UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

DEBT COLLECTION:
PROTECTING CONSUMERS

Tuesday, September 29, 2009

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

Workshop held at

San Francisco State University

835 Market Street, Rooms 675 and 676

San Francisco, California

Matter No. PO94806

Reported and transcribed by Susan Palmer, CERT 124

Panelists:

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P R O C E E D I N G S

OPENING REMARKS

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

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

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

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

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

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

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

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

What we're going to do is at the end of each panel is try to pose questions from the audience here as well as the audience who is participating through our website. If you're here in the audience and you have a question that you would like to have the moderator pose to the panelists, there are cards that we are making available over on the table, right out -- and they are in your packref4Tj-nel is

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a lot of material.

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

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

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

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

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

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

Chuck.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

in this area.

So with that, I will turn it over to our first panel. And what's the (inaudible). I turn it back over to Tom. Okay. Thank you.

(Applause.)

INTRODUCTION OF PARTICIPANTS

MR. PAHL: Thank you.

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

(Panelists seated.)

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

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

Beginning here -- and we have seated the panelists in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INITIATING PROCEEDINGS AND CONSUMER PARTICIPATION RATES

MS. MURPHY: Thanks, Tom.

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

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

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

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

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

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

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

MS. MURPHY: Okay. Thank you.

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

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

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

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

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

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

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

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

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

I think another issue that arises is whether the addresses that are used are good, and I think this particularly occurs when you have a downstream debt purchaser and it's been a while since the debt was incurred and since the consumer was in touch with the company with whom the consumer allegedly incurred the debt. And so, you know, 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. So I think that's another issue is the currency of that information.

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

MS. MURPHY: Mr. Narita.

MR. NARITA: Yeah. I think one thing to keep in mind is that the creditors and the debt collectors have a very strong interest in making sure rong

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

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

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

MS. MURPHY: Ms. Sternlight.

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

good terms or not good terms and to the extent, as Ms. Van Aken was speaking about, that 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.

Ms. Van Aken has already given, you know, a good

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

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

There's an interesting proposal from the Working Group in Massachusetts on Small Claims. I think it's in your record, the 2007 Massachusetts Working Group. We'll talk about it more tomorrow, but the concept there is before you take a default, there ought to be some confirmation that the service and the address that was served were good, an independent verification. This could deal with the issue of the old address in the debt file in an efficient way because you'd only have to do it if

And finally, I think that there's an extra problem in debt collection, both in court and in arbitration, which relates

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

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

MS. MURPHY: Mr. Naimark.

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

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

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

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

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

MR. NAIMARK: I don't know.

MS. MURPHY: Does anyone have a thought?

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

MS. MURPHY: Ms. Barron.

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

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

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

MS. MURPHY: Mr. Capitel.

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

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

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

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

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

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

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

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

up on Irv's point about cost, I think cost of service is a big issue and probably one of the reasons that creditors are attracted to arbitration is the reduced cost, you know. It's the promise of arbitration or some people say the myth of arbitration

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

MS. MURPHY: Mr. Yalon.

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

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

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

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

MS. MURPHY: Ms. Van Aken.

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

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

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

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

MS. MURPHY: Let's actually talk about that. Regardless of what form of service is being used, what sort of

Mr. Jarzombek.

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

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

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

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

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

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

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

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

MS. MURPHY: Ms. Sternlight.

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

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

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

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

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

MS. MURPHY: Mr. Sturdevant.

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

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

That is not the situation when we come to consumer and

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

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

MS. MURPHY: Ms. Hillebrand.

MS. HILLEBRAND: Thank you.

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

made which is -- I think Jay Welsh put his finger on it when he

conspicuous and I think that's fine. One thing that we have to keep in mind though is that the collection industry is regulated, and unless we're going to modify the FDCPA, Section 6092(f)(8) prohibits a collector from saying anything on the outside of an

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

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

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

Mr. Sturdevant.

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

the public justice system.

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

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

MS. MURPHY: Mr. Melcer.

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

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

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

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

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

MS. MURPHY: Ms. Barron.

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

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

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

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

MS. MURPHY: Thank you.

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

Thank you very much.

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

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

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

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

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

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

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

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

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

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

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

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

Okay. Mr. Naimark.

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

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

MR. HARWOOD: Other comments on whether consumers have

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

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

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

MS. STERNLIGHT: I'm just going to focus on the question as to what extent do consumers have a choice with respect to whether their debts are subject to arbitration. And I think it's really a pretty easy answer that, you know, obviously 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. Now there have been a few companies that have changed that very recently.

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

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

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

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

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

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

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

MR. HARWOOD: Mr. Welsh.

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

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

So go ahead, Mr. Melcer.

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

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

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

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

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

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

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

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

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

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

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

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

MS. HILLEBRAND: Thank you.

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

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

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

about consumers not having choice. I would just remind you it's not even as simple as if I read every credit card contract, I could pick one that doesn't have it. Many of them you don't get

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

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

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

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

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

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

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

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

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

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

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

MR. NAIMARK: Yes.

MR. HARWOOD: Anybody else?

Mr. Melcer.

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

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

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

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

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

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

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

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

MR. HARWOOD: We'll find a way.

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

MR. HARWOOD: Thank you.

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

MR. HARWOOD: Good point.

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

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

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

Does that mean it's there for better? No. I mean, just because it's cheaper or even faster, the reasons that it's faster and cheaper, I'm guessing, is because instead of having live hearings we have these psaper,TD f2.1 -wunzt.7 0 ouessoeing1414whcos

reported cases.

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

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

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

(Laughter.)

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

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

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

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

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

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

Ms. Hillebrand.

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

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

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

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

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

MR. HARWOOD: So I've got some followup questions, but

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

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

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

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

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

The United States Supreme Court has reduced punitive

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

When I tried the B of A case in the early 90s, '93,'94, the architect of the system, who was himself a retired appellate justice, Winslow Christian, said, "Look, I decided to do this because bottom line it's just cheaper for the bank. We're going to lose more cases involving customers, so, you know, they'll

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

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

MS. BARRON: Thank you.

MR. HARWOOD: Okay. Ms. Hillebrand.

MS. HILLEBRAND: The short answer is yes.

Consumers Union since the mid 90s has endorsed the move away from mandatory binding arbitration. We're not against arbitration, but we think 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.

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

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

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

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

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

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

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

MR. HARWOOD: Okay. Mr. Narita.

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

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

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

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

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

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

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

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

Go ahead.

MS. HILLEBRAND: There's another problem with it. I mean, is it better than what we have now? Yes. Is it good enough? No. And that problem is what happens in a default situation. If the provider is still being chosen by the creditor in over 90 percent of the cases because the consumer doesn't know, they can say, “No, I want this other one instead,w, theyat wen7 0 T

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

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

(Laughter.)

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

Where do we go from here? And in Texas we have a home solicitation statute, and it came into being because of the aluminum siding salespeople and whatever that sold you a real bill of goods. But it required certain things, two signatures, a certain size type so that you didn't have, "Nothing has changed in this agreement," like I think Mr. Sturdevant talked about earlier. You had to sign if the sales presentation was any language other than English. If it's Spanish presentation, you had to sign a Spanish acknowledgment of the release. That would be a good, I think, form for us to look at when we're looking at ways to work for an opt in

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

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

MS. HILLEBRAND: California.

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

MR. HARWOOD: It's not just attorneys.

MR. JARZOMBEK: They do it in the justice court, same guy, different court.

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

MS. BARRON: California.

MR. HARWOOD: California.

sense?

Ms. Sternlight.

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

That's a major reason why I and many others think mandatory arbitration in general is a bad thing. I think we aren't talking about it more today only because we're so focused

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

(Laughter.)

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

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

MR. HARWOOD: Okay.

Mr. Narita.

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

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

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

Go ahead.

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

MR. HARWOOD: Okay.

Ms. Barron.

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

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

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

that arbitration would be used in disputes?

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

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

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

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

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

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

MR. PAHL: Okay.

Mr. Naimark.

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

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

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

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

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

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

MS. HILLEBRAND: Yes.

(Laughter.)

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

Yes, Ms. Van Aken.

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

What we learned is 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. They have control over amendments, and, you know, at the end of the day they submit the whole file to the arbitrator. So nominally the arbitrator could undo any of these decisions that have already been made. But, for instance, you know, a customer requesting a participatory hearing is something where a case manager decides that in the first instance, and then if the arbitrator, in my understanding, decides that request should have been granted, the case leaves the arbitrator. And so the arbitrator has very little incentive to make a decision like that.

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

MR. PAHL: Okay.

Mr. Narita.

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

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

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

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

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

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

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

MR. PAHL: Mr. Sturdevant.

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

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

represents of JAMS on the east coast and threatened to withdrawal all mediation and arbitration business if they did not rescind that policy statement. And JAMS rescinded it publicly by March,

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

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

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

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

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

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

MR. PAHL: Yes.

Mr. Yalon.

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

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

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

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

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

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

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

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

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

And then we had a policy about rulings on disclosures.

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

MR. PAHL: Yes, Ms. Barron.

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

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

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, and I think the FTC and we all involved in this process at this table have a historic opportunity now to avoid an

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

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

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

When we see somebody that is working in a biased environment in one way or the other, that person is no longer on

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

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

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

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

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

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

At that time both our organization and JAMS elected to not just report the cases in California. Our report includes all our consumer cases and employment cases around the country. And I think it's inevitable that in playing a role of dispute

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MS. HILLEBRAND: Yes.

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

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

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

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

MR. PAHL: Mr. Melcer.

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

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

MR. PAHL: Yes, Ms. Hillebrand.

MS. HILLEBRAND: Well, judges of course are responsible to the public, can be tossed out the next election and the like.

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

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

MR. PAHL: Ms. Hillebrand.

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

MR. PAHL: Yes, Professor Sternlight.

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

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

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

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

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

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

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

MR. PAHL: Yes, Ms. Barron.

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

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. If you don't have a jury trial, if you have a court trial, you still get a statement of decision.

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

We then went to trial on that case and won, and it

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

MR. PAHL: Mr. Melcer.

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

MR. PAHL: Mr. Narita.

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

MR. PAHL: Ms. Van Aken.

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

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

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

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

Mr. Capitel.

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

MR. PAHL: Yes, Mr. Sturdevant.

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

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

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

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

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

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

Mr. Narita.

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

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

One of the benefits of arbitration is its simplicity and supposedly its finality, so I don't see any benefit to having particular, basically trial court arbitrators or trial court decisions having any kind of precedential effect, unless you're going to build in some, you know, incredibly cumbersome appellate system right into the arbitration forum, which, you know, gets to build i

would be.

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

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

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

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

MR. PAHL: Mr. Naimark.

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

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

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

MR. PAHL: Sure.

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

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

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

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

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

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

MR. PAHL: Ms. Hillebrand.

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

And part of the reason the answer has to be “yes” is the deterrent fact, the compliance effect, the effect of all those companies that have a general counsel whose job it is to

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

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

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

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

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

the class action issue, all those others are violations of the

that we need to keep those separate.

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

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

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

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

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

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

So thank you all very much.

(Applause.)

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

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

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

Yes, Ms. Van Aken.

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

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

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

Well, if you have a thumb on the scales in every case, it may not be that that consumer can show that particular connection, but it's still a very, very important issue. And, you know, the way it gets played out in practice is some consumers and some litigants do try to take on an arbitration provider, and they're met with this doctrine of arbitral immunity that says that generally you can't sue the provider [sic] the way -- you can't sue the arbitrator the way you can't sue a judge. And 5

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

MS. BUSH: Okay. Thank you.

Would anyone like follow up on that?

MR. NAIMARK: Yes. To a certain extent, I understand your frustration, but I think the San Francisco lawsuit and the

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

So my answer to the question that, first of all, should they be confirmed; in the context of a NAF award, I think never. But not to look like I'm so one-sided, there are some things that should happen or should be brought to court. For example, there ought to be some kind of proof of service. It shouldn't be like the one I talked about this morning where the 11-year-old child

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

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

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

NAF awards in the case of a debt buyer -- I just have to go say this:

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

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

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

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

MR. JARZOMBEK: Some of them are, yes.

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

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

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

MS. BUSH: Thank you.

Mr. Melcer.

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

I agree with you that all of those things, you know, are important. All of those things should have been looked at by the arbitrator. And whether or not they did, the question is,(17)Tj2.7 -

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

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

MR. STURDEVANT: I think Jerry's experience in Texas

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

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

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

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

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

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

MR. YALON: Thank you.

If you want to litigate the case, then you have to litigate the case. 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. You want proof that there was an arbitration award that granted an award in a specific amount in favor of one party against another party, I think a copy of the arbitration award does that.

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

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

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

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

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

If we want to change the law about what's required and have a uniform system across the country, that would be great. But we already have a system where there is federal law about what the requirements are. And we already have state court judges, even appellate court level judges in other states, where

generally.

The State of California has found it necessary with its budget issues to reduce its staffing in every court in the state and close one business day per month. So what we see is an increase in demand for judicial services, a decrease in

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

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

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

MS. BUSH: Yes, Mr. Jarzombek.

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

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

If you read an NAF award, you can't find anything in it that amounts to a manifest disregard of the law. So was it done that way by design? You can draw your own conclusion on that. But there's nothing in there that you can challenge when you get a single statement that an award in the favor of the claimant for a total amount of X is their finding. There's nothing there, and until you have the components to know if there has been a manifest disregard -- you know, another thing that Mr. Welsh said, "You have to wonder why somebody would go through this process." Itdfnow tprobdem" ul.ssssv1as been a10

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

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

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

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

one should be able to go to a state court judge who is evaluating whether or not to confirm that award under state or federal law,

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

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

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

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

MS. BUSH: Okay.

Mr. Sturdevant.

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

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

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

And as long as there is substantial evidence supporting the jury's verdict or the trial court judgment, it must be upheld on appeal. In other words, appellate courts can't weigh facts, but I just read this morning, from the most current weekly addition of Law Week, that in one of the(5)rufr,rp cases in which a jury r,rrded 500 million against Microsoft in an infringement suit, it was sent back for reconsideration becau(5)although there was a patent violation, the Court of Appeals in the Federal Circuit said that the jury heard insufficient evidence concerning how to calculate in a meaningful ,rp the value of any of the rufning royalty rgreements to arrive at the lump sum damages report.

So whether it's, you know, a collection case involving the cost of a television that mrp or mrp not have been purchased bp the person who is sued or involved in an arbitration, or whether it's a patent infringement case, there has to be sufficient evidence to sustain the r,rrd.

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

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

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

MS. BUSH: Thank you.

Ms. Hillebrand.

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

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

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

MS. HILLEBRAND: Is the problem created by the non-match? Yes. 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.

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

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

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

But we should take a look at California Code of Civil

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

MS. BUSH: Okay.

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

MS. BUSH: Ms. Barron.

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

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

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

But beyond that we talked a lot today about the fact that the arbitrators don't have to follow the law, and there's, in fact, 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. Not having to meet this higher standard of a manifest disregard for the law, which frankly is pretty offensive in the civil justice system.

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

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

system that's broken. And as I've said earlier, I think this is a historic opportunity to make some strides in improving that broken system. And I urge the FTC once again to take a look at

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

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

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

MS. VAN AKEN: Assuming a notice -- if you're using a bad address to serve the original notice of arbitration, then every piece of mail in the course of that arbitration, including the award, is also going to be sent to that bad address. That service is going to start the 90 days ticking. So it certainly 1112 evve learned ot taberignuding

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

Does anyone have a comment?

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

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

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

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

MS. BUSH: Ms. Sternlight, Professor.

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

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

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

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

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

award.

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

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

CONCLUSION

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

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

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

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

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

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

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

MR. PAHL: Thank you.

Ms. Sternlight.

MS. STERNLIGHT: I would hope that the FTC would issue a really thorough and strong report, putting out its findings as to the gross unfairness that has occurred in the past in this field of mandatory debt collection. We all know that has been to date primarily the work of NAF, which is no longer in that

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

MR. PAHL: Thank you.

Mr. Narita.

MR. NARITA: Thanks. Well, again, we're talking about arbitration in the consumer collection arena. And so I think when the FTC is deciding what it wants to do, it should remember that the collection industry, to a large extent, does not have a stake ah(t)Tl(1q lata9sa ltthe consumer1iuionrtionse mate csd so pur1 0c

to think about.

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

MR. PAHL: Thank you.

Mr. Naimark.

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

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

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

MR. PAHL: Thank you.

Mr. Melcer.

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

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

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

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

MR. PAHL: Great. Thank you.

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

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

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

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

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

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

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

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

MR. PAHL: Thank you.

Mr. Capitel.

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

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

I think that the Federal Trade Commission should encourage the credit card companies that on every credit card, on

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

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

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

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

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

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

Thank you very much.

MR. PAHL: Thank you.

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

Okay. Well, thank you.

(Laughter.)

MR. PAHL: We're done. No.

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

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

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

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

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

CERTIFICATION OF REPORTER

DOCKET/FILE NUMBER:

CASE TITLE: FTC

HEARING DATE: September 29, 2009