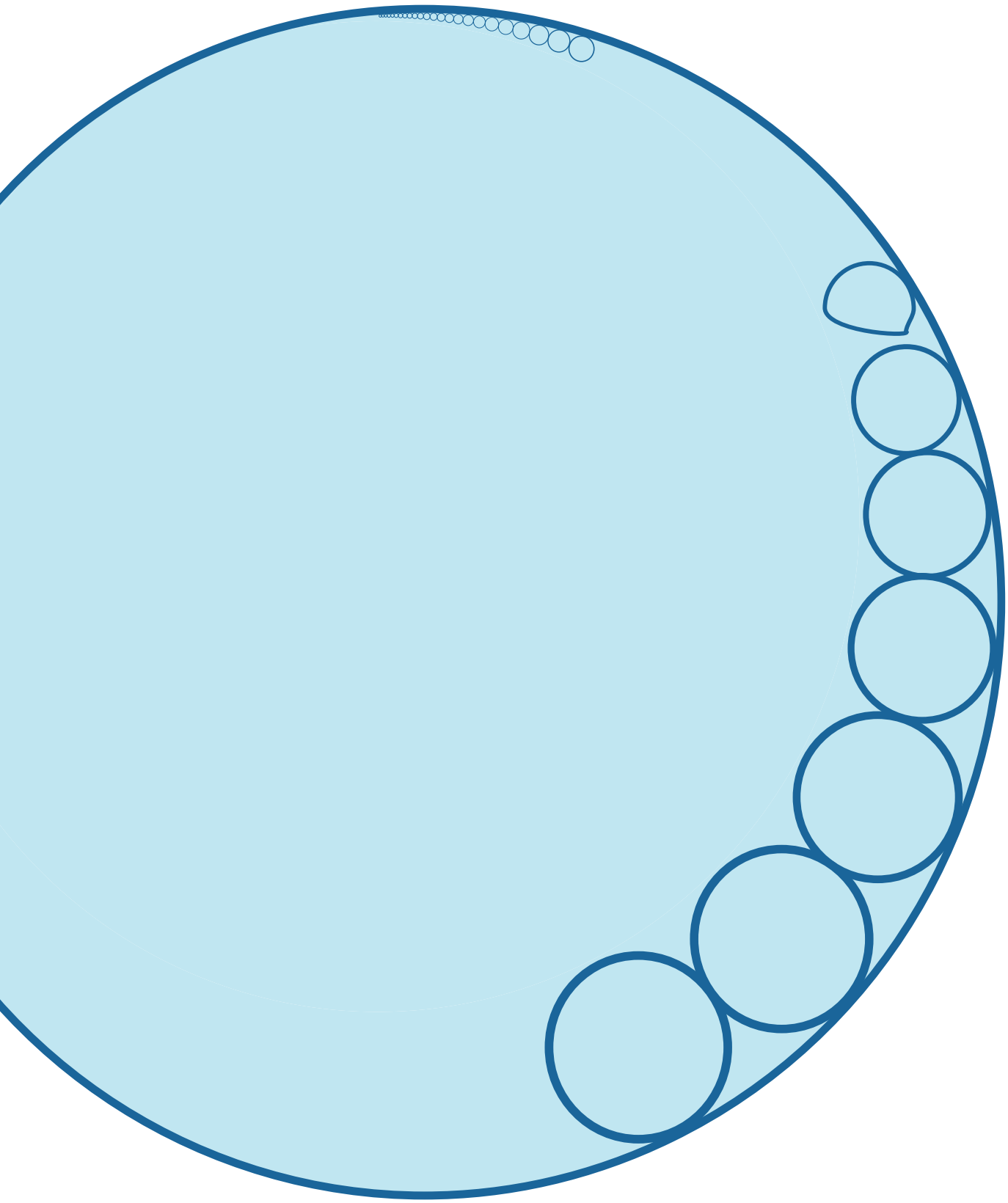
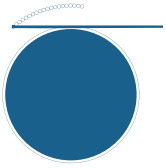


Repairing A Broken System:

Protecting Consumers in Debt Collection Litigation and Arbitration

July 2010



Federal Trade Commission

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

Executive Summary

Creditors and collectors seek to recover on consumer debts through the use of litigation and arbitration. Based on its extensive analysis, the Federal Trade Commission ("FTC" or "Commission"), the nation's consumer protection agency, concludes that neither litigation nor arbitration currently provides adequate protection for consumers. The system for resolving GLVSXWHV DERXW FRQVXPHU GHEWV LV EURNHQ 7R ¿[WK state governments, the debt collection industry, and other stakeholders should make a variety of VLJQL¿FDQW UHIRUPV LQ OLWLJDWLRQ DQG DUELWUDWLRQ

&UHGLW EHQH¿WV FRQVXPHUV E\ DOORZLQJ WKHP WR RE entire cost at the time of purchase. This lets consumers make purchases they might not otherwise EH DEOH WR DIIRUG DQG DOORZV WKHP WR EHQH¿W IURP J for them over time. Because consumers sometimes fail to pay their creditors, debt collection SOD\V D YLWDOO\ LPSRUWDQW UROH LQ WKH FRQVXPHU FU creditors, of course, who are repaid money they are owed. More importantly, however, by providing compensation to creditors when consumers do not repay their debts, the debt collection system helps keep credit prices low and helps ensure that consumer credit remains widely available.

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

Collectors use two types of proceedings to compel payment on consumer debt. They may ¿OH DQ DFWLRQ LQ FRXUW DOOHJLQJ WKDW D FRQVXPHU K court that he or she owes the debt. Alternatively, if permitted by the credit contract or other agreement between the creditor and the consumer, the collector may commence an arbitration proceeding. In the proceeding, the collector may claim that the consumer has not paid and seek

PDWWHUV WKH &RPPLVVLRQ¶V SULQFLSDO ¿QGLQJV FRQFO
debt collection litigation are:

States should consider adopting measures to make it more likely that consumers

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

- Arbitration forums should conduct proceedings in a manner which makes it more likely consumers will participate.
  - Consumers frequently do not appear in arbitration proceedings. While it is not FOHDU WR ZKDW H[WHQW QRWL¿FDWLRQ SUREOHPV forums should adopt measures to increase the likelihood they have valid addresses for consumers, track and document delivery of notices, and use envelopes which make it clear that their contents are important while not disclosing consumer debts to third parties. Arbitration forums and arbitrators also should conduct a closer assessment of consumers' assertions that they did not receive adequate notice.
  - Arbitration forums should establish rules that limit the total cost to consumers of arbitrating a dispute to the cost that they would pay to defend against a similar proceeding in court.
- Arbitration forums should require that awards contain more information about how the case was decided and how the award amount was calculated. Arbitrators rarely accompany awards with an opinion setting forth a statement of the law and an DSSOLFDWLRQ RI WKH OD ZáÒs<¡C'…xg; «¬¯oL R QôÀ Z W QPDKH

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

Chapter 1
Introduction

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

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

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

Chapter 2
Litigation Proceedings

I. The Legal Framework of Debt Collection Litigation

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

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

A. Notice to Consumers of Debt Collection Litigation

inadequate or improper service occurs frequently.[23] 2QH ORFDO RI¿FLDO UHSRUWHG FRPSUHKHQVLYH LQYHVWLJDWLRQ RI SURFHVV VHUYHUV LQ SHUIRUPLQJ VHUYLFH 7KH\ DUH ¿OLQJ RXW IDOVH DI¿GDGGUHVVHV 7KH\ DUH QRW VXI¿FLHQWO\ FRQFHUQHG DERXW WKH[24] similarly that one of his colleagues had conducted a "spot audit" of one process server and found that he "claimed to be in areas thirty miles apart in the Chicago-land area within minutes . . . . And we [asked,] 'Is he Superman?'"[25]

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

Most of the information available as to problems with service of process is anecdotal or UHODWHV WR SDUWLFXODU ORFDO MXULVGLFWLRQV VSHFL

23. See, e.g., APPLESTEVOSparkes

current addresses of consumers by consulting reliable sources (such as municipal or motor YHKLFOH UHFRUGV DQG DWWHVW XQGHU SHQDOW\ RI SHU efforts.[32] Likewise, a bench and bar working group in Connecticut recently recommended that debt collectors consult two reliable sources to verify a consumer's address and attest, under oath, that they consulted such sources.[33] The requirements adopted in Massachusetts and under FRQVLGHUDWLRQ LQ &RQQHFWLFXW PD\ EH XVHIXO PRGHOV

7KLUG VRPH MXULVGLFWLRQV QRZ UHTXLUH LQ DGGLWL United States mail to provide consumers with supplemental notice of debt collection lawsuits.)RU H[DPSOH 1RUWK &DUROLQD UHTXLUHV GHEW EX\HUV W WKHLU LQWHQW WR ¿OH VXLW WKLUW\ GD\V SULRU WR LQL related information such as an itemized accounting of amounts sought and proof of ownership of the debt.[34] 1HZ <RUN &LW\ UHTXLUHV WKDW FROOHFWRUV SUH the court clerk sends to the purported debtor by United States mail, and local law provides that WKH FRXUW PD\ QRW HQWHU D GHIDXOW MXGJPHQW LI WKH[35] These supplemental notice mechanisms can be an important backstop if ordinary service efforts are SUREOHPDWLF RU XQVXFFHVVIXO ,Q 1HZ <RUN &LW\ IROO more consumers are appearing in court and many of the consumers who do appear explain that the clerk-mailed notices were their only notice of the pending legal action.[36] 2WKHU MXULVGLF PD\ EHQH¿W IURP LPSOHPHQWLQJ VLPLODU VXSSOHPHQWDO

)LQDOO\ ODZ HQIRUFHPHQW DFWLRQV DQG MXGLFLDO VD

matters.[37]

Although no empirical data were submitted bearing on which, if any, of the many possible explanations are correct, the FTC believes that it is worthwhile to encourage measures that could increase consumer participation in debt collection litigation. Roundtable participants suggested a number of measures to reduce the costs to consumers or otherwise encourage them to defend. If lack of understanding and fear about the litigation process is deterring some consumers from DSSHDULQJ LQ FRXUW WKHQ MXULVGLFWLRQ VSHFL¿F FRQ[40] explaining the debt collection litigation process in clear and concise terms could encourage participation. In addition, if counsel assisted consumers in connection with debt collection litigation, it might demystify the process and help consumers understand their rights and assert defenses.[41] In some MXULVGLFWLRQV SUR ERQR DWWRUQH\V OHJDO VHUYLFHV appear in court to offer such assistance.[42] State and local courts, bar associations, law schools, and others should consider measures to increase the availability of counsel to assist consumers in debt collection litigation.

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

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40. The Commission engages in extensive consumer education on a wide variety of topics, including debt FROOHFWLRQ %HFDXVH WKH SURFHGXUHV DQG UXOHV UHODWHG W DQG ORFDO RI¿FLDOV ZRXOG EH EHWWHU SODFHG WKDQ WKH)7& WR SDUWLFXODUL]H See also Appleseed Report, supra note 23, at 22-23 (discussing court website, public access terminals, pro se UHVRXUFHV DQG IRUPV DYDLODEOH DW 1HZ <RUN &LW\ explanations of available defenses in consumer debt collection actions).

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

42. See, e.g., Appleseed Report, supra QRWH DW 'U\VGDOH 7U 9 DW 'U\VGDO 7U 9 DW 0)< &RPPHQW DW &/$52 SURJUDPV LQ FRXUWKRXVH Some other courthouse-based programs to assist consumers in debt collection matters include CARPLS in Chicago (www.carpls.org) and an incipient Fair Debt Collection "Attorney for the Day" program run by the %RVWRQ %DU $VVRFLDWLRQ See also 5RW H U L/D Z 7 Hbut see Debski, Tr. V at 29 (claiming that such programs may unethically involve "poaching clients or soliciting clients at the courthouse steps while they're in an emotional state").

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

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

6WDWH DQG ORFDO MXULVGLFWLRQV WKDW KDYH DGRSWHG VSHFLDO GLVFRYHU\ UXOHV IRU GHEW FROOHFWLRQ GLVSXWHV

Participating in litigation is particularly costly for consumers if collectors are unprepared to proceed when consumers appear in court. Collectors often seek continuances or dismissals ZLWKRXW SUHMXGLFH ZKHQ FRXUWV JUDQW VXFK UHTXHVW required once again to bear the costs of taking off work and coming to court.[45] To discourage collectors from engaging in these practices, courts should consider awarding consumers the costs of preparing for and attending the canceled hearing, including their lost wages and transportation costs.

III. Evidence of Indebtedness in the Debt Collection Litigation Process

A. Debt Collection Pleadings and Related Information

1. Complaint Information

Most states have adopted notice pleading requirements for civil litigation, including debt collection litigation, although some states continue to use more elaborate code pleading requirements.[46] Many state notice pleading systems are modeled on the notice pleading requirements included in the Federal Rules of Civil Procedure ("F.R.C.P."). Under F.R.C.P.

D WKH FRPSODLQW PXVW LQFOXGH D ³VKRUW DQG SODLQ VWDWHPHQW´ RI WKH FODLP DQG D GHPDQG

[47] The United States Supreme Court recently explained that F.R.C.P. 8(a) requires that a complaint "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests"[48] by making a "claim to relief that is plausible on its face."[49] In such a claim, "the plaintiff pleads factual content that

45. See also Appleseed Report, supra QRWH DW UHFRPPHQGLQJ WKDW 1HZ <<

allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged”[50] and allows the court to infer “more than the mere possibility of misconduct.”[51].aImoun8(EMboth(EMac answering the complaint, F.R.C.P. 8(b) requires only that the defendant admit or deny every element of the plaintiff’s claims, and F.R.C.P. 8(c) requires that the defendant state any DI¿UPDWLYH GHIHQVHV KH RU VKH ZDQWV WR DVVHUW ,I V the [defendant] c9056004800560e [defend4nhr t42 reW nBTfMaca t4specte Tm[(element of1 11 Tt to in608004

DSSOLFDEOH VWDWXWH RI OLPLWDWLRQV DQG KRP ZKHQ L[61] and (8) information as to the full chain of assignments of the debt.[62]

6HYHUDO MXGJHV ZKR SDUWLFLSDWHG LQ WKH URXQGWD in many debt collection complaints appears to be inadequate.[63] They reported that the most common question of consumer defendants in debt collection cases is, "Where is this from?"[64] That is, consumers are often puzzled by the allegations that they owe a debt to an entity they do not recognize,[65] and they are puzzled about the timing and amount of the alleged debt. Some MXGJHV VWDWHG WKDW PRUH LQIRUPDWLRQ VKRXOG EH LQ consumers can understand who is suing them, on what basis, and for how much.[66]

Some collector representatives emphasized that, although they regularly provide more information in their complaints, in a notice pleading system they are only required to provide limited information.[67] Most collector representatives favored including enough information in the complaint itself to enable the defendant to easily recognize and understand the debt on which the complaint is based.[68] Other collector representatives, however, favored including more information in their complaints, such as: (1) the name of the original creditor and a redacted version of the original account number for purchased accounts, perhaps accompanied E\ D VWDWHPHQW WKDW WKH DFFRXQW ZDV WUDQ[69] VIHUUHG

61. See e.g. *%/6 &RPPHQW DW .LQNOH\ 7U ,9 DW
62. See e.g., Appleseed Report, supra QRWH DW *%/6 &RPPHQW DW (GHOPDQ 7 at 143.
63. See e.g. 'RQQHOO\ 7U , DW 0RLVHHY 7U , DW
64. See e.g. 'RQQHOO\ 7U , DW)LVKHU 7U 9 DW 0RLVHHY 7U , DW
65. See discussion about the growth of debt buying, supra, at Chapter 2, § I. When debt is purchased by a new entity, in some instances consumers may mistakenly believe that their lack of familiarity with the entity indicates that they never incurred the alleged debt.
66. See

WKH GDWH RI GHIDXOW RU FKDUJH R[and (3) the WKH DPRXQW amount of interest demanded and the basis for how the interest amount was computed, perhaps accompanied by a statement of fees and other charges incurred since the time of charge-off.[71]

The function of debt collection complaints in a notice pleading system is to provide VXI¿FLHQW LQIRUPDWLRQ VR WKDW FRQVXPHUV FDQ GH FRPSODLQW DOOHJDWLRQV DQG DVVHUW DI¿UPDWLYH GHIH GHWHUPLQH ZKHWKHU WR JUDQW D PRWLRQ IRU D PRUH GH

2. Complaint Attachments

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

6RPH MXGLFLDO SDUWLFLSDQWV VDLG WKDW WKH LQFOX
FRPSODLQWV ZRXOG EH XVHIXO 2WKHU MXGJHV KRZHYHU
D UHTXLUHPHQW EHFDXVH WKH DGGLWLRQDO SDSHU ¿OHG
have in managing the documents they receive.[80]

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75. Consumer advocates recently supported proposed legislation in Massachusetts that would require the contract be attached as part of a debt collection complaint. See Mitchell-Munevar, Tr. V at 156. Likewise, a bill SHQGLQJ LQ 0LQQHVRWD ZRXOG UHTXLUH GHEW EX\HU SODLQWLIIV V forth the date and amount of the last payment, and written proof that the plaintiff does, indeed, own the debt. See 0LQQHVRWD 6) 1R 6LPLODUO\ 1HZ <RUN¶V SURSRV $VVHP % 6 /HJ 6HVV 1 < ZRXOG UHTXLUH WKDW which the action is based be attached to a consumer debt collection complaint.

76. See, e.g. %DUU\ 7U , DW %URPEHUJ 7U 9 DW ³\RX KDYH WR KDY DPHQGPHQWV FKDLQV RI DVVLJQPHQW SURRI RI 7UDV,VDJQPHQW (GHOPDQ 7U , DW .LQNOH\ 7U ,9 DW 0LWFKHOO 0XQH

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

adopting similar checklists, to promote the application of proper and uniform requirements for GHWHUPLQLQJ ZKHWKHU ŴR JUDQW D GHIDXOW MXGJPHQW 6RPH MXULVGLFWLRQV DOVR KDYH DGRSWHG VSHFL¿F FK

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

To the extent that states conclude there is uncertainty as to the applicable statute of limitations for a debt or how to apply it, the Commission recommends that they consider modifying their laws to reduce the uncertainty. If state statutes of limitations for consumer debts DUH FOHDU VLPSOH DQG XQLIRUP FRQVXPHUV DQG FROOH

B. Collecting on Time-Barred Debt

Roundtable participants discussed the collection of time-barred debt. As noted above, state ODZ JHQHUDOO\ GRHV QRW SURKLELW FROOHFWRUV IURP X ¿OLQJ DQ DFWLRQ RQ D WLPH EDUUHG GHEW 7KH W discussed were whether the FDCPA should be amended to prohibit the collection of such debt and whether the law should permit payments on such debt to "revive" the unpaid amount of the debt.

114. See, e.g.

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

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

119. See, e.g. 'HEVNL 7U 9 DW bGLsequalified\ 7U V at 85 (“it’s clear that collecting on out-of-stat[ute] consumer debt is a bad idea”).

120. See, e.g., $$53 &RPPHQW DW IDYRUV UHTXLULQJ DQ DI¿UPDWLYH GLVFO FROOHFWLQJ WLPH EDUUHG GHEWV %DUU\ 7U , DW)'&3$ VKRX WKDW WKH VWDWXWH KDV H[SLUHG (GHOPDQ 7U , DW VWDWHG making a small payment” the only purpose of which is to re-trigger the statute of limitations), 94 (stated debt buyers frequently send collection letters on time-barred debts implying that there is still “a binding, legally HQIRUFHDEOH REOLJDWLRQ´ (GHOPDQ &RPPHQW DW FROOHFWLQ RU GHFHSWLYH SUDFWLFH XQOHVV WKHUH LV D UHDVRQDEOH EDVLV at 139 (consumers are told to send a little bit of money to “show good faith” even where they do not owe the PHGLFDO ELOO RU WKHLU LQVXUDQFH 7UR P,SDDQW VKRXOG EH WKLQJ RI GHEW FROOHFWRUV ZKR VRUW RI WULFN VRPHERG\ DQG VD\ -XVW SD\PHQW ZRXOG PDNH ³D GHEW WKDW¶V XQFROOHFWLEOH MXGLFLDO VKRXOG EH UHTXLUHG WR FODULI\ WKDW FRQVXPHUV FDQQRW EH VX FRPPHQW DW)'&3$ ODQJXDJH VKRXOG EH DPHQGHG WR H[SOLFLW RQ WLPH EDUUHG GHEWV 1HSYHX 7U , DW FRQVXPHUV GR QRW KDSSHQHG :HLQEHUJ 7U , DW KDV VHHQ GHEW EX\HUV VFUDU RQ DJHG GHEWV WKDW WKH\ UHDOO\ GRQ¶W UHFRJQLOH also Donnelly, Tr. I at 121 (consumers wouldn’t understand such disclosures).

121. See, e.g. $QGHUVHQ 7U , DW 6DUJLV 7U See also DMA Comment at 14 6L Q\OH\ 7U , D (consumer disclosure might lead consumers mistakenly to believe that the debt is no longer valid).

122.)7& $FW † D 8 6 & † D)'&3$ † 8 6 & † H ,Q DGGLW information may violate state laws prohibiting unfair and deceptive acts and practices.

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

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

Roundtable participants differed in their views about whether a payment should revive the statute of limitations on a time-barred debt. Some opined that state law should continue to allow the revival upon payment of time-barred debts.[127] Other participants contended that stat.

disclose to consumers the effect of paying on a time-barred debt, or to require consumers to
P D N H D N Q R Z L Q J D I ¿ U P D W L R Q W K D W W K H \ [129] Z D L Y H W K H L U U L

C. Suits on Time-Barred Debts

0DQ\ FRQVXPHU DGYRFDWHV DQG VRPH MXGJHV H[SUHVV regularly sue consumers on time-barred debts.[131] Some consumer advocates suggested that debt buyers are more likely than original creditors to threaten or bring suits on time-barred debts.[132] 2QH 1HZ <RUN OHJDO VHUYLFHV SURYLGHU DQDO\]HG D VDP RI¿FH RYHU DQ HLJKWHHQ PRQWK SHULRG DQG IRXQG WKDW VXI¿FLHQW LQIRUPDWLRQ ZDV DYDLODEOH ZHUH ¿OHG DIW In addition, in thirteen percent of all cases, the debt's time-barred status was apparent from the face of the complaint.[133] On the other hand, many collector representatives maintained that it would be against a collector's interest to sue on a time-barred debt, and that such suits are rarely LI HYH[134] ¿OHG

$ VLJQL¿FDQW FRQVXPHU SURWHFWLRQ SUREOHP UHODW Up XWH °p€p 0

include this information.[135] If consumers do not defend, there is no one to raise the defense that WKH GHEW LV WLPH EDUUHG ,QGHHG VRPH MXGJHV ZKR S even if a debt collection action appears to be time-barred, it would be improper for courts to FRQVLGHU DI¿UPDWLYH GHIHQVHV WKDW QR SDUW\ KDG UD[136] As a result, some courts appear to be JUDQWLQJ GHIDXOW MXGJPHQWV RQ WLPH EDUUHG GHEW

The Commission recommends that states change their laws to require collectors to prove that the debts they are collecting are not time-barred, rather than imposing on consumers the EXUGHQ RI UDLVLQJ WKH UXQQLQJ RI WKH VWDWXWH RI OLP above, states also should revise their laws to require that collectors set forth in their complaints the date of default and the applicable statute of limitations.[137] These changes would highlight the statute of limitations issue in debt collection litigation for consumers and make it appropriate for FRXUWV WR FRQVLGHU WKH LVVXH EHIRUH JUDQWLQJ GHID

FROOHFWRUV ZKR YLRODWH WKH)'&3$ E\ WKUHDWHQLQJ WR
deter such practices, the Commission intends to focus more of its enforcement efforts on those who engage in such conduct.[139]

V. Garnishment of Exempt Funds in Bank Accounts

0DQ\ URXQGWDEOH SDUWLFLSDQWV LGHQWL¿HG WKH IUH
LQ EDQN DFFRXQWV DV D FULWLFDO LVVXH IRU FRQVXPHUV
FRQVXPHU WKHQ WKH FROOHFWRU PD\ VHHN WR UHFRYHU
consumer's bank account. Although each state has its own garnishment rules, a collector usually must apply to a state court for a garnishment order. A collector typically must give notice of its application to the consumer,[140] and the collector generally provides a copy of the application to the bank. Upon receiving this notice, the bank typically "freezes" the funds in the consumer's account pending resolution of the application. If the state court issues a garnishment order, then the collector serves a copy of the order on the bank and the bank pays the collector from the funds in the account.

Federal and state law declare that certain funds in the bank accounts of consumers are exempt from garnishment.[141] Federal law generally exempts Social Security, Supplemental 6HFXULW\ ,QFRPH 66, YHWHUDQV¶ EHQH¿WV DQG QXPHUR
garnishment.[142] 0DQ\ VWDWH ODZV H[HPSW VLPLODU VWDWH EHQH
IXQGDPHQWDO REMHFWLYH RI WKHVH ODZV LV WR HQVXUH
FUHGLWRUV GRHV QRW FUHDWH XQGXH KDUGVKLS[143] IRU EHQH

1RWZLWKVWDQGLQJ VXFK ODZV EDQNV IUHTXHQWO\ IUH
pending resolution of the collector's application for a garnishment order.[144] Such freezes create

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139.)RU WKUHDWHQLQJ WR See United States v. Weyerhaeuser Co., 665 F. Supp. 1232 (E.D. Pa. 1987); 6 ' 7H[-XQH FTC v. Capital Acquisitions & Mgmt. Corp., 1 R & 1 ' ,OO 'HF

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

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

142. See, e.g., 8 6 & †† 6RFLDO 6HFXULW\ DQG 66, EHQH See generally NCLC Collection Actions, supra note 109, at Appendix C.

143. Hillebrand, Tr. IV at 238 ("you know, you don't want to leave a person penniless when there's food to be ERXJKW DQG NLGV WR EH VHQW WR 7FKRRO DQG UHQW WR EH SDLG
be spent on rent, food, and subsistence).

144. See, e.g., +LOOHEUDQG 7U ,9 DW 0DUNRII 7U , DW 0RRUH 7U
1HZEXUJHU 7U ,9 DW 7\OHU 7U 9 DW :HLQEHUJ 7U , DW

considerable hardship for consumers.[145] Once the consumer's bank account is frozen, he or she cannot get access to the funds in the account, often causing rent checks to bounce, debit card ZLWKGUDZDO UHTXHVWV WR EH UHMHFWHG DQG VR IRUWK for freezing the account and for checks that bounce because of the freeze, charges which many LQGLJHQW FRQVXPHUV ¿QG GLI¿FXOW WR SD\ 7KH GXUDW roundtable participants estimated that consumers often are without access to funds for about a month.[146]

There was a consensus among roundtable participants that banks should not freeze funds WKDW DUH H[HPSW IURP JDUQLVKPHQW XQGHU IHGHUDO RU however, as to who is responsible when these funds are frozen. Most debt collectors expressed a desire to comply with the law and avoid garnishing exempt funds.[147] Collectors explained that they usually do not have information from the consumer or the bank identifying the exempt EHQH¿WV FRQVXPHUV UHFHLYH ZKLFK DFFRXQWV FRQWDLQ been commingled with other funds.[148] Without such information, collectors contend that as a practical matter they cannot avoid asking that exempt funds be frozen when they seek to garnish bank accounts. Collector participants and others suggested that, because banks have more

145. See, e.g. %URZQ 7U , DW ³E\ WKH WLPH ZH JHW LQWR FRXUW >REMH WKH FOLHQW LV IDFLQJ WRQV RI RWKHU ¿QDQFLDO SUREOHPV DV Z WKHLU PRQH\ KDV DFWXDOO\ EHHQ IUR]HQ 0DXUHU 7U ,9 DW D DQG FRQVXPHUV PLJKW ³>PLVV@ WKHLU UHQW SD\PHQW DQG VR LW DUH ³¿QGLQJ RXW DERXW >WKH JDUQLVKPHQW@ ,ZRXOG WKLQN WKHUH DFFRXQW FDXVHV FRQVXPHUV WR IDFH IUHH]H IHHV DQG PXOWLSOH ³:KHQ WKRVH DFFRXQWV DUH IUR]HQ >FRQVXPHUV@ GRQ¶W KD GRQ¶W KDYH PHGLFLQH´ 1HZEXUJHU 7U ,9 DW 7HQKXQGIHOG 7 time the bank account is unfrozen, "so much damage [has been] done" such as the rent check having bounced DQG IRUFLQJ WKH IDPLO\ LQWR HYLFWLRQ SURFHHGLQJV :LOQHU 7 accounts have been garnished are] trying to buy groceries at the store because they have no food, and now their card doesn't work, they have no access to money. So, we have people who need to go to food pantries, who need to borrow money from relatives to survive, but maybe they don't have any relatives or friends. . . . We have had clients getting eviction notices because they weren't able to pay their rent because of the frozen bank accounts.").

146. See, e.g. 1HSYHX 7U , DW ³:KHQ WKRVH DFFRXQWV DUH IUR]HQ > WR WKH DFFRXQW@ IRU >DSSUR[LPDWHO\@ D PRQWK ´ 0DXUHU 7U for approximately a month).

147. See, e.g. $QGHUVHQ 7U , DW $VVHW &RPPHQW DW %XFNOHV 7U 7U , DW 0DUNRII 7U , DW 0RRUH 7U ,9 DW 1$5&$ & 35$ &RPPHQW DW 5D\ 7U ,9 DW

148. See, e.g. $VVHW &RPPHQW DW FUHGLWRUV DOPRVW QHYHU NQRZ WKH Comment at 8 (banks should be required to notify collectors that an account contains exempt funds before the FROOHFWRU IUHH]HV RU JDUQLVKHV WKH DFFRXQW 35$ &RPPHQW D to let them know about exempt funds in accounts).

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

Bank representatives maintain that they are "between a rock and a hard place."[150] They acknowledged that at times they freeze exempt funds in bank accounts, explaining that it can EH GLI¿FXOW WR GHWHUPLQH ZKLFK IXQGV DUH H[HPSW DQ commingled exempt and non-exempt funds. Banks contend that they "call a time out" and freeze all of the funds in accounts pending a court resolution because they fear being held liable to MXGJPHQW FUHGLWRUV LI WKH\ PDNH D PLVWDNH DQG IDLO[151]

Several states have attempted to reduce or eliminate problems associated with freezing exempt funds by setting a pre-determined amount that banks may not freeze in an account with any exempt funds.[152] Under this "pre-determined amount" approach, Connecticut provides that, for bank accounts that have received funds from certain exempt sources within the previous thirty days, $1,000 in the account is preserved for the consumer, and banks may freeze any excess amount.[153] California follows a similar approach, permitting consumers continued access to a pre-determined amount of money in accounts with exempt funds.[154] 1HZ <RUN DOVR KDV enacted such a statute, preserving $2,500 in bank accounts into which exempt funds have been GHSRVLWHG LQ WKH SUHYLRXV IRUW\ ¿YH GD\V[155]

The federal government has also been considering how to protect against banks freezing IHGHUDOO\ H[HPSW IXQGV $W WKH)7&¶V URXQGWDEOH LQ

149. See e.g. $QGHUVHQ 7U , DW +LOOHEUDQG 7U ,9 DW /HLEV 0RRUH 7U ,9 DW 1$5&$ &RPPHQW DW 1HZEXJHU 7U ,9 DW

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

151. Tenhundfeld, Tr. V at 222.

152. See e.g, CAL. CIV. PROC. CODE † CONN. GEN. STAT. ANN. † E 1 < & 3 / 5 5222 (2009). See also

a pre-determined amount proposal under discussion by his agency and numerous federal agencies that distribute funds exempt from garnishment under federal law (e.g, the Social Security Administration).[156] 2Q $SULO WKH 'HSDUWPHQgWg„• WKH

approaches,[161] WR LVVXH D ¿QDO UXOH OLPLWLQJ WKH IUHH]LQJ R possible. The FTC also continues to encourage states to prevent banks from freezing amounts in bank accounts containing exempt funds.[162] The Commission recommends that states which KDYH QRW OLPLWHG WKH DPRXQWV LQ DFFRXQWV VXEMHFW determined amount approach or the lookback approach.[163]

Another suggestion made during the roundtables was to educate consumers as to their rights with regard to exempt funds in bank accounts and encourage them to take steps to exercise those rights. Consumers often do not know whether the funds they receive are exempt from garnishment. The Commission has engaged in efforts to educate consumers about their right not to have exempt funds garnished.[164] ,Q DGGLWLRQ WKURXJK WKHLU -135 UHTXLUH WKDW ¿QDQFLDO LQVWLWXWLRQV SURYLGH FRQVX rights.[165] The FTC believes it would be worthwhile for others to consider providing this sort of information to consumers.

6HYHUDO URXQGWDEOH SDUWLFLSDQWV DOVR VXJJHVWH plain language explanation identifying the funds in their accounts which may be exempt from garnishment.[166] In particular, panelists suggested that the notice consumers receive from the state garnishment.

Chapter 3
Arbitration Proceedings

I. The Arbitration Framework

the impact of debt collection arbitration on consumers.[180] Some arbitration critics contend that [181]

Other critics assert that the debt collection arbitration system does not have adequate procedures to ensure fairness towards consumers[182] and is biased in favor of creditors and collectors.[183]

To evaluate the impact of arbitration on the debt collection system, the Commission considered the topic during its 2007 Debt Collection Workshop. In its 2009 workshop report, the FTC reported that it had heard varying opinions and concerns regarding consumer debt collection arbitration.[184] The information presented and submitted in connection with the Workshop, K R Z H Y H U Z D V Q R W V X I ¿ F L H Q W I R Up 0 recommendations related to this topic.

services for consumer debt collection claims.[186] A number of private class actions suits against 1$) KDYH EHHQ ¿OHG[187]

,Q WKH ZDNH RI WKLV VHWWOHPHQW ZLWK 1$) WKH $PHU an arbitration forum which had handled some debt collection arbitrations, decided to impose a moratorium on providing such services until concerns regarding the system are addressed.[188] Subsequently, a number of large banks announced that they would discontinue their use of binding mandatory arbitration clauses in credit card agreements.[189] In light of these events, it is an opportune time to assess the validity and viability of arbitration as an alternative to the court system as a method of resolving debt collection disputes. Indeed, many commentators have H[SUHVVHG WKH EHOLHI WKDW VRPH HQWLW\ ZLOO HYHQWX[190]

The Commission believes that, to ensure that consumers are adequately protected if arbitration once again becomes a common method of resolving debt collection disputes, mandatory pre-dispute arbitration should be permitted only if: (a) creditors provide consumers

the arbitration process is fair to creditors, collectors, and consumers. For the reasons discussed EHORZ WKH &RPPLVVLRQ LV QRW FRQ¿GHQW WKDW GHEW F these two conditions. The Commission therefore will continue to closely monitor, evaluate and report, as appropriate, on whether debt collection arbitration models are providing consumers with meaningful choice and a fair process.[191]

II. Meaningful Consumer Choice

The decision to submit disputes to arbitration rather than the public court system must be based on an agreement between the creditor and the consumer. This agreement usually takes the form of a mandatory pre-dispute arbitration provision in the contract between the creditor and the consumer, a provision that creditors draft. To give consumers a meaningful choice[192] to submit their disputes to arbitration, they must have: (1) a basic understanding of arbitration and its FRQVHTXHQFHV WKH RSWLRQ ZKHWKHU WR DJUHH WR D reasonable method of exercising that option.

A. Consumer Understanding of Arbitration

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

191. In late 2009, AAA convened a task force of arbitration and debt collection experts to evaluate whether the organization should recommence debt collection arbitration, and, if so, how such arbitration should be

B. Consumer Arbitration Choices[194]

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

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

194. Some debate has arisen in the academic literature and elsewhere over arbitration clauses that prohibit class actions and whether such bans should be permitted. Some roundtable participants expressed opposition to class action bans, including one consumer advocate who opined that one of the main reasons that companies prefer arbitration is to avoid class actions. (See Sternlight, Tr. III at 88). The roundtables focused on the LVVXH RI GHEW FROOHFWLRQ DUELWUDWLRQV DJDLQVW LQGLYLGXD DUELWUDWLRQV ± DQG WKXV WKH)7& WDNHV QR SRVLWLRQ UHJDUG collection proceedings.

195. See e.g., Frank, Tr. II at 86 ("[D]o people who get consumer loans know they have an arbitration clause, and WKH HYLGHQFH LV WKDW WKH YDVW PDMRULW\ RI WKHP GR QRW ´

196.)UDQN 7U ,, DW ³>7@KHUH¶V >VLF@ WKLQJV WKH\ >FUHGLW FD DQG FOHDUO\ \ ñà Y™(DQG € `€À`fDQQR > HQGK€`€À`fDQQR > RQV YDV

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

Some roundtable participants suggested that arbitration provisions state that, at the time the dispute with the creditor arises, the consumer has the right to demand that the matter be moved IURP DUELWUDWLRQ WR D VPDOO FODLPV FRXUW[210] LI WKH FR AAA mandates in its consumer dispute process protocol that companies include such a "small claims carve-out" in their arbitration agreements. AAA acknowledged, however, that few consumers exercise their right to have their matters heard in small claims court rather than in AAA consumer arbitration.[211]

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

whether to arbitrate, and provides consumers with a reasonable method of exercising that choice.

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

1. Arbitrator Bias and Appearance of Bias

0DQ\ FRQVXPHUV DUH QRW DZDUH RI YDULRXV DI¿OLDWL arbitration forums and individual arbitrators.[224] 7R WKH H[WHQW WKDW WKHVH DI a level that would preclude the forum or arbitrator from participating in a particular arbitration, disclosing such information would promote transparency and more informed consumer choice. 2QH URXQGWDEOH SDUWLFLSDQW DGYRFDWHG WKDW DUELV LQWHUHVW WKDW ZRXOG GLV[225]TXDOLI\ WKHP LI WKH\ ZHUH M

Roundtable participants also discussed how arbitrators are paid and whether the payment structure affects how they handle their cases. One issue is whether arbitrators should be SDLG D ¿[HG VDODU\ RU DV KDV EHHQ PRUH FR[226]PPRQ SDLG

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

Another key issue related to bias is whether arbitrators are biased in favor of creditors, sometimes referred to as “repeat-player” bias.[230] The basic theory is that arbitrators are more likely to decide in favor of collectors because they bring or can bring numerous matters before the same arbitrator and through the same arbitration forum. Some claim that arbitration forums assign fewer matters to arbitrators who rule in favor of consumers.[231] Arbitrators generally are SDLG SHU PDWWHU VR DUELWUDWRUV KDYH D ¿QDQFLDO L result in them receiving fewer cases.

more matters from the arbitration forum.[233] 7KH &5/ VWXG\ DOVR IRXQG WKDW ¿IUHTXHQWO\ EHIRUH WKH IRUXP UHFHLYHG PRUH IUHTXHQW in the forum less frequently.[234]

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

Roundtable participants suggested a number of alternatives to address repeat player bias or the perception of bias arising from repeat players' rates of success in arbitration. In the appointment of arbitrators, some argued that arbitrations forums should: (1) use a strict rotation RI DUELWUDWRUV DQG LPSRVH D OLPLW RQ WKH WRWDO

233. See, e.g.) U D Q N 7 US TACKED DDW, supra note 200, at 8 (adding that, "[t]his gives arbitrators a very VWURQJ LQFHQWLYH WR VLGH ZLWK WKH ¿UPV ´

234. See

CPR-Georgetown Commission on Ethics and Standards of Practice in ADR issued standards,[252]

3. Commission Views

The Commission concludes that, especially in the wake of serious concerns relating to 1$) LW LV LPSHUDWLYH WKDW DUELWUDWRUV DQG DUELWU WR SUHYHQW ELDV DQG WKH DSSHDUDQFH RI ELDV 1R RQH VKRXOG EH SHUPLWWHG WR KDYH DQ\ RZQHUVKLS RU RWKH ZKR KDV D GLUHFW ¿QDQFLDO LQWHUHVW LQ D PDWWHU RU matter or disputes involving that creditor.[262] Fundamental notions of fairness require no less.

More generally, the Commission concludes that rigorous standards of ethical conduct for arbitration forums, arbitration administrators, and arbitrators are sorely needed. It is not QHFHVVDU\ WKDW DQ DUELWUDWLRQ IRUXP EH D QRQ SUR¿ some bias and appearance of bias. The Commission also concludes that the private sector should try to develop debt collection arbitration standards, promote compliance with these standards,[263] and vigorously enforce them. If the private sector cannot or will not take the action needed, then either the government should develop and enforce such standards or Congress should prohibit debt collection arbitration entirely and have these matters resolved in the public court system.

On the critical issue of bias and perception of bias arising from the selection of arbitrators, the FTC recommends that forums promote arbitrator neutrality[264] by diversifying their rosters of arbitrators, rotating matters randomly among arbitrators[265] (perhaps with some consumer selection),[266] and limiting the number of matters assigned to an arbitrator. The Commission also recommends that the process and procedures arbitration forums use to select arbitrators be PDGH DV WUDQVSDUHQW DV SRVVLEOH WR UHVWRUH SXEOL arbitration proceedings.[267]

B. Notice and Cost of Participation

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

264. See, e.g.,

service of process in court proceedings.[273] For example, arbitration forums may not require SHUVRQDO VHUYLFH RI WKH QRWLFH E\ D SURFHVV VHUYHU.[274] Others responded that arbitration is intended to be less formal and expensive than the court system and that the costs of arbitration would increase if arbitration notices had to meet the standards for service of process IRU DFWLRQV.[275] ¿QHG LVVXH LV WKDW HYHQ LI the notice reaches a consumer's household, it may not reach the correct person in the household.[276]

$W WKH URXQGWDEOHV SDUWLFLSDQWV RIIHUHG VXJJHV to be similar to service of process in litigation but also to allow for other options providing H[SHGLWLRXV VHUYLFH DQG GHOLYHU\ YHUL¿FDWLRQ VXFK can show that previous attempts to deliver actual notice to a valid address failed. A similar VXJJHVWLRQ RIIHUHG ZDV WKDW WKH VHQGHU FRXOG XVH D VHQGHU WUDQVPLWV WKH QRWLFH E\ FHUWL¿HG PDLO DQG VLJQ LW WKHQ WKH VHQGHU ZRXOG FRQ¿UP WKH DGGUHVV court.[277]

273. See, e.g., Sternlight, Tr. III at 22-23 (the issue of whether "services are allowed in the arbitration context WKDW ZRXOGQ¶W SDVV PXVWHU LQ WKH FRXUW FRQWH[W , WKLQN Hillebrand, Tr. III at 26 ("if arbitration is taking the place of the court, the service ought to be as good as WKH FRXUW SURFHVV >DIWHU FHUWDLQ LPSURYHPHQWV DUH PDGH WR VWDQGDUG RI VHUYLFH LQ FRXUW LV UHDVRQ ZK\ FHUWDLQ FRQVXPHU DV RSSRVHG WR QRWL¿FDWLRQ RI DUELWUDWLRQ SURFHHGLQJ

274. AAA Comment at 5 (noting generally more informal methods of service in arbitration than litigation). +RZHYHU DW WKH URXQGWDEOHV D FROOHFWRU DWWRUQH\ QRWHG QRWL¿FDWLRQ SURFHVVHV WKDW SDUDOOHO VHUYLFH RI SURFHVV U RYHUQLJKW GHOLYHU\ See also Delman Comment at 2, 7 (stating a need for legislation or regulation to, among other things, "[r]equire notice of proceedings to be given in same manner as service of summons"). Available written forum rules appear to be more permissive than prescriptive: See JAMS, Comprehensive Arbitration Rules & Procedures, Rule 8. Service, effective July 15, 2009, available at http:// ZZZ MDPVDGU FRP UXOHV in ("service may be made by hand delivery, overnight R GHOLYHU\ VHUYLFH RU 8 6 PDLO´ DQG SDUWLHV see also DSO PDNH SUF Code, supra note 255, Rule 6 "Service of Claims, Responses, Requests, and Documents," (service of initial FODLPV PD\ EH GRQH E\ 8 6 FHUWL¿HG PDLO ZLWK D VLJQHG UHWXU other written acknowledgment of delivery, or otherwise in accordance with rules of civil procedure).

275.

When AAA administered consumer debt collection arbitrations, it used a notice process that exceeded its typical arbitration notice requirements.[278] Collectors were required to send arbitration notices via a method that allowed the notice to be tracked and the consumer's VLJQDWXUH REWDLQHG $$$ RULJLQDOO\ WUDQVPLWWHG L mail, return receipt requested. AAA eventually switched to a method whereby the United States 3RVWDO 6HUYLFH FRQ¿UPHG WKH GDWH DQG WLPH RI GHOL

(YHQ LI FRQVXPHUV UHFHLYH QRWL¿FDWLRQV RI DUELWU Some roundtable panelists claimed that many consumers do not open these notices, because WKHUH LV QRW VXI¿FLHQW LQIRUPDWLRQ RQ WKH HQYHORS the enclosed document may be important.[279] For example, a consumer would likely recognize

Arbitration forum rules generally require that collectors must satisfy the arbitrator that F R Q V X P H U V Z H U H S U R S H U O \ Q R W L[184] ¿ H 2 G Q H R I J R V K H U D U P E H L Q W U R W L F

2. Costs of Arbitration

A primary rationale for using arbitration rather than litigation is that it is purportedly less expensive than litigation. Some proponents of arbitration asserted that at least in some instances arbitration is less expensive than court proceedings,[293] although the Commission also received comments to the contrary.[294] 1R HPSLULFDO HYLGHQFH ZDV SUHVHQWHG GH¿QLWLYHO\ ZKHWKHU WKH WRWDO FRVW RI GHEW FROOH of debt collection litigation.[295]

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

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

293. See Melcer, Tr. III at 68.

294. $W OHDVW VRPH GHEW EX\HUV ¿OHG FRPPHQWV H[SODLQLQJ WKDW V is required by the contracts between the original creditors and the consumers. See, e.g., Asset Comment at 6 (stating that they arbitrate "when contractually required to do so. We prefer not to arbitrate, however. Although arbitration does often allow for more interaction with the consumers . . . it increases the cost of OLWLJDWLRQ LQ SDUW EHFDXVH WKH DZDUGV DUH [illegible] involved in arbitration cases, but not by choice. We have arbitrated because the terms of some contracts required arbitration. If cooperation with a customer is not likely, we would prefer to litigate rather than DUELWUDWH EHFDXVH OLWLJDWLRQ LV EHWWHU GH¿QHG DQG PRUH

295. See Searle Center Preliminary Report, supra note 235 (study showed a low cost of arbitration for consumer FODLPDQWV EXW GLG QRW VSHFL¿FDOO\ IRFXV RQ GHEW FROOHFWL

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

297. See id.

the costs, while others require them to pay some of the costs.[298] When AAA conducted debt collection arbitrations, it required that consumers pay some of the costs of arbitration, but it limited these costs to the amount that the consumer would have paid had the matter gone to litigation.[299] $ 0DLQH VWXG\ RI GDWD IURP FRQVXPHU DUELWUDW FUHGLW FDUG GHEWV ± IRXQG WKDW WKH DSSOLFDEOH DUE fees up to a certain dollar amount, and that in most of the cases reported, the collector paid all of WKH DUELWUDWLRQ IHHV EHFDXVH WKDW[300] VSHFL¿HG GROOD

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

298. The total cost borne by a consumer in arbitration may depend on the particular forum, terms of the arbitration clause in the consumer contract, how the forum enforces provisions of the arbitration clause, which party initiates arbitration, whether any fees are waived, and the extent to which costs are assessed beyond the cost of the arbitrator. Compare Sturdevant, Tr. III at 71 (stating that largest cost in arbitration is the cost of the arbitrator, and that most agreements provide that the parties will share the cost) with Welsh, Tr. III at 71, 72 (disagreeing with Mr. Sturdevant, noting that JAMS has never done debt collection arbitration, but that in its consumer arbitrations consumers do not pay more than they would have paid in court). See, e.g., JAMS Consumer Standards, supra

One controversial method of allocating costs between the collector and the consumer is using fee-shifting provisions either in credit contrct s or pursuant to forum rules. Pursuant to these types of provisions, at the end of arbitrction proceeding, the arbitrctor may order the losing party to pay for some or all of the costs of arbitration – and the vast majority of consumers who lose in arbitration – those they would have paid in court.[304] Patifcipan s also noted instances in which consumers have been required to pay costs for "extrcs" such as motions, closing argumen s, a statemen of reasons for the arbitrctor's decision, and the like.[305]

Consumers cannot patifcipate in arbitrction if they cannot afford it. The Commission therefore encourages efforts to decrease consumer costs, such as providing simple forms or checklists to assist consumers in responding and allowing consumers to use technology to submit informction and patifcipate in hearings.[307] Arbitrction forums generally should limit the total cost to consumers of arbitrction to the amount that they would have paid to defend against a similar proceeding in court, regardless of whether the contrct between the patifes contains provisions that shift fees and other costs onto the losing patiy. In addition, arbitrction forums should allow consumers to request fee waivers from arbitrctors as soon as prct icable, rather than requiring that consumers wait until the end of the proceeding.

C. Arbitrction Awards

1. Awards and Arbitrctor Opinions

Arbitrctors issue awards at the conclusion of the proceeding, but they are not required to accompany their awards with an opinion setting forth a statemen of the law and an application of the law to the facts. Such reasoned opinions are

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

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

305. See, e.g. -RKQVRQ 7U ,, DW 9DQ $NHQ 7U ,,, DW

306. See Appleseed Report, suprc QRWH DW LQ WKH FRQWH[W RI OLWLJDWLRQ York City Civil Court, which include check-off lists of defenses available to the consumer).

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

6RPH UROHV SDUWLFLSDQWV VWDWHG WKDW LVVX
such as increasing the transparency of the arbitration process.[311] It would also provide a record
IRU MXGLFLDO UHYLHZ RI WKH DZDUG WR WKH[312] WHQW WKD

On the other hand, some participants said that reasoned opinions usually are not necessary because most debt collection arbitrations are relatively simple and straightforward factual inquiries.[313] Other participants expressed concern that issuing more reasoned opinions might
VXEMHFW DZDUGV WR[314] PRUH FRXUW FKDOOHQJHV

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

308. See Sorkin, Tr. II at 180. Available written forum rules vary as to whether a reasoned opinion must be requested: see, e.g. 1$) & Supra Q RWH 5XOH ± 6HOHFWLRQ RI D 3DUWLFLS
Awards, (stating in Rule 26 that parties to a participatory hearing provide "[a]ny Request or requirement for

DVVHUWLQJ WKDW LW ZRXOG XQGHUPLQH WKH VLPSOLFLW\ XVHIXO SUHFHGHQW DQ\ZD\ JLYHQ WKDW WKH RSLQLRQV DU similarly argued that courts should issue decisions stating what the law is and therefore serving as precedent, while arbitrators should issue opinions applying the law to the particular facts in the proceeding.[317]

The Commission concludes that arbitrators should issue reasoned opinions to accompany awards in all debt collection arbitration proceedings. These opinions should state the law applied,[318] explain the application of the law to the facts, and set forth a calculation of the amount awarded, including breaking the amount into principal, interest, and fees. Such opinions would help the parties understand the rationale for the amounts arbitrators awarded, and would assist ZLWK MXGLFLDO UHYLHZ RI DUELWUDWLRQ DZDUGV DQG SX SURFHHGLQJV %HFDXVH PRVW RI WKHVH RSLQLRQV ZRXOG factual disputes, the FTC believes that their preparation should not impose undue burdens or costs on the forums or the collectors, and that such opinions would not ordinarily be well-suited for use as precedent in future proceedings.

2. Challenging and Confirming Awards

,I D FRQVXPHU GRHV QRW UHFHLYH WKH LQLWLDO QRWL¿ DUELWUDWRU¶V QRWL¿FDWLRQ WKDW DQ DZDUG KDV EHHQ learns of the arbitration.[319] 5RXQGWDEOH SDUWLFLSDQWV VDLG WKDW D are sent to consumers by regular mail, even if consumers did not appear in the arbitration proceeding.[320] 6RPH SDUWLFLSDQWV DUJXHG WKDW WKH methods more rigorous than regular mail.[322]

316. See 1DULWD 7U ,,, DW

317. See 1DLPDUN 7U ,,, DW

318. Roundtable participants generally agreed that arbitrators should be required to follow the law in resolving the parties' disputes. Barron, Tr. III at 159 ("I have sensed a consensus that this panel, people on both sides of the question and in the middle, would like to have the system where the arbitrators had to follow the law.") Compare 1 $) & R Rule 20. Authority of Arbitrators (stating that an arbitrator shall, among RWKHU WKLQJV ³IROORZ WKH with DAA Rules, supra note 262, Rule 28 ("Unless otherwise provided by agreement of the parties, the arbitrator is not bound to apply legal principles in reaching what the arbitrator considers to be a fair resolution of the dispute.").

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

320. See Johnson, Tr. II at 218.

321. See Sternlight, Tr. III at 163-64 ("If we're going to require better notice . . . similarly we're going to need better QRWLFH DV WR WKH GHFLVLRQ LWVHOI´ +LOOHEUDQG 7U ,,, DW

322. Johnson, Tr. II at 218.

$V ZLWK LQLWLDO QRWL¿FDWLRQV RI DUELWUDWLRQ LW
DZDUG QRWLFHV WR DGRSW PHDVXUHV WKDW LQFUHDVH

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

7KH)$$ LV WKH VRXUFH RI WKH GLIIHUHQFH EHWZHHQ W
an award.[332] A change to the FAA[333] likely would apply to all types of consumer arbitration,
QRW MXVW GHEW FROOHFWLRQ DUELWUDWLRQ ,Q RWKHU
often than in debt collection arbitration. The Commission believes that further study is needed to determine whether amending the FAA to equalize the time periods for challenging and
FRQ¿UPLQJ DQ DUELWUDWLRQ DZDUG LV RQ EDODQFH EHQH

5RXQGWDEOH SDUWLFLSDQWV GLVFXVVHG ZKDW D FROO
DQ DUELWUDWLRQ DZDUG LQ FRXUW &RQVXPHU DGYRFDW
evidence to sustain the award in court,[334] and one advocate suggested that such evidence would
FRQVLVW RI SURRI WKDW FRQVXPHUV UHFHLYHG QRWL
WKH HYLGHQFH WKDW ZDV SURYLGHG WR WKH DUELWUDWR

prove effective in addressing the problems in the debt collection arbitration process, then the

accessing and analyzing these awards.[350] , W DSSHDUV WR EH GLI¿FXOW IRU FF FXUUHQWO\ WR ORFDWH DZDUGV RQ WKH ZHEVLWHV RI MXU[351] Some participants stated that results should be presented to the public in a searchable format.[352] If awards are made available but not in a manner easily accessible to consumers, it might convey

Repairing A Broken System

Chapter 4
Conclusion

The Commission concludes that the current system for resolving consumer debts is broken, because consumers are not adequately protected in either debt collection litigation or arbitration. 7R UHSDLU WKH V\VWHP WKH)7& LQ WKLV UHSRUW KDV VH federal and state governments, the debt collection industry, and others need to make for the V\VWHP WR EH ERWK HI¿FLHQW DQG IDLU 7KH DJHQF\ LV L interested parties on implementing these reforms as soon as practicable. The Commission hopes that the roundtable discussions and this report will be catalysts for change, resulting in a debt collection system which provides better protection for consumers without unduly burdening legitimate debt collection.

Appendix A
Debt Collection Roundtable Panelists

Abrams, James W. (Hon.)

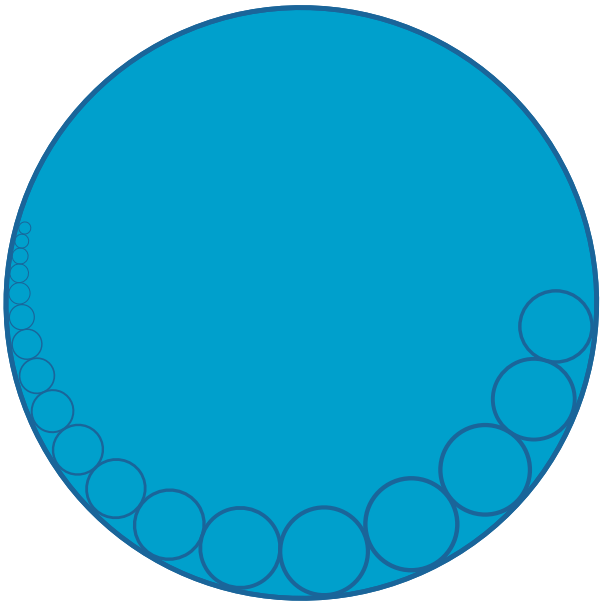
Andersen, Rozanne

Arons, Paul

Appendix B
FTC Contributors to Debt Collection Roundtables

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

Appendix C
Agendas for Debt Collection Roundtables



Agenda

Debt Collection: Protecting Consumers

Day 1 — Litigation

9:00 Opening Remarks

Joel Winston,

9:15 Introduction of Participants

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

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-
-

10:45 Break

Day 2 — Arbitration

9:00 Opening Remarks

David Vladeck, , , , ,

9:15 Introduction of Participants

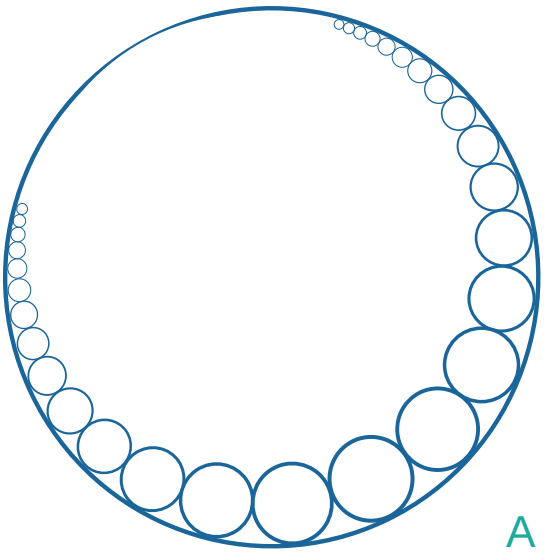
9:30 Consumer Arbitration and the FAA: A Primer

Christopher Drahozal,

2:00 Bias and Perceptions of Bias

- , ,
, ,

Agenda



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

September 29 — Arbitration

9:00 Opening Remarks

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

9:15 Introduction of Participants

9:30 Initiating Proceedings and Consumer Participation Rates

How should arbitration proceedings be initiated so that consumers are made aware of them and their potential consequences? What evidence is there as to consumers' understanding and knowledge about the arbitration process?
Who should have the burden of establishing that adequate

required in an arbitration proceeding?
Should there be changes in the law or industry practices with respect to notifying consumers about arbitration?
Should there be any other changes with respect to initiating proceedings or consumer participation?

10:15 Break

Agenda

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

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

11:30 Lunch

1:00 Bias and Transparency

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

2:15 Enforcing Awards; Contesting Awards

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

3:00 Conclusion

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

3:15 Adjourn

September 30, — Litigation

9:00 Opening Remarks

Jeffrey Klurfeld, Director,

Federal Trade Commission

9:15 Introduction of Participants

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

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

10:45 Break

11:00 Timing: Statute of Limitations Issues

How frequently do debt collectors seek to collect on debt that is beyond the statute of limitations? Are debt collectors more likely to collect on debt that is beyond the statute of limitations with certain types of debt, or on behalf of certain types of owners of debts?
What role do the courts have in addressing statute of limitations issues in debt collection? What substantiation, if any, regarding the statute of limitations should be required of collectors?

they have no legal obligation to pay a debt that is beyond the statute of limitations? Should there be other changes in the law or industry practice with respect to statute of limitations issues?

12:15 Lunch

1:30 Prima Facie Collection Case and Evidentiary Burdens

What evidence of indebtedness do debt collectors typically provide to courts in

Agenda

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

10:45 BREAK

11:00 Statutes of Limitations

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

What actions should lawmakers, the courts, the FTC, the industry, or others take to address statute of limitations issues?

Panelists

James Abrams, Judge, Connecticut Superior Court
Carolyn Coffey, MFY Legal Services, Inc.
Michael Debski, Rubin & Debski, P.A.
Peter Evans, Judge, Fifteenth Judicial Court of Florida, Palm Beach County
Joanne Faulkner
Cary Flitter, Lundy, Flitter, Beldecos & Berger, P.C.
Michele Gagnon, Peroutka & Peroutka, P.A.
Mark Groves, Glasser and Glasser, P.L.C.
Diane Lebedeff, Judge, New York City Civil Court
Carlene McNulty, North Carolina Justice Center
Joann Needleman, National Association of Retail Collection Attorneys
Donald Redmond, Portfolio Recovery Associates, Inc.

Yvonne Rosmarin
Albert Zeszlinski , NCO Group, Inc.

12:15 LUNCH

1:45 Evidence of Indebtedness

adequate evidence of the consumer's indebtedness? What is the type and quantum of evidence of indebtedness that courts do or should require to be submitted with the complaint, to enter a default judgment, or to enter a contested judgment?
What mechanisms should be implemented to ensure that collectors' claims of indebtedness are substantiated?
Should the courts require a different type or quantum of evidence of indebtedness for different types of collectors, such as creditors, third-party collectors, and debt buyers?
How would recent or proposed changes in state laws and court procedures concerning evidence of indebtedness affect consumers and the debt collection industry?
What actions should lawmakers, the courts, the FTC, the industry, or others take to address evidence of indebtedness issues?

Panelists

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

3:30 BREAK

29. Drahozal, Christopher (7/27/2009) # 542930-00023
30. Drahozal, Christopher (11/30/2009) # 545921-00004
31. Edelman, Combs, Latturner & Goodwin, LLC (Edelman, Daniel) (7/28/2009) # 542930-00029
32. Elder, Dane (6/30/2009) # 542930-00006
33. Eric M. Berman, P.C. (Berman, Eric) (1/7/2010) # 545921-00017
34. Feerick Center for Social Justice (Galacatos, Dora) (1/8/2010) # 545921-00023
35. Feerick Center for Social Justice (Galacatos, Dora) (1/9/2010) # 545921-00025
36. Fogal, Jordan (8/11/2009) # 542930-00033
37. Fogal, Jordan (8/28/2009) # 542930-00041
38. Forsythe, Brian (8/31/2009) # 542930-00044
39. Fox, Emma (8/17/2009) # 542930-00035
40. Gargano, William (12/10/2009) # 545921-00012
41. Greater Boston Legal Services (Mitchell-Munevar, Alexander) (1/11/2010) # 545921-00026
42. Jacksonville Area Legal Aid, Inc. (Drysdale, Lynn) (1/8/2010) # 545921-00020
43. JayinGR (11/30/2009) # 545921-00003
44. Kaplan, Jonathan (10/30/2009) # 544507-00010
45. Kaplan, Jonathan (10/30/2009) # 544507-00011
46. /DZ 2I¿FHV +RZDUG /HH 6FKLII 3& 2OVKDQ $GDP
47. Lear, Chris (1/5/2010) # 545921-00016
48. Leykis, Tom (10/19/2009) # 544507-00005
49. Lindenau, (8/1/2009) # 542930-00028
50. Long, Gena (12/19/2009) # 545921-00014
51. Luck (8/27/2009) # 542930-00037
52. Malik (11/19/2009) # 544507-00015
53. Matson, Victor (8/28/2009) # 542930-00039
54. Mettier, Laurie (7/27/2009) # 542930-00013
55. MFY Legal Services (Coffey, Carolyn) (1/8/2010) # 545921-00021
56. Midland Credit Management, Inc. (Martin, Lance) (7/31/2009) # 542930-00025
57. Miranda, Alma (10/29/2009) # 544507-00007
58. 1DWLRQDO $VVRFLDWLRQ RI 3URIHVVLRQDO 3URFHVV 6H # 542930-00042
59. 1DWLRQDO $VVRFLDWLRQ RI 5HWDLO &ROOHFWLRQ $WW # 542930-00043
60. 1DWLRQDO &RQVXPHU /DZ &HQWHU +REEV 5REHUW
61. 1('$3 :LOQHU &ODXGLD

62. 1RUGOXQG /RUUDLQH ± *HQHUDO 'LVWULFW &RXUW RI)

Appendix E
Sample State Debt Collection Checklists

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

— road defects claims (G.L. c. 84, §§ 15-21 or c. 81, § 18) require a timely demand letter.

— G H ¿ F L H Q F \ M X G J P H Q W V I R U V H F X U H G F R Q V X P H U J D I ¿ G D Y L W ¿ O H G Z L W K W K H F O D L P * / F † > after repossession require

‡ If not, you must require the plaintiff to establish the missing elements.

‡ The plaintiff need not prove any element that is established by the facts alleged, taken as true.

7. Is an assessment of damages required?

‡ If the claim is not for a sum certain, you must make an assessment of damages.

‡ The claim must state separately the amounts sought for damages, multiple damages, statutory penalties, attorney fees, costs, and total amount (Rule 2[a]). If the defendant G R H V Q R W D S S H D U W K H S O D L Q W L I ¶ V I D L O X U H W R G G H F L V L R Q Z K H W K H U W R H Q W H U D G H I D X O W M X G J P H Q W

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

‡ e.g., multiple damages, a statutory penalty, discretionarily-set attorney's fees, or court F R V W V R W K H U W K D Q W K H ¿ O L Q J I H H

‡ If so, you must exercise your discretion to set the amount.

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

‡ e.g., contractual attorney's fees, collection costs, etc.

‡ If so, you must review that they are reasonable and not excessive.

— e.g., G H ¿ F L H Q F \ M X G J P H Q W V I R U P D \ H F R Z H G Q F R Q W H Q G X V X P H Q charges for installments due after repossession (G.L. c. 255 § 131[d]).

Repairing A Broken System

whether the defendant is in military service, the court may exercise the discretion granted by the Act to require an indemnity bond, to stay execution, or to make such other orders as the court deems necessary to protect the rights of the defendant, or the court may GLVPLVV WKH FODLP ZLWKRXW SUHMXGLFH

8. Plaintiff in trade or commerce or pursuing assigned debt. Where the claim involves a plaintiff in trade or commerce or pursuing assigned debt and the plaintiff has not FRPSOLHG ZLWK 5XOH E WKH FRXUW VKDOO OODQQRW HQ VKDOO GLVPLVV WKH FODLP ZLWKRXW SUHMXGLFH

Fairfax County, Virginia
Purchased-Debt Default Judgment Checklist

R 7KH RULJLQDO FUHGLWRU KDV EHHQ QDPHG RU RWKHU

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

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

  R A copy of the signed application, or other form of acceptance, signed by the GHEWRU 25

  R $ FRS\ RI D ELOO UHÀHFWLQJ SXUFKDVHV RU SD\PH WKH FDUG RU DFFRXQW 25

  R $ FRS\ RI DQ HOHFWURQLF SULQWRXW VXI¿FLHQWO account, as well as payments, purchases, or other indicia of actual use of the card or account.

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

R There is either no nexus to the terms and conditions (i.e. no indicia of actual use), or no WHUPV DQG FRQGLWLRQV KDYH EHHQ SURYLGHG /DFN contract between the original creditor and the debtor, Plaintiff does not seek to collect DWWRUQH\¶V IHHV RU LQWHUHVW RWKHU WKDQ LQWHU or the date on which demand was made after the claim was purchased.

R /DFNLQJ SULPD IDFLH HYLGHQFH RI D UDWL¿HG FRQWU REMHFWLYH HYLGHQFH WKDW WKH DPRXQW VRXJKW LQ exclusive of any compounded interest.

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

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

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

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

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

In addition to the requirements of G.S. 58-70-145, in any cause of action initiated by a debt EX\HU DV WKDW WHUP LV GH¿QHG LQ * 6 DOO RI W the complaint or claim:

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

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

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

(a) 3ULRU WR HQWU\ RI D GHIDXOW MXGJPHQW RU VXPPDU\ M LQLWLDWHG E\ D GHEW EX\HU WKH SODLQWLII VKDOO ¿OH and nature of the debt.

E 7KH RQO\ HYLGHQFH VXI¿FLHQW WR HVWDEOLVK WKH D DXWKHQWLFDWHG EXVLQHVV UHFRUGV WKDW VDWLVI\ WKH Rules of Evidence. The authenticated business records shall include at least all of the following items:

(1) The original account number.

(2) The original creditor.

(3) The amount of the original debt.

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

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

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

(7) The date of last payment.

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

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

Small Claims Judgment Checklist for Magistrates

This small claims checklist is to establish uniform minimum evidentiary norms, improve fairness, and enhance the public perception of the small claims court. (C.G.S. § 51-15)

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

‡ Is the proper amount of interest claimed, if any?

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

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

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

Loans are limited to 12% CGS § 37-4

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

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

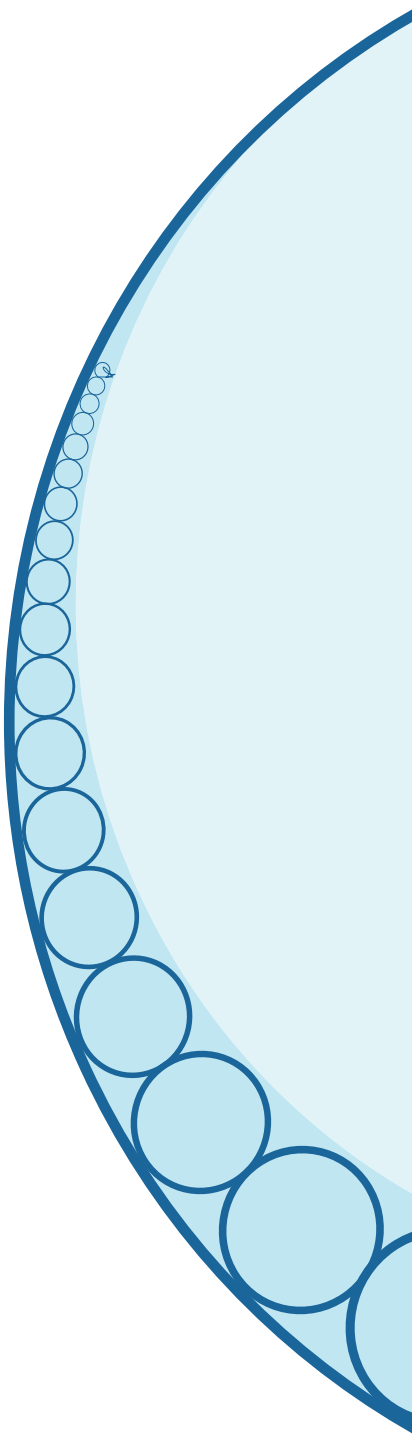
** described as all-encompassing language in Rhodes v. Hartford, 201 Conn. 89, 99 (1986).

1% 7KHUH DUH H[FHSWLRQV IRU IHGHUDO EDQ rates

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

‡ Items to consider when entering judgment

— ,V WKHUH UHDVRQ WR EHOLHYH WKDW WKH GHIHQ the "nominal order" excessive in the circumstances? If so, what weekly order should enter?

— ,I WKH GHIHQGDQW¶V ¿QDQFLDO FLUFXPVWDQFHV type of wage or property execution should issue, what stay do you order?

— ,I D FODLP IRU PHGLFDO ELOOV QR MXGJPHQW VK provider if on Medicaid 42 U.S.C. § 1396a(a)(25)(C).