

**Statement for the Record of  
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**Senate Judiciary Committee**

**Hearing on  
Arbitration: Is It Fair When Forced?**

Chairman Franken, Ranking Member Cornyn, and Members of the Committee:  
I am pleased to submit this statement for the record addressing the use of arbitration to resolve consumer and employment disputes. I am the John M. Rounds Professor of Law at the University of Kansas School of Law and an Associate Reporter for the Restatement, Third, of the U.S. Law of International Commercial Arbitration. I also served as the Chair of the Consumer Arbitration Task Force of the Searle Civil Justice Institute, and in that capacity was an author of the “Searle study,” which examined in detail consumer arbitration cases administered by the American Arbitration Association (“AAA”).<sup>1</sup> I submit this statement, not on behalf of any of those entities, but as an individual scholar who specializes in arbitration law.

## **I. Overview: Empirical Research and the Fairness of Consumer Arbitration**

Both sides in the debate over the fairness of consumer and employment arbitration have recognized the importance of empirical research. Indeed, even Public Citizen, a vocal critic of consumer arbitration, has stated that it “agree[s]” that “congressional scrutiny of arbitration ‘can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study.’”<sup>2</sup> According to Professor Peter B. Rutledge, “it now appears to be common ground that the policy debate over the Arbitration Fairness Act should focus on empirical data.”<sup>3</sup> If so, that is an important and valuable development. Anecdotes alone do not provide a solid basis for legislative action.

But of course one must be cautious in evaluating empirical data as well. Even the best empirical studies have limits or are subject to qualifications. And numbers can be misleading if misinterpreted. So empirical studies must be used thoughtfully as a basis for making policy, recognizing both their value and their limitations.<sup>4</sup> My goal in this statement is to describe the empirical literature on consumer arbitration (which is what my research has focused on), highlighting both insights that the literature provides and circumstances in which it has been misconstrued.

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<sup>1</sup> See Consumer Arbitration Task Force, Searle Civil Justice Institute, Consumer Arbitration Before the American Arbitration Association: Preliminary Report (Mar. 2009), available at <http://www.adr.org/si.asp?id=6610>; see also Consumer Arbitration Task Force, Searle Civil Justice Institute, Creditor Claims in Arbitration and in Court: Interim Report (Nov. 2009). The Searle Preliminary Report is published as Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843 (2010) [hereinafter Drahozal & Zyontz, *AAA Consumer Arbitration*]; and Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. \_\_\_\_ (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1904545](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904545) [hereinafter Drahozal & Zyontz, *Private Regulation*]. The Searle Interim Report is published as Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77 (2011) [hereinafter Drahozal & Zyontz, *Creditor Claims*]. For the convenience of the Committee, I have attached the Executive Summary of both reports to this statement.

<sup>2</sup> Public Citizen, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration 2* (2008) (quoting Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J. L. PUB. POL’Y 549, 589 (2008)).

<sup>3</sup> Peter B. Rutledge, *The Case Against the Arbitration Fairness Act*, DISP. RESOL. MAG., Fall 2009, at 4, 4; see also Peter B. Rutledge, *Common Ground in the Arbitration Debate*, 1 Y.B. ARB. & MED. 1, 8 (2009) (“there now appears to be a consensus that the future of arbitration should be decided by data, not anecdote”) (emphasis omitted).

<sup>4</sup> For a discussion of the limitations of the data used in the Searle study, for example, see Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 1, at 846, 896-97.

The following summarizes the key points in the statement below:

- Most consumer contracts do not include arbitration clauses, and even most credit card issuers do not, and never have, included arbitration clauses in their cardholder agreements.
- High business win rates in arbitration do not show that arbitration is biased against consumers. Business win rates are as high, if not higher, in comparable court cases as they are in arbitration.
- Higher win rates of repeat businesses in arbitration are likely due to their better ability to screen cases and not due to biased decision-making by arbitrators.
- Many consumer arbitration clauses do not include class arbitration waivers, and it is unlikely that all businesses — or even all credit card issuers — will respond to the Supreme Court’s decision in *AT&T Mobility v. Concepcion* by switching to arbitration.
- Restricting the enforcement of pre-dispute arbitration clauses is likely to have unanticipated consequences, harming rather than helping at least some if not many consumers.

## II. Consumer Choice and Pre-Dispute Arbitration Agreements

A central theme in criticisms of consumer arbitration is that consumers do not have any choice if they want to avoid arbitration.<sup>5</sup> But it emphatically is not the case that all consumer contracts include arbitration clauses. To the contrary, the best available empirical evidence, although now somewhat dated, is that most consumer contracts do *not* include arbitration clauses.<sup>6</sup> Rather, it is only particular types of consumer contracts that include arbitration clauses.

Credit card agreements are commonly cited as a type of contract as to which consumers have no choice but to agree to arbitration.<sup>7</sup> In a 2009 House Hearing on the use of arbitration clauses by credit card issuers, Congressman Cohen (Tenn.) stated the commonly held view that

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<sup>5</sup> E.g., S. 987, Arbitration Fairness Act of 2011, 112<sup>th</sup> Cong., § 2(3) (2011).

<sup>6</sup> Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 62 (2004) (“Across the industries studied, fifty-seven of the 161 sampled businesses (35.4%) included arbitration clauses in their consumer contracts.”). The use of arbitration clauses varied widely by type of industry. *Id.* at 63.

<sup>7</sup> Other studies of the use of arbitration clauses in consumer contracts include Florencia Marotta-Wurgler, “Unfair Dispute Resolution Clauses: Much Ado About Nothing?”, in BOILERPLATE: THE FOUNDATIONS OF MARKET CONTRACTS 45 (Omri Ben-Shahar ed., 2007) (finding that only 6.0% of software license agreements studied included arbitration clauses, although noting that some of the contracts studied were commercial rather than consumer contracts); and Theodore Eisenberg, Geoffrey P. Miller, & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 883 (2008) (finding that 20 of 26, or 76.9%, of sample of consumer contracts included arbitration clauses; sample included consumer financial services and telecommunications contracts).

“[n]early every credit card issuer includes an arbitration agreement in [its] ... contracts with cardholders.”<sup>8</sup> David Arkush of Public Citizen has stated that “[n]early every consumer lender puts a clause in the standard-form contract saying that the consumer can never sue the company, for anything.”<sup>9</sup>

In fact, it has never been the case that “[n]early every credit card issuer” uses arbitration clauses. As of December 31, 2009, over 80 percent (247 of 298, or 82.9%) of credit card issuers did *not* use arbitration clauses in their cardholder agreements.<sup>10</sup> Many, but not all, of those issuers were credit unions that offered credit cards to their members. Barely 17 percent (51 of 298, or 17.1%) of issuers used arbitration clauses in their credit card agreements.<sup>11</sup>

The reason for the perception that consumers had limited choice as to credit cards was that almost all of the very large credit card issuers used arbitration clauses. But even that has changed. As of December 31, 2009, just over 95 percent of credit card loans outstanding were by issuers that used arbitration clauses in their cardholder agreements. One year later, as of December 31, 2010, that percentage had declined to 48 percent.<sup>12</sup> The most recent data thus suggest that consumers have a much larger degree of choice (and, indeed, always have had a much larger degree of choice) than commonly perceived.

One additional point: critics assert that if arbitration is “fair,” consumers will agree to it after a dispute arises, implying that the only reason for businesses to use pre-dispute arbitration agreements (and deny consumers the choice of going to court) is to take advantage of consumers. That is not the case: pre-dispute arbitration clauses permit consumers and businesses to enter into deals that make them both better off, deals that they could not enter into after a dispute arises. As I have explained in prior writing:

[T]hat an individual who agreed to arbitrate before a dispute arose changes his or her mind [after a dispute arises] does not necessarily mean that enforcing the

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<sup>8</sup> See *Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?*: Hearing Before the House Subcomm. on Comm'l and Admin. Law of the House Comm. on the Judiciary 1-2, 111th Cong. (2009), available at [http://judiciary.house.gov/hearings/printers/111th/111-39\\_49475.PDF](http://judiciary.house.gov/hearings/printers/111th/111-39_49475.PDF).

<sup>9</sup> Memo to Elizabeth Warren: How to Protect Consumers (Sept. 17, 2010) (quoting David Arkush, director, Public Citizen's Congress Watch division), available at <http://blogs.reuters.com/reuters-wealth/2010/09/17/memo-to-elizabeth-warren-how-to-protect-consumers/>.

<sup>10</sup> The Credit CARD Act of 2009 requires credit card issuers to supply their credit card agreements to the Federal Reserve, which in turn is to make them available to the public via the Federal Reserve web page. Credit Card Accountability Responsibility and Disclosure Act of 2009, § 204(a), 123 Stat. 1734, 1746-47 (May 22, 2009) (codified at 15 U.S.C. § 1632(d)(3)); 12 C.F.R. § 226.58; see Board of Governors, Federal Reserve System, Consumer Credit Card Agreements Search, <http://www.federalreserve.gov/creditcardagreements/> (last visited October 7, 2011). The data described in the text were collected from credit card agreements available on the Federal Reserve web page.

<sup>11</sup> Christopher R. Drahozal & Peter B. Rutledge, Arbitration and Consumer Credit 20 & tbl. 3 (July 6, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1880180](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880180).

<sup>12</sup> Peter B. Rutledge & Christopher R. Drahozal, Contract and Choice 5 (Sept. 26, 2011) (work in progress; preliminary results). Most of the decline appears to be due to two factors: (1) the decision of the National Arbitration Forum to cease administering new consumer arbitrations in settlement of Minnesota Attorney General Swanson's consumer fraud suit against the NAF; and (2) the decision of four large issuers to settle an antitrust suit against them by agreeing to remove arbitration clauses from their cardholder agreements for three-and-one-half years. *Id.* at 4. Whether those issuers will resume use of arbitration clauses after that period expires is unknown.

predispute arbitration agreement is unfair. The individual may have been willing to give up the right to bring high-dollar but rare claims before a jury in exchange for the ability to pursue low-dollar but more common claims in arbitration. Such a deal is possible only before a dispute arises, when there is uncertainty as to what type of claim (if any) will materialize. Once the individual knows what type of claim he or she has (either high-value or low-value), either the individual may be unwilling to arbitrate (if it is a high-value claim) or the corporation may be unwilling to arbitrate (if it is a low-value claim that could not economically be brought in court). By entering into a predispute arbitration agreement in such circumstances, the parties can enter into a deal that makes both of them better off. Permitting the individual (or the corporation for that matter) later to avoid arbitration would effectively preclude such deals from being made, making the parties worse off. Enforcement of the predispute arbitration agreement in this sort of case would be the fair, not the unfair, approach.<sup>13</sup>

The empirical evidence, while not decisive, is consistent with this view. The vast majority of consumer and employment arbitrations arise out of pre-dispute, not post-dispute, arbitration agreements.<sup>14</sup> That is true even for international arbitrations — a setting in which no one contends that arbitration is being used to take advantage of a weaker party.<sup>15</sup> The rarity of post-dispute arbitration agreements, even in international arbitration, suggests that parties can more readily enter into pre-dispute arbitration agreements than post-dispute agreements. Precluding parties from using pre-dispute arbitration agreements thus is likely to reduce, possibly dramatically, the use of arbitration to resolve consumer and employment disputes.

### III. Outcomes in Consumer Arbitration

Critics of consumer arbitration have cited what they see as excessively high win rates for businesses as evidence that arbitration is unfair to consumers.<sup>16</sup> While I applaud their reliance on data rather than anecdotes, the conclusions critics draw from that data are incorrect.

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<sup>13</sup> Christopher R. Drahozal, “*Unfair*” *Arbitration Clauses*, 2001 U. Ill. L. Rev. 695, 749; see also Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 278-80 (2008); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 262-64 (2006).

<sup>14</sup> Drahozal & Zyontz, *Private Regulation*, *supra* note 1, at 49 (“Indeed, virtually all of the 301 cases in the [consumer] case file sample — 290 (or 96.3%) — arose out of pre-dispute agreements; 11 (or 3.7%) arose out of post-dispute agreements to arbitrate.”); Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 319 (2003) (“AAA found only 6% (69/1148) of their 2001 employment arbitrations were the result of post-dispute agreements. In 2002, the frequency of post-dispute agreements was even lower, 2.6% (29/1124).”).

<sup>15</sup> Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, 1(2) ICC INT’L CT. ARB. BULL. 14 (1990), reprinted in CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 65, 67 (2005) (“Of the cases submitted to the ICC Court, only four [of 237] in 1987 and six [of 215] in 1989 resulted from a *compromis*, that is, an agreement to submit an already-existing dispute to arbitration.”).

<sup>16</sup> E.g., Letter from Professors of Consumer Law and Banking Law to Senators Dodd and Shelby and Congressmen Frank and Bachus, Statement in Support of Legislation Creating a Consumer Financial Protection Agency 6 (Sept. 29, 2009), available at <http://law.hofstra.edu/pdf/Media/consumer-law%209-28-09.pdf> (“Studies

First, win rates in consumer arbitration vary depending on the type of case being resolved and numerous other factors. Businesses do not always win in arbitration. For example, the Searle study found that consumer claimants won some relief in 53.3 percent of the AAA consumer arbitrations studied, and that, in those cases, consumers were awarded 52.1 percent of the amount they sought.<sup>17</sup>

Second, and more fundamentally, evaluating whether a win rate is too high (or too low) cannot be done in the abstract. It must be based on a comparison to a base line — or, in other words, you need to have a control group. The obvious control group to use here is courts: outcomes in arbitration cases need to be compared to outcomes in comparable cases in court in order to draw any conclusions about how consumers fare.<sup>18</sup> This is easier said than done, of course. It is hard to control for differences across types of cases. Important differences, such as the legal and factual strength of the case, are difficult to observe. That said, there is one type of case in which the characteristics of the cases are likely to be at least roughly comparable in arbitration and in court: debt collection cases brought by businesses — which happens to be the exact type of case cited by the critics as showing a high business win rate in arbitration.

So how do consumers fare in debt collection cases? In arbitration, as the data cited above suggest, businesses win the vast majority of the cases. The Searle study, for example, found that “[c]reditors won some relief in 86.2 percent of the individual AAA debt collection arbitrations and 97.1 percent of the AAA debt collection program arbitrations that went to an award.”<sup>19</sup> But the study found that creditors won some relief at an even higher rate (ranging from 98.4 percent to 100.0 percent of the cases) in debt collection cases in court.<sup>20</sup> Likewise, while prevailing creditors were awarded from 92.9 percent to 99.2 percent of the amount sought in AAA arbitrations, they were awarded from 96.2 percent to 99.5 percent of the amount sought in debt collection cases in court.<sup>21</sup>

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have found the arbitrators find for companies against consumers 94 to 96% of the time, suggesting that arbitration providers are responding to the incentive to find for those who select them: the companies that insert their names in their form contracts.”).

<sup>17</sup> Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 1, at 897-99. By comparison, business claimants won some relief in 83.6% of the AAA arbitrations studied, and in those cases recovered 93.0% of the amount sought. *Id.* at 898-99. The reason for the difference, as stated in the study, is not that arbitration is biased in favor of businesses but rather that businesses bring different types of claims than consumers. *Id.* at 901 (“Business claimants usually bring claims for specific monetary amounts representing debts for goods provided or services rendered. Many of the cases are resolved *ex parte*, with the consumer failing to appear. By comparison, cases with consumer claimants are much less likely to involve liquidated amounts and more likely to be contested by businesses.”).

<sup>18</sup> *E.g.*, Maine Bureau of Consumer Credit Protection, Report to Committee: Compilation of Information Provided by Consumer Arbitration Providers 7 (Apr. 1, 2009) (“[A]lthough credit card banks or assignees prevail in most arbitrations, this fact alone does not necessarily indicate unfairness to consumers. The fact is that the primary alternative to arbitration (a civil action in court) also commonly results in judgment for the plaintiff.”), available at <http://www.maine.gov/pfr/consumercredit/documents/ArbitrationProvidersReport.rtf>.

<sup>19</sup> Drahozal & Zyontz, *Creditor Claims*, *supra* note 1, at 80.

<sup>20</sup> *Id.* For data availability reasons, the study examined debt collection cases in Oklahoma and Virginia state courts, and student loan collection cases in federal court. I have every reason to believe the results would have been the same if we had studied other courts instead.

<sup>21</sup> *Id.* at 80-81. Controlling for confounding factors using multiple regression analysis did not change the results. *Id.* at 98-101.

I certainly do not claim that these data show that arbitration is better for consumers than litigation. But likewise the data provide no support for the view that consumers fare worse in arbitration than they do in comparable cases in court.<sup>22</sup> And the data show definitively that high business win rates in arbitration do not in and of themselves prove that arbitration is unfair to consumers.

#### IV. Incentives of Arbitrators and Arbitration Providers

A more specific concern about outcomes in arbitration is the view that the structure of the arbitration process results in decisions that are biased in favor of businesses. Because arbitrators get paid only when they are selected to serve, rather than being paid salaries like judges are, critics assert that arbitrators will tend to favor “repeat players” — parties that will likely appear in arbitration on multiple occasions and so have more opportunities to appoint arbitrators than non-repeat players. Indeed, some have extended the criticism to providers of arbitration services, which are alleged to favor businesses (repeat players) over consumers in appointing arbitrators or otherwise structuring the arbitral process.

The evidence on whether repeat players have a higher success rate in arbitration is mixed. As noted above, businesses do have a higher win rate in arbitration than consumers, but that is likely due to the different types of claims businesses assert.<sup>23</sup> The usual test for the existence of a repeat-player effect has been to compare win rates for repeat businesses in arbitration to win rates for non-repeat businesses in arbitration.<sup>24</sup> The Searle study, for example, found that under this usual approach, repeat businesses had a slightly higher win rate against consumers than non-repeat businesses, but that the difference was not statistically significant. Under an alternative definition of repeat business, the study found a greater repeat-player effect, albeit even then one that was only weakly statistically significant.<sup>25</sup> Other studies, usually of AAA employment arbitrations, also have found that repeat businesses have a higher win rate in arbitration than non-repeat businesses.<sup>26</sup>

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<sup>22</sup> For evidence on comparative outcomes in employment cases in arbitration and court, see, e.g., Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003-Jan. 2004, at 53 (“These results are consistent with arbitrators, at least those participating in AAA-sponsored arbitration, not acting in a materially different fashion than in-court adjudicators.”). However, it is much more difficult to be confident that the cases being compared are actually comparable in the employment setting than in the debt collection setting.

<sup>23</sup> See *supra* note 17.

<sup>24</sup> E.g., Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189, 189-90 (1997). An alternative test would be to compare win rates for repeat businesses in arbitration to win rates for repeat businesses in court.

<sup>25</sup> Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 1, at 909-11.

<sup>26</sup> Bingham, *supra* note 25, at 213; Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, IRRRA 50TH ANN. PROC. 33, 38-39 (1998); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 223 (1998); Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMP. LEGAL STUD.1, 11-16 (2011).

But bias is not the only, or even the most likely, explanation for such a repeat-player effect. Repeat businesses are likely to be more sophisticated at screening cases and settling disputes than non-repeat businesses. As such, one would expect them to be more likely than non-repeat businesses to settle the strong claims against them and arbitrate only the weak claims. If so, one would expect to find exactly the pattern described above: that repeat businesses have higher win rates than non-repeat businesses. One implication of this alternative theory is that repeat businesses will likely settle cases at a higher rate than non-repeat businesses. And that is exactly what the Searle study found: “that repeat businesses are more likely to settle or otherwise close cases before an award than non-repeat businesses.”<sup>27</sup> Accordingly, the study concludes, “the repeat-player effect is more likely due to case screening by repeat businesses than arbitrator (or other) bias.”<sup>28</sup>

As for alleged bias by arbitration providers in favor of businesses, such allegations seem belied by the adoption and enforcement of “due process protocols” by the two leading providers of arbitration services in the United States (the AAA and JAMS).<sup>29</sup> Due process protocols are private fairness standards designed to enhance the fairness of arbitration for consumers and employees.<sup>30</sup> Arbitration providers enforce the due process protocols by refusing to administer arbitrations under agreements that do not comply with the applicable protocol.<sup>31</sup>

The Searle study examined the AAA’s enforcement of the Consumer Due Process Protocol, and concluded that the AAA “appears to be effective at identifying and responding to those clauses with protocol violations.”<sup>32</sup> The study found that the arbitration clauses in 98.2% of the AAA cases studied either complied with the Due Process Protocol or that the AAA properly identified and responded to any non-compliance.<sup>33</sup> In addition, the AAA refused to

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<sup>27</sup> Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 1, at 913.

<sup>28</sup> *Id.* at 916. Lisa Bingham likewise concludes that the repeat-player effect was likely due, not to bias, but rather to better case screening by businesses. Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in *ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53<sup>RD</sup> ANNUAL CONFERENCE ON LABOR* 303, 323 tbl. 2 (Samuel Estreicher & David Sherwyn eds. 2004).

<sup>29</sup> Most of the criticisms of arbitration providers were directed at the National Arbitration Forum, which no longer administers consumer arbitrations. As noted above, the NAF settled a consumer fraud suit brought against it by Minnesota Attorney General Swanson by agreeing not to administer new consumer arbitration cases. *See supra* note 12.

<sup>30</sup> *See* National Consumer Disputes Advisory Committee, *Consumer Due Process Protocol* (April 17, 1998), available at [www.adr.org/sp.asp?id=22019](http://www.adr.org/sp.asp?id=22019); *see also* Task Force on Alternative Dispute Resolution in Employment, *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (May 9, 1995), available at [www.adr.org/sp.asp?id=28535](http://www.adr.org/sp.asp?id=28535); Commission on Health Care Dispute Resolution, *Health Care Due Process Protocol* (July 27, 1998), available at [www.adr.org/sp.asp?id=28633](http://www.adr.org/sp.asp?id=28633); National Task Force on the Arbitration of Consumer Debt Collection Disputes, *Consumer Debt Collection Due Process Protocol – Statement of Principles* (Oct. 2010), available at <http://www.adr.org/si.asp?id=6248>; JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness* (revised Jan. 1, 2007), available at [www.jamsadr.com/rules/consumer\\_min\\_std.asp](http://www.jamsadr.com/rules/consumer_min_std.asp); JAMS, *JAMS Policy on Employment Arbitration, Minimum Standards of Procedural Fairness* (revised Feb. 19, 2005), available at [www.jamsadr.com/rules/employment\\_Arbitration\\_min\\_std.asp](http://www.jamsadr.com/rules/employment_Arbitration_min_std.asp).

<sup>31</sup> *See* Drahozal & Zyontz, *Private Regulation*, *supra* note 1, at 16-18.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> *Id.* The Searle study did not examine AAA enforcement of the employment due process protocol, but the available evidence suggests that AAA enforcement is effective in the employment context as well. *See* Bingham &

administer at least 85 consumer cases (constituting 9.4 percent of its consumer caseload) because of protocol violations during the period studied, and over 150 businesses have waived problematic provisions or revised their arbitration clauses as a result of AAA protocol compliance review.<sup>34</sup> It is hard to square the AAA's enforcement of the Consumer Due Process Protocol with the suggestion that arbitration providers are systematically biased in favor of businesses.<sup>35</sup>

## V. Arbitration Clauses and Class Arbitration Waivers

An important and as yet unanswered question is the effect of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion* on the use of arbitration clauses.<sup>36</sup> In *Concepcion*, the Court held that the Federal Arbitration Act preempts California's ability to use its unconscionability doctrine to invalidate arbitration clauses with class arbitration waivers — provisions that require arbitration to proceed on an individual rather than a class basis.<sup>37</sup> It is too soon after the decision in *Concepcion* to be able to evaluate empirically its effects. But the available empirical evidence does suggest a couple of possibilities worth noting.

First, prior to *Concepcion*, the use of class arbitration waivers varied widely by industry, and many consumer arbitration agreements did not include class arbitration waivers at all. The Searle study found that of the arbitration clauses giving rise to AAA consumer arbitrations during the time period studied, only 36.5 percent (109 or 299) included class arbitration waivers.<sup>38</sup> All of the cell phone contracts included class arbitration waivers, as did all of the credit card contracts. But none of the insurance contracts and none of the real estate brokerage agreements included class arbitration waivers. And somewhat over half of the car sale contracts (53.1%) and home builder contracts (64.7%) included class arbitration waivers.<sup>39</sup>

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Sarraf, *supra* note 28, at 321 (finding consumer win rate increased after adoption of Employment Due Process Protocol); Eric Tuchmann, The Arbitration Fairness Act, Analyzed: International Dispute Negotiation Podcast 62, minute 14:05 (Feb. 20, 2009), available at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/455/IDN-62--The-Arbitration-Fairness-Act-Analyzed.aspx> (“So if we tell them there’s a problem with it in the employment context they’re very likely to welcome our suggestions and make the changes that we’re asking for. The consumer situation is a little bit different. Those are much more likely to be one-off disputes with customers.... The results are a little bit more mixed in the consumer context with organizations’ willingness to comply with our requests.”).

<sup>34</sup> Drahozal & Zyontz, *Private Regulation*, *supra* note 1, at 5. To be clear, the number of businesses waiving or revising problematic provisions is over the entire course of AAA application of the protocol, not just during the time period studied.

<sup>35</sup> Certainly there are other arbitration providers than the AAA and JAMS. Any concerns about those providers not following a due process protocol could be dealt with by legislation such as S.1186, the Fair Arbitration Act of 2011, 112<sup>th</sup> Cong. (2011), rather than a total prohibition of pre-dispute arbitration clauses in consumer and employment contracts.

<sup>36</sup> 131 S. Ct. 1740 (2011).

<sup>37</sup> *Id.* at 1753.

<sup>38</sup> Drahozal & Zyontz, *Private Regulation*, *supra* note 1, at 51.

<sup>39</sup> *Id.* One implication of this data is that making all consumer arbitration clauses unenforceable because of concerns about the availability of class relief would be overbroad. See Christopher Drahozal, *Concepcion and the Arbitration Fairness Act*, SCOTUSBLOG (Sep. 13, 2011, 11:46 AM), <http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act/>.

Second, even after *Concepcion*, it is unlikely that all consumer contracts — or even all credit card contracts, which ordinarily include class arbitration waivers when they include arbitration clauses — will begin using arbitration clauses. As Professor Rutledge and I conclude in a recent paper:

Our finding that issuers are less likely to use arbitration clauses when located in states that (prior to *Concepcion*) had held class arbitration waivers unenforceable suggests that the use of arbitration clauses will increase as a result of *Concepcion*. But the significance of other variables in the model (the riskiness of the credit card portfolio, the degree of specialization in credit card loans, the size of the issuer, and the issuer's organizational form) suggests that not all credit card issuers are likely to use arbitration clauses following the decision in *Concepcion*.<sup>40</sup>

To illustrate the point: very few credit card issuers (5 of 97, or 5.2%) located in states that had held class arbitration waivers unenforceable prior to *Concepcion* used arbitration clauses. But even in states that had held class arbitration waivers enforceable prior to *Concepcion*, only a minority of credit card issuers (23 of 103, or 22.3%) used arbitration clauses.<sup>41</sup> That percentage likely will increase after *Concepcion*. But given the other factors that seem to explain the use of arbitration clauses by credit card issuers, these data suggest that the use of arbitration clauses will not become ubiquitous after *Concepcion*, even in the credit card industry.

## VI. Unintended Consequences of Restrictions on Consumer Arbitration Clauses

After teaching contract law for seventeen years, it is clear to me that when parties face restrictions on one type of contract term, such as an arbitration clause, they often respond by changing other terms of their contract. And, in some cases, they might even respond by refusing to enter into a contract altogether. Too often decision makers do not consider these sorts of unintended consequences in evaluating the costs and benefits of proposed laws.

Several such unintended consequences might result from the adoption of restrictions on the use of pre-dispute arbitration clauses in consumer and employment contracts.

First, consumers and employees without disputes — who have no complaint with their treatment by a business — likely will be made worse off by legal restrictions on the use of arbitration. The cost savings that businesses achieve through arbitration benefit consumers by enabling the businesses to reduce prices and employers to increase wages.<sup>42</sup> Removing those cost savings by restricting the use of arbitration will have the opposite effect. The effect is likely to be particularly pronounced for those least able to afford it. For example, the consumers most likely to be affected by restrictions on the use of arbitration clauses in credit card agreements are those with low credit ratings who have few alternative sources of credit. A statistical examination of the factors explaining the use of arbitration clauses by credit card issuers finds a

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<sup>40</sup> Drahozal & Rutledge, *Consumer Credit*, *supra* note 11, at 23.

<sup>41</sup> *Id.* at 23 & tbl. 8.

<sup>42</sup> *E.g.*, Ware, *supra* note 13, at 254-57.

strong correlation between the riskiness of the issuer's credit card portfolio and its use of arbitration clauses.<sup>43</sup> If credit card issuers can no longer include arbitration clauses in their cardholder agreements, they may become less willing to lend to those higher risk consumers.

Second, restrictions on the enforceability of arbitration agreements may reduce rather than enhance the ability of some consumers and employees to have their claims heard. The available empirical evidence suggests that for relatively low-dollar claims, arbitration may be a more accessible forum than court.<sup>44</sup> Employment lawyer Lewis Maltby makes the point bluntly in the context of employment arbitration: “[M]ost employees will not be able to secure their employer’s agreement to arbitrate once a dispute arises. The vast majority of employment disputes, however, do not involve enough damages to support contingent fee litigation. Therefore, outlawing pre-dispute agreements to arbitrate will leave many employees with no access to justice.”<sup>45</sup>

Finally, some consumers will be less able to have their cases actually heard if the availability of arbitration is restricted. Very few court cases actually make it trial. Indeed, in 2009, only 1.2 percent of federal court dispositions were by either jury trial or bench trial.<sup>46</sup> Most court cases are resolved instead by dispositive motions or settlement. Consumers who bring those cases never have a “day in court” to tell their story to a judge or jury. By comparison, the Searle study found that over 50 percent of consumer claims in AAA arbitrations made it to a hearing before an arbitrator, and over 30 percent were resolved by the issuance of an award after a hearing.<sup>47</sup> To the extent there is value in consumers actually being able to present their claim to a neutral decision maker, restricting the availability of arbitration will deprive consumers of that value.

## VII. Conclusions

To reiterate: my view is that sound public policy should be based on careful empirical study and not simply anecdotal reports. The available empirical evidence does not support the view that arbitration is necessarily unfair to consumers. Rather, that evidence suggests that pre-dispute arbitration clauses make some, if not many, consumers better off, and that broad-ranging restrictions on arbitration may well be counter-productive.

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<sup>43</sup> Drahozal & Rutledge, *Consumer Credit*, *supra* note 11, at 23.

<sup>44</sup> Eisenberg & Hill, *supra* note 22, at 53.

<sup>45</sup> Maltby, *supra* note 14, at 314.

<sup>46</sup> See Admin. Office of the U.S. courts, Judicial Facts and Figures tbl.4.10 (2010), *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table410.pdf>.

<sup>47</sup> Drahozal & Zyontz, *AAA Consumer Arbitration*, *supra* note 1, at 881 fig. 5. Of the hearings in the consumer cases studied, 62.1% were either in person or by telephone; the remaining cases involved document-only hearings. *Id.* at 893. But in the cases with document-only hearings, the consumer had the right to request an in-person or telephone hearing and evidently did not do so. *Id.* at 865 (“For claims seeking \$10,000 or less, the default rule is that the case will be resolved on the basis of documents only. Either party may request a telephone or in-person hearing, however. Likewise, the arbitrator may hold a telephone or in-person hearing if he or she decides one is necessary. For claims seeking over \$10,000, the default rule is that the arbitrator will hold either a telephone or in-person hearing unless the parties agree otherwise.”).

**ATTACHMENT 1:**

**CONSUMER ARBITRATION  
BEFORE THE AMERICAN ARBITRATION ASSOCIATION**

**Executive Summary  
March 2009**

***Issues and Background***

Empirical evidence has become a central focus of the policy debate over consumer and employment arbitration. Both supporters and opponents of the proposed Arbitration Fairness Act, which would make pre-dispute arbitration clauses unenforceable in consumer and employment (and franchise) agreements, have recognized that empirical evidence on the fairness and integrity of consumer and employment arbitration proceedings is essential to making an informed decision on the bill. Yet the empirical record, particularly on consumer arbitration, has critical gaps.

One set of issues on which further empirical research would be helpful is the costs, speed, and outcomes of consumer arbitrations. How much do consumers pay to bring claims in arbitration? How long do consumer arbitrations take to resolve? How do consumers fare in arbitration, particularly against businesses that are repeat users of arbitrators and arbitration providers? While a number of important studies on employment arbitration have been provided, the empirical record on these issues in consumer arbitrations is sparse.

A second set of issues of interest involves the enforcement of arbitration due process protocols -- privately created standards setting out minimum requirements of procedural fairness for consumer and employment arbitrations. Due process protocols commonly require independent and impartial arbitrators, reasonable costs, convenient hearing locations, and remedies comparable to those available in court. Leading arbitration providers have pledged not to administer arbitrations arising out of arbitration clauses that violate the protocols. But empirical evidence on the effectiveness of these private enforcement efforts is lacking.

***Searle Civil Justice Institute Task Force on Consumer Arbitration***

To shed light on these issues, the Searle Civil Justice Institute (SCJI) undertook a large-scale study of consumer arbitrations administered by the American Arbitration Association (AAA). The AAA is a leading provider of arbitration services, including arbitrations between consumers and businesses. SCJI commissioned a Task Force to advise and lead this study of consumer arbitrations. Although the study will ultimately examine many aspects of AAA consumer arbitrations, the initial research inquiries were directed at two topics:

1. *Costs, Speed, and Outcomes of AAA Consumer Arbitrations.* This aspect of the Preliminary Report assesses key characteristics of the AAA consumer arbitration process. In particular, it examines the following research questions:

- General characteristics of AAA consumer arbitration cases including claimant type (i.e., consumer or business), types of businesses involved, and amounts claimed.
- Costs of consumer arbitration (arbitrator fees plus AAA administrative fees), including the impact of the arbitrator's power to reallocate such fees in the award.
- Speed of the arbitration process from filing to award, in the aggregate and by claimant type (i.e., consumer or business).
- Various measures of outcomes such as win-rates, damages awarded, and evidence of as well as possible explanations for any repeat-player effects.

In addition to these broad research questions, SCJI also examined the extent to which consumer arbitrations are resolved *ex parte*; the frequency with which arbitrators award attorneys' fees, punitive damages, and interest; and results for consumers proceeding *pro se*.

2. *AAA Enforcement of the Consumer Due Process Protocol.* This aspect of the Preliminary Report provides an empirical analysis of how effectively the AAA enforces compliance with the Consumer Due Process Protocol. It considers a number of key research questions including:

- To what extent do the consumer arbitration clauses comply, in their own right, with the Due Process Protocol?
- How effective is AAA review of arbitration clauses for compliance with the Due Process Protocol?
- To what extent does the AAA refuse to administer consumer cases because of the failure of businesses to comply with the Due Process Protocol?
- How do businesses respond to AAA enforcement of the Protocol?

In addition to these research questions, SCJI examined several other issues that arise in connection with the Due Process Protocols.

### ***Data and Methodology***

SCJI reviewed a sample of AAA case files involving consumer arbitrations. The primary dataset consists of 301 AAA consumer arbitrations that were closed by an award between April and December of 2007. (The focus on cases closed by an award during this particular timeframe is based on the availability of the original case files.) This sample of cases was then coded for approximately 200 variables describing various aspects of the arbitration process, including a review of the arbitration clause in the file. In addition, when possible a broader AAA dataset comprising all consumer cases closed between 2005 and 2007 was utilized. The AAA maintains this dataset in the ordinary course of its business, collecting data for internal purposes but not recording all variables of interest to SCJI. The data were analyzed using standard statistical methods in order to describe and evaluate consumer arbitrations as administered by the AAA.

## ***Key Findings – Costs, Speed, and Outcomes of AAA Consumer Arbitrations***

**The upfront cost of arbitration for consumer claimants in cases administered by the AAA appears to be quite low.**

In cases with claims seeking less than \$10,000, consumer claimants paid an average of \$96 (\$1 administrative fees + \$95 arbitrator fees). This amount increases to \$219 (\$15 administrative fees + \$204 arbitrator fees) for claims between \$10,000 and \$75,000. These amounts fall below levels specified in the AAA fee schedule for low-cost arbitrations, and are a result of arbitrators reallocating consumer costs to businesses.

**AAA consumer arbitration seems to be an expeditious way to resolve disputes.**

The average time from filing to final award for the consumer arbitrations studied was 6.9 months. Cases with business claimants were resolved on average in 6.6 months and cases with consumer claimants were resolved on average in 7.0 months.

**Consumers won some relief in 53.3% of the cases they filed and recovered an average of \$19,255; business claimants won some relief in 83.6% of their cases and recovered an average of \$20,648.**

The average award to a successful consumer claimant in the sample was 52.1% of the amount claimed and to a successful business claimant was 93.0% of the amount claimed. This result appears to be driven by differences in types of claims initiated by consumers and business. Business claims are almost exclusively for payment of goods and services while consumer claims are seeking recovery for non-delivery, breach of warranty, and consumer protection violations.

**No statistically significant repeat-player effect was identified using a traditional definition of repeat-player business.**

Consumer claimants won some relief in 51.8% of cases against repeat businesses under a traditional definition (i.e., businesses who appear more than once in the AAA dataset) and 55.3% against non-repeat businesses – a difference that is not statistically significant.

**Utilizing an alternative definition of repeat player, some evidence of a repeat-player effect was identified; the data suggests this result may be due to better case screening by repeat players.**

Consumer claimants won some relief in 43.4% of cases against repeat businesses and 56.1% against non-repeat businesses under an alternative definition (based on the AAA's categorization of businesses in enforcing the Consumer Due Process Protocol) – a difference that is statistically significant at the 10% level. However, 71.1% of consumer claims against repeat businesses so defined were resolved prior to an award, while only 54.6% of claims against non-repeat businesses were resolved prior to an award. This suggests that such effect is attributable to better

case screening by repeat players (i.e., settling stronger consumer claims and arbitrating weaker claims).

**Arbitrators awarded attorneys' fees to prevailing consumer claimants in 63.1% of cases in which the consumer sought such an award.**

Consumer claimants sought to recover attorneys' fees in over 50% of the cases in which they were awarded damages and were awarded attorneys' fees in 63.1% of those cases. In those cases in which the award of attorneys' fees specified a dollar amount, the average attorneys' fee award was \$14,574.

### ***Key Findings – AAA Enforcement of the Due Process Protocol***

**A substantial majority of consumer arbitration clauses in the sample (76.6%) fully complied with the Due Process Protocol when the case was filed.**

Most arbitration clauses in consumer contracts that come before the AAA are consistent with the Consumer Due Process Protocol as applied by the AAA. The same is true for cases in which protocol compliance was a matter for the arbitrator to enforce.

**AAA's review of arbitration clauses for protocol compliance was effective at identifying and responding to clauses with protocol violations.**

In 98.2% of cases in the sample subject to AAA protocol compliance review, the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.

**The AAA refused to administer a significant number of consumer cases because of Protocol violations by businesses.**

In 2007, the AAA refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (9.4% of its consumer case load), because the business failed to comply with the Consumer Due Process Protocol. The most common reason for refusing to administer a case (55 of 129 cases, or 42.6%) was the business's failure to pay its share of the costs of arbitration rather than any problematic provision in the arbitration clause.

**As a result of AAA's protocol compliance review, some businesses modify their arbitration clauses to make them consistent with the Consumer Due Process Protocol.**

In response to AAA review, more than 150 businesses have either waived problematic provisions on an ongoing basis or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol. This is in addition to the more than 1550 businesses identified by the AAA as having arbitration clauses that comply with the Protocol. By comparison, AAA has identified 647 businesses for which it will not administer arbitrations because of Protocol violations.

## ***Policy Implications and Next Steps***

The empirical findings in the SCJI Preliminary Report on AAA consumer arbitrations have important implications for those interested in discussing and formulating public policy regarding arbitration.

1. Not all consumer arbitrations, arbitration providers, or arbitration clauses are alike. Differing results from empirical studies of arbitration may reflect variations associated with case mix, type of claimant, or provider review processes. This suggests the need for a nuanced approach to public policy concerning arbitration.
2. Private regulation complements existing public regulation of the fairness of consumer arbitration clauses. Policy makers should not ignore the role that arbitration providers can play in promoting fairness on behalf of consumers.
3. Courts could usefully reinforce the AAA's enforcement of the Consumer Due Process Protocol by declining to enforce an arbitration clause when the AAA has refused to administer an arbitration arising out of the clause or by otherwise reinforcing the role of the Due Process Protocol.
4. Arbitration may be less expensive for consumers than sometimes believed. For many consumers, the AAA arbitration process costs less than the amount specified in the AAA rules because arbitrators often shift some portion of the costs to businesses. Moreover, arbitrators award attorneys' fees to a substantial proportion of prevailing consumers in AAA consumer arbitrations.
5. Empirical studies have tended to find that repeat players fare better in arbitration than non-repeat players. To the extent such a repeat-player effect exists in arbitration, the critical policy question is what causes it. Our findings are consistent with prior studies in suggesting that any repeat-player effect is likely caused by better case screening by repeat players rather than arbitrator (or other) bias in favor of repeat players. A further as yet unresolved question is whether a repeat-player effect exists in litigation, and, if so, how litigation compares to arbitration in this regard.

While the empirical results presented in the SCJI Preliminary Report on Consumer Arbitration may usefully inform the policy debate on consumer arbitration, the Report nonetheless has limitations. First, its findings are limited to AAA consumer arbitrations. Empirical results from studying AAA consumer arbitration do not necessarily apply to other arbitration providers. Second, its findings on the costs, speed, and outcomes of AAA consumer arbitrations are difficult to interpret without a baseline for comparison, such as the procedures and practices in traditional court proceedings. A future phase of this research project by the Searle Civil Justice Institute's Task Force on Consumer Arbitration will undertake that comparison. It will seek to compare the procedures in AAA consumer arbitration with procedures available for consumers in court as well as comparing empirically key process characteristics of courts and arbitration.

## ATTACHMENT 2:

# CREDITOR CLAIMS IN ARBITRATION AND IN COURT INTERIM REPORT NO. 1

## Executive Summary November 2009

### *Issues and Background*

With the recent settlement of a lawsuit brought by the Minnesota Attorney General against the National Arbitration Forum alleging fraud and deceptive practices, debt collection arbitration has again become a central focus of the policy debate over consumer arbitration. Some critics of consumer arbitration assert that the high win rate of business claimants in debt collection arbitrations alone shows that arbitration is biased in favor of businesses. Others compare the win rate of business claimants in arbitration to the win rate of consumer claimants in arbitration, concluding that the higher win rate of business claimants provides evidence of bias. Neither of these measures, however, necessarily shows bias in arbitration. Instead, the proper comparison is between outcomes for business claimants in arbitration and outcomes for business claimants in comparable cases in court. But despite the need for such a comparison, on this issue, as with many issues in consumer arbitration, empirical studies are lacking.

This Interim Report builds on the Preliminary Report, Consumer Arbitration Before the American Arbitration Association, issued in March 2009 by the Searle Civil Justice Institute's Consumer Arbitration Task Force ("SCJI Task Force"). It seeks to compare the outcomes of AAA debt collection arbitrations to the outcomes of debt collection cases in court to help in evaluating arbitration as a means of resolving consumer disputes.

### *Data and Methodology*

The arbitration cases examined by the SCJI Task Force are 105 debt collection cases closed from April through December 2007 and included among the cases analyzed in the Preliminary Report (the "individual AAA debt collection arbitrations"). These cases are supplemented by 47,124 cases closed from March 2008 through June 2009 and brought by a single debt buyer as part of a consumer debt collection program administered by the AAA (the "AAA debt collection program arbitrations").

The court cases examined by the SCJI Task Force are 382 cases terminated between late 2006 and late 2007 seeking collection of unpaid student loans in federal court; 749 debt collection cases closed between April and December 2007 from Oklahoma state courts; and 283 debt collection cases closed in 2005 from Virginia state courts. The court systems included in the study were chosen solely for reasons of data availability.

The Task Force focused on debt collection cases because debt collection cases tend to present relatively simple legal and factual issues and thus are relatively comparable in arbitration and in court. The data were analyzed using standard statistical methods to control for other identifiable differences among the cases, such as the amount claimed, the type of creditor, and whether the consumer appeared.

### ***Key Findings***

#### **Creditors prevailed less often (that is, consumers prevailed more often) in the arbitrations studied than in court.**

In the cases studied, creditors won some relief in 86.2% of the individual AAA debt collection arbitrations and 97.1% of the AAA debt collection program arbitrations that went to an award. By comparison, creditors won some relief in 98.4% to 100.0% of the debt collection cases in court that went to judgment. This finding still holds even after controlling for differences among the types of cases and the venue in which they were brought.

#### **Creditor recovery rates in the arbitrations studied were lower than, or comparable to, creditor recovery rates in court.**

In the cases studied, prevailing creditors were awarded 92.9% of the amount sought in the individual AAA debt collection arbitrations and 99.2% of the amount sought in the AAA debt collection program arbitrations. By comparison, prevailing creditors were awarded from 96.2% to 99.5% of the amount sought in the debt collection cases in court. Even after controlling for differences among the cases, there was no statistically significant difference between creditor recovery rates in arbitration and in court.

#### **Consumer response rates in the arbitrations studied did not differ systematically from consumer response rates in court.**

In the individual AAA debt collection cases studied, consumers responded (i.e., did not default) in between 65.7% and 79.0% of the cases. In the AAA debt collection program arbitrations studied, consumers responded in between 1.9% and 14.8% of the cases. By comparison, the consumer response rate in the court cases studied ranged from 6.9% to 41.2%.

#### **The rate of other case dispositions (e.g., dismissals and settlements) did not differ systematically between the arbitration and court cases studied.**

Just under half (44.8%) of the individual AAA debt collection arbitrations studied were disposed of other than by award (e.g., by dismissal, withdrawal, or settlement), while 13.2% of the AAA debt collection program arbitrations studied were disposed of other than by award. By comparison, 22.1% to 35.0% of the debt collection cases in court were disposed of other than by judgment.

## ***Policy Implications***

The empirical findings in the SCJI Interim Report have important implications for the formulation of public policy regarding arbitration.

1. These empirical findings should dispel the notion that high creditor win rates and recovery rates in debt collection arbitrations in and of themselves show that arbitration is biased in favor of businesses. In fact, in the cases studied, creditor win rates and recovery rates were as high or higher in court than in arbitration.
2. High creditor win rates and recovery rates appear to be due to characteristics of debt collection cases rather than the venue – court or arbitration – in which those cases are resolved. Accordingly, it would appear that any policy prescriptions to deal with such concerns should focus on the process of debt collection rather than on dispute resolution venue.
3. Consumer response rates may also be due to characteristics of debt collection cases rather than the venue in which those cases are resolved. While the consumer response rate in AAA debt collection program arbitrations was low, the response rate in individual AAA debt collection arbitrations was higher – indeed, higher than the response rate in debt collection cases in court. Nonetheless, the low consumer response rate in debt collection cases in some venues suggests that further research into the reasons for the low response rate may be important to formulating policy in this area.

While the empirical results presented in the Interim Report may usefully inform the policy debate on consumer arbitration, the Report nonetheless has limitations. First, empirical results from studying AAA debt collection arbitrations do not necessarily apply to other types of arbitration or other arbitration providers. But in setting national policy concerning arbitration, information on consumer arbitrations administered by the AAA is necessary for making an informed decision. Second, the findings on debt collection actions in court necessarily are limited to the courts studied, but those findings appear broadly consistent with previous studies of debt collection cases in court. Third, to the extent we focus on court judgments and arbitration awards, differential settlement rates among the venues might bias our results. Fourth, cases are not selected into arbitration randomly; thus, finding truly comparable cases between court and arbitration is extremely difficult. Despite these limitations, however, the report furthers our empirical understanding of arbitration as a means of resolving consumer disputes, and contributes new information to the policy debate.