat. Ann. § 893.05 (2009).

102. *See*, *e.g.*, Evans, Tr. V at 89 (Florida); Gargano, Tr. IV at 119 (California); Lipman, Tr. I at 90 (Iowa); Surh, Tr. IV at 113 (California). In Mississippi and Wisconsin, however, the expiration of the statute of limitations legally extinguishes the debt, thus making a suit on a time-barred debt subject to dismissal for failure to state a cause of action. Miss. Code Ann. § 15-1-3 (2009) (*see*, *e.g.*, *Lowery v. Statewide Healthcare Serv., Inc.*, 585 So. 2d 778, 780 (Miss. 1991)); Wis. Stat. Ann. § 893.05 (2009) (*see*, *e.g.*, *Klewer v. Cavalry Invs., LLC*, 2002 U.S. Dist. LEXIS 1778, *6, *8 (W.D. Wis. 2002)).

statute of limitations, however, does not prohibit the collector from using non-litigation means (such as collection telephone calls) to try to collect on the debt.[103]

Nearly all courts that have examined the propriety of suing or threatening to sue to collect on a debt that is older than the applicable statute of limitations (also known as "time-barred debt") have concluded that such practices violate the FDCPA. In *Kimber v. Federal Financial Corp.*, the court held it was unfair and unconscionable in violation of Section 808 to sue on time-barred debt in light of the strong public policy favoring statutes of limitations and the likelihood that the "least sophisticated consumer" would "unwittingly acquiesce" to suit due to lack of awareness that the passage of time could be raised as a defense.[104] It further held that to threaten suit on a time-barred debt was deceptive in violation of Section 807 because it "implicitly represented that [the collector] could recover in a lawsuit, when it [could] not properly do so."[105] Most other courts addressing this issue have reached the same result.[106] Industry groups have also adopted policies requiring members to refrain from suing or threatening suit on time-barred debts.[107] The Commission agrees with the interpretation that the FDCPA bars actual or threatened suit to collect on time-barred debts.[108]

103. Even in the absence of a legal obligation to repay a debt, people may choose to pay for moral or other reasons. *See, e.g.*, John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1121 (1983-1984) ("I found the belief widespread among credit industry professionals that voluntary payment is motivated largely by moral as opposed to legal considerations").

104. *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987).

105. *Kimber*, 668 F. Supp. at 1489.

106. *Freyermuth v. Credit Bureau Servs., Inc.*, 248 F.3d 767 (8th Cir. 2001); *McCullough v. Johnson, Rodenberg & Lauinger*, 2009 U.S. Dist. LEXIS 69881 (D. Mont. 2009); *Ramirez v. Palisades Collection, L.L.C.*, 2008 U.S. Dist. LEXIS 48722 (N.D. Ill. 2008); *Larsen v. JBC Legal Group, P.C.*, 553 F. Supp. 2d 290 (E.D.N.Y. 2008); *Martsolf v. JBC Legal Group, P.C.*, 2008 U.S. Dist. LEXIS 6876 (M.D. Pa. 2008); *Rawson v. Credigy Receivables, Inc.*, 2006 U.S. Dist. LEXIS 6450 (N.D. Ill. 2006); *Thinesen v. JBC Legal Group, P.C.*, 2005 U.S. Dist. LEXIS 21637 (D. Minn. 2005); *Dunaway v. JBC & Assocs., Inc.*, 2005 U.S. Dist. LEXIS 37885 (E.D. Mich. 2005); *Spencer v. Hendersen-Webb*, 81 F. Supp. 2d 582 (D. Md. 1999); *Stepney v. Outsourcing Solutions, Inc.*, 1997 U.S. Dist. LEXIS 18264 (N.D. Ill. 1997); *Martinez v. Albuquerque Collection Servs.*, 867 F. Supp. 1495 (D. N.M. 1994); *Beattie v. D.M. Collections, Inc.*, 754 F. Supp. 383 (D. Del. 1991); *but see Simmons v. Miller*, 970 F. Supp. 661 (S.D. Ind. 1997) (no FDCPA violation where suit had not been knowingly filed beyond statute of limitations); *Lindbergh v. Transworld Sys., Inc.*, 846 F. Supp. 175 (D. Conn. 1994) (no FDCPA violation where suit was not knowingly filed beyond statute of limitations).

107. *See*, *e.g.*, ACA Comment at 12 (collectors that "threaten or pursue litigation of an out of statute account do so in violation of the law and ACA's Code of Ethics").

108. Likewise, the Commission believes that threatening or commencement of arbitration proceedings to collect on time-barred debts may violate Sections 807 and 808 of the FDCPA, 15 U.S.C. §§ 1692e, 1692f. *See Kimber*, 668 F. Supp. at 1489.

A. Statute of Limitations Period

Most statutes of limitations on consumer debt begin to run from the date that the consumer defaulted on the debt.[109] The period of time for the statute of limitations varies by state. In addition, for each state, the period of time may vary with the particular kind of debt and circumstances under which it arose (*e.g.*, whether the debt arose under a written or oral contract).[110]

Roundtable participants said that it is sometimes difficult to determine which among several potential statutes of limitations is applicable to a particular debt.[111] In Illinois, for example, recent case law clarified that the appropriate statute of limitations for an action to collect on credit card debt depends on whether the suit is based on a written contract.[112] If the collector produces a written contract, a ten-year statute of limitations applies. If the collector cannot do so, a five-year statute of limitations applies.

Uncertainty as to the applicable statute of limitations could harm both consumers and collectors. For instance, if consumers are not certain as to how long collectors have to sue them, they may make partial payments on time-barred debt, thereby unintentionally reviving the statute of limitations. In addition, if collectors are uncertain as to the applicable statute of limitations, they may inadvertently file actions to recover on time-barred debt.[113]

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109. *See*, *e.g.*, Nat'l Consumer Law Ctr., Collection Actions §§ 3.7.6, 3.7.7 (1st ed. 2008) (hereinafter NCLC Collection Actions).

110. *See*, *e.g.*, *Portfolio Acquisitions, LLC v. Feltman*, 391 Ill. App. 3d 642, 652 (Ill. App. Ct. 1st Dist. 2009) (holding that, under Illinois law, a credit card contract was oral rather than written and subject to the 5-year statute of limitations for oral contracts rather than the 10-year statute of limitations for written contracts where parol evidence would be required to show all essential terms and conditions of the contract). *See also* Donnelly, Tr. I at 125 (ambiguity of complaint as to whether it refers to an account-stated or an oral contract, which have different applicable statutes of limitations); Markoff, Tr. I at 98; Lipman, Tr. I at 106-107, 123.

111. *See*, *e.g.*, NARCA Comment at 7 ("several different statute of limitations *may* apply to a debt claim") (emphasis added); Coleman, Tr. IV at 95; Debski, Tr. V at 121; Donnelly, Tr. I at 125; Edelman, Tr. I at 82; Evans, Tr. V at 101, 121; Flitter, Tr. V at 98; Kinkley, Tr. IV at 85; Lipman, Tr. I at 106; Naves, Tr. IV at 127, 145-46; Newburger, Tr. IV at 92; Sinsley, Tr. I at 84. *See also Florida Consumer Turns Tables on Debt Collector – Sued for $800.00 Dollars, Consumer Collects $120,000.00 Dollars From Debt Collector*, Yahoo! News, Mar. 1, 2010, *available at* http://www.prweb.com/releases/2010/03/prweb3657014.htm (describing consumer's defense of state collection action and subsequent pursuit of federal FDCPA action against collector for suit on time-barred debt, where collector filed based on the wrong state's statute of limitations and where contract was held to be oral rather than written).

112. *See Portfolio Acquisitions*, 391 Ill. App. 3d at 652.

113. *See*, *e.g.*, Asset Comment at 3 (some cases involving allegations of suit on time-barred debt involve "intricate legal issues" such as choice of law provisions and distinguishing between written and oral contracts); NARCA Comment at 6-7 (actions should be governed by the statute of limitations of the forum state, not the state where the credit agreement originated).

Roundtable participants discussed whether a single, uniform statute of limitations for consumer debt cases would reduce such uncertainty where it exists. Many participants favored this concept in theory, although consumer advocates and collector representatives recognized that they likely would differ widely as to how long such a statutory period should be,[114] and they expressed serious reservations about Congress establishing a national standard.[115] Most participants preferred that states continue to perform their traditional role in setting statutes of limitations for debt collection actions,[116] though many expressed that making state statutes more uniform would be beneficial for both collectors and consumers.[117]

To the extent that states conclude there is uncertainty as to the applicable statute of limitations for a debt or how to apply it, the Commission recommends that they consider modifying their laws to reduce the uncertainty. If state statutes of limitations for consumer debts are clear, simple, and uniform, consumers and collectors stand to benefit.

B. Collecting on Time-Barred Debt

Roundtable participants discussed the collection of time-barred debt. As noted above, state law generally does not prohibit collectors from using methods other than threatening to file or filing an action in court[118] to collect on time-barred debt. The two major issues participants discussed were whether the FDCPA should be amended to prohibit the collection of such debt and whether the law should permit payments on such debt to "revive" the unpaid amount of the debt.

114. *See*, *e.g.*, Kinkley, Tr. IV at 141-42; Moore, Tr. IV at 146-47; Naves, Tr. IV at 127, 145-46; Newburger, Tr. IV at 148. *See also* ACA Comment at 15 (promoting a uniform statute of limitations of 10 years across all jurisdictions); Cada Comment at 1 (11/22/09) (suggesting all states should adopt a statute of limitations of 4 years); Staulcup Comment at 1 (favoring a uniform statute of limitations of 7 years).

115. Proposed Levin Amendment SA 1097 to the Credit Card Act of 2009 would have amended the Truth in Lending Act to provide for rulemaking to establish a uniform statute of limitations for collecting debt on credit card accounts after the accounts had been closed by the creditor or the cardholder, but this amendment was not included in the Credit CARD Act of 2009. CQ Congressional Record Service, Congressional Record, Senate, Page S5445, May 13, 2009.

116. *See* Abrams, Tr. V at 121; Coffey, Tr. V at 121; Debski, Tr. V at 121; Faulkner, Tr. V at 121-22; Flitter, Tr. V at 122; Gagnon, Tr. V at 122; Groves, Tr. V at 122; McNulty, Tr. V at 123; Needleman, Tr. V at 123; Redmond, Tr. V at 123; Rosmarin, Tr. V at 123. *See also* Evans, Tr. V at 121; Lebedeff, Tr. V at 123; Zezulinski, Tr. V at 123.

117. *See*, *e.g.*, Kinkley, Tr. IV at 141-43; Naves, Tr. IV at 127, 145-46; Newburger, Tr. IV at 148.

118. Recent statutory reform in North Carolina provides that it is an unfair practice for a debt buyer collector to "[bring] suit or [initiate] an arbitration proceeding against the debtor *or otherwise [attempt] to collect on a debt* when the [collector] knows, or reasonably should know, that such collection is barred by the applicable statute of limitations." N.C. Gen. Stat. § 58-70-115(4) (emphasis added).

Participants differed in their views about whether the FDCPA should be amended to bar the collection of time-barred debt. Most collector participants favored continuing to allow the collection of time-barred debt, provided that collectors neither sue nor threaten to sue the consumers from whom they are trying to collect.[119] Many consumer advocates asserted that the FDCPA should prohibit such collection attempts, or, in the alternative, that collectors should explicitly be required to disclose to consumers that they cannot be sued to collect on the debt.[120] Collector representatives countered that making such a disclosure would require that the collector interpret state law as to the applicable statute of limitations, which state officials could construe as the unauthorized practice of law.[121]

The Commission takes no position on whether the FDCPA should be amended to preclude collectors from collecting debt that they know or should know is time-barred. Nevertheless, because most consumers do not know or understand their legal rights with respect to the collection of time-barred debt, the Commission believes that in many circumstances such a collection attempt may create a misleading impression that the collector can sue the consumer in court to collect the debt, in violation of Section 5 of the FTC Act and Section 807 of the FDCPA.[122] To avoid creating this misleading impression, collectors would need to disclose clearly and prominently to consumers before seeking payment on such time-barred debt that,

119. *See*, *e.g.*, Debski, Tr. V at 88; Sinsley, Tr. I at 86; *but see also* Groves, Tr. V at 85 ("it's clear that collecting on out-of-stat[ute] consumer debt is a bad idea").

120. *See*, *e.g.,* AARP Comment at 2 (favors requiring an affirmative disclosure about the statute of limitations when collecting time-barred debts); Barry, Tr. I at 120 (FDCPA should be amended to require disclosure to consumer that the statute has expired); Edelman, Tr. I at 83 (stated he has seen debt buyers "badger somebody into making a small payment" the only purpose of which is to re-trigger the statute of limitations), 94 (stated debt buyers frequently send collection letters on time-barred debts implying that there is still "a binding, legally enforceable obligation"); Edelman Comment at 20 (collecting time-barred debts should be declared an unfair or deceptive practice unless there is a reasonable basis to believe the debts are not time-barred); Flory, Tr. IV at 139 (consumers are told to send a little bit of money to "show good faith" even where they do not owe the medical bill or their insurance company should be paying it); Kinkley, Tr. IV at 138-39 ("And there are a lot of debt collectors who sort of trick somebody and say: Just send me five bucks" without disclosing that such payment would make "a debt that's uncollectible judicially now collectable"); NCLC Comment at 5 (collectors should be required to clarify that consumers cannot be sued for non-payment of a time-barred debt); NEDAP comment at 5 (FDCPA language should be amended to explicitly prohibit debt collectors from filing suits on time-barred debts); Nepveu, Tr. I at 91 (consumers do not know that it matters how long ago something happened); Weinberg, Tr. I at 96 (has seen debt buyers scare senior citizens into authorizing small payments on aged debts that they really don't recognize in order to re-trigger the statute of limitations); *but see also* Donnelly, Tr. I at 121 (consumers wouldn't understand such disclosures).

121. *See*, *e.g.*, Andersen, Tr. I at 116; Sargis, Tr. IV at 135; Sinsley, Tr. I at 117-18. *See also* ACA Comment at 14 (consumer disclosure might lead consumers mistakenly to believe that the debt is no longer valid).

122. FTC Act § 5(a), 15 U.S.C. § 45(a); FDCPA § 807, 15 U.S.C. § 1692e. In addition, the failure to disclose this information may violate state laws prohibiting unfair and deceptive acts and practices.

because of the passage of time, they can no longer sue in court to collect the debt or otherwise compel payment.[123]

The second issue related to collecting on time-barred debt roundtable participants addressed was the "reviving" of such debt. In many states, making a payment on a debt after it has gone into default triggers the start of a new statute of limitations period for the entire debt, even if the original statute of limitations period has already expired.[124] For example, if such a state has a three-year statute of limitations for credit card debt and it has been five years since a consumer paid on his $3,000 credit card debt, the collector could not lawfully sue him to collect on the debt. But if he decides to pay the collector $10, the payment would start a three-year period during which the collector could sue for the remaining $2,990.[125] Debt collectors generally do not disclose to consumers that making any payment on a time-barred debt revives the collector's ability to sue to collect on the entire debt.[126]

Roundtable participants differed in their views about whether a payment should revive the statute of limitations on a time-barred debt. Some opined that state law should continue to allow the revival upon payment of time-barred debts.[127] Other participants contended that state law should be amended so that a payment on a time-barred debt does not revive the statute of limitations.[128] Still others asserted that state law should be changed to require that the collectors

123. In some circumstances, collecting on time-barred debt could be an unfair act or practice under Section 5 of the FTC Act or state laws prohibiting unfair acts or practices. For collecting on time-barred debt to be unfair under Section 5 of the FTC Act, the Commission would have to demonstrate that "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." FTC Act § 5(n); 15 U.S.C. § 45(n). Determining whether an act or practice is unfair is a fact-specific inquiry.

124. *See*, *e.g.*, NCLC Collection Actions, *supra* note 109, at § 3.7.7.3.1.

125. For sake of simplicity, we have not included in this amount additional interest or fees that the credit contract may impose.

126. Most consumers do not understand that a payment will revive the statute of limitations. Some roundtable participants suggested that many consumers do not even understand the basic concept that a statute of limitations prevents collectors from suing to collect on debts after the passage of a period of time. *See*, *e.g.*, Nepveu, Tr. I at 91; *but see also* Lerch, Tr. I at 100 (consumers do know about the concept that when something happened too long ago, suit is barred).

127. *See*, *e.g.*, Debski, Tr. V at 118-19 (no need for disclosure or affirmation when consumer continues to pay on an out-of-statute debt).

128. *See*, *e.g.*, Rosmarin, Tr. V at 96.

disclose to consumers the effect of paying on a time-barred debt, or to require consumers to make a knowing affirmation that they waive their rights to be immune from suit.[129]

The Commission recommends that states in which a partial payment revives the statute of limitations consider modifying their laws so that a payment on a time-barred debt does not revive the debt unless the consumer is aware of and acknowledges its revival. Otherwise, consumers do not expect that a partial payment toward a time-barred debt will have the serious, adverse consequence of starting a new statute of limitations during which the collector can sue to collect the entire debt. Limiting consumers' responsibility to the amount of the partial payment on a time-barred debt would conform the law to reasonable consumer expectations.

In states where laws continue to provide that a partial payment on a time-barred debt revives it, the Commission believes that in many circumstances a collector's attempt to collect a debt that it knows or should know is time-barred may create a misleading impression as to the consequences of making such a payment, in violation of Section 5 of the FTC Act and Section 807 of the FDCPA.[130] To avoid creating a misleading impression, collectors would need to disclose clearly and prominently to consumers prior to requesting or accepting such payments that (1) the collector cannot sue to collect the debt and (2) providing a partial payment would revive the collector's ability to sue to collect the balance.

129. *See, e.g.*, AARP Comment at 2 (creditors should be required to disclose affirmatively that debt is time-barred and that making partial payment will revive the obligation); Evans, Tr. V at 119-20 (favors a disclosure requirement for consumers paying on time-barred debts because "we have to make sure [consumers] understand what they're doing and they're doing it with knowledge"); Faulkner, Tr. V at 81-82 ("it should be an unfair practice to buy or sell out-of-statute debts" and, without a disclosure, consumers are misled to believe they are under threat of suit on time-barred debts); Lebedeff, Tr. V at 84-85 (familiar with collection practice of asking for a token payment to prolong statute or revive an out-of-statute debt obligation); Rosmarin, Tr. V at 118 (disfavors reviving a time-barred debt through subsequent payment except when consumers write affirmative statements evincing understanding of their lack of legal obligation to pay and affirming that they still want to pay); *but see also* ACA Comment at 14 (notification that a debt is time-barred might confuse consumers); Midland Credit Management (Midland) Comment at 3 (providing consumers with more information regarding an account's legal status would only confuse consumers and should not be attempted).

130. FTC Act § 5(a), 15 U.S.C. § 45(a); FDCPA § 807, 15 U.S.C. § 1692e.

C. Suits on Time-Barred Debts

Many consumer advocates and some judges expressed the view that some collectors regularly sue consumers on time-barred debts.[131] Some consumer advocates suggested that debt buyers are more likely than original creditors to threaten or bring suits on time-barred debts.[132] One New York legal services provider analyzed a sample of all the debt collection cases in its office over an eighteen-month period and found that over fifty percent of the cases for which sufficient information was available were filed after the statute of limitations period had expired. In addition, in thirteen percent of all cases, the debt's time-barred status was apparent from the face of the complaint.[133] On the other hand, many collector representatives maintained that it would be against a collector's interest to sue on a time-barred debt, and that such suits are rarely if ever filed.[134]

A significant consumer protection problem related to suits on time-barred debt appears to arise from the combination of collectors filing them and consumers not defending them. Because an expired statute of limitations is an affirmative defense in most states, collectors have no obligation to allege in the complaint that the debt is not time-barred, and many collectors do not

131. *See*, *e.g.*, Abrams, Tr. V at 96-97; Coffey, Tr. V at 95; DC 37 Comment at 4; Edelman, Tr. I at 82-84; Edelman Comment at 18; Evans, Tr. V at 89; Faulkner, Tr. V at 108; Lipman, Tr. I at 89; McNulty, Tr. V at 95; NEDAP Comment at 4; Rosmarin, Tr. V at 83; *but see also* Phillips, Tr. I at 86-87 ("we don't know what the instance is of filing suits beyond the statute of limitations because we don't have the data" and the majority of debt collection complaints are silent as to the relevant information); Weinberg, Tr. I at 100 ("so many of the debt buyers have no . . . reliable information as to the date of last payment or date of default . . . . I think a lot of lawsuits are filed where the lawyer has made no effort to determine whether it's beyond the statute of limitations because [the lawyer has] no information."). Note that case law has established that it is generally a violation of the FDCPA for a collector to sue or threaten to sue on a time-barred debt. *See*, *e.g.*, *Kimber v. Fed. Fin. Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987); *Ramirez v. Palisades Collection LLC*, 2008 U.S. Dist. LEXIS 48722, *13 (N.D. Ill. June 23, 2008); *McCorriston v. L.W.T., Inc.*, 536 F. Supp. 2d 1268, 1271 n.2 (M.D. Fla. 2008).

132. *See*, *e.g.*, Edelman, Tr. I at 82 ("I think it's very common among the debt buyers"); Faulkner, Tr. V at 81-82 ("There are people in the debt-buying industry [who] make it a practice to buy primarily . . . out-of-statute debt."); Kinkley, Tr. IV at 84 (speaking about collection rather than litigation).

133. Letter to FTC from Robert A. Martin of DC 37 Municipal Employees Legal Services, Feb. 11, 2010 (on file with FTC), at 1-2, supplementing the information described in DC 37 Comment.

134. *See*, *e.g.*, ACA Comment at 12; Andersen, Tr. I at 115; Asset Comment at 3-4; Coleman, Tr. IV at 96; Debski, Tr. V at 88-89; Midland Comment at 2; Gagnon, Tr. V at 94; Lerch, Tr. I at 100; Markoff, Tr. I at 98-9; NARCA Comment at 7; Needleman, Tr. V at 82-83; Newburger, Tr. IV at 111; Redmond, Tr. V at 124-25; Sinsley, Tr. I at 84; *see also* Groves, Tr. V at 85-87 (collecting as well as filing suit on time-barred debt is a "bad idea").

include this information.[135] If consumers do not defend, there is no one to raise the defense that the debt is time-barred. Indeed, some judges who participated in the roundtables stated that, even if a debt collection action appears to be time-barred, it would be improper for courts to consider affirmative defenses that no party had raised.[136] As a result, some courts appear to be granting default judgments on time-barred debt.

The Commission recommends that states change their laws to require collectors to prove that the debts they are collecting are not time-barred, rather than imposing on consumers the burden of raising the running of the statute of limitations as an affirmative defense. As discussed above, states also should revise their laws to require that collectors set forth in their complaints the date of default and the applicable statute of limitations.[137] These changes would highlight the statute of limitations issue in debt collection litigation for consumers and make it appropriate for courts to consider the issue before granting default judgments to collectors.

Federal action also could assist in decreasing the extent to which default judgments are entered in actions based on time-barred debts. The Commission recommends that Congress amend Section 809(a) of the FDCPA to require that collectors include the date of default in the validation notices they provide to consumers at the outset of the collection process.[138] If collectors are required to have this information when collection begins, then it should be readily available at the time an action is filed. Further, because increased enforcement actions against

135. Few complaints currently state the date of default or the length of the applicable statute of limitations. *See*, *e.g.*, Abrams, Tr. V at 97; Donnelly, Tr. I at 89, 107; Evans, Tr. V at 90-91; Hillebrand, Tr. IV at 112-13; Kinkley, Tr. IV at 85; Lipman, Tr. I at 89-90; Moiseev, Tr. I at 113-14; Phillips, Tr. I at 87; Rosmarin, Tr. V at 96; Surh, Tr. IV at 113-14. In some states, however, collectors are required to include this information in their complaints. *See*, *e.g.*, N.Y. City Civ. Ct. Chief Clerk's Memorandum 186 (May 13, 2009); Fisher, Tr. V at 195; Lebedeff, Tr. V at 93. In addition, some creditor attorneys have adopted as a best practice the inclusion of such information in their complaints. *See, e.g.*, Buckles, Tr. I at 133 (routinely provides date of last payment in complaint); *but see* Debski, Tr. V at 115.

136. *See*, *e.g.*, Abrams, Tr. V at 97 (often saw cases suing on out-of-statute debt but "I felt my hands were tied"); Evans, Tr. V at 90; Lipman, Tr. I at 90.

137. Similarly, the Commission believes that arbitration forums should require that collectors initiating arbitration proceedings state the date of default and applicable statute of limitations, and that arbitrators should determine whether the claim is time-barred.

138. Pursuant to Section 809(a) of the FDCPA, 15 U.S.C. § 1692g(a), a collector must send, within five days after the initial communication with the consumer in connection with the collection of a debt, a written "validation notice" containing: (1) the amount of the debt; (2) the name of the creditor to whom the debt is owed; (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector; (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

collectors who violate the FDCPA by threatening to file or filing time-barred lawsuits would deter such practices, the Commission intends to focus more of its enforcement efforts on those who engage in such conduct.[139]

V. Garnishment of Exempt Funds in Bank Accounts

Many roundtable participants identified the freezing and garnishment of exempt funds in bank accounts as a critical issue for consumers. If a collector obtains a judgment against a consumer, then the collector may seek to recover on that judgment by attempting to garnish the consumer's bank account. Although each state has its own garnishment rules, a collector usually must apply to a state court for a garnishment order. A collector typically must give notice of its application to the consumer,[140] and the collector generally provides a copy of the application to the bank. Upon receiving this notice, the bank typically "freezes" the funds in the consumer's account pending resolution of the application. If the state court issues a garnishment order, then the collector serves a copy of the order on the bank and the bank pays the collector from the funds in the account.

Federal and state law declare that certain funds in the bank accounts of consumers are exempt from garnishment.[141] Federal law generally exempts Social Security, Supplemental Security Income (SSI), veterans' benefits, and numerous other federal benefits from garnishment.[142] Many state laws exempt similar state benefits from garnishment. The fundamental objective of these laws is to ensure that the garnishment of these funds by judgment creditors does not create undue hardship for benefit recipients, many of whom are indigent.[143]

Notwithstanding such laws, banks frequently freeze accounts that contain exempt funds pending resolution of the collector's application for a garnishment order.[144] Such freezes create

139. For threatening to file time-barred suits, *see United States v. Whitewing Fin. Group*, No. H-06-2102 (S.D. Tex. June 22, 2006); *FTC v. Capital Acquisitions & Mgmt. Corp.*, No. 04C7781 (N.D. Ill. Dec. 2, 2004).

140. Consumers typically do not receive such notices until after their accounts have been frozen by the bank. This ensures that consumers do not withdraw all funds from their accounts in anticipation of a freeze or garnishment.

141. There are limited exceptions pursuant to which exempt funds may be garnished. For example, exempt funds are sometimes reachable to pay federal income taxes, child support or alimony. *See generally* NCLC Collection Actions, *supra* note 109, at § 12.5.10.

142. *See*, *e.g.*, 42 U.S.C. §§ 407, 1383 (Social Security and SSI benefits); 38 U.S.C. § 5301 (veterans' benefits). *See generally* NCLC Collection Actions, *supra* note 109, at Appendix C.

143. Hillebrand, Tr. IV at 238 ("you know, you don't want to leave a person penniless when there's food to be bought and kids to be sent to school and rent to be paid"); Kinkley, Tr. IV at 226 (exempt funds are intended to be spent on rent, food, and subsistence).

144. *See*, *e.g.*, Hillebrand, Tr. IV at 210-11; Markoff, Tr. I at 175; Moore, Tr. IV at 217-18; Nepveu, Tr. I at 176-77; Newburger, Tr. IV at 227; Tyler, Tr. V at 213-14; Weinberg, Tr. I at 178-79; Wilner, Tr. V at 213.

considerable hardship for consumers.[145] Once the consumer's bank account is frozen, he or she cannot get access to the funds in the account, often causing rent checks to bounce, debit card withdrawal requests to be rejected, and so forth. Further, banks typically charge consumers fees for freezing the account and for checks that bounce because of the freeze, charges which many indigent consumers find difficult to pay. The duration of freezes on bank accounts varies, but roundtable participants estimated that consumers often are without access to funds for about a month.[146]

There was a consensus among roundtable participants that banks should not freeze funds that are exempt from garnishment under federal or state law. There was significant disagreement, however, as to who is responsible when these funds are frozen. Most debt collectors expressed a desire to comply with the law and avoid garnishing exempt funds.[147] Collectors explained that they usually do not have information from the consumer or the bank identifying the exempt benefits consumers receive, which accounts contain exempt funds, and whether such funds have been commingled with other funds.[148] Without such information, collectors contend that as a practical matter they cannot avoid asking that exempt funds be frozen when they seek to garnish bank accounts. Collector participants and others suggested that, because banks have more

145. *See*, *e.g.*, Brown, Tr. I at 180 ("by the time we get into court [objecting to the garnishment of exempt funds,] the client is facing tons of other financial problems, as well as the bank fees that have accumulated, because their money has actually been frozen); Maurer, Tr. IV at 215 (a freeze can "result in all kinds of bank charges" and consumers might "[miss] their rent payment, and so it's a real hardship"); Moiseev, Tr. I at 200 (consumers are "finding out about [the garnishment] when their checks are bouncing"); Nepveu, Tr. I at 176 (freezing the account causes consumers to face freeze fees and multiple insufficient funds fees for checks that bounce), 202-03 ("When those accounts are frozen, [consumers] don't have money for food; they don't have rent; they don't have medicine"); Newburger, Tr. IV at 227; Tenhundfeld, Tr. V at 221; Weinberg, Tr. I at 179 (by the time the bank account is unfrozen, "so much damage [has been] done" such as the rent check having bounced and forcing the family into eviction proceedings); Wilner, Tr. V at 218 ("[m]aybe [consumers whose bank accounts have been garnished are] trying to buy groceries at the store because they have no food, and now their card doesn't work, they have no access to money. So, we have people who need to go to food pantries, who need to borrow money from relatives to survive, but maybe they don't have any relatives or friends. . . . We have had clients getting eviction notices because they weren't able to pay their rent because of the frozen bank accounts.").

146. *See, e.g.*, Nepveu, Tr. I at 202-03 ("When those accounts are frozen, [consumers] . . . usually don't have [access to the account] for [approximately] a month."); Maurer, Tr. IV at 215 (consumers may be without their funds for approximately a month).

147. *See*, *e.g.*, Andersen, Tr. I at 210; Asset Comment at 6; Buckles, Tr. I at 183; Midland Comment at 4; Leibsker, Tr. I at 186-7; Markoff, Tr. I at 175-6; Moore, Tr. IV at 217-18; NARCA Comment at 8; Olshan, Tr. V at 215; PRA Comment at 3; Ray, Tr. IV at 215-16.

148. *See*, *e.g.*, Asset Comment at 6 (creditors almost never know the source of funds in an account); NARCA Comment at 8 (banks should be required to notify collectors that an account contains exempt funds before the collector freezes or garnishes the account); PRA Comment at 3 (consumers must communicate with collectors to let them know about exempt funds in accounts).

information than collectors about the origin of deposited funds, banks should bear the primary responsibility for not freezing exempt funds.[149]

Bank representatives maintain that they are "between a rock and a hard place."[150] They acknowledged that at times they freeze exempt funds in bank accounts, explaining that it can be difficult to determine which funds are exempt, and especially difficult if consumers have commingled exempt and non-exempt funds. Banks contend that they "call a time out" and freeze all of the funds in accounts pending a court resolution because they fear being held liable to judgment creditors if they make a mistake and fail to freeze non-exempt funds.[151]

Several states have attempted to reduce or eliminate problems associated with freezing exempt funds by setting a pre-determined amount that banks may not freeze in an account with any exempt funds.[152] Under this "pre-determined amount" approach, Connecticut provides that, for bank accounts that have received funds from certain exempt sources within the previous thirty days, $1,000 in the account is preserved for the consumer, and banks may freeze any excess amount.[153] California follows a similar approach, permitting consumers continued access to a pre-determined amount of money in accounts with exempt funds.[154] New York also has enacted such a statute, preserving $2,500 in bank accounts into which exempt funds have been deposited in the previous forty-five days.[155]

The federal government has also been considering how to protect against banks freezing federally exempt funds. At the FTC's roundtable in December, a U.S. Treasury official described

149. *See*, *e.g.*, Andersen, Tr. I at 189; Hillebrand, Tr. IV at 218, 230; Leibsker, Tr. I at 186; Markoff, Tr. I at 175; Moore, Tr. IV at 218; NARCA Comment at 8; Newburger, Tr. IV at 201; Ray, Tr. IV at 230.

150. *See* Tenhundfeld, Tr. V at 221-22.

151. Tenhundfeld, Tr. V at 222.

152. *See*, *e.g.*, Cal. Civ. Proc. Code § 704.080 (2009); Conn. Gen. Stat. Ann. § 52-367b (2009); N.Y. C.P.L.R. 5222 (2009). *See also* Wash. Rev. Code § 6.27.060 (2009) (requiring plaintiff seeking a writ of garnishment to submit an affidavit affirming that plaintiff has reason to believe and does believe that the garnishee has funds or property of the defendant's which are not exempted from garnishment by state or federal law).

153. Conn. Gen. Stat. Ann. § 52-367b(c) (2009).

154. Cal. Civ. Proc. Code § 704.080(b) (2009). For a single account holder, the automatic exemption from freeze is $1,225 for a public benefits recipient and $2,425 for a social security recipient. For joint account holders, the automatic exemption from freeze is $1,825 for public benefits recipients and $3,650 for social security recipients.

155. N.Y. C.P.L.R. 5222(h) (2009). Some workshop participants stated that there have been problems in the implementation of this statute because it requires a continuing freeze on future funds that come into the account, rather than merely looking at the account at the time the bank receives notice that a collector is seeking a garnishment order. *See*, *e.g.*, Kerrigan, Tr. V at 229-30; Tyler, Tr. V at 232-33; *see also* Grippo, Tr. V at 233-34. Note also that the New York statute provides that a fixed amount ($1,740) in a bank account is protected from freeze even if the funds in the account are not derived from exempt sources. N.Y. C.P.L.R. 5222(i) (2009).

a pre-determined amount proposal under discussion by his agency and numerous federal agencies that distribute funds exempt from garnishment under federal law (*e.g.*, the Social Security Administration).[156] On April 19, 2010, the Department of the Treasury, the Office of Personnel Management, the Railroad Retirement Board, the Social Security Administration, and the Department of Veterans Affairs ("Agencies") issued a joint notice of proposed rulemaking ("JNPR") on the garnishment of accounts containing federal benefit payments.[157] Instead of a pre-determined amount approach, the JNPR adopted a "lookback" approach preventing banks from freezing exempt funds. The amount banks would not be permitted to freeze is "the lesser of the sum of all [federally exempt] benefit payments deposited to an account during the lookback period or the balance in an account on the date of account review."[158] The proposed rule defines the "lookback period" as "the 60-calendar-day period preceding the date on which a financial institution is served a garnishment order."[159]

The Agencies proposed a lookback approach rather than a pre-determined amount approach because of their concern that a pre-determined amount might "go beyond the underlying statutory authorities to protect 'moneys paid' and . . . result in the unauthorized over-protection of funds when benefit payments were less than the flat amount . . . ."[160] For example, assume a consumer's bank account contains $2,500, of which $1,500 was deposited by the Social Security Administration during the past sixty days and $1,000 came from non-exempt sources. If a pre-determined $2,000 freeze amount is applied, $500 in the account that comes from non-exempt sources would be protected from the freeze even though it was not exempt from garnishment. Under the lookback approach, by contrast, the amount protected from a freeze can never exceed the amount of exempt funds deposited, so the amount protected would be $1,500. The Agencies sought public comment through June 18, 2010 on their proposed rule incorporating the lookback approach. No final rule has been issued.

Both the lookback approach and the pre-determined amount approach appear to benefit consumers through protecting the indigent from undue hardship. The Commission generally supports the rulemaking efforts the Agencies proposed in the JNPR and encourages them, after considering the scope of their legal authority and the costs and benefits of alternative

156. *See* Grippo, Tr. V at 225-26.

157. Garnishment of Accounts Containing Federal Benefit Payments, joint notice of proposed rulemaking (proposed Apr. 19, 2010), 75 Fed. Reg. 20299 (hereinafter Garnishment JNPR).

158. Garnishment JNPR, *supra* note 157, at proposed § 212.3.

159. Garnishment JNPR, *supra* note 157, at proposed § 212.3.

160. Garnishment JNPR, *supra* note 157, at 20301.

approaches,[161] to issue a final rule limiting the freezing of exempt funds as expeditiously as possible. The FTC also continues to encourage states to prevent banks from freezing amounts in bank accounts containing exempt funds.[162] The Commission recommends that states which have not limited the amounts in accounts subject to a freeze consider adopting either the pre-determined amount approach or the lookback approach.[163]

Another suggestion made during the roundtables was to educate consumers as to their rights with regard to exempt funds in bank accounts and encourage them to take steps to exercise those rights. Consumers often do not know whether the funds they receive are exempt from garnishment. The Commission has engaged in efforts to educate consumers about their right not to have exempt funds garnished.[164] In addition, through their JNPR, the Agencies propose to require that financial institutions provide consumers more information about their garnishment rights.[165] The FTC believes it would be worthwhile for others to consider providing this sort of information to consumers.

Several roundtable participants also suggested that consumers would benefit from a plain language explanation identifying the funds in their accounts which may be exempt from garnishment.[166] In particular, panelists suggested that the notice consumers receive from the state court informing them that a collector is seeking to garnish their bank accounts should come with a form with boxes consumers can check to indicate sources of exempt funds.[167] The Commission recommends that state courts consider using such forms, which could help educate consumers about their rights and enable unrepresented consumers to exercise those rights more easily.

161. Financial institutions may incur different costs under these approaches because a lookback approach requires a more extensive account review and calculation than a pre-determined amount approach.

162. The proposed federal rule does not preempt state law unless federal and state law are inconsistent. Garnishment JNPR, *supra* note 157, at proposed § 212.9.

163. In considering which approach to employ, the Commission recommends that states evaluate the likely costs and benefits of each approach, especially as a lookback requirement may involve extensive transaction-level account review.

164. The Commission issued a consumer education piece on this topic in May 2009. It is available at http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt135.shtm.

165. Section 212.7 of the JNPR, *supra* note 157, would require that financial institutions provide consumers with notices about receipt of a garnishment order, eligibility for continued access to a protected amount, freezing of any other amounts, an exemplary list of federal, state, and other benefits generally exempt from garnishment, and their right and procedures to assert a further garnishment exemption for amounts above the protected amount. A sample notice is provided at proposed Appendix A to Part 212.

166. *See*, *e.g.*, Grippo, Tr. V at 257-58; Kerrigan, Tr. V at 260; Lerch, Tr. I at 202; Markoff, Tr. I at 200; *but see also* Tyler, Tr. V at 258-59 (rather than consumer education, he would prefer making honoring of exemptions automatic, "so people actually don't need to know this right, and their account[s] [remain] safe").

167. *See*, *e.g.*, Lerch, Tr. I at 202 (Indiana form); Moiseev, Tr. I at 200 (Michigan form).

Chapter 3
Arbitration Proceedings

I. The Arbitration Framework

Debt collection disputes may be resolved in private arbitration as well as in the public court system. Arbitration is a form of alternative dispute resolution in which the parties submit their disputes to an arbitrator, a private third party, rather than a judge.[168] The arbitrator is often affiliated with an arbitration company, known as an "arbitration forum," and is tasked, like a judge, with considering the parties' evidence and submissions, and then rendering a decision. Arbitration generally is less formal and has simpler rules than court litigation.[169] The arbitrator's decision is final[170] and is enforceable in court, subject to limited grounds for appeal.[171]

To use arbitration, the parties must agree to resolve their dispute by this process, rather than by the court system. The parties can agree to arbitration after a dispute has arisen. They can also agree beforehand, typically through the use of an arbitration clause in the parties' contract stating that, should a dispute arise, they will arbitrate to resolve that dispute. Such "mandatory pre-dispute arbitration" clauses have become increasingly common in consumer contracts for goods and services,[172] such as credit cards, cellular phones, and medical services. If a consumer

168. Drahozal, Tr. II at 18 ("The basic idea of arbitration is private judging.").

169. American Arbitration Association, Alternative Dispute Resolution Basics FAQ, *available at* http://www.aaauonline.org/upload/439166290_adr_basics_faqs.pdf ("Arbitration is less formal than litigation and the evidentiary process is limited.").

170. Drahozal, Tr. II at 18 (stating that "an arbitrator is someone who decides the issue, and it's a binding decision on the parties"). Although decisions issued in debt collection arbitration are binding on the parties, note that arbitration in connection with other consumer transactions may be non-binding.

171. Federal Arbitration Act (FAA), 9 U.S.C. §§ 10-11 (2006).

172. Majority Staff of H. Subcomm. on Domestic Policy, Comm. on Oversight and Gov't Reform, 111th Cong., Arbitration Abuse: an Examination of Claims Files of the National Arbitration Forum (July 21, 2009), at 3 ("Virtually all consumer transactions with large businesses are now subject to pre-dispute, mandatory arbitration clauses."); Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 871 (2007-2008) ("Arbitration clauses are common features of American consumer agreements."); *Mandatory Binding Arbitration – Is It Fair and Voluntary?*, *Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Congress 1st Sess. (2009) (statement of Stuart T. Rossman, Director of Litigation, National Consumer Law Center, *Recent Developments in the Forced Arbitration Market and the Continued Need for Protective Legislation*, at 1, *available at* http://judiciary.house.gov/hearings/pdf/Rossman090915.pdf ("Practically every credit card agreement, cell phone contract . . . now contains a pre-dispute mandatory arbitration clause.")) (hereinafter Rossman Testimony); Public Citizen, Forced Arbitration: Unfair and Everywhere 1 (Sept. 14, 2009), *available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf (stating that, "forced arbitration remains almost ubiquitous in many industries").

does not pay on these contracts, the creditor or other collector of the debt may use arbitration to collect the amount owed.

Arbitration proceedings and decisions are governed by federal and state law. The primary law governing arbitration is the Federal Arbitration Act ("FAA"),[173] which was enacted to overcome court reluctance to enforce arbitration agreements between corporations.[174] The FAA makes arbitration clauses (including mandatory pre-dispute arbitration clauses in consumer contracts) enforceable,[175] and it generally overrides any state laws to the extent they are contrary to the FAA.[176] Disputes within the scope of the arbitration agreement can be arbitrated. A party wishing to challenge the enforceability of an arbitration agreement can do so in court using state law defenses applicable to contracts generally,[177] so long as such defenses apply to contract provisions in general and do not single out arbitration clauses. Courts have limited power and opportunity to review awards and decisions resulting from arbitration.[178]

As collectors increasingly have turned to arbitration to collect on consumer debt, a debate has arisen about the advantages and disadvantages of using arbitration forums to resolve such disputes. Some contend that debt collection arbitration has significant benefits, such as more expeditious and less expensive proceedings, as well as diverting a large number of cases that would otherwise clog the court system.[179] Others, however, have expressed reservations about

173. 9 U.S.C. §§ 1, *et seq.* (2006).

174. S. Rep. No. 536, 68th Cong., 1st Sess., at 2 (1924) (stating that the federal courts "have denied relief to the parties seeking to compel the performance of executory agreements to settle and determine disputes by arbitration"); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (stating that in enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.").

175. FAA, 9 U.S.C. § 2 (2006) (making written arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

176. Drahozal, Tr. II at 22.

177. FAA, 9 U.S.C. § 2 (2006).

178. *Id.* at §§ 9-13 (2006); Drahozal, Tr. II at 29 (stating that the FAA sets out standards relating to the enforcement of arbitration awards, but noting that it is "less clear" whether the FAA governs or whether state standards may be used to some degree).

179. ACA Comment at 4 (noting arbitration's "important role in reducing already overcrowded court dockets"); AAA Comment, testimony of Richard Naimark to House Oversight and Government Reform Committee, Domestic Policy Subcommittee (July 22, 2009) at 5 (noting that if arbitration is no longer available for consumer debt claims, "a very large number of small dollar claims will be filed in our already overburdened courts") (public comment # 542930-00016, hereinafter AAA Comment); U.S. Chamber of Commerce Comment at 3 (citing benefits of arbitration such as the consumer usually having "the choice to conduct his or her arbitration over the phone or 'on the papers,' which saves the consumer from having to take any days off work to resolve the dispute.").

the impact of debt collection arbitration on consumers.[180] Some arbitration critics contend that consumers do not have a real choice as to whether they will be subject to an arbitration clause.[181] Other critics assert that the debt collection arbitration system does not have adequate procedures to ensure fairness towards consumers[182] and is biased in favor of creditors and collectors.[183]

To evaluate the impact of arbitration on the debt collection system, the Commission considered the topic during its 2007 Debt Collection Workshop. In its 2009 workshop report, the FTC reported that it had heard varying opinions and concerns regarding consumer debt collection arbitration.[184] The information presented and submitted in connection with the Workshop, however, was not sufficient for the Commission to make extensive findings, conclusions, and recommendations related to this topic.[185] To gather more data and views, in 2009 the FTC held roundtable discussions in Chicago and San Francisco on this topic.

During the summer and fall of 2009, while the Commission was conducting its roundtables, there were major developments in the use of arbitration to resolve debt collection disputes. In July 2009, the Minnesota Attorney General's Office ("Minnesota AG") filed suit against the National Arbitration Forum ("NAF"), then the leading debt collection arbitration forum. The Minnesota AG alleged that NAF had engaged in consumer fraud, deceptive trade practices, and false advertising. NAF purportedly held itself out as an impartial provider of dispute resolution while actually having financial ties to key members of the debt collection industry through a series of complex and purposefully hidden affiliations. Days after the suit was filed, NAF entered into a settlement with the Minnesota AG which required it to cease providing arbitration

180. Alderman Comment, attaching Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act – It's All About Separation of Powers*, 12 J. Consumer & Com. L., 151, 154 (Summer 2009) ("Consumer arbitration is often simply a way for a business to reduce the number of disputes, avoid the courts and juries, and achieve more favorable results.") (hereinafter Alderman Comment).

181. Jackson, Tr. II at 91 ("Right now they [consumers] have no choice."); Johnson Tr. II at 95 ("Pre-dispute consumer arbitration simply doesn't work.").

182. *See* Bland Comment, Testimony to House Subcommittee on Domestic Policy, "Arbitration or 'Arbitrary': The Misuse of Arbitration to Collect Consumer Debts," at 11 (referring to NAF, expressing doubts about "the ability of consumers to get a fair hearing in arbitration, as compared to the experiences they would have in court.")

183. *See, e.g.*, Sturdevant, Tr. III at 93 ("I think there is substantial bias in the process"); Public Citizen, The Arbitration Trap – How Credit Card Companies Ensnare Consumers 1 (Sept. 2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf (stating that, "binding mandatory arbitration is a rigged game in which justice is dealt from a deck stacked against consumers.") (hereinafter Arbitration Trap).

184. Challenges of Change, *supra* note 1, at 55.

185. *Id.*

services for consumer debt collection claims.[186] A number of private class actions suits against NAF have been filed.[187]

In the wake of this settlement with NAF, the American Arbitration Association ("AAA"), an arbitration forum which had handled some debt collection arbitrations, decided to impose a moratorium on providing such services until concerns regarding the system are addressed.[188] Subsequently, a number of large banks announced that they would discontinue their use of binding mandatory arbitration clauses in credit card agreements.[189] In light of these events, it is an opportune time to assess the validity and viability of arbitration as an alternative to the court system as a method of resolving debt collection disputes. Indeed, many commentators have expressed the belief that some entity will eventually emerge to fill the void left by NAF.[190]

The Commission believes that, to ensure that consumers are adequately protected if arbitration once again becomes a common method of resolving debt collection disputes, mandatory pre-dispute arbitration should be permitted only if: (a) creditors provide consumers with meaningful choice as to whether their debt collection disputes will be arbitrated; and (b)

186. *See* Consent J., State of Minn. v. Nat'l Arbitration Forum, Inc., State of Minn., Hennepin County Dist. Ct., 27-CV-09-18550 (signed by parties July 17, 2009; entered Aug. 7, 2009), *available at* http://www.publicjustice.net/Repository/Files/NAFMinn_Letter_071909.pdf.

187. *See In re* Nat'l Arbitration Forum Trade Practices Litigation, Docket No. 10-md-02122 (D. Minn., Transfer Order creating multidistrict litigation filed Feb. 3, 2010).

188. *See* Letter from William K. Slate II, American Arbitration Association, to Lori Swanson, Attorney General, State of Minnesota (July 20, 2009), *available at* http://www.nclc.org/images/pdf/arbitration/testimonysept09-exhibit4.pdf, at 2 (implementing moratorium until "there is some consensus on how concerns about the administration of debt collection arbitrations might be successfully addressed").

189. *See* Dow Jones Newswires, *Banks Agree to Settle Suit Over Arbitration Clause – Lawyers*, (Apr. 6, 2010), *available at* http://www.nasdaq.com/aspx/stock-market-news-story.aspx?storyid=201004061448dowjonesdjonline000297&title=banks-agree-to-settle-suit-over-arbitration-clause-lawyers (according to lawyers representing class action plaintiffs in a suit over credit card arbitration clauses, Bank of America, Capital One Financial, J.P. Morgan Chase, and HSBC Holdings agree to a settlement, pending court approval, that would, *inter alia*, "require the companies to stop enforcing arbitration clauses . . . and to remove those items from their terms for 3 ½ years"); see also National Consumer Law Center, Forced Arbitration – Consumers need Permanent relief, 13 (Apr. 2010), *available at* http://www.nclc.org/images/pdf/arbitration/report-forced-arbitration.pdf (hereinafter NCLC Arbitration Report) (stating that JPMorgan Chase, Bank of America, Capital One and HSBC reached tentative settlements to stop enforcing existing mandatory arbitration clauses and to refrain from including such clauses in their contracts until at least 2013); CardRatings.com, *HSBC Drops Mandatory Credit Card Arbitration*, (Jan. 5, 2010), *available at* http://www.cardratings.com/hsbc-mandatory-credit-card-arbitration.html (indicating that Regions Bank, TD Bank, and PNC Bank had represented that they would leave mandatory arbitration clauses out of new agreements).

190. Johnson, Tr. II at 97 ("[A]nother NAF is going to emerge."); Bland, Tr. II at 106 (speaking against the position that, "no one else is going to show up with a wink and a nod and some pretty protocols and so forth to devise a system which again delivers the goods of basically a set system . . . ."), 209 (discussing the possibility that a successor of NAF, "appears down the road"); Barron, Tr. III at 107 ("It would be a terrible mistake to think that because NAF isn't here now, there's no opportunity for a similar provider to arise . . . ."); Sternlight, Tr. III at 169.

the arbitration process is fair to creditors, collectors, and consumers. For the reasons discussed below, the Commission is not confident that debt collection arbitration currently satisfies either of these two conditions. The Commission therefore will continue to closely monitor, evaluate and report, as appropriate, on whether debt collection arbitration models are providing consumers with meaningful choice and a fair process.[191]

II. Meaningful Consumer Choice

The decision to submit disputes to arbitration rather than the public court system must be based on an agreement between the creditor and the consumer. This agreement usually takes the form of a mandatory pre-dispute arbitration provision in the contract between the creditor and the consumer, a provision that creditors draft. To give consumers a meaningful choice[192] to submit their disputes to arbitration, they must have: (1) a basic understanding of arbitration and its consequences; (2) the option whether to agree to arbitration, and under what conditions; and (3) a reasonable method of exercising that option.

A. Consumer Understanding of Arbitration

Many roundtable participants suggested that consumers do not understand arbitration or its consequences.[193] Without such an understanding, consumers may not be aware of the choice related to arbitration they are being asked to make. Public and private sector efforts would be useful in conveying information about arbitration to consumers and would help them make better-informed decisions.

191. In late 2009, AAA convened a task force of arbitration and debt collection experts to evaluate whether the organization should recommence debt collection arbitration, and, if so, how such arbitration should be reformed. FTC staff has been a member of the task force, and has participated in its meetings and discussions. The AAA task force's work is ongoing.

192. The 'meaningful choice' whether to arbitrate does not necessitate that creditors in their consumer contracts offer an alternative to arbitration, such as litigation. Consumers may exercise meaningful choice to arbitrate by refraining from contracting with a creditor, so long as all other conditions for meaningful choice and fair process discussed in this report are met.

193. *See*, *e.g.*, Johnson, Tr. II, at 43 ("Consumers are not familiar with arbitration."); Sturdevant, Tr. III at 18 ("So I don't think that there is any general level of awareness by consumers about arbitration."); Sternlight, Tr. III at 23 ("Even if people get served with a document that says arbitration, they have no concept; even law students, even law professors have no concept of what arbitration is.").

B. Consumer Arbitration Choices[194]

Assuming that consumers have a basic understanding of arbitration, they can make meaningful choices only if they are aware of the arbitration provisions in contracts and have the ability to make choices regarding those provisions. Many consumer advocates at the roundtables stated that consumers generally do not know that their contracts contain arbitration provisions.[195] Indeed, one consumer advocate opined that the credit card companies purposefully draft contracts in a manner such that consumers do not notice these clauses.[196] Other roundtable participants questioned whether consumers who are aware of the arbitration provisions in their contracts actually understand them,[197] explaining that it may be challenging to disclose information about arbitration in a contract in a clear and prominent manner.[198] One consumer advocate indicated that consumers may have particular difficulty understanding provisions that are contingent on a future event, such as the possibility that consumers will not be able to make their payments under the contract.[199]

Some roundtable participants expressed concern that consumers currently have no meaningful ability or opportunity to make choices or weigh their options at the point of

194. Some debate has arisen in the academic literature and elsewhere over arbitration clauses that prohibit class actions and whether such bans should be permitted. Some roundtable participants expressed opposition to class action bans, including one consumer advocate who opined that one of the main reasons that companies prefer arbitration is to avoid class actions. (*See* Sternlight, Tr. III at 88). The roundtables focused on the issue of debt collection arbitrations against individual consumers – which comprise the vast majority of such arbitrations – and thus the FTC takes no position regarding clauses that bar or restrict class actions in debt collection proceedings.

195. *See*, *e.g.*, Frank, Tr. II at 86 ("[D]o people who get consumer loans know they have an arbitration clause, and the evidence is that the vast majority of them do not.").

196. Frank, Tr. II at 86-87 ("[T]here's [sic] things they [credit card companies] don't want you to notice necessarily; and clearly the way the arbitration is disclosed, it's disclosed in a manner that definitely the case is it's not something that the company wishes you to be focused on.").

197. *See, e.g.*, Jackson, Tr. II at 91 ("Credit card contracts are extremely difficult to understand. I have difficulty reading them, and I've been trained as a lawyer.").

198. *See* Sorkin, Tr. II at 106-07 ("I don't think it's easy to provide meaningful disclosure and meaningful choice. I think there's a real contest to it . . . . It's very hard to disclose even a limited amount of information in a way that's meaningful . . .").

199. Frank, Tr. II at 89 (Consumers may underestimate the likelihood of an event, especially one which is contingent on another future event.); *see also* Sorkin, Tr. II at 107 (noting that, "when some of the information is contingent on an unlikely future event, it's even harder to disclose it in a way that enables a meaningful choice").

contract.[200] Consumers generally do not negotiate or try to negotiate the arbitration provisions in their credit card contracts. A number of participants stated that consumers may not attempt to negotiate because they may not believe they have any alternative given that all of the companies in the relevant industry (e.g., banks that issue credit cards) have arbitration provisions in their contracts.[201] Another participant noted that some consumers may not negotiate concerning arbitration provisions because they are purchasing goods or services (e.g., urgent medical care) in circumstances in which time is of the essence.[202] Some consumer advocates have suggested that consumers want the opportunity to negotiate about arbitration provisions in their contracts.[203] Representatives of collectors,[204] on the other hand, expressed doubt about whether consumers, assuming they had the ability and opportunity to do so, would even want to try to negotiate such contractual provisions.[205]

Roundtable participants also discussed allowing consumers to "opt out" of mandatory arbitration even after having entered into a contract with an arbitration provision. Some consumer credit contracts do contain provisions allowing consumers a certain period of time from the date of the contract to opt out of mandatory arbitration. One attorney who represents creditors reported that an increasing number of credit card issuers are providing consumers with such an option, with the time period to opt out ranging from fifteen days to sixty days.[206] However, some roundtable participants stated that, for a variety of reasons, consumers rarely exercise such opt-out rights.[207] Many consumer advocates asserted that, if consumers were aware

200. *See* Joshua M. Frank, Center for Responsible Lending, Stacked Deck: A Statistical Analysis of Forced Arbitration, 6 (May 2009), *available at* http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf (stating that "[e]ven when a consumer can shop for loans, they typically cannot renegotiate the key terms of the standard contract. They have no choice or control over which arbitration forums can be used in a forced arbitration clause.") (hereinafter Stacked Deck).

201. Frank, Tr. II at 88-89; Jackson, Tr. II at 90 ("You want a phone, you're going to get arbitration. You want a credit card, you're going to get an arbitration clause."); *see* Sternlight, Tr. III at 56-57 (stating that, "if you define the word choice in any kind of remotely meaningful way, consumers do not have a choice because all or certainly virtually all credit card companies currently require consumers' debt to be sent to arbitration.").

202. Hillebrand, Tr. III at 66.

203. *See* Jackson, Tr. II at 91.

204. The use of the term "collector(s)" includes original creditors and subsequent debt collectors.

205. *See* Kaplinsky, Tr. II at 85.

206. Kaplinsky, Tr. II at 85 (stating that, "a lot of them have been doing that for years, I have been counseling them to do that . . . .").

207. *See*, *e.g.*, Bland, Tr. II at 101 ("only a very, very tiny percentage of people opted out").

of that option, they would choose to do so.[208] In contrast, an attorney for creditors opined that few consumers would choose to opt out of arbitration because they prefer it to court litigation.[209]

Some roundtable participants suggested that arbitration provisions state that, at the time the dispute with the creditor arises, the consumer has the right to demand that the matter be moved from arbitration to a small claims court if the court would have jurisdiction over the claims.[210] AAA mandates in its consumer dispute process protocol that companies include such a "small claims carve-out" in their arbitration agreements. AAA acknowledged, however, that few consumers exercise their right to have their matters heard in small claims court rather than in AAA consumer arbitration.[211]

Beyond the initial choice whether to arbitrate and any subsequent opt-out options, some roundtable participants suggested additional arbitration options consumers could select. One collector attorney suggested that creditors could give consumers the ability to choose or reject arbitration terms in exchange for receiving more or less favorable interest rates.[212] For example, a consumer might be offered a ten percent interest rate without a mandatory pre-dispute arbitration clause, or a nine and three-quarters percent rate with such a clause. Roundtable participants also suggested giving consumers choices as to the arbitration forum that would resolve their disputes. Some consumer advocates suggested that, if the creditor drafts the

208. *See* Lake Research Partners, "National Study of Public Attitudes on Forced Arbitration," Apr. 2009, *available at* http://www.fairarbitrationnow.org/uploads/Forced%20Arbitration%20Study%20Slides%200409.pdf at 3, 4 (in a study commissioned by the Employee Rights Advocacy Institute for Law and Policy and Public Citizen, and funded by the Public Welfare Foundation, researchers polling 800 adults found that 59% oppose fine print forced arbitration clauses in employment and consumer contracts); *see also* Arbitration Trap, *supra* note 183, at 56 (advising consumers obtaining a credit card with a mandatory pre-dispute arbitration clause to "sign an arbitration opt-out if one is available or strike the clause from the contract and initial the change").

209. Kaplinsky, Tr. II at 110.

210. Kaplinsky Comment, attaching "The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers," at 13 (stating the attorney's message to his clients to draft a fair arbitration clause, including a small claims court carve-out).

211. Naimark, Tr. III at 54 (noting that in the consumer debt collection cases AAA previously administered, although the initial letter to consumers informed them of the option to go to small claims court, "very, very few took that option"). One suggestion offered was that, if such a small claims court option is permitted (as with AAA's protocol), then consumers should be informed of this right in the notices provided to them about the initiation of arbitration proceedings. Kaplinsky, Tr. II at 84 (stating of the demand for arbitration, "[t]hat notice probably ought to contain a clear disclosure that if you don't want to arbitrate this debt, you've got the right to have it heard in small claims court, and you've got to do the following in order to take advantage of that").

212. Kaplinsky Comment, "The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers," at 16 (stating, "[c]onsider bifurcated pricing under which the consumer will pay a lower interest rate or lower fee is he or she does not opt out of the arbitration provision").

arbitration provision in the contract, the consumer should be allowed to choose[213] the arbitration forum[214] from among a number of alternatives.[215] An academic offered the caveat, however, that even with this approach consumers might not have an acceptable number or quality of arbitration forums from which to choose,[216] perhaps because there may be a limited number of arbitration providers.[217]

C. Reasonable Methods of Exercising Choice

Consumers must have a reasonable method, at a reasonable cost, of exercising their choice whether to arbitrate, as well as their choice regarding any other arbitration options or terms. Where a contract offers only one arbitration option, consumer assent to the contract may suffice. However, where selection from among a range of choices is required, how such choices should be made available to consumers depends on the context in which they are offered. For example, if consumers have the option in credit contracts to select the arbitration forum, at a minimum the names of the potential arbitration forums should be disclosed clearly and prominently in the contracts. If consumers have the option to select between litigation and arbitration, allowing them a selection method such as checking a box on the contract generally could be a relatively low-cost means of exercising their option.

D. FTC Views on Consumer Choice in Arbitration

The Commission concludes that consumers should, but generally do not, have a meaningful choice regarding mandatory pre-dispute arbitration provisions in consumer credit contracts. To give consumers such choice, they must have: (1) a basic understanding of arbitration and its consequences; (2) the option whether to agree to arbitration, and under what conditions; and (3) a reasonable method of exercising that option. The FTC thinks that substantial changes in mandatory pre-dispute arbitration provisions are needed to meet these criteria. Creditors should draft their consumer credit contracts in a way that ensures consumers are aware of their choice

213. One panelist aptly described this method as "one cuts, one chooses," Drahozal, Tr. II at 122-23, explaining that such a decision rule gives the one making the cut (i.e., drafting the contract) an incentive to make the arbitration provision fair.

214. The reporting and transparency requirements discussed below to make the arbitration process more fair would also provide critical information in helping consumers make better-informed choices among arbitration forum options.

215. *See* Bland, Tr. II at 102; *see also* Edelman Comment at 22 ("Consumer should be given choice of 3 or more forums.").

216. *See* Sternlight, Tr. III at 81-82.

217. Consumer ability to choose from among any alternative providers or processes would be enhanced by, *inter alia*, consumer education efforts and transparent reporting of arbitration results. (*See* Sections II.A, "Consumer Understanding of Arbitration," and III.D, "Transparency of Arbitration Results.")

whether to arbitrate, and provides consumers with a reasonable method of exercising that choice. The FTC recommends that the public and private sector study the efficacy of alternatives to give consumers meaningful choice, including evaluating the various options discussed above and considering whether, and under what conditions, options beyond the initial choice whether to arbitrate must be offered in consumer credit contracts. The Commission also recommends that the public and private sector educate consumers so that they can make better-informed choices related to arbitration.[218]

III. Fair Arbitration Process

For arbitration to be a viable alternative for debt collection disputes, the arbitration process must meet fundamental standards for fairness. First, the arbitration forum and the arbitrator cannot be biased or appear to be biased. Second, consumers must receive adequate notice of the arbitration proceeding and be able to participate in it at a reasonable cost. Third, the arbitrator must issue a reasoned decision so that the parties understand the basis for the arbitration award, and parties must have an adequate opportunity to enforce or challenge the award. Finally, the arbitration process and the arbitration itself must be transparent, so that the parties and public can assess the fundamental fairness of arbitration forums and arbitrators.

A. Bias and Appearance of Bias

A major issue in the current debate over consumer debt collection arbitration is bias and the appearance of bias.[219] Consumer advocates often assert that arbitration is biased or appears to be biased in favor of creditors and collectors.[220] Others have questioned this assertion.[221]

218. Roundtable participants expressed the need for consumer education regarding arbitration. Johnson, Tr. II at 96-97 ("We need to educate these consumers."); Naimark, Tr. III at 45.

219. *See* Capitel, Tr. III at 110 (noting the importance of the perception of bias, not just actual bias, to how public perceives the process and decides whether to participate in that process).

220. *See*, *e.g.*, GAO Report, *supra* note 10, at 34 ("Some consumer advocates expressed concern that requiring arbitration is unfair because they believe the arbitration system can be biased against consumers."); Rossman Testimony, *supra* note 172, at 3 ("The essential problem with forced arbitration is that it creates a system strongly biased in favor of the corporation and against the individual."); NCLC Arbitration Report, *supra* note 189, at 1 ("Consumers are forced into a private system of justice that is inherently biased in favor of creditors and collectors.").

221. *See, e.g.*, Canter, Tr. II at 144-45 (stating, "I have handled consumer arbitrations for creditors, both document hearings and participatory hearings and in-person hearings; and [setting aside any connection between the arbitration provider and creditor] . . . I never perceived any bias"); *see also* Maine Bureau of Consumer Credit Protection, Memorandum to Joint Standing Committee on Insurance and Financial Services, Report to Committee: Compilation of Information Reported by Consumer Arbitration Providers (Apr. 1, 2009), *available at* http://www.maine.gov/pfr/consumercredit/documents/ArbitrationProvidersReport.rtf, at 2 (studying data from 2,500 consumer arbitration cases – nearly all of which involved credit card debts – reported under Maine state law for 2008. "In the small number of cases in which consumers advanced defenses, arbitrators showed a willingness to rule in the consumers' favor.") (hereinafter Maine Arbitration Report).

Some roundtable participants expressed the view that, to evaluate bias, one should look only at the conduct of the individual arbitrator making the decision, not at the actions of the arbitration forum.[222] Others responded that the possible bias of individual arbitrators cannot be divorced from any bias of the forum as a whole, especially given that employees of the forum make major decisions with regard to the arbitration.[223] At a minimum, even if individual arbitration decisions are not biased, they may be perceived as being biased if the arbitration forum is biased. Therefore, it is appropriate to examine the potential for bias by both the arbitrator and the forum.

1. Arbitrator Bias and Appearance of Bias

Many consumers are not aware of various affiliations or financial arrangements of arbitration forums and individual arbitrators.[224] To the extent that these affiliations do not rise to a level that would preclude the forum or arbitrator from participating in a particular arbitration, disclosing such information would promote transparency and more informed consumer choice. One roundtable participant advocated that arbitrators be required to disclose any conflicts of interest that would disqualify them if they were judges.[225]

Roundtable participants also discussed how arbitrators are paid and whether the payment structure affects how they handle their cases. One issue is whether arbitrators should be paid a fixed salary or, as has been more common, paid by the number of matters handled.[226] According to participants, both systems have risks: payment per matter provides arbitrators with an incentive to spend too little time on each matter; payment of a fixed salary provides an incentive for arbitrators not to be efficient.[227] Another issue is the relationship between arbitrator compensation and the complexity of the matter being arbitrated. One large arbitration forum suggested that, when consumers raise certain defenses – such as those involving allegations of identity theft – it may increase the complexity and time required to arbitrate a matter.[228] The

222. *See*, *e.g.*, Kaplinsky, Tr. II at 166-67; Narita, Tr. III at 99.

223. *See* Van Aken, Tr. III at 98-99 (stating that, "case managers have control over the schedule. They have control over deeming a response sufficient or deficient such that it goes into different piles and to different arbitrators . . . . [A] customer requesting a participatory hearing is something where a case manager decides that in the first instance . . . .").

224. *See* Stacked Deck, *supra* note 200, at 2 ("Arbitration case records are typically not publicly available, leaving consumers with little ability to determine the fairness of an arbitration forum or the record of a specific arbitrator.").

225. *See* Hillebrand, Tr. III at 97 (referring to California Code of Civil Procedure §1281.96).

226. *See* Drahozal, Tr. II at 149; see also Arbitration Trap, *supra* note 183, at 8 ("Unlike judges, arbitrators are paid only when they are assigned cases by arbitration companies. Rich rewards accrue to arbitrators who receive a steady diet of cases . . . .").

227. *See* Drahozal, Tr. II at 149-50.

228. AAA Comment at 7.

individual arbitrator should receive additional compensation, with all or much of it being charged to the corporate claimant.[229]

Another key issue related to bias is whether arbitrators are biased in favor of creditors, sometimes referred to as "repeat-player" bias.[230] The basic theory is that arbitrators are more likely to decide in favor of collectors because they bring or can bring numerous matters before the same arbitrator and through the same arbitration forum. Some claim that arbitration forums assign fewer matters to arbitrators who rule in favor of consumers.[231] Arbitrators generally are paid per matter, so arbitrators have a financial incentive not to engage in conduct that would result in them receiving fewer cases.

Roundtable participants had a vigorous debate concerning whether there is repeat player bias in debt collection arbitration. A study of arbitrations – most of which were debt collection matters – by the consumer group Public Citizen found that collectors and creditors succeeded in at least ninety-four percent of these arbitrations.[232] The Center for Responsible Lending ("CRL") subsequently conducted a statistical analysis of the Public Citizen dataset and found that arbitrators who decided in favor of firms, as opposed to consumers, subsequently received

229. *Id.*

230. *See*, *e.g.*, Sturdevant, Tr. III at 94; Alderman Comment, *supra* note 180, at 154 ("Consumer arbitration is often simply a way for a business to reduce the number of disputes, avoid the courts and juries, and achieve more favorable results."); Arbitration Trap, *supra* note 183, at 32 (referring to the "repeat player effect," calling it "[o]ne of the major problems with arbitration," and defining it as "a situation in which a built-in bias develops in favor of the claimant that frequently sends business to the arbitration firm in the form of claims against its customers, who are usually participating for the first-time.").

231. *See*, *e.g.*, Johnson, Tr. II at 151 (stating that there have been, "experiences around the country where an arbitrator, an NAF arbitrator, ruled in favor of a consumer and never worked again. It happened in one of my cases where an arbitrator ruled in my favor. I never saw that arbitrator again."); Alderman Comment, *supra* note 180, at 155 (referring to an article from the Christian Science Monitor based on data from NAF, "The *Monitor* also found support for the notion that arbitrators who rule against businesses are 'blackballed' and not selected again."); Bland Comment, Testimony to House Subcommittee on Domestic Policy, "Arbitration or 'Arbitrary': The Misuse of Arbitration to Collect Consumer Debts," at 10 ("Harvard law professor Elizabeth Bartholet went public with her concerns that, after she awarded a consumer $48,000 in damages, NAF removed her from 11 other cases, all of which involved the same credit card company, on the credit card company's objection.").

232. *See* Arbitration Trap, *supra* note 183, at 4 (focusing on a subset of the data where there were indications that an arbitrator had been assigned to the cases, "Public Citizen found that in a sample of nearly 19,300 California cases decided by one arbitration firm, consumers prevailed in 4 percent of the cases, while companies prevailed in 94 percent. (The prevailing party was not listed in the remaining cases.)"); *but see* U.S. Chamber Institute of Legal Reform, Navigant Consulting Analysis, July 11, 2008, *available at* http://www.instituteforlegalreform.com/issues/docload.cfm?docId=1212, at 1 (using the same data set as Public Citizen and the Center of Responsible Lending, but looking at a subset of the data that only excluded settlements, found that consumers prevailed or had cases against them dismissed 32.1% of the time).

more matters from the arbitration forum.[233] The CRL study also found that firms that arbitrated frequently before the forum received more frequent and larger awards than firms that arbitrated in the forum less frequently.[234]

Other studies have concluded that, although "repeat players" generally receive better results than non-repeat players, the reason is not necessarily bias.[235] Rather, these studies report that repeat players are often sophisticated businesses and, due to greater arbitration experience, may tend to settle weaker matters so that only their stronger matters actually make it to the arbitration decision.[236] Some individuals and entities have also emphasized that any repeat player advantage in arbitration is no different than in the court system.[237]

Roundtable participants suggested a number of alternatives to address repeat player bias or the perception of bias arising from repeat players' rates of success in arbitration. In the appointment of arbitrators, some argued that arbitrations forums should: (1) use a strict rotation of arbitrators; and (2) impose a limit on the total number of matters any one arbitrator can have

233. *See*, *e.g.*, Frank, Tr. II at 147; Stacked Deck, *supra* note 200, at 8 (adding that, "[t]his gives arbitrators a very strong incentive to side with the firms.").

234. *See*, *e.g.*, Frank, Tr. II at 147-48; Stacked Deck, *supra* note 200, at 7 (determining that for award amount as percent of amount requested in a collection arbitration case, a consumer plaintiff on average would receive 55%, a firm that appears once 91%, and a frequently appearing firm 95%). In addition, one panelist also reported an incident in which a creditor allegedly threatened to withhold its arbitration business to get a forum to change its ruling, Sturdevant, Tr. III at 101-102, although it was pointed out that the mere presence of a threat does not necessarily mean the forum is biased. Naimark, Tr. III at 102-03.

235. *See*, *e.g.*, Drahozal, Tr. II at 148; ACA Comment at 22 ("Merely because a creditor is successful in court or before an arbitrator in recovering a debt that is validly owed offers no independent evidence whether bias affected the outcome."); *see also* Drahozal Comment (July 28, 2009) at 1-2,4 (describing Searle Center study of AAA debt collection cases indicating that if there is a "repeat-player" effect, it is not due to bias in arbitration, but may be due to better screening of cases); *see also* Searle Center on Law, Regulation and Economic Growth, Consumer Arbitration Before the American Arbitration Association – Preliminary Report 110 (Mar. 2009), *available at* http://www.searlearbitration.org/p/full_report.pdf, at 110 (concluding that "the evidence suggests that any repeat-player effect is not due to arbitrator (or other) bias in favor of repeat businesses. Instead, it appears to result from case screening by repeat businesses . . . .") (hereinafter Searle Center Preliminary Report); *see also* Searle Center on Law, Regulation and Economic Growth, Creditor Claims in Arbitration and in Court Interim Report No. 1, 27 (Nov. 2009), *available at* http://www.law.northwestern.edu/searlecenter/uploads/Creditor%20Claims%20Interim%20Report%2011%2019%2009%20FINAL2.pdf (studying AAA arbitration data and comparing it with certain court data, and concluding that generally "consumers fared at least as well in arbitration as in court." The study noted that, "we do not claim that arbitration outcomes are better for consumers than outcomes for comparable cases in court. Nonetheless, at a minimum, these findings should dispel the notion that high creditor win rates and recovery rates in debt collection arbitrations show that arbitration is unfair to consumers."); *see also* Maine Arbitration Report, *supra* note 221, at 7 (noting that "although credit card banks or assignees prevail in most arbitrations, this fact alone does not necessarily indicate unfairness to consumers").

236. Drahozal, Tr. II at 148-49; *see also* Narita, Tr. III at 100-101.

237. *See* Yalon, Tr. III at 105-106; Maine Arbitration Report, *supra* note 221, at 7 ("The fact is that the primary alternative to arbitration (a civil action in court) also most commonly results in judgment for the plaintiff.").

on his or her docket,[238] or on the number of matters that any arbitrator may hear involving a particular party.[239] These requirements would help address the concern that, while a forum may claim to have a large number of arbitrators on its roster, only a few of them may actually preside over the vast majority of matters.[240]

Roundtable participants also suggested that arbitration forums should make sure that the overall composition of their rosters of arbitrators reflects a balance[241] between arbitrators of different backgrounds,[242] such as those with experience representing consumers as well as experience representing collectors. A more diverse roster of arbitrators would be responsive to the concern that most arbitrators in debt collection matters have represented or been associated with collectors.[243] One practical difficulty, however, in applying a strict rotation among a diverse roster of arbitrators or in limiting the number of matters assigned to an arbitrator is that arbitration forums that oversee a large number of matters may have trouble finding enough qualified arbitrators. [244] One panelist emphasized that, whatever arbitrator selection process and standards are used, they should be more transparent,[245] thus helping to identify bias and decrease the appearance of bias.

Although there seemed to be little disagreement that requirements such as arbitrator rotations or limits on the number of cases assigned to each arbitrator were useful in preventing bias among arbitrators, panelists expressed concern as to how to ensure that such standards are enforced. One idea offered was that the arbitration forum would enforce these standards.

238. Naimark, Tr. II at 146-147 ("Trying to keep a strict rotation, what we would like to do is put a limit ultimately on the number of cases that any arbitrator can receive in his caseload.")

239. AAA Comment at 6 (also noting that such a requirement should be communicated to the parties, to assist in reducing perceptions of bias).

240. Barron, Tr. III at 108 ("A rotational system, whether it's computer generated or human generated, is not terribly effective if there are three arbitrators that are rotated. If there's 150, maybe we're talking about a different thing."); Bland Comment, attaching Testimony of Paul Bland, Committee on Oversight and Government Reform, Subcommittee on Domestic Policy, July 22, 2009 at 8 (stating that NAF had advertised "that it has a total of more than 1,500 arbitrators in all 50 states, but that statistic has little significance if the vast majority of cases are steered to a small number of persons" and that "[i]ndeed, a large body of information establishes that NAF intentionally funnels the vast majority of cases to a very small group of selected arbitrators").

241. The balanced roster concept is significant because, even if participants are offered a certain number of "vetoes" or allowed to select their arbitrator from among a certain number of potential candidates, the choice is not helpful if all the options suffer from the same risk or degree of bias. *See* Johnson, Tr. II at 154 (stating that, "in my experience with AAA[,] and you have to ask for it, they'll give you five names or at least three names, and if you each strike one . . . then you end up with another one. The problem with that is the pool. The pool is defense attorneys.").

242. *See* Naimark, Tr. II at 147.

243. *See* discussion *supra* note 241.

244. *See* Naimark, Tr. II at 147.

245. Johnson, Tr. II at 163.

AAA, for example, currently has a system in place under which it will remove arbitrators from matters if they engage in an ethical violation.[246] Other panelists, however, expressed doubts as to whether arbitration forums would effectively enforce such standards.[247]

2. Forum Bias or Appearance of Bias

There was substantial discussion at the roundtables regarding the bias or appearance of bias of arbitration forums. As discussed above, in July 2009, the Minnesota AG brought an action against NAF alleging that it had engaged in deception by offering a forum to arbitrate debt collection without disclosing that it was owned by collection law firms with matters in NAF arbitration. Roundtable participants agreed that there is bias or an appearance of bias if a party with matters before an arbitration forum has financial ties to the forum,[248] and, therefore, no such ownership interest should be permitted.

Another issue raised was whether an arbitration forum's for-profit or not-for-profit status is relevant to bias or appearance of bias. AAA, for example, is a not-for-profit organization,[249] while NAF and JAMS are for-profit organizations. Some suggested that incentives would be different for a non-profit than for a for-profit forum.[250] Consumer advocates argued that for-profit arbitration forums have an incentive to favor those who pay their salaries and expenses and decide whether to continue sending business to the forum. Collectors, not consumers, make these decisions and therefore the forums have an incentive to make policies benefitting collectors. However, other participants expressed that non-profit status could potentially ameliorate bias or the appearance of bias but would not completely eliminate them, because one side, the collector, continues to determine the arbitration agreement and pay the arbitration forum.[251]

With respect to ethical standards, roundtable participants stated that there are existing protocols addressing dispute resolution providers such as arbitration forums. In 2002, the

246. Naimark, Tr. II at 159.

247. *See* Bland, Tr. II at 160.

248. *See*, *e.g.*, Hillebrand, Tr. III at 98; Van Aken, Tr. III at 98; Sternlight, Tr. III at 111 (stating that, "I would think that everybody in the room would agree or perhaps has agreed that. . . the minimum has to be that the provider cannot have financial ties to parties that appear in front of it."); Frank Tr. II at 164 ("direct financial ties are always a problem").

249. *See* AAA website, Questions and Answers as Administered by the American Arbitration Association, *available at* http://www.adr.org/si.asp?id=5029.

250. *See* Naimark, Tr. II at 168.

251. *See* Frank, Tr. II at 164; *see also* Hillebrand, Tr. III at 96 (stating that a non-profit status would be "helpful" but is "not a panacea").

CPR-Georgetown Commission on Ethics and Standards of Practice in ADR issued standards,[252] stating that arbitration forums should: (1) ensure that their arbitrators are familiar with "prevailing norms of ethical conduct in ADR"; and (2) take steps to educate their arbitrators regarding ethical issues.[253] In 2004, the American Bar Association House of Delegates approved a revised code of ethics (drafted in conjunction with a special committee of AAA), providing ethical standards for arbitrators and addressing issues such as impartiality and conflicts of interest.[254] However, it is not clear to what extent debt collection arbitration forums adhere to ethical protocols or enforce them.[255] One roundtable participant further suggested that there should be not only ethical standards for arbitration forums, but also a code of ethics for arbitration administrators, that is, the employees of the arbitration forum who implement its rules.[256]

Numerous participants suggested that the FTC should issue recommendations or guidelines addressing ethical standards for consumer debt collection arbitration, including standards for how arbitrators are selected and assigned,[257] arbitrator neutrality,[258] arbitration forum neutrality,[259] and transparency.[260] Others participants expressed the view that it is not enough just to have the standards; they also must be vigorously enforced.[261]

252. Sternlight, Tr. III at 111; *see also* "Principles for ADR Provider Organizations," CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, May 1, 2002, *available at* http://www.cpradr.org/Portals/0/finalProvider.pdf (hereinafter CPR-Georgetown Principles).

253. *See* CPR-Georgetown Principles, *supra* note 252, at 12.

254. "The Code of Ethics for Arbitrators in Commercial Disputes," American Bar Association (ABA) and American Arbitration Association, approved by the ABA February 2004, *available at* http://www.abanet.org/dispute/commercial_disputes.pdf.

255. A number of arbitration forums have, at least in writing, general provisions addressing enforcement of their ethics regulations. *See* JAMS, Arbitrators Ethics Guidelines, VII. An Arbitrator Should Withdraw Under Certain Circumstances, *available at* http://www.jamsadr.com/arbitrators-ethics/ (stating certain circumstances under which an arbitrator should withdraw, including non-waivable conflict of interest and lack of impartiality) (hereinafter JAMS Ethics Guidelines); National Arbitration Forum, Code of Procedure, Rule 23, Disqualification of Arbitrator, at 31, Aug. 1, 2008, *available at* http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf (providing that an arbitrator shall be disqualified where there are conflicts of interest or bias) (hereinafter NAF Code); American Arbitration Association, Consumer Due Process Protocol, Apr. 17, 1998, *available at* http://www.adr.org/sp.asp?id=22019, at Statement of Principles, Principle 3 (providing, under section entitled "Disclosure and Disqualification," that, upon objection of a party, the forum will determine whether the arbitrator should be disqualified) (hereinafter AAA Consumer Protocol).

256. Kaplinsky, Tr. II at 159.

257. *See* Van Aken, Tr. III at 167.

258. *See* Sternlight, Tr. III at 170; *see also* Barron, Tr. III at 178.

259. Sternlight, Tr. III at 170.

260. *See*, *e.g.*, Van Aken, Tr. III at 167; Sternlight, Tr. III at 170 ("more transparency"); Barron, Tr. III at 178-79 ("consider . . . transparency of system").

261. Sturdevant, Tr. III at 168.

3. Commission Views

The Commission concludes that, especially in the wake of serious concerns relating to NAF, it is imperative that arbitrators and arbitration forums take significant and concrete steps to prevent bias and the appearance of bias. No one who has matters before an arbitration forum should be permitted to have any ownership or other financial interest in the forum, and no one who has a direct financial interest in a matter or a creditor should be allowed to arbitrate the matter or disputes involving that creditor.[262] Fundamental notions of fairness require no less.

More generally, the Commission concludes that rigorous standards of ethical conduct for arbitration forums, arbitration administrators, and arbitrators are sorely needed. It is not necessary that an arbitration forum be a non-profit, although having such a status could eliminate some bias and appearance of bias. The Commission also concludes that the private sector should try to develop debt collection arbitration standards, promote compliance with these standards,[263] and vigorously enforce them. If the private sector cannot or will not take the action needed, then either the government should develop and enforce such standards or Congress should prohibit debt collection arbitration entirely and have these matters resolved in the public court system.

262. As for other potential financial conflicts, at a minimum arbitrators should disclose them to the parties. *See, e.g.,* AAA Consumer Protocol, *supra* note 255, at Statement of Principles, Principle 3 ("Neutrals [arbitrators] should be required to disclose to the Independent ADR Institution [forum] any circumstance likely to affect impartiality, including any bias or financial or personal interest which might affect the result of the ADR proceeding, or any past or present relationship or experience with the parties or their representatives, including past ADR experiences. The Independent ADR Institution [forum] should communicate any such information to the parties . . . . Upon objection of a party to continued service of the Neutral [arbitrator], the Independent ADR Institution [forum] should determine whether the Neutral [arbitrator] should be disqualified and should inform the parties of its decision."); National Arbitration Forum, Statement of Principles, *available at* http://www.adrforum.com/main.aspx?itemID=401&hideBar=False&navID=296&news=3 (stating that the arbitrator is "required to disclose the existence of interests or relationships that are likely to affect their impartiality or that might reasonably create a material appearance that they are biased against one party or favorable to another"); Council of Better Business Bureaus, Inc., Rules of Binding Arbitration for Disputes Subject to Pre-Dispute Binding Arbitration Clauses, 2004, *available at* http://www.bbb.org/us/Dispute-Resolution-Services/Pre-Dispute-Arbitration ("If a financial, competitive, professional, family or social relationship exists between the arbitrator and one of the parties (even if the arbitrator believes the relationship is so minor as to have no effect on the decision), it shall be revealed to all parties, and you may decide that this arbitrator should not serve in your case.") (hereinafter BBB Rules); JAMS Ethics Guidelines, *supra* note 255 (stating that an arbitrator should promptly disclose anything that could reasonably lead a party to question the arbitrator's impartiality).

263. *See, e.g.,* AAA Consumer Protocol, *supra* note 255, at Statement of Principles, Principle 3 (the forum "should make reasonable efforts to ensure that Neutrals [arbitrators] understand and conform to pertinent ADR rules, procedures and ethical standards."); see National Arbitration Forum, Code of Conduct for Arbitrators, Sept. 2006, *available at* http://www.adrforum.com/users/naf/resources/CodeOfConductForArbitrators1.pdf (providing ethical standards for arbitrators); *see* JAMS Ethics Guidelines, *supra* note 255 (providing guidance to arbitrators regarding ethical issues).

On the critical issue of bias and perception of bias arising from the selection of arbitrators, the FTC recommends that forums promote arbitrator neutrality[264] by diversifying their rosters of arbitrators, rotating matters randomly among arbitrators[265] (perhaps with some consumer selection),[266] and limiting the number of matters assigned to an arbitrator. The Commission also recommends that the process and procedures arbitration forums use to select arbitrators be made as transparent as possible to restore public confidence in the integrity of debt collection arbitration proceedings.[267]

B. Notice and Cost of Participation

As with debt collection litigation, numerous participants at the roundtables stated that few consumers participate in debt collection arbitration proceedings. Some participants claimed that the rate of non-participation in debt collection arbitration is comparable to the rate of failure to defend in debt collection litigation, that is, over ninety percent of consumers do not participate in arbitration.[268] Participants discussed a wide variety of possible reasons why consumers

264. *See, e.g.,* AAA Consumer Protocol, *supra* note 255, at Statement of Principles, Principle 3 ("All parties are entitled to a Neutral [arbitrator] who is independent and impartial."); *see* National Arbitration Forum, Consumer and Employee Arbitration Rights, Apr. 2009, *available at* http://www.adrforum.com/resource.aspx?id=1490 (providing that arbitrators be "neutral" and that "arbitration should be administered by someone other than the arbitrator or the parties themselves"); *see* BBB Rules, *supra* note 262 ("The arbitrator shall sign an oath pledging to make an impartial decision."); *see* JAMS, Consumer Arbitration Minimum Standards, July 15, 2009, *available at* http://www.jamsadr.com/consumer-arbitration ("The arbitrator(s) must be neutral.") (hereinafter JAMS Consumer Standards).

265. *See* AAA Consumer Protocol, *supra* note 255, Reporter's Comments to Principle 3 "Independent and Impartial Neutral; Independent Administration," (suggestion of, among other things, a larger panel of neutrals and rotating assignments to address repeat player concerns); *see also* Searle Center on Law, Regulation and Economic Growth, Creditor Claims in Arbitration and in Court Interim Report No. 1, Appendix A. Procedures in AAA Debt Collection Program Arbitration, Nov. 2009, *available at* http://www.law.northwestern.edu/searlecenter/uploads/Creditor%20Claims%20Interim%20Report%2011%2019%2009%20FINAL2.pdf at 29-30 (describing AAA arbitrators, in its debt collection program arbitrations, as being selected randomly from a pre-screened group, and using software to rotate the arbitrators in each state).

266. *See, e.g.,*AAA Consumer Protocol, *supra* note 255, at Statement of Principles, Principle 3 ("The Consumer and the Provider should have an equal voice in the selection of Neutrals [arbitrators] in connection with a specific dispute."); *see* BBB Rules, *supra* note 262 (the section "Selecting Your Arbitrator" provides, while allowing for some variation, that "[t]he BBB maintains a pool of individuals who have volunteered to serve as arbitrators . . . . A party may reject the name of an arbitrator only if a financial, competitive, professional, family or social relationship exists . . . ."); *see* JAMS Consumer Standards, *supra* note 264 ("the consumer must have a reasonable opportunity to participate in the process of choosing the arbitrator(s)").

267. *See* CPR-Georgetown Principles, *supra* note 252, II – Information Regarding Services and Operations, at 9 (stating that forums should take reasonable steps to provide information about the method by which neutrals are selected for service).

268. *See*, *e.g.*, Naimark, Tr. II at 33 (estimating consumer non-participation in debt collection arbitration at potentially over 90%), Tr. III at 28 ("one of the most striking differences between these [debt collection] arbitrations and even other consumer arbitrations is the extremely high rate of no-show by the consumer"); Capitel, Tr. III at 30 (the 95% rate of default in debt collection arbitration is "unconscionable").

participate in arbitration so infrequently, including problems in the arbitration notices consumers receive and the costs to consumers of participation.

1. Notice of Arbitration

Debt collection arbitration proceedings commence when one of the parties to the dispute, usually the collector, invokes its contractual right to compel arbitration. Once a collector informs the arbitration forum that it wants to have a dispute arbitrated, the collector or the forum sends a notice to the consumer notifying him or her that the dispute will be arbitrated. Some roundtable participants asserted that these notices are inadequate because: (a) they are sent to the wrong address; (b) they are delivered through flawed methods; and (c) the notice does not adequately advise consumers of the arbitration proceeding and the importance of participating in it.

Consumer advocates expressed concern that arbitration notices are too often sent to the wrong addresses, including old and out-of-date addresses.[269] The problem, according to consumer advocates, is especially likely to affect low-income consumers, who may change residences more frequently than the general population.[270] Neither consumer advocates, arbitration forums, nor other participants, however, provided a detailed description or any empirical analysis of the measures arbitration forums, creditors, or collectors use to determine the addresses to which arbitration notices are sent. Consumer advocates suggested that senders take greater steps to ensure the accuracy of the addresses used, such as engaging in several rounds of notice if the notice is returned to the sender and checking government databases or using third-party locator services to verify that the addresses are accurate and current.

Generally, how the consumer is to be notified about arbitration is specified in the terms of the contract between the creditor and the consumer[271] and is also addressed in arbitration forum rules and protocols.[272] Some roundtable participants expressed concern that the methods of notification allowed in the arbitration context were lax and would not be accepted as adequate

269. Van Aken, Tr. III at 21 ("I'm aware of companies that don't go back and seek information about the consumers current whereabouts but simply use whatever address they've been provided in the file that they purchased from the original issuer of the debt.").

270. Bland, Tr. II at 36-37 ("[A] demographer will tell you that there's something like 16 percent of the population [that] moves every year. People who are victims of predatory lending with low income tend to move a lot more often than that.").

271. *See*, *e.g.*, Narita, Tr. III at 22; Sternlight, Tr. III at 22.

272. *See* description of forum rules, *infra* note 274.

service of process in court proceedings.[273] For example, arbitration forums may not require personal service of the notice by a process server or court official.[274] Others responded that arbitration is intended to be less formal and expensive than the court system and that the costs of arbitration would increase if arbitration notices had to meet the standards for service of process for actions filed in court.[275] A related issue is that, even if the notice reaches a consumer's household, it may not reach the correct person in the household.[276]

At the roundtables, participants offered suggestions for enhancing notification processes to be similar to service of process in litigation but also to allow for other options providing expeditious service and delivery verification, such as overnight or priority mail, if the sender can show that previous attempts to deliver actual notice to a valid address failed. A similar suggestion offered was that the sender could use a "tiered" method of notification, whereby if the sender transmits the notice by certified mail and the notice is returned or the consumer does not sign it, then the sender would confirm the address or serve the notice as it would serve process in court.[277]

273. *See*, *e.g.*, Sternlight, Tr. III at 22-23 (the issue of whether "services are allowed in the arbitration context that wouldn't pass muster in the court context. I think that's a concern that we're here to talk about today."); Hillebrand, Tr. III at 26 ("if arbitration is taking the place of the court, the service ought to be as good as the court process [after certain improvements are made to the court process]"); Barron, Tr. III at 29 (higher standard of service in court is reason why certain consumers learn of claim at point of confirmation of award, as opposed to notification of arbitration proceeding), 30 (noting superiority of personal service method).

274. AAA Comment at 5 (noting generally more informal methods of service in arbitration than litigation). However, at the roundtables, a collector attorney noted that, based on his experience [with NAF rules], the notification processes that parallel service of process rules were allowed, along with other methods such as overnight delivery (Canter, Tr. II at 40); *see also* Edelman Comment at 22 (stating a need for legislation or regulation to, among other things, "[r]equire notice of proceedings to be given in same manner as service of summons"). Available written forum rules appear to be more permissive than prescriptive: *See* JAMS, Comprehensive Arbitration Rules & Procedures, Rule 8. Service, effective July 15, 2009, *available at* http://www.jamsadr.com/rules-comprehensive-arbitration ("service may be made by hand-delivery, overnight delivery service or U.S. mail" and parties may also make provisions for electronic service); *see also* NAF Code, *supra* note 255, Rule 6 "Service of Claims, Responses, Requests, and Documents," (service of initial claims may be done by U.S. certified mail with a signed return receipt, private service with receiver signature, other written acknowledgment of delivery, or otherwise in accordance with rules of civil procedure).

275. *See*, *e.g.*, Capitel, Tr. III at 30-31 (recognizing that more rigorous notice would impose costs but nevertheless stating that, if personal service is most effective means of notification, then it should be used); Narita, Tr. III at 33 (personal service requirement would increase costs of arbitration, which would be passed on to the consumer); Sternlight, Tr. III at 39 (acknowledging costs of good service, but noting that it is worth it because "[w]e can't have a system, a private system, where people can be found to owe money that maybe they never owed and they never heard about the claims being brought against them").

276. *See* Jarzombek, Tr. III at 24 (relating anecdote of a minor child signing for certified mail address to the parent of the child).

277. AAA Comment at 6.

When AAA administered consumer debt collection arbitrations, it used a notice process that exceeded its typical arbitration notice requirements.[278] Collectors were required to send arbitration notices via a method that allowed the notice to be tracked and the consumer's signature obtained. AAA originally transmitted its arbitration notices to consumers via certified mail, return receipt requested. AAA eventually switched to a method whereby the United States Postal Service confirmed the date and time of delivery to the consumer's address.

Even if consumers receive notifications of arbitration proceedings, they may not read them. Some roundtable panelists claimed that many consumers do not open these notices, because there is not sufficient information on the envelope to indicate the identity of the sender or that the enclosed document may be important.[279] For example, a consumer would likely recognize the name of its credit card brand (e.g., Visa, MasterCard, or American Express) or perhaps the name of the bank which issued its card (e.g., Citibank, Chase, or Bank of America), but is less likely to recognize the name of an arbitration forum (e.g., AAA or NAF), or the name of a debt collector sending the arbitration notice. Further, arbitration notices do not state on the envelope that an arbitration proceeding is being commenced against the consumer. In contrast, a consumer receiving a document with a court listed on the envelope is more likely to conclude that the contents are important to read. Some consumers therefore may simply throw away arbitration notices without opening or reading them.[280]

Participants discussed potential ways for the envelope design to convey that the contents are important and that consumers should read them. One suggestion was that the face of the envelope could include a concise statement in bold indicating its importance.[281] Others noted that the envelope would need to comply with FDCPA requirements, which generally prohibit debt collectors from revealing a consumer's debts to others.[282] One participant stated his belief that something could be devised for the front of the envelope that would be FDCPA-compliant yet still provide enough information to persuade consumers to open it and read the contents.[283]

278. AAA Comment at 5.

279. *See* Hillebrand, Tr. III at 27 (noting that it is more likely a consumer will ignore a mailing from an entity of whom they have never heard).

280. Bland, Tr. II at 34 ("most people don't open mail from anonymous groups that they've never heard of . . . .")

281. Bland, Tr. II at 35-36.

282. *See* Narita, Tr. III at 45-46; *see also* Section 805(b) of the FDCPA, 15 U.S.C. §1692c(b).

283. Melcer, Tr. III at 49 (giving examples of statements like "there is a claim against you . . . you may lose rights.")

Arbitration forum rules generally require that collectors must satisfy the arbitrator that consumers were properly notified of the arbitration proceeding.[284] One government official indicated that a mere statement by an attorney that notice was given, without any further details, has been considered acceptable in some arbitrations.[285] Consumer advocates and government officials also claimed that the individuals who sign or stamp the paper to certify that consumers have received the arbitration notice may not actually have personal knowledge of such receipt.[286]

Participants suggested a number of ideas for improving consumer notification and for standardizing notice certification practices. Some called for greater verification procedures to demonstrate that notification has been delivered correctly.[287] Others suggested that the process would be improved if notices were delivered by a mail service that requires a signature, and if an electronic copy of that signature were permitted to serve as proof of delivery.[288] One government official suggested that arbitrators should be more demanding in determining whether senders have followed proper notification procedures.[289]

Participants also noted that the content of the arbitration notices may have an important impact on whether consumers participate in the proceedings. Consumer advocates maintained that notices should contain enough relevant information to allow the consumer to recognize the debt, including the name of the original creditor and the amount of the original debt, so that he or

284. *See* NAF Code, *supra* note 255, Rule 7. Filing, Rule 12. Initial Claim, at 12, 19 (providing in Rule 7 that a party shall timely file a proof of service, and in Rule 12 that a claim shall not proceed to arbitration until the proof of service (or a response) has been filed).

285. Van Aken, Tr. III at 35.

286. One example raised involved an individual in one city certifying that he had sent out an extraordinarily large number of notices, when in fact the postmarks on those notices were from other cities around the country. Both the number and location of the mailings would indicate that the individual did not send out all the notices or have personal knowledge that they were sent. *See* Bland, Tr. II at 38-39. *See also* Jarzombek, Tr. III at 24 (relating anecdote of a minor child signing for an arbitration notification for a parent, where the fact that it was not the correct person's signature was not noticed at the arbitration).

287. *See*, *e.g.*, Jarzombek, Tr. III at 25; Hillebrand, Tr. III at 26 (noting ideas regarding adequate service in the court context from a 2007 Massachusetts Working Group on Small Claims).

288. *See* Narita, Tr. III at 33 (suggesting sending "a notice of an arbitration claim out by registered mail, or FedEx, or something, and you ask the consumer to sign that they've received it and that becomes your service"); Canter, Tr. II at 40-41 (suggesting that rules for notification "parallel the process server's rules and state rules, but with the addition that you allow service by these overnight mails which can now – couriers which can now capture the signature and make an electronic copy, and that electronic copy can be evidence of the service of process, just like a certified mail service of process"); AAA Comment at 5 (stating that "the AAA implemented a notice process for our debt collection arbitrations that greatly exceeded the requirements typically contained in our rules. Specifically, we required the claimant business party to serve the demand for arbitration in a manner that could be tracked, with the expectation that a signature would be obtained indicating the each demand had been received").

289. *See* Van Aken, Tr. III at 20-21.

she can make an informed decision whether to participate.[290] Some participants suggested it was important to stress for consumers the potentially serious consequences of arbitration, as well as to describe the arbitration process as accessible to the consumer.[291] A creditor attorney suggested standardized arbitration notices be sent to consumers, possibly referring them to the FTC's website for further information about arbitration generally.[292]

The Commission concludes that consumers need to be made better aware of debt collection arbitration proceedings. While it is not certain to what extent notification problems are the cause of consumers not participating in arbitration, it would be worthwhile for senders of arbitration notices to adopt measures to: (1) increase the likelihood that they have valid addresses for consumers; (2) track and document their delivery of notices to consumers; and (3) use envelopes for the notices which make it clear that their contents are important while not inadvertently disclosing the debts of consumers to third parties. The Commission also concludes that arbitration forums and arbitrators should take steps to conduct a closer assessment of claims that consumers have received adequate notification.

The FTC lacks the information and experience needed to recommend specific measures to achieve these objectives. The Commission recommends that private and public sector entities with an interest in debt collection arbitration conduct tests to determine which measures would be most cost-effective. Particularly with respect to ensuring valid addresses and tracking and documenting delivery of notices, interested entities should explore how the use of technology could increase accuracy and efficiency.

290. *See*, *e.g.*, Hillebrand, Tr. III at 46-47 (analogizing to the 2007 National Consumer Law Center recommendations for specific things that ought to be in a litigation complaint for debt collection); Barron, Tr. III at 51 (supporting the NCLC factors as an important potential aspect of notification).

291. AAA Comment at 6.

292. Narita, Tr. III at 91.

2. Costs of Arbitration

A primary rationale for using arbitration rather than litigation is that it is purportedly less expensive than litigation. Some proponents of arbitration asserted that at least in some instances arbitration is less expensive than court proceedings,[293] although the Commission also received comments to the contrary.[294] No empirical evidence was presented or submitted showing definitively whether the total cost of debt collection arbitration is in fact lower than the total cost of debt collection litigation.[295]

In evaluating debt collection arbitration from a consumer protection perspective, it is important to focus not only on the relative costs of arbitration and litigation but also on the costs of arbitration to consumers. For debt collection arbitration to be a viable alternative to the court system, the costs to consumers must not be prohibitive.[296] In assessing the costs to consumers, it is necessary to examine the allocation of costs between the collector and the consumer, as well as when these costs are allocated and the method used to allocate them.[297]

Arbitration forums generally establish rules regarding the amount of arbitration costs for which consumers are responsible. Some forums require consumers to pay little, if any, of

293. *See* Melcer, Tr. III at 68.

294. At least some debt buyers filed comments explaining that they only use arbitration proceedings because it is required by the contracts between the original creditors and the consumers. *See*, *e.g.*, Asset Comment at 6 (stating that they arbitrate "when contractually required to do so. We prefer not to arbitrate, however. Although arbitration does often allow for more interaction with the consumers . . . it increases the cost of litigation, in part, because the award must still be confirmed in court."); PRA Comment at 4 ("PRA has been involved in arbitration cases, but not by choice. We have arbitrated because the terms of some contracts required arbitration. If cooperation with a customer is not likely, we would prefer to litigate rather than arbitrate because litigation is better defined and more certain.").

295. *See* Searle Center Preliminary Report, *supra* note 235 (study showed a low cost of arbitration for consumer claimants, but did not specifically focus on debt collection arbitration).

296. *See* Alderman Comment, *supra* note 180, at 154 ("Courts and commentators alike have also noted the often-excessive costs of arbitration, which may deny access for those unable to pay.") (internal citation omitted).

297. *See id*.

the costs, while others require them to pay some of the costs.[298] When AAA conducted debt collection arbitrations, it required that consumers pay some of the costs of arbitration, but it limited these costs to the amount that the consumer would have paid had the matter gone to litigation.[299] A Maine study of data from consumer arbitration cases – nearly all which involved credit card debts – found that the applicable arbitration clauses required the collector to pay all fees up to a certain dollar amount, and that in most of the cases reported, the collector paid all of the arbitration fees because that specified dollar amount had not been reached.[300]

One approach which has been used to limit the costs to consumers is using "fee waivers," *i.e.*, an arbitration forum may decide that a consumer does not have to pay a fee because of economic hardship. Some roundtable participants emphasized, however, that such waivers are difficult to obtain.[301] In addition, according to one consumer advocate, the waiver requests are not ruled on until the end of the proceeding, such that consumers remain uncertain throughout the proceeding as to the costs for which they will be responsible.[302]

298. The total cost borne by a consumer in arbitration may depend on the particular forum, terms of the arbitration clause in the consumer contract, how the forum enforces provisions of the arbitration clause, which party initiates arbitration, whether any fees are waived, and the extent to which costs are assessed beyond the cost of the arbitrator. *Compare* Sturdevant, Tr. III at 71 (stating that largest cost in arbitration is the cost of the arbitrator, and that most agreements provide that the parties will share the cost) *with* Welsh, Tr. III at 71, 72 (disagreeing with Mr. Sturdevant, noting that JAMS has never done debt collection arbitration, but that in its consumer arbitrations consumers do not pay more than they would have paid in court). *See, e.g.*, JAMS Consumer Standards, *supra* note 264 ("When the company is the claiming party initiating an arbitration against the consumer, the company will be required to pay all costs associated with the arbitration. In California, the arbitration provision may not require the consumer to pay the fees and costs incurred by the opposing party if the consumer does not prevail."); American Arbitration Association, Consumer-Related Disputes Supplementary Procedures, at Section C-8 "Administrator Fees and Arbitrator Fees," *available at* http://www.adr.org/sp.asp?id=22014 (the consumer is responsible for one-half the arbitrator fee, up to a maximum amount determined by the amount of the claim) (hereinafter AAA Supplementary Procedures); AAA Consumer Protocol, *supra* note 255, at Statement of Principles, Principle 6 (providing for "reasonable cost to Consumers based on the circumstances of the dispute"); National Arbitration Forum, Fee Schedule to Code of Procedure (Aug. 1, 2008), at 3, 4-12, *available at* http://www.adrforum.com/users/naf/resources/2008FeeSchedule-FinalPrint1.pdf ("[a] Consumer Respondent pays one-half of the fee for a Participatory Hearing if selected by the Consumer Respondent up to a maximum of $250" and listing numerous additional fees for other activities, filings and requests). *See also* Sturdevant, Tr. III at 71-72 (stating that there are "all sorts of providers in this country that don't have [provisions that consumers don't have to pay for arbitrators]" but also noting the existence of reported cases where forum protocols have been disregarded).

299. Welsh, Tr. III at 72; *see also* Kaplinsky Comment, attaching "The Use of Pre-Dispute Arbitration Agreements by Consumer Financial Services Providers," at 13 (noting that his message to his clients, to draft a fair arbitration clause, would include agreeing "to pay all arbitration fees other than what the consumer would pay as a filing fee and other than what is waived by the arbitration administrator"). However, it is AAA's position that contracts where there is negotiation (such as homes and automobiles) may not fall under its consumer protocols, but rather under its commercial protocols, which can be more expensive for the parties. *See* Johnson, Naimark, Tr. II at 237-40.

300. Maine Arbitration Report, *supra* note 221, at 8.

301. *See* Edelman Comment at 21 ("difficulty of obtaining fee waivers").

302. Hillebrand, Tr. III at 74.

One controversial method of allocating costs between the collector and the consumer is using fee-shifting provisions either in credit contracts or pursuant to forum rules. Pursuant to these types of provisions, at the end of arbitration proceeding, the arbitrator may order the losing party to pay for certain costs, such as filing or arbitrator fees.[303] Consumers who lose in arbitration – and the vast majority of consumers do – can thus be required to pay costs exceeding those they would have paid in court.[304] Participants also noted instances in which consumers have been required to pay costs for "extras" such as motions, closing arguments, a statement of reasons for the arbitrator's decision, and the like.[305]

Consumers cannot participate in arbitration if they cannot afford it. The Commission therefore encourages efforts to decrease consumer costs, such as providing simple forms or checklists to assist consumers in responding to notifications of arbitration,[306] and allowing consumers to use technology to submit information and participate in hearings.[307] Arbitration forums generally should limit the total cost to consumers of arbitration to the amount that they would have paid to defend against a similar proceeding in court, regardless of whether the contract between the parties contains provisions that shift fees and other costs onto the losing party. In addition, arbitration forums should allow consumers to request fee waivers from arbitrators as soon as practicable, rather than requiring that consumers wait until the end of the proceeding.

C. Arbitration Awards

1. Awards and Arbitrator Opinions

Arbitrators issue awards at the conclusion of the proceeding, but they are not required to accompany their awards with an opinion setting forth a statement of the law and an application of the law to the facts. Such reasoned opinions are rare in arbitration; roundtable participants

303. Johnson, Tr. II at 152-153 (discussing JAMS arbitration rules, and stating that, if a consumer loses, the arbitrator has the right to assess the hourly arbitrator's fee against the consumer).

304. *See, e.g.*, Johnson, Tr. II at 153.

305. *See, e.g.*, Johnson, Tr. II at 236; Van Aken, Tr. III at 73.

306. *See* Appleseed Report, *supra* note 23, at 22-23 (in the context of litigation, discussing forms available at New York City Civil Court, which include check-off lists of defenses available to the consumer).

307. *See* AAA Consumer Protocol, *supra* note 255, Reporter's Comments to Principle 6 "Reasonable Cost," (suggestion that in certain cases "it may be possible to fulfill the principle of reasonable cost by the use of the Internet, the telephone, other electronic media, or through written submissions"), *see also* U.S. Chamber of Commerce Comment (Sept. 1, 2009) at 3 (stating that the "consumer usually has the choice to conduct his or her arbitration over the phone or 'on the papers,' which saves the consumer from having to take any days off work to resolve the dispute"). However, use of technology, such as the Internet, in arbitration proceedings should not be required of consumers who are unfamiliar with or lack access to it.

explained that this is because a party must request the opinion[308] and often must pay a fee for it.[309] Participants differed as to whether a party should be required to make such a request.[310]

Some roundtable participants stated that issuing reasoned opinions would have benefits, such as increasing the transparency of the arbitration process.[311] It would also provide a record for judicial review of the award to the extent that such review is permitted under the FAA.[312]

On the other hand, some participants said that reasoned opinions usually are not necessary because most debt collection arbitrations are relatively simple and straightforward factual inquiries.[313] Other participants expressed concern that issuing more reasoned opinions might subject awards to more court challenges.[314]

Assuming that arbitrators issue reasoned opinions along with awards, the question arises as to how much weight arbitrators should give these opinions in subsequent proceedings. Some participants associated with collectors argued against opinions having a precedential effect,[315]

308. *See* Sorkin, Tr. II at 180. Available written forum rules vary as to whether a reasoned opinion must be requested: *see*, *e.g.*, NAF Code, *supra* note 255, Rule 26 – Selection of a Participatory Hearing, Rule 37 – Awards, (stating in Rule 26 that parties to a participatory hearing provide "[a]ny Request or requirement for a Written Award accompanied by the appropriate fee," and that, in Rule 37, awards are "summary" unless a request or prior agreement is filed, within a certain time and with fee payment); BBB Rules, *supra* note 262, Rule 28 – The Decision ("all parties shall be mailed a written decision accompanied by the arbitrator's reasons for the decision"); AAA Supplementary Procedures, *supra* note 298, at Section C-7 "The Award" ("In the award, the arbitrator should apply any identified pertinent contract terms, statutes, and legal precedents."); AAA Consumer Protocol, *supra* note 255, at Statement of Principles, Principle 15 "Arbitration Awards" ("At the timely request of either party, the arbitrator should provide a brief written explanation of the basis for the award. To facilitate such requests, the arbitrator should discuss the matter with the parties prior to the arbitration hearing.").

309. *See* Van Aken, Tr. III at 120.

310. *Compare* Hillebrand, Tr. III at 119-120, *with* Kaplinsky, Tr. II at 176. However, if reasoned opinions are to be permitted only upon request, one panelist raised the concern that parties have a sufficient amount of time to make a request. Van Aken, Tr. III at 120 (in the past, there has been only a short period of time during which the request for a reasoned opinion could be made).

311. *See* Bland, Tr. II at 180-81 (speaking of written opinions that are public and searchable).

312. *See* Barron, Tr. III at 118 ("If the standard for review of an arbitration award upon confirmation is very, very high threshold of a manifest disregard for the law, then there absolutely must be a statement of decision coming out of the arbitration proceedings that can build a record for that delicate review process.").

313. *See* Narita, III at 120 ("I'm not sure in this specific context, the consumer debt collection context whether the opinions would be particularly robust.")

314. Sorkin, Tr. II at 180.

315. *See*, *e.g.*, Kaplinsky, Tr. II at 177-78; Canter, Tr. II at 195 ("I think the role of precedent should remain as it is, and that is the state law or the federal law that governs the dispute."); Narita, Tr. III at 123 (noting supposed arbitration benefits of simplicity and finality); ACA Comment at 22 ("Arbitration decisions are informal, non-precedential, fact-resolution events. If this was changed, arbitration would lose the characteristics that differentiate it from civil litigation. Blurring the lines . . . would defeat the purpose of engaging in arbitration.").

asserting that it would undermine the simplicity and finality of arbitration and would not be useful precedent anyway given that the opinions are fact-specific.[316] A forum representative similarly argued that courts should issue decisions stating what the law is and therefore serving as precedent, while arbitrators should issue opinions applying the law to the particular facts in the proceeding.[317]

The Commission concludes that arbitrators should issue reasoned opinions to accompany awards in all debt collection arbitration proceedings. These opinions should state the law applied,[318] explain the application of the law to the facts, and set forth a calculation of the amount awarded, including breaking the amount into principal, interest, and fees. Such opinions would help the parties understand the rationale for the amounts arbitrators awarded, and would assist with judicial review of arbitration awards and public assessment of debt collection arbitration proceedings. Because most of these opinions would involve relatively limited and case-specific factual disputes, the FTC believes that their preparation should not impose undue burdens or costs on the forums or the collectors, and that such opinions would not ordinarily be well-suited for use as precedent in future proceedings.

2. Challenging and Confirming Awards

If a consumer does not receive the initial notification of the arbitration proceeding, an arbitrator's notification that an award has been issued usually will be the first time the consumer learns of the arbitration.[319] Roundtable participants said that award notifications frequently are sent to consumers by regular mail, even if consumers did not appear in the arbitration proceeding.[320] Some participants argued for better notification,[321] using certified mail or other methods more rigorous than regular mail.[322]

316. *See* Narita, Tr. III at 123.

317. *See* Naimark, Tr. III at 125.

318. Roundtable participants generally agreed that arbitrators should be required to follow the law in resolving the parties' disputes. Barron, Tr. III at 159 ("I have sensed a consensus that this panel, people on both sides of the question and in the middle, would like to have the system where the arbitrators had to follow the law.") *Compare* NAF Code, *supra* note 255, Rule 20. Authority of Arbitrators (stating that an arbitrator shall, among other things, "follow the applicable substantive law"); *with* BBB Rules, *supra* note 262, Rule 28. The Decision, 2004 ("Unless otherwise provided by agreement of the parties, the arbitrator is not bound to apply legal principles in reaching what the arbitrator considers to be a fair resolution of the dispute.").

319. In fact, some consumers may not learn about an arbitration award until their bank account is garnished. *See, e.g.*, Hillebrand, Tr. III at 157.

320. *See* Johnson, Tr. II at 218.

321. *See* Sternlight, Tr. III at 163-64 ("If we're going to require better notice . . . similarly we're going to need better notice as to the decision itself"); Hillebrand, Tr. III at 157.

322. Johnson, Tr. II at 218.

As with initial notifications of arbitration, it would be worthwhile for senders of arbitration award notices to adopt measures that: (1) increase the likelihood that they have valid addresses; (2) track and document their delivery of these notices; and (3) use envelopes for the notices which make it clear that the contents are important while not disclosing the debts of consumers to third parties. The Commission lacks the information and experience needed to recommend more specific measures and thus recommends that private and public sector entities with an interest in debt collection arbitration conduct tests to determine how best to achieve these objectives at the lowest cost.

Receipt of the notice of award is particularly important because consumers only have ninety days after delivery of notification[323] to contest the award in court, whereas collectors have up to a year after such delivery to confirm the award in court.[324] Some consumer advocates believe that this asymmetry is problematic[325] because collectors wait until after the ninety day period before moving to confirm the award, so that consumers can no longer raise certain defenses.[326] Some roundtable participants thus suggested that consumers be allowed the same period of time to contest the award as the collectors have to confirm it.[327]

A collector attorney said that it is important for the creditor to have more time to confirm than the consumer has to contest, although he did indicate that whether the collector should have a year to do so is debatable.[328] His reasoning was that the collector cannot move to confirm the award until it knows it is a final judgment – a fact that cannot be known until ninety days have passed and the consumer has not challenged the award.[329] Consumer advocates, however, responded that cross-petitions to confirm and vacate can be filed and resolved at the same time.[330] Collector representatives also asserted that the asymmetry of time frames in the FAA generally

323. FAA, 9 U.S.C. § 12 (2006). However, some roundtable participants argued that the ninety day period does not start to run until consumers *receive* notice of the award, so if this notice has not been provided, consumers retain the ability to challenge the award. *See*, *e.g.*, Canter, Tr. II at 223.

324. FAA, 9 U.S.C. § 9 (2006).

325. *See*, *e.g.*, Hillebrand, Tr. III at 157 ("If the time period to confirm is still running after the time to raise objections about the arbitration has passed, that mismatch is going to create difficulties."); Barron, Tr. III at 158-59.

326. *See*, *e.g.*, Johnson, Tr. II at 219; Van Aken, Tr. III at 161-62.

327. *See*, *e.g.*, Canter, Tr. II at 223 ("It may make sense to make it the same time period as the period for enforcing the award."); Bland, Tr. II at 224-5 ("Having two different time periods really prejudices consumers in a significant way.")

328. *See* Melcer, Tr. III at 160-61.

329. *See* Melcer, Tr. III at 160.

330. Van Aken, Tr. III at 161.

is not biased against consumers in general, because the party that has only ninety days to contest the award may not be the consumer,[331] especially in arbitrations involving issues other than debt.

The FAA is the source of the difference between the time periods to challenge and confirm an award.[332] A change to the FAA[333] likely would apply to all types of consumer arbitration, not just debt collection arbitration. In other types of arbitration, consumers likely win more often than in debt collection arbitration. The Commission believes that further study is needed to determine whether amending the FAA to equalize the time periods for challenging and confirming an arbitration award is on balance beneficial.

Roundtable participants discussed what a collector should be required to prove to confirm an arbitration award in court. Consumer advocates opined that collectors should have sufficient evidence to sustain the award in court,[334] and one advocate suggested that such evidence would consist of: (1) proof that consumers received notification of the arbitration proceeding; (2) the evidence that was provided to the arbitrator; (3) the contract providing for arbitration; (4) evidence of any assignments of the debt at issue; and (5) a breakdown of the amount awarded (detailing what portion constitutes principal, interest, penalties, fees, expenses, etc.).[335] Another consumer group representative suggested that collectors be required to submit admissible evidence that the consumer agreed to arbitrate.[336] Others argued, however, that imposing such extensive requirements to confirm an award amounts to an automatic and comprehensive judicial review, which would undermine the arbitration process.[337]

The Commission does not take a position on whether the standards for confirming arbitration awards need to be changed. As discussed elsewhere in this report, the FTC advocates changes to the arbitration process to provide consumers with meaningful choice whether to submit disputes to arbitration, improve notice of the commencement of the arbitration process, require reasoned opinions (including a breakdown of the amount awarded) to accompany arbitration awards, and improve notice of the arbitration award. If these measures do not

331. *See* Drahozal, Tr. II at 231.

332. Drahozal, Tr. II at 231 (stating that it is "unsettled" whether the FAA applies in state courts, but there are states that apply it in this context).

333. *See*, *e.g.*, Johnson, Tr. II at 218; Bland, Tr. II at 220 ("the Commission could advocate legislation").

334. *See* Sturdevant, Tr. III at 155; Hillebrand, Tr. III at 144.

335. *See* Jarzombek, Tr. III at 137-140.

336. *See* Edelman Comment at 22.

337. *See*, *e.g.*, Melcer, Tr. III at 141; Yalon, Tr. III at 145 ("If you want the arbitration presentation to the court to be a relitigation of the case, then you have violated the purpose of the arbitration."); ACA Comment at 23 ("The purpose of arbitration is to quickly and efficiently deal with cases without the costs and difficulties of litigation. Allowing either party to contest the ruling of the neutral arbitrator would defeat the purpose of arbitration.").

prove effective in addressing the problems in the debt collection arbitration process, then the Commission may revisit the need for enhanced and expanded judicial review of arbitration awards.

D. Transparency of Arbitration Results

A major issue related to debt collection arbitration is the amount and type of information about awards which is made available to the public. If consumers are to choose whether to consent to arbitration of their disputes, including whether to permit their disputes to be handled by a particular arbitration forum, then they must have sufficient information to make these choices meaningful. Moreover, if the public is to assess the costs and benefits of debt collection arbitration as an alternative to the court system, then it must have sufficient data to make an informed assessment. Roundtable participants generally agreed that better information about debt collection arbitration should be disclosed to make the process used and the decisions made more transparent to the public.[338]

Some participants argued for a nationwide arbitration reporting and disclosure system.[339] California requires that arbitration forums report information such as type of dispute, amount claimed, and amount awarded, and that this information be disclosed to the public.[340] Some participants advocated that a nationwide system should make available more detail than California requires. They asserted, for example, that the report of an arbitration award should include not simply the amount awarded, but also a breakdown of how much of the amount is

338. *See*, *e.g.*, Drahozal, Tr. II at 192; Bush, Tr. II at 198-99 (expressing consensus of participants). AAA also maintains its own database about arbitration on its website, and it allows the public to access this database. Naimark, Tr. II at 186-87; Naimark Comment, attaching testimony to the Domestic Policy Subcommittee, Oversight and Government Reform Committee, U.S. House of Representatives, July 22, 2009 at 8; *see* http://www.adr.org/sp.asp?id=29470.

339. *See*, *e.g.*, Bland, Tr. II at 208; Hillebrand, Tr. III at 113-114; Van Aken, Tr. III at 114.

340. *See* Hillebrand, Tr. III at 97. *See also* Cal. Civ. Code §1281.96 (in relevant part requiring, subject to certain exceptions, that arbitration providers collect and post at least quarterly on their website in searchable form, for the preceding five years, information on consumer arbitrations including: (a) the name of the nonconsumer party (if it is a corporation or other business entity); (b) the type of dispute; (c) whether the consumer or nonconsumer prevailed; (d) number of times the nonconsumer has previously been a party in an arbitration or mediation administered by the arbitration provider; (e) whether the consumer was represented by an attorney; (f) dates for when the provider received the demand for arbitration, when the arbitrator was appointed, and the date of disposition; (g) the type of disposition; (h) amounts of the claim, award, and any other relief granted; and (i) the arbitrator's name, arbitrator's fee for case, and percentage of the fee allocated to each party). The State of Maine recently enacted similar requirements. Maine also mandated public disclosure in a searchable format of information concerning whether the arbitration provider within the preceding year has had a financial interest in a party or a party's attorney, and whether a party or party's attorney within the preceding year has had a financial interest in the arbitration provider. LD 1256, An Act to Provide Protections for Consumers Subject to Mandatory Arbitration Clauses, 2010 Maine Pub. Law (enacted Mar. 31, 2010).

for fees, interest, principal,[341] and attorneys' fees.[342] They also noted that when insufficient information is reported, it may not provide much insight into the arbitration process.[343] For instance, if a consumer is reported as having received an arbitration award, it may look like a "win" for the consumer, but this may be misleading if the amount awarded is substantially less than the consumer likely would have obtained in litigation.[344]

Other participants opposed requiring that arbitration forums report such information for debt collection proceedings. Some argued that such reporting would reduce or eliminate one of the benefits of arbitration over litigation – the private resolution of disputes.[345] To address this issue, other participants advocated that the results of arbitration should only be reported and made public with the consent of both parties.[346] One participant responded that redacting the names of the parties from the awards would obviate their privacy concerns.[347] Other participants pointed out that reporting requirements would impose substantial costs on arbitration forums.[348] Some disputed, however, that the cost to arbitration forums of reporting accurate and usable data would be unduly burdensome.[349]

Assuming that arbitration awards are reported and made available to the public, some participants emphasized that it is important for the public to have consumer-friendly methods of

341. *See*, *e.g.*, Canter, Tr. II at 185; Naimark, Tr. III at 117-18; *see* Barron, Tr. III at 118 (stating that, "this is one of the most problematic aspects of the arbitration system").

342. Bland, Tr. II at 201-2.

343. *See*, *e.g.*, Johnson, Tr. II at 193; Frank, Tr. II at 189-91; Stacked Deck, *supra* note 200, at 3 (noting that even though California legislation requiring reporting of arbitration results is a "good model," there are nevertheless problems due to the fact that "the data reported by some firms is virtually meaningless due to missing information. Even when data is present, results are provided in a way that renders collection labor intensive."); Arbitration Trap, *supra* note 183, at 5 (noting that for the California reporting requirement, California Code of Civil Procedure §1281.96, "[t]he data are maintained by arbitration providers on their own Web sites, where they are stored in thousands of unwieldy individual records. For example, NAF posts quarterly reports about its California work in a hard-to-find place on its Web site, using a very cumbersome format that makes analysis difficult.").

344. *See* Johnson, Tr. II at 119-20 ("[T]his is a very difficult area to study because you can't just categorize wins and losses . . . [award of $750 for consumer] certainly didn't feel like it [a win] to me considering that any court in Iowa would have given me four or five times that and to my client.").

345. Kaplinsky, Tr. II at 176-77.

346. Capitel, Tr. III at 121.

347. Kaplinsky, Tr. II at 179.

348. Naimark, Tr. II at 205 ("In terms of building a system to report such data, it is quite expensive, and it can be considered a real burden."); ACA Comment at 22 ("ACA does not believe that the value of requiring the systematic reporting of consumer arbitration data is sufficient to justify the costs of such a system.").

349. Frank, Tr. II at 207 (discussing use of a form for data collection and concluding that "[i]t's really not an excessive burden for a large arbitration forum").

accessing and analyzing these awards.[350] It appears to be difficult for consumers or the public currently to locate awards on the websites of jurisdictions that disclose such information.[351] Some participants stated that results should be presented to the public in a searchable format.[352] If awards are made available but not in a manner easily accessible to consumers, it might convey an advantage to repeat players who are familiar with the reporting system and know how to use it to track developments and obtain other key information.[353]

Another issue raised at the roundtables was how to ensure that arbitration forums report and disclose as required by law.[354] Some argued that a strong enforcement mechanism is needed to ensure data are accurately and completely reported.[355] One participant noted that the enforcement mechanism for the California arbitration reporting and disclosure system is a private right of action, but consumers could only bring such an action by showing that they suffered economic injury from the forum's failure to report and disclose properly.[356]

The Commission recommends that Congress consider the creation of a nationwide reporting and disclosure system for debt collection arbitration awards to make such arbitrations more transparent. This system could report and disclose arbitration awards and the reasoned decisions concerning those awards, with appropriate redactions to protect the privacy of consumers who participate in these proceedings. This information could be made available to the public in a user-friendly, searchable format. To foster compliance with these reporting and disclosure requirements, the Commission recommends that the federal government enforce them. Although such a reporting and disclosure system would have benefits to consumers, it should be structured so that its costs are not prohibitive or unduly expensive.

E. Arbitration Monitoring, Evaluation and Reporting

As discussed above, consumer advocates and consumer rights groups have raised significant concerns about the fundamental fairness of debt collection arbitration.[357] The Minnesota AG's suit against NAF, then the leading debt collection arbitration forum, for allegedly holding itself

350. *See* Frank, Tr. II at 191.

351. Bland, Tr. II at 121 ("to find out decisions is next to impossible because it's not a very transparent system").

352. *See* Bland, Tr. II at 199; Sternlight, Tr. III at 117.

353. *See* Bland, Tr. II at 181-82.

354. *See* Frank, Tr. II at 209-10.

355. *See*, *e.g.*, Hillebrand, Tr. III at 115; Van Aken, Tr. III at 114.

356. Bland, Tr. II at 210-11 (noting that there were compliance issues with the California reporting requirements, which can be enforced by private right of action but with a requirement to show that lack of disclosure caused the claimant to suffer economic damage).

357. *See, e.g., supra* notes 183, 220, and 230.

out as impartial while actual having financial ties to key members of the debt collection industry, resulted in a settlement requiring NAF to cease arbitrating consumer debt collection claims.[358] In the wake of the NAF settlement, a number of large banks announced that they would discontinue the use of debt collection arbitration provisions in their credit card contracts.[359] AAA announced that it was imposing a moratorium on its consumer debt collection arbitration until concerns about consumer debt collection arbitration were addressed.[360] AAA in the meantime has convened a task force of arbitration and debt collection experts to evaluate whether the organization should recommence consumer debt collection arbitration, and if so, how such arbitration should be reformed.

The FTC commends the prudence of creditors in refraining from enforcing their consumer debt collection arbitration provisions, and supports the efforts of AAA in not only imposing a moratorium on its debt collection arbitration program, but in actively seeking ways to reform the current arbitration process.[361] While such initiatives show promise, in light of the past alleged conduct of NAF and the extensive concerns discussed at length above, the Commission concludes that close monitoring and evaluation of debt collection arbitration models is needed to ensure that they provide consumers with meaningful choice and a fair process.[362] The FTC therefore is committed to engaging in such monitoring and evaluation, and as appropriate, will report the results of its monitoring and evaluation to policymakers, industry, consumer groups, and the general public.

358. *See supra* note 186.

359. *See supra* note 189.

360. *See supra* note 188.

361. *See* description of AAA task force, *supra* note 191.

362. Some roundtable participants opined that arbitration of debt collection disputes should be permitted only if consumers chose arbitration after the dispute has arisen. Alderman Comment, *supra* note 180, at 151, 157 ("pre-dispute mandatory arbitration must not be allowed to preclude consumer access to the courts and circumvent the civil justice system . . . . The simplest change is to preclude pre-dispute arbitration clauses in consumer contracts, while permitting parties to agree to arbitration after a dispute has arisen and other alternatives have been considered" and arguing for Congress to enact legislation that prohibits the use of binding pre-dispute arbitration clauses in consumer contracts); Johnson, Tr. II at 95 ("pre-dispute consumer arbitration simply doesn't work"); Hillebrand, Tr. III at 79 ("each party should have the ability to choose it and to agree upon it after the dispute has arisen and you know what's at stake"); Rossman Testimony, *supra* note 172, at 2 ("Prompt legislative action is needed to make pre-dispute binding mandatory arbitration clauses unenforceable in civil rights, employment, consumer, and franchise disputes."). The Commission believes that it is worthwhile to explore further whether consumers can be given a meaningful choice as to mandatory pre-dispute arbitration before concluding that only a post-dispute arbitration option should be permitted.

Chapter 4
Conclusion

The Commission concludes that the current system for resolving consumer debts is broken, because consumers are not adequately protected in either debt collection litigation or arbitration. To repair the system, the FTC in this report has set forth a variety of significant reforms that federal and state governments, the debt collection industry, and others need to make for the system to be both efficient and fair. The agency is interested in continuing to work with all interested parties on implementing these reforms as soon as practicable. The Commission hopes that the roundtable discussions and this report will be catalysts for change, resulting in a debt collection system which provides better protection for consumers without unduly burdening legitimate debt collection.

Appendix A
Debt Collection Roundtable Panelists

Abrams, James W. (Hon.)
Andersen, Rozanne
Arons, Paul
Barron, Nancy
Barry, Peter F.
Bender, Leslie C.
Berman, Eric M.
Bland, Jr., F. Paul
Bowne, Lauren Z.
Bragg, O. Randolph
Bromberg, Brian L.
Brown, Lorray S. C.
Buckles, Michael H. R.
Canter, Ronald S.
Capitel, Irving S.
Carpenter III, Hiram A. (Hon.)
Coffey, Carolyn E.
Coleman, June D.
Debski, Michael T.
Donnelly, Thomas M. (Hon.)
Drahozal, Christopher R.
Drysdale, Lynn
Edelman, Daniel A.
Estin, Andrew R.
Evans, Peter M. (Hon.)
Faulkner, Joanne S.
Fisher, Fern (Hon.)
Flanagan, James P. (Hon.)
Flitter, Cary L.
Flory, Jen
Frank, Joshua
Gagnon, Michele R.
Gargano, William R. (Hon.)
Grippo, Gary
Groves, Mark K.
Hillebrand, Gail
Jackson, Christine M.
Jarzombek, Jerry J.
Johnson, Ray
Kaplinsky, Alan
Kerrigan, Kathleen
Kinkley, Michael D.
Lebedeff, Diane A. (Hon.)
Leibsker, Ira F.
Lerch, Steven J.
Lipman, Jeffrey M. (Hon.)
Loftus, Connell A.
Lyngklip, Ian
Markoff, Robert
Martin, Angela
Maurer, Scott
McNulty, Carlene
Melcer, David
Mitchell-Munevar, Alexander
Moiseev, Susan (Hon.)
Moore, Harvey
Myers, Jerry
Naimark, Richard W.
Narita, Tomio B.
Naves, Ron
Needleman, Joann
Nepveu, Julie
Newburger, Manny
Nordlund, Lorraine (Hon.)
Olshan, Adam J.
Panarese, Joseph D. (Hon.)
Philipps, David J.
Pittman, Dale
Ray, Thomas M.
Redmond, Donald W.
Rosmarin, Yvonne W.
Sargis, Ronald H.
Sinsley, Barbara
Sorkin, David E.
Sternlight, Jean R.
Sturdevant, James C.
Surh, Tom (Hon.)
Tamaroff, Paul K.
Tenhundfeld, Mark
Tepper, Marla
Tyler, Johnson M.
Van Aken, Christine
Weinberg, Michelle
Jay Welsh
Wilcox, Ronald
Wilner, Claudia
Wu, Chi Chi
Yalon, Jr., Jerome M.
Yellon, Larry
Zezulinski, Albert

Appendix B
FTC Contributors to Debt Collection Roundtables

Bansal, Megha
Bergquist, S. Parrish
Brown, Dama
Bush, Julie
Carter, Tom
Graybill, Dean
Harwood, Charles
Klurfeld, Jeffrey
Mayer, Julie
Murphy, Bevin
O'Toole, David
Pahl, Thomas
Redding, Katherine
Thorleifson, Tracy
Vladeck, David
Winston, Joel

Appendix C
Agendas for Debt Collection Roundtables

Chicago, Illinois

August 5, 2009 – Litigation
August 6, 2009 – Arbitration

San Francisco, California

September 29, 2009 – Arbitration
September 30, 2009 – Litigation

Washington, DC

December 4, 2009 – Litigation

Agenda

Debt Collection: Protecting Consumers

A Roundtable

August 5-6, 2009
Chicago, IL

Day 1 — Litigation

9:00 Opening Remarks

Joel Winston, Associate Director, Federal Trade Commission, Division of Financial Practices

9:15 Introduction of Participants

9:45 Initiating Suits: Default Judgments and Service of Process

- How frequently are default judgment entered in debt collection litigation? Are debt collectors more likely to obtain a default judgment with some types of debt, such as credit card debt, or on behalf of some types of owners of debts, such as debt buyers?
- What costs and benefits result from the entry of default judgments?
- Should there be changes in the law or industry practice with respect to service of process or default judgments?

10:45 Break

11:00 Timing: Statute of Limitations Issues

- How frequently do debt collectors collect or seek to collect on debt that is beyond the statute of limitations? Are debt collectors more likely to collect or seek to collect on debt that is beyond the

Agenda

statute of limitations with some types of debt, or on behalf of some types of owners of debts?
- What are the costs and benefits of collectors attempting to collect on debt that is beyond the statute of limitations?
- Should collectors be required to disclose affirmatively to consumers that they have no legal obligation to pay a debt that is beyond the statute of limitations? Should there be other changes in the law or industry practice with respect to collecting on debt that is beyond the statute of limitations?

12:15 Lunch

1:30 Prima Facie Collection Case and Evidentiary Burdens

- What evidence of indebtedness do debt collectors typically provide to courts in connection with the debt collection complaints they file? Does the evidence that is provided vary based on the type of debt being collected or the type of debt owner?
- Is sufficient evidence typically provided along with the complaints that are filed in debt collection litigation?
- Should there be changes in the law or industry practice to require debt collectors to submit greater evidence of indebtedness?

2:30 Garnishment

- How frequently do debt collectors freeze or garnish bank accounts containing exempt federal benefits to collect on judgments? Are debt collectors more likely to do so with some types of debt, or on behalf of some types of owners of debts?
- What are the costs and benefits of collectors seeking to freeze or garnish bank accounts containing exempt federal benefits?
- Should there be changes in the law or industry practice with respect to debt collectors freezing and garnishing bank accounts containing exempt federal benefits?

3:30 Break

3:45 Productive Change and Best Practices

- How have industry members, consumer advocates, and court personnel worked, together or separately, on possible changes in the law or industry practice to address problems related to debt collection litigation? Do any of these possible solutions appear to be working or likely to work?

5:00 Adjourn

Day 2 — Arbitration

9:00 Opening Remarks

David Vladeck, Director, Federal Trade Commission, Bureau of Consumer Protection

9:15 Introduction of Participants

9:30 Consumer Arbitration and the FAA: A Primer

Christopher Drahozal, Professor of Law, University of Kansas School of Law; Chair, Arbitration Task Force of the Searle Civil Justice Institute at Northwestern University School of Law

10:00 Initiating Proceedings and Consumer Participation Rates

- How should arbitration proceedings be initiated so that consumers are made aware of them and their potential consequences?
- Should there be changes in the law or industry practices with respect to notifying consumers about arbitration?

10:45 Break

11:00 Choice of Provider, Choice of Location, and Role of Consumer Choice

- To what extent should consumers have a choice as to whether disputes regarding their debts are subject to arbitration?
- Should there be changes in the law or industry practice regarding the degree of consumer choice about arbitration disputes, such as whether, when, or where to arbitrate, which organization is the arbitration provider, or which individual arbitrator will adjudicate the proceeding?

12:00 Lunch

1:30 Arbitration Provider Procedures

- What procedures should apply in debt collection arbitration proceedings?
- Should there be changes in the law or industry practice with respect to these procedures?

2:00 Bias and Perceptions of Bias

- To what extent are there ownership, contractual, or other ties between collectors and arbitration providers? Which, if any, of these ties should be prohibited or disclosed to consumers?
- Should there be changes in the law or industry practice with respect to arbitration conduct to address real or perceived bias?

2:45 Break

3:00 Transparency of Results; Role of Precedent

- Should the results and reasoning behind arbitration decisions be stated clearly and publically? Should arbitration decisions have precedential effects on future arbitrations?
- Should there be changes in the law or industry practice to make arbitration decisions more transparent or to increase their precedential value?
- Should there be changes in the law or industry practice to require the systematic reporting of data about consumer arbitration, as is done in California?

4:00 Enforcing Awards; Contesting Awards

- How should a debt collector who wins an arbitration award be able to convert that decision into an enforceable judgment?
- How and when should a consumer be able to contest an arbitration decision?
- Should there be changes in the law or industry practice with respect to collectors' ability to convert arbitration decisions into judgments or consumers' ability to contest such decisions?

5:00 Adjourn

Agenda

Debt Collection: Protecting Consumers

A Roundtable
September 29-30, 2009
San Francisco, CA

September 29 — Arbitration

9:00 Opening Remarks

Charles Harwood, Deputy Director,
Bureau of Consumer Protection,
Federal Trade Commission

9:15 Introduction of Participants

9:30 Initiating Proceedings and Consumer Participation Rates

- How should arbitration proceedings be initiated so that consumers are made aware of them and their potential consequences? What evidence is there as to consumers' understanding and knowledge about the arbitration process?
- Who should have the burden of establishing that adequate notification regarding arbitration was given? What evidence of appropriate consumer notification should be required in an arbitration proceeding?
- Should there be changes in the law or industry practices with respect to notifying consumers about arbitration? Should there be any other changes with respect to initiating proceedings or consumer participation?

10:15 Break

Agenda

10:30 Choice of Provider, Choice of Location, and Role of Consumer Choice

- To what extent do consumers have a choice as to whether disputes regarding their debts are subject to arbitration?
- Are arbitration proceedings faster or cheaper than court proceedings for debt collection disputes? What other benefits and costs flow from the use of arbitration proceedings for debt collection disputes?
- Should there be changes in the law or industry practice regarding consumer choice about whether, when, or where to arbitrate, which organization is the arbitration provider, or how individual arbitrators are selected?

11:30 Lunch

1:00 Bias and Transparency

- Should there be changes in the law or industry practice with respect to ties between collectors and arbitration providers? Which, if any, of these ties create bias or perceived bias? Should such ties be prohibited or disclosed to consumers?
- Should there be changes in the law or industry practice to make the results and reasoning behind arbitration decisions more transparent and public? Should arbitration decisions have precedential effects on future arbitrations?
- Should there be changes in the law or industry practice to require the systematic reporting of data about consumer arbitration, as is done in California?

2:15 Enforcing Awards; Contesting Awards

- How should a debt collector who wins an arbitration award be able to convert that decision into an enforceable judgment?
- How and when should a consumer be able to contest an arbitration decision?
- Should there be changes in the law or industry practice with respect to collectors' ability to convert arbitration decisions into judgments or consumers' ability to contest such decisions?

3:00 Conclusion

- What debt collection arbitration issues do you think the FTC needs to further study or discuss?
- What should the FTC do to improve debt collection arbitration proceedings?

3:15 Adjourn

September 30, — Litigation

9:00 Opening Remarks

Jeffrey Klurfeld, Director,
Western Regional Office,
Federal Trade Commission

9:15 Introduction of Participants

9:30 Initiating Suits: Default Judgments and Service of Process

- How frequently are default judgments entered in debt collection litigation? What evidence is there of a possible relationship between default judgments and service of process?
- In what ways is process served in debt collection litigation against consumers? What role do the courts have regarding service of process? What is required of debt collectors regarding service of process?
- Should there be changes in the law or industry practice with respect to service of process or default judgments?

10:45 Break

11:00 Timing: Statute of Limitations Issues

- How frequently do debt collectors seek to collect on debt that is beyond the statute of limitations? Are debt collectors more likely to collect on debt that is beyond the statute of limitations with certain types of debt, or on behalf of certain types of owners of debts?
- What role do the courts have in addressing statute of limitations issues in debt collection? What substantiation, if any, regarding the statute of limitations should be required of collectors?
- Should collectors be required to affirmatively disclose to consumers that they have no legal obligation to pay a debt that is beyond the statute of limitations? Should there be other changes in the law or industry practice with respect to statute of limitations issues?

12:15 Lunch

1:30 Prima Facie Collection Case and Evidentiary Burdens

- What evidence of indebtedness do debt collectors typically provide to courts in connection with the debt collection complaints they file? Does the evidence that is provided vary based on the type of debt being collected or the type of debt owner?
- What substantiation of indebtedness is typically provided along with the complaints filed in debt collection litigation? Is sufficient substantiating evidence typically provided over the course of debt collection litigation?
- Should there be changes in the law or industry practice to require debt collectors to file greater evidence of indebtedness? Should there be any other changes?

2:45 Garnishment

- How frequently do debt collectors freeze or garnish bank accounts containing exempt federal benefits to collect on judgments? When and how are consumers notified regarding the freezing or garnishing of funds?
- What are the respective roles of the courts, the banks, the collectors, and the judgment debtors in protecting exempt federal funds from freezing or garnishment?
- Should there be changes in the law or industry practice with respect to debt collectors freezing and garnishing bank accounts containing exempt federal benefits?

3:45 Break

4:00 Closing Issues and Future Directions

- What debt collection litigation issues do you think the FTC needs to further study or discuss?
- What role should the FTC play with respect to debt collection litigation proceedings?

5:00 Adjourn

Agenda

Debt Collection: Protecting Consumers

A Roundtable
December 4, 2009
Washington, DC

9:00 Introductory Remarks

David Vladeck, Director
Bureau of Consumer Protection, Federal Trade Commission

9:15 Initiating Suits: Service of Process and Consumer Participation

- Why aren't more consumers defending against collection suits?
- To what extent are consumers failing to participate in collection suits because they were not served with process?
- What are the other reasons for failure to participate?
- What can courts and others do to increase consumer participation in debt collection suits?
- What actions should lawmakers, the courts, the FTC, the industry, or others take to address service of process and consumer participation issues?

Panelists

James Abrams, Judge, Connecticut Superior Court
Carolyn Coffey, MFY Legal Services, Inc.
Michael Debski, Rubin & Debski, P.A.
Peter Evans, Judge, Fifteenth Judicial Court of Florida, Palm Beach County
Joanne Faulkner, Law Office of Joanne S. Faulkner
Cary Flitter, Lundy, Flitter, Beldecos & Berger, P.C.
Michele Gagnon, Peroutka & Peroutka, P.A.
Mark Groves, Glasser and Glasser, P.L.C.

Agenda

Diane Lebedeff, Judge, New York City Civil Court
Carlene McNulty, North Carolina Justice Center
Joann Needleman, National Association of Retail Collection Attorneys
Donald Redmond, Portfolio Recovery Associates, Inc.
Yvonne Rosmarin, Law Office of Yvonne W. Rosmarin
Marla Tepper, New York City Department of Consumer Affairs
Larry Yellon, National Association of Professional Process Servers
Albert Zezulinski, NCO Group, Inc.

10:45 BREAK

11:00 Statutes of Limitations

- How frequently do debt collectors seek to collect on debt that is beyond the statute of limitations?
- Should there be a federal statute of limitations for consumer debts? If so, how long should it be?
- What restrictions or rules should be imposed with respect to collecting time-barred debt?
  - Prohibition or limitations on collection?
  - Disclosure that the consumer is not obligated to pay?
  - Prohibition on a payment reviving the entire debt?
  - Disclosure that a payment revives the entire debt?
  - Disclosure in complaints in collection actions of the date of last payment on a debt and the applicable statute of limitations?
- What actions should lawmakers, the courts, the FTC, the industry, or others take to address statute of limitations issues?

Panelists

James Abrams, Judge, Connecticut Superior Court
Carolyn Coffey, MFY Legal Services, Inc.
Michael Debski, Rubin & Debski, P.A.
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Diane Lebedeff, Judge, New York City Civil Court
Carlene McNulty, North Carolina Justice Center
Joann Needleman, National Association of Retail Collection Attorneys
Donald Redmond, Portfolio Recovery Associates, Inc.

Yvonne Rosmarin, Law Office of Yvonne W. Rosmarin
Albert Zezulinski, NCO Group, Inc.

12:15 LUNCH

1:45 Evidence of Indebtedness

- To what extent are complaints filed or judgments entered without adequate evidence of the consumer's indebtedness? What is the type and quantum of evidence of indebtedness that courts do or should require to be submitted with the complaint, to enter a default judgment, or to enter a contested judgment?
- What mechanisms should be implemented to ensure that collectors' claims of indebtedness are substantiated?
- Should the courts require a different type or quantum of evidence of indebtedness for different types of collectors, such as creditors, third-party collectors, and debt buyers?
- How would recent or proposed changes in state laws and court procedures concerning evidence of indebtedness affect consumers and the debt collection industry?
- What actions should lawmakers, the courts, the FTC, the industry, or others take to address evidence of indebtedness issues?

Panelists

Leslie Bender, Law Offices of Leslie C. Bender
Eric Berman, Eric M. Berman, P.C.
Brian Bromberg, Bromberg Law Office, P.C.
Hiram Carpenter, Judge, Twenty-Fourth Judicial District of Pennsylvania, Blair County
Lynn Drysdale, Jacksonville Area Legal Aid
Fern Fisher, Judge, New York City Civil Court
James Flanagan, Judge, Suffolk County First District Court, New York
Connell Loftus, Mann Bracken, LLP
Angela Martin, Martin, Attorney at Law, PLLC
Alexander Mitchell-Munevar, Greater Boston Legal Services
Jerry Myers, Smith Debnam Narron Drake Saintsing & Myers, LLP
Lorraine Nordlund, Judge, General District Court of Fairfax County, Virginia
Adam Olshan, Law Offices of Howard Lee Schiff, P.C.
Dale Pittman, The Law Office of Dale W. Pittman, P.C.
Chi Chi Wu, National Consumer Law Center

3:30 BREAK

3:45 Garnishment of Bank Accounts

- To what extent do collectors attempt to garnish federally-exempt funds in consumers' bank accounts?
- What should the federal government, including the federal bank regulatory agencies, do to address problems regarding the freezing, levy, or attempted garnishment of exempt funds in bank accounts?
- What approaches have states or localities taken to address the garnishment of exempt funds and the charging of fees to consumers? Have these approaches been successful?
- What actions should lawmakers, the courts, the FTC, the industry, or others take to address garnishment of bank accounts?

Panelists

Hiram Carpenter, Judge, Twenty-Fourth Judicial District of Pennsylvania, Blair County
Fern Fisher, Judge, New York City Civil Court
James Flanagan, Judge, Suffolk County First District Court
Gary Grippo, U.S. Department of the Treasury
Kathleen Kerrigan, Bank of America
Lorraine Nordlund, Judge, General District Court of Fairfax County, Virginia
Adam Olshan, Law Offices of Howard Lee Schiff, P.C.
Mark Tenhundfeld, American Bankers Association
Johnson Tyler, South Brooklyn Legal Services
Claudia Wilner, Neighborhood Economic Development Advocacy Project

5:00 Closing Remarks

Joel Winston, Associate Director
Division of Financial Practices, Federal Trade Commission

Appendix D
Debt Collection Roundtables Public Comments

1. AARP (Certner, David) (1/19/2010) # 545921-00029
2. ACA International (Beato, Andrew) (9/1/2009) # 542930-00047
3. Accounts Receivable Management, Inc. (Cosenza, Michael) (1/12/2010) # 545921-00027
4. Alderman, Richard (7/5/2009) # 542930-00008
5. American Arbitration Association (Naimark, Richard) (7/31/2009) # 542930-00016
6. American Arbitration Association (Naimark, Richard) (7/31/2009) # 542930-00017
7. American Arbitration Association (Naimark, Richard) (7/31/2009) # 542930-00018
8. American Arbitration Association (Naimark, Richard) (7/31/2009) # 542930-00019
9. Appleseed (Cavendish, Betsy) (3/1/2010) # 545921-00031
10. Asset Acceptance, LLC (Herbert, Edwin) (7/31/2009) # 542930-00020
11. Astrahan, Cheri (11/5/2009) # 544507-00013
12. Attorney Reynolds, Attorney Wu (7/31/2009) # 542930-00026
13. Ballard Spahr Andrews & Ingersoll, LLP (Kaplinsky, Alan S.) (8/10/2009) # 542930-00032
14. Bland, Paul (7/22/2009) # 542930-00024
15. Breeden, Lisa (8/27/2009) # 542930-00036
16. Breeden, Lisa (11/18/2009) # 544507-00014
17. Brown, J (11/22/2009) # 544507-00017
18. Cada (11/22/2009) # 544507-00016
19. Cada (11/22/2009) # 545921-00002
20. Capitel, Irving (12/2/2009) # 545921-00005
21. Certified Civil Process Servers Association of Texas (Pendergrass, Tod) (9/28/2009) # 544507-00002
22. Chamber of Commerce of the United States of America (Josten, R. Bruce) (9/1/2009) # 542930-00046
23. Chan, Henry (10/29/2009) # 544507-00009
24. Compliance Security Partners, LLC (Mertz, David) (10/19/2009) # 544507-00006
25. Consumers Union (Bowne, Lauren) (7/31/2009) # 542930-00027
26. DC 37 Municipal Employees Legal Services (Martin, Robert) (12/1/2009) # 544507-00018
27. DC 37 Municipal Employees Legal Services (Martin, Robert) (12/3/2009) # 545921-00011
28. Drahozal, Christopher (7/28/2009) # 542930-00014

29. Drahozal, Christopher (7/27/2009) # 542930-00023
30. Drahozal, Christopher (11/30/2009) # 545921-00004
31. Edelman, Combs, Latturner & Goodwin, LLC (Edelman, Daniel) (7/28/2009) # 542930-00029
32. Elder, Dane (6/30/2009) # 542930-00006
33. Eric M. Berman, P.C. (Berman, Eric) (1/7/2010) # 545921-00017
34. Feerick Center for Social Justice (Galacatos, Dora) (1/8/2010) # 545921-00023
35. Feerick Center for Social Justice (Galacatos, Dora) (1/9/2010) # 545921-00025
36. Fogal, Jordan (8/11/2009) # 542930-00033
37. Fogal, Jordan (8/28/2009) # 542930-00041
38. Forsythe, Brian (8/31/2009) # 542930-00044
39. Fox, Emma (8/17/2009) # 542930-00035
40. Gargano, William (12/10/2009) # 545921-00012
41. Greater Boston Legal Services (Mitchell-Munevar, Alexander) (1/11/2010) # 545921-00026
42. Jacksonville Area Legal Aid, Inc. (Drysdale, Lynn) (1/8/2010) # 545921-00020
43. JayinGR (11/30/2009) # 545921-00003
44. Kaplan, Jonathan (10/30/2009) # 544507-00010
45. Kaplan, Jonathan (10/30/2009) # 544507-00011
46. Law Offices Howard Lee Schiff, PC (Olshan, Adam) (1/8/2010) # 545921-00018
47. Lear, Chris (1/5/2010) # 545921-00016
48. Leykis, Tom (10/19/2009) # 544507-00005
49. Lindenau, (8/1/2009) # 542930-00028
50. Long, Gena (12/19/2009) # 545921-00014
51. Luck (8/27/2009) # 542930-00037
52. Malik (11/19/2009) # 544507-00015
53. Matson, Victor (8/28/2009) # 542930-00039
54. Mettier, Laurie (7/27/2009) # 542930-00013
55. MFY Legal Services (Coffey, Carolyn) (1/8/2010) # 545921-00021
56. Midland Credit Management, Inc. (Martin, Lance) (7/31/2009) # 542930-00025
57. Miranda, Alma (10/29/2009) # 544507-00007
58. National Association of Professional Process Servers (Tamaroff, Paul) (8/31/2009) # 542930-00042
59. National Association of Retail Collection Attorneys (Canter, Ronald) (8/31/2009) # 542930-00043
60. National Consumer Law Center (Hobbs, Robert) (7/31/2009) # 542930-00021
61. NEDAP (Wilner, Claudia) (1/8/2010) # 545921-00022

62. Nordlund, Lorraine – General District Court of Fairfax County, Virginia (11/19/2009)
63. Oversight and Government Reform (Issa, Darrell) (7/25/2009) # 542930-00011
64. Pendergrass, Tod (12/3/2009) # 545921-00008
65. Piaser, Lisa (12/15/2009) # 545921-00013
66. Pittman, Dale (12/7/2009) # 545921-00009
67. Portfolio Recovery Associates, LLC (Redmond, Donald) (7/31/2009) # 542930-00022
68. Rajput, Abida (1/14/2010) # 545921-00028
69. Reynolds, Maryellen (7/26/2009) # 542930-00012
70. Sanders, Veronica (10/5/2009) # 544507-00004
71. Schnackel (8/28/2009) # 542930-00040
72. Shea, Josh (7/30/2009) # 542930-00015
73. South Brooklyn Legal Services (Tyler, Johnson) (1/8/2010) # 545921-00019
74. Staulcup (6/29/2009) # 542930-00004
75. Sturdevant Law Firm (Sturdevant, James C.) (1/22/2010) # 543670-00030
76. Taylor, Cynthia (6/28/2009) # 542930-00002
77. Tomerlin, Leslie (9/30/2009) # 544507-00003
78. Tuttle (7/19/2009) # 542930-00010
79. Vandermeulen (11/1/2009) # 544507-00012
80. Vassar, Nolan (6/29/2009) # 542930-00003
81. Vassar, Nolan (6/30/2009) # 542930-00005
82. Vassar, Nolan (7/2/2009) # 542930-00007
83. Vassar, Nolan (7/16/2009) # 542930-00009
84. Wahl, K (9/1/2009) # 542930-00045
85. Watson (1/9/2010) # 545921-00024
86. Whealen, Michael (6/27/2009) # 542930-00001
87. Williams, Janine (12/3/2009) # 545921-00007
88. Woodall, Will (1/5/2010) # 545921-00015

Appendix E
Sample State Debt Collection Checklists

1. Massachusetts – Small Claims Default Judgment Checklist
2. Massachusetts – Small Claims Rule 7(d)
3. Fairfax County, Virginia – Purchased Debt Default Judgment Checklist
4. North Carolina Gen. Stat. §§ 58-70-145 – 58-70-155
5. Connecticut – Small Claims Bench/Bar Committee Proposed Small Claims Judgment Checklist

Massachusetts Small Claims Default Judgment Checklist

1. **Was the Statement of Small Claim properly served on the defendant?**
   - First-class mail service is sufficient if not returned undelivered (Rule 3[a]).
   - Service on an *out-of-state defendant* requires a return receipt or other long-arm service (G.L. c. 233A, § 6).
   - *Improper venue* is waived if not objected-to; if objected-to, may transfer to proper court (G.L. c. 218, § 21).

2. **Is the plaintiff *in trade or commerce* or collecting an *assigned debt*?** If so:
   - You must confirm that the plaintiff filed the VERIFICATION OF DEFENDANT'S ADDRESS form verifying the defendant's address (Rule 2[b]). If the defendant failed to do so:
     — you must dismiss the claim without prejudice, or
     — in your discretion, you may permit late filing of the form if it properly verifies the address to which the Statement of Small Claim was mailed.
   - The Statement must also include the *original creditor's name* (if different), the last four digits of the *original account number*, and the amount and date of *last payment* (Rule 2[a]), or you must dismiss the claim without prejudice.

3. **Is the *military affidavit* completed and signed?**
   - *If the defendant is on active military duty*, you must follow the requirements of the Servicemembers Relief Act.
   - If *you cannot determine whether the defendant is on active military duty*, you may either deny a default judgement or consider conditions to protect the defendant's rights if on active military duty (Rule 7[d][7]).

4. **Does the court have *subject matter jurisdiction* to hear the claim?** E.g.,
   No:
   - *Mass. Tort Claims Act* negligence claims against a state or local agency or employee (G.L. c. 258)
   - *Slander or libel* claims (G.L. c. 218, § 21)
   - *Equitable relief without a money claim* (G.L. c. 218, § 21)
   - *Invasion of privacy* (G.L. c. 214, § 1B)

   Yes:
   - *Road defects* (G.L. c. 84, §§ 15-21 or c. 81, § 18)
   - *Medical malpractice* (but must refer for a tribunal)
   - Equitable *replevin* of personal property along with a money claim (c. 214, § 3[1])

5. **Do the facts alleged, if true, *constitute a recognized claim* on which relief may be granted?** (e.g., a recognized contract, tort or warranty claim, statutory action, etc.)

6. **Do the facts alleged, if true, *establish each element* of a recognized claim?** E.g.,
   — *consumer protection* claims (G.L. c. 93A, § 9) require a prior demand letter.

- — *road defects* claims (G.L. c. 84, §§ 15-21 or c. 81, § 18) require a timely demand letter.
- — *deficiency judgments for secured consumer goods* after repossession require an affidavit filed with the claim (G.L. c. 255, § 131[d]).

- If not, you must require the plaintiff to establish the missing elements.
- The plaintiff need not prove any element that is established by the facts alleged, taken as true.

7. Is an *assessment of damages* required?

- If the claim is not for a sum certain, you must make an assessment of damages.
- The claim must state separately the amounts sought for damages, multiple damages, statutory penalties, attorney fees, costs, and total amount (Rule 2[a]). If the defendant does not appear, the plaintiff's failure to do so may influence your discretionary decision whether to enter a default judgment.

8. Does the claim include *any amounts that are discretionary*?

- e.g., multiple damages, a statutory penalty, discretionarily-set attorney's fees, or court costs other than the filing fee
- If so, you must exercise your discretion to set the amount.

9. Does the claim include *any amounts that must be reasonable* by law?

- e.g., contractual attorney's fees, collection costs, etc.
- If so, you must review that they are reasonable and not excessive.
  - — e.g., *deficiency judgments for secured consumer goods* may not include finance charges for installments due after repossession (G.L. c. 255 § 131[d]).

Massachusetts Small Claims Rule 7(d)

(d) **Defendant's Failure to Appear for Trial.** If the plaintiff appears for trial and the defendant fails to appear, the court may render judgment for the plaintiff and make an order for payment to the plaintiff. Prior to entering such judgment the court shall review the Statement of Small Claim to determine whether further inquiry or an assessment of damages is required. Normally these should be done on the scheduled trial date. The court shall examine any of the following circumstances:

1. *Uncertain Jurisdiction.* If the court's subject matter jurisdiction or proper service of the Statement of Small Claim is uncertain, the court shall inquire into the matter.

2. *Uncertain Claim*. If the facts alleged, taken as true, do not appear to constitute a claim on which relief may be granted, the court shall inquire into the matter.

3. *Uncertain Liability*. If the facts alleged, taken as true, do not establish each essential element of a claim, the court shall inquire into the matter and may elicit additional facts to determine if such element or elements are established.

4. *Uncertain Damages*. If the Statement of Small Claim requests damages that are not a sum certain or a sum which can by computation be made certain, the court shall conduct an assessment of damages. The court shall inquire into any amounts sought which do not appear to be supported by the facts as alleged.

5. *Discretionary Awards*. If the law requires an exercise of discretion in awarding multiple damages, a statutory penalty, or discretionary attorney's fees or court costs, the court shall inquire into the matter and exercise such discretion.

6. *When Review for Reasonableness Required*. The court shall review any amounts that the law requires be examined for reasonableness, such as contractual attorney's fees or collection costs. In such matters, the court's function is not to substitute its own discretion for the parties' agreement, but to avoid court enforcement of a clearly unjust result.

7. *Inconclusive Military Affidavit*. If the plaintiff is unable to file the affidavit required by the Servicemembers Civil Relief Act, 50 U.S.C. App. § 501 et seq., stating that the defaulting defendant is not in military service and showing necessary facts to support the affidavit, the court shall inquire into the matter. If it appears that the defendant is in military service, the court shall not enter any default judgment without first appointing an attorney for the defendant, and under certain circumstances staying the entry of any default judgment, as required by the Act. If the court cannot determine from the affidavit

whether the defendant is in military service, the court may exercise the discretion granted by the Act to require an indemnity bond, to stay execution, or to make such other orders as the court deems necessary to protect the rights of the defendant, or the court may dismiss the claim without prejudice.

8. *Plaintiff in trade or commerce or pursuing assigned debt.* Where the claim involves a plaintiff in trade or commerce or pursuing assigned debt and the plaintiff has not complied with Rule 2(b), the court shall not enter a default judgment for the plaintiff, and shall dismiss the claim without prejudice.

Fairfax County, Virginia
Purchased-Debt Default Judgment Checklist

- ❑ The original creditor has been named, or otherwise identified, in the court filings.

- ❑ The means by which, or the fact that, the debt was acquired by the current creditor has been established.

- ❑ A copy of the Terms and Conditions, or other agreement between the parties, has been attached, along with one of the following:

    - ❑ A copy of the signed application, or other form of acceptance, signed by the debtor; OR

    - ❑ A copy of a bill reflecting purchases or payments, or other indicia of actual use of the card or account; OR

    - ❑ A copy of an electronic printout sufficiently establishing the existence of the account, as well as payments, purchases, or other indicia of actual use of the card or account.

- ❑ Each of the relevant portions of the documents provided has been highlighted for the Court.

- ❑ There is either no nexus to the terms and conditions (i.e. no indicia of actual use), or no terms and conditions have been provided. Lacking prima facie evidence of a ratified contract between the original creditor and the debtor, Plaintiff does not seek to collect attorney's fees, or interest other than interest at the legal rate, from the date of judgment, or the date on which demand was made after the claim was purchased.

- ❑ Lacking prima facie evidence of a ratified contract, Plaintiff has demonstrated through objective evidence that the amount sought in this claim consists of principal only, exclusive of any compounded interest.

North Carolina Gen. Stat. §§ 58-70-145 – 58-70-155

Part 5. Special Requirements in Actions Filed by Collection Agency Plaintiffs.

§ 58-70-145. Complaint of a collection agency plaintiff must contain certain allegations.

In any cause of action that arises out of the conduct of a business for which a plaintiff must secure a permit pursuant to this Article, the complaint shall allege as part of the cause of action that the plaintiff is duly licensed under this Article and shall contain the name and number, if any, of the license and the governmental agency that issued it.

§ 58-70-150. Complaint of a debt buyer plaintiff must be accompanied by certain materials.

In addition to the requirements of G.S. 58-70-145, in any cause of action initiated by a debt buyer, as that term is defined in G.S. 58-70-15, all of the following materials shall be attached to the complaint or claim:

(1) A copy of the contract or other writing evidencing the original debt, which must contain a signature of the defendant. If a claim is based on credit card debt and no such signed writing evidencing the original debt ever existed, then copies of documents generated when the credit card was actually used must be attached.

(2) A copy of the assignment or other writing establishing that the plaintiff is the owner of the debt. If the debt has been assigned more than once, then each assignment or other writing evidencing transfer of ownership must be attached to establish an unbroken chain of ownership. Each assignment or other writing evidencing transfer of ownership must contain the original account number of the debt purchased and must clearly show the debtor's name associated with that account number.

§ 58-70-155. Prerequisites to entering a default or summary judgment against a debtor under this Part.

(a) Prior to entry of a default judgment or summary judgment against a debtor in a complaint initiated by a debt buyer, the plaintiff shall file evidence with the court to establish the amount and nature of the debt.

(b) The only evidence sufficient to establish the amount and nature of the debt shall be properly authenticated business records that satisfy the requirements of Rule 803(b) of the North Carolina Rules of Evidence. The authenticated business records shall include at least all of the following items:

(1) The original account number.

(2) The original creditor.

(3) The amount of the original debt.

(4) An itemization of charges and fees claimed to be owed.

(5) The original charge-off balance, or, if the balance has not been charged off, an explanation of how the balance was calculated.

(6) An itemization of post charge-off additions, where applicable.

(7) The date of last payment.

(8) The amount of interest claimed and the basis for the interest charged.

Connecticut – Small Claims Bench/Bar Committee Proposed Small Claims Judgment Checklist

Small Claims Judgment Checklist for Magistrates

This small claims checklist is to establish uniform minimum evidentiary norms, improve fairness, and enhance the public perception of the small claims court. (C.G.S. § 51-15) Magistrate does not have to award judgment if violates law or if the stipulation is against the interests of justice. PB 24-24, 24-26

Is there reason to believe that the plaintiff, and particularly a plaintiff that is a frequent user of the small claims court, is repeatedly failing to comply with small claims rules and procedures designed to protect defendants from improper judgments or is coming to court unprepared? If so, you should seriously consider dismissing the action and imposing sanctions under Practice Book §24-33, which allows you to impose costs of up to $100 on the offending party payable to the defendant who appears or to the judicial system in the event of nonappearance.

The goal is to get the party to discontinue the practice in all of its cases. Conduct which might justify sanctions in appropriate cases includes the bringing of suits beyond the statute of limitations, the failure to verify addresses as required by the Practice Book or the use of addresses at which the defendant is known not to reside, the failure to report to the court that a mailing was returned by the Postal Service as undeliverable, the filing of improper attorney's fee or interest claims, the failure to file proper military affidavits, the failure to provide required information on an affidavit of debt or the inclusion of claims known not to be awardable, and other similar matters that interfere with the fair administration of justice by the court. PB § 24-26, PB § 24-33

- **Was proper service made?**

  — The basis for knowledge of defendant's current address; address discrepancies. At least two methods of verification must be documented. Proposed PB § 24-9

  The methods shall be drawn from the following list: (1) Municipal record verification (e.g., from a street list or tax records); (2) Verification from the Department of Motor Vehicles; (3) Receipt of correspondence from the defendant with that return address; (4) Other verification from the defendant that the address is current; (5) The mailing by first class mail, at least four weeks prior to the filing of the small claims action, of a letter to the defendant at such address, which letter has not been returned by the United States Postal Service;

(6) Verification of the defendant's address from an online database, other than white pages or other unpaid general telephone directories; or (7) Verification of the defendant's address by obtaining independent verification from an additional source specifically described by the plaintiff.

— Is there reason to believe that the defendant did not reside at the address at which the process was served (e.g., in a housing case, that the defendant had vacated the premises before the action was brought)? Proposed PB § 24-9

— Is there a proper military affidavit PB § 24-24(b)(2)

- **Do papers include all material facts and documents? PB § 24-24**

  — Does the complaint set forth a valid cause of action showing the nature of any cause of action such as utility, credit card, personal loan, and list original creditor? PB § 24-9

  — If a check or other negotiable instrument was copy attached? PB § 24-24

    » Does it show the date of last payment or date of the last charge-off? Proposed PB § 24-9, Cf. 17-25(b)

    » Does to have the balance at original chargeoff and an itemization of post chargeoff additions? Proposed PB § 24-9, PB § 24-24, Cf. 17 -25(b)

    » Is the date of chargeoff listed? (note, this will be at least 6 months from date of last payment) Proposed PB § 24-9, PB § 24-24, Cf. 17-25(b)

  — The basis for statute of limitations (federal prohibition to bring time-barred suit) Proposed PB §24-9

- **Is the affidavit of debt in the proper form?**

  — An admissible affidavit showing unbroken assignment of the particular account (standing) CGS § 52-118

  — A non-generic affidavit of debt by original creditor or if original creditor not available the affiant must identify self, basis of knowledge, original account number, original creditor, amount of debt, original charge off balance or if balance not charged off, how it was calculated. If affiant not an employee of the plaintiff, state the relationship with the plaintiff and the address of the affiant. PB § 24-24, Cf. 17-25

  — Itemization of amounts requested after chargeoff PB § 24-24

— In consumer cases and only where there is a signed contract, attorney's fees are limited to 15%, CGS 42-150aa

- **Is the proper amount of interest claimed, if any?**

— Interest if claimed before beginning of action PB § 24-24

The interest award is discretionary. There is a ten percent limit with some exceptions CGS §37-3a

There is an eight percent limit if there is no agreement for interest. CGS § 37-1

Loans are limited to 12% CGS § 37-4

There is a 12% limit for use or forbearance* of money or credit** CGS § 36a-573

* Forbearance is "a refraining from the enforcement of something (as a debt, right, or obligation) that is due"

** described as all-encompassing language in Rhodes v. Hartford, 201 Conn. 89, 99 (1986).

NB. There are exceptions for federal bank exemption and other statutory rates

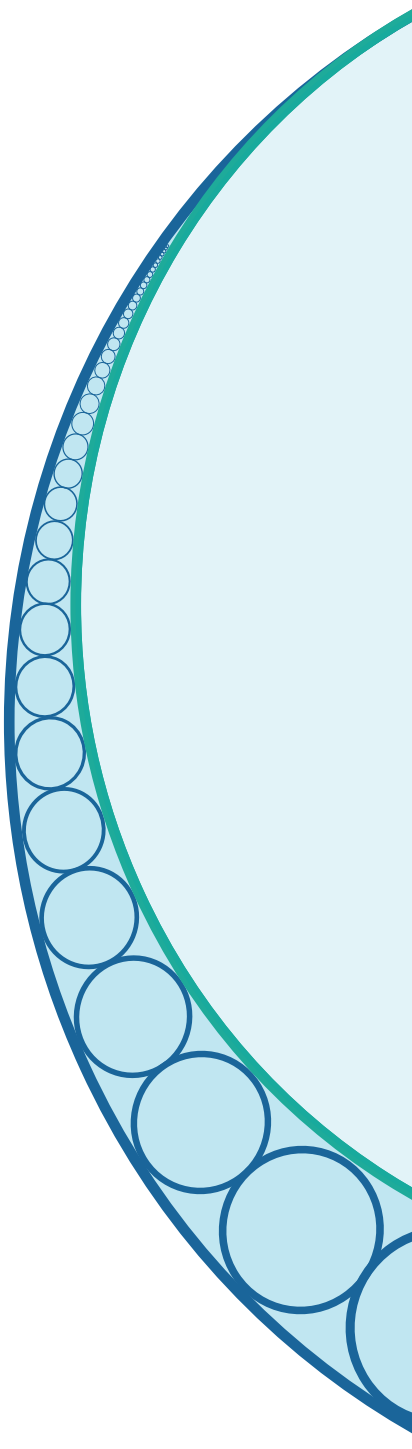
— Was there an agreement signed by defendant, or citation to statute, that supports any claimed recovery of interest in excess of 10%, fees, stating period covered and rate claimed. PB § 24-24

- **Items to consider when entering judgment**

— Is there reason to believe that the defendant's financial circumstances renders the "nominal order" excessive in the circumstances? If so, what weekly order should enter?

— If the defendant's financial circumstances are such that a stay of a particular type of wage or property execution should issue, what stay do you order?

— If a claim for medical bills, no judgment should enter for a medical service provider if on Medicaid 42 U.S.C. § 1396a(a)(25)(C).



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