

Testimony of

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December 12, 2007

Statement of the American Arbitration Association
Submitted to the

Subcommittee on the Constitution
Committee on the Judiciary
United States Senate

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Good morning, Chairman Feingold, Senator Brownback, and members of the Subcommittee. I am Richard Naimark, Senior Vice President of The American Arbitration Association (AAA). We appreciate the opportunity to testify before the Subcommittee today.

As the world's largest provider of alternative dispute resolution ("ADR") services, including arbitration, the AAA has pioneered the development of arbitration rules, protocols and codes of ethics and we share our experience with the subcommittee.

The AAA is a not-for-profit public service organization with an 81-year history in the administration of justice. Arbitrators who hear cases that are administered by the AAA are not employees of AAA, but are independent neutrals screened and trained. AAA does not represent the ADR industry or other arbitral institutions, but as a result of our unique position and longstanding work in the field of alternative dispute resolution, we believe we have an important contribution to make to the subject matter of the hearing taking place today.

We must make no mistake in our focus on this subject, the primary issue at hand is access to justice.

The reality in this country is that our legal system is difficult to navigate for most Americans. Claims with a dollar value below \$50,000 - \$65,000 have a difficult time obtaining legal representation, regardless of the validity of the claim. The litigation process is exceedingly difficult for pro se individuals to pursue. Arbitration can, and does, provide ready access to justice IF due process protections are built in.

Arbitration provides a fair, efficient, and cost-effective mechanism for the resolution of disputes when implemented fairly and impartially, in accordance with due process protocols:

? A recent analysis of 2006 AAA consumer cases, in which the consumer is the claimant, yielded an 81% favorable outcome for the consumer (58% voluntary settlement; 48% outright win, per award of arbitrator of the remaining cases going to an award).

? A similar analysis of 2006 employment cases administered by the AAA found that the employee had a favorable outcome 77% of the time.

These figures may seem astonishing to you (additional information and methodology described in Annex D). How can this data be reconciled with other data and anecdotal information being offered?

One key factor, the most important one for you as lawmakers, is that these statistics are based on cases that went through arbitration that conforms to the Due Process Protocol for Mediation and Arbitration

of Consumer Disputes and the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship.

The AAA, recognizing that the use of arbitration in consumer agreements presented some unique issues, a decade ago convened a group of representatives of consumer, academic, government, and industry groups to examine these issues. This National Consumer Disputes Advisory Committee (Annex A) ultimately issued the Consumer Due Process Protocol (the full Protocol is attached as Annex B).

The AAA and a few other organizations have implemented this Protocol, but others have not. In the employment arena, the AAA similarly convened the Task Force on Alternative Dispute Resolution in Employment, a coalition of employee, business and regulatory interests, to develop the Employment Due Process Protocol (see Annex C).

Arbitration between a consumer and a business, or an employee and a business, must incorporate these safeguards to ensure a level playing field, maintaining basic procedural fairness of the process. These Protocols have been in operation for nearly a decade and have proven effective and reliable. Courts have repeatedly referred to the Protocols as a standard of fair play in this context.

Key Provisions of the Consumer Due Process Protocols:

? Consumers and businesses have a right to an independent and impartial neutral and independent administration of their dispute.

? Consumers and employees always have a right to representation.

? Costs of the process must be reasonable.

? Location of the proceeding must be reasonably accessible.

? No party may have unilateral choice of arbitrator.

? There shall be full disclosure by arbitrators of any potential conflict or appearance of conflict or previous contact between the arbitrator and the parties. The arbitrator shall have no personal or financial interest in the matter.

? There shall be no limitation of remedy that would otherwise be available.

? Small claims may opt out where there is small claims court jurisdiction.

? Parties to the dispute must have access to information critical to resolution of the dispute.

? The use of mediation to foster voluntary resolution of the matter.

? Clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character.

Congress can address the problems in the use of arbitration in consumer and employment disputes by codifying the standards and protections developed by the National Consumer Disputes Advisory Committee and the Task Force on Alternative Dispute Resolution in Employment. Fairness in consumer and employment arbitration will no longer be voluntary.

One final note: Any legislation designed to shape the consumer and employment arbitration process should not modify the Federal Arbitration Act (FAA), but rather, should be accomplished with a piece of companion legislation.

The FAA is a piece of omnibus serving a very broad sphere of arbitration activity in this country. It has been in existence since 1923 and has been continually shaped and refined by the courts, up through the U.S. Supreme Court to the point where it functions exceedingly well in the vast majority of business to business and other types of arbitration. What is more, the shaping of the FAA has been consistent with international standards of practice in arbitration, making the US a jurisdiction successfully aligned with the predominant cross border system of justice - International arbitration. To modify the FAA would upset over 80 years of judicial wisdom and guidance for a process that works quite well in tens of thousands of business arbitrations annually. Modification would unnecessarily send a message of ambiguity and policy hostility to arbitration to the international community. Companion legislation can accomplish the goals of Congress, without disruption to a venerable and successful process.

Annex A

SIGNATORIES TO A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION
OF CONSUMER DISPUTES

Dated: April 17, 1998

Some of the signatories to this Protocol were designated by their respective organizations, but the Protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.

The Honorable Winslow Christian
Co-chair
Justice (Retired)
California Court of Appeal

Ken McEldowney
Executive Director
Consumer Action

William N. Miller, Co-chair
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Office of Consumer Affairs
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Michelle Meier
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Daniel C. Smith
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Terry L. Trantina
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Robert Marotta
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Formerly Office of the General Counsel
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Deborah M. Zuckerman
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Robert E. Meade
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Thomas Stipanowich
Academic Reporter
W.L. Matthews Professor of Law
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Annex B

Consumer Due Process PROTOCOL

Statement of Principles of the National Consumer Disputes Advisory Committee

Statement of Principles

Introduction: Genesis of the Advisory Committee

Scope of the Consumer Due Process

Glossary of Terms

Major Standards and Sources

Principle 1. Fundamentally-Fair Process

Principle 2. Access to Information Regarding ADR Program

Principle 3. Independent and Impartial Neutral; Independent Administration

Principle 4. Quality and Competence of Neutrals

Principle 5. Small Claims

Principle 6. Reasonable Cost

Principle 7. Reasonably Convenient Location

Principle 8. Reasonable Time Limits

Principle 9. Right to Representation

Principle 10. Mediation

Principle 11. Agreements to Arbitrate

Principle 12. Arbitration Hearings

Principle 13. Access to Information

Principle 14. Arbitral Remedies

Principle 15. Arbitration Awards

LIST OF SIGNATORIES

STATEMENT OF PRINCIPLES

PRINCIPLE 1. FUNDAMENTALLY-FAIR PROCESS

All parties are entitled to a fundamentally-fair ADR process. As embodiments of fundamental fairness, these Principles should be observed in structuring ADR Programs.

PRINCIPLE 2. ACCESS TO INFORMATION REGARDING ADR PROGRAM

Providers of goods or services should undertake reasonable measures to provide Consumers with full and accurate information regarding

Consumer ADR Programs. At the time the Consumer contracts for goods or services, such measures should include (1) clear and adequate notice regarding the ADR provisions, including a statement indicating whether participation in the ADR Program is mandatory or optional, and(2) reasonable means by which Consumers may obtain additional information regarding the ADR Program. After a dispute arises, Consumers should have access to all information necessary for effective participation in ADR.

PRINCIPLE 3. INDEPENDENT AND IMPARTIAL NEUTRAL; INDEPENDENT ADMINISTRATION

1. Independent and Impartial Neutral. All parties are entitled to a Neutral who is independent and impartial.

2. Independent Administration. If participation in mediation or arbitration is mandatory, the procedure should be administered by an

Independent ADR Institution. Administrative services should include the maintenance of a panel of prospective Neutrals, facilitation

of Neutral selection, collection and distribution of Neutral's fees and expenses, oversight and implementation of ADR rules and procedures, and monitoring of Neutral qualifications, performance, and adherence to pertinent rules, procedures and ethical standards.

3. Standards for Neutrals. The Independent ADR Institution should make reasonable efforts to ensure that Neutrals understand and conform to pertinent ADR rules, procedures and ethical standards.

4. Selection of Neutrals. The Consumer and Provider should have an equal voice in the selection of Neutrals in connection with a specific dispute.

5. Disclosure and Disqualification. Beginning at the time of appointment, Neutrals should be required to disclose to the Independent ADR Institution any circumstance likely to affect impartiality, including any bias or financial or personal interest which might affect the result of the ADR proceeding, or any past or present relationship or experience with the parties or their representatives, including past ADR experiences. The Independent ADR Institution should communicate any such information to the parties and other Neutrals, if any. Upon objection of a party to continued service of the Neutral, the Independent ADR Institution should determine whether the Neutral should be disqualified and should inform the parties of its decision. The disclosure obligation of the Neutral and procedure for disqualification should continue throughout the period of appointment.

PRINCIPLE 4. QUALITY AND COMPETENCE OF NEUTRALS

All parties are entitled to competent, qualified Neutrals. Independent ADR Institutions are responsible for establishing and maintaining standards for Neutrals in ADR Programs they administer.

PRINCIPLE 5. SMALL CLAIMS

Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.

PRINCIPLE 6. REASONABLE COST

1. Reasonable Cost. Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process.

2. Handling of Payment. In the interest of ensuring fair and independent Neutrals, the making of fee arrangements and the payment of fees should be administered on a rational, equitable and consistent basis by the Independent ADR Institution.

PRINCIPLE 7. REASONABLY CONVENIENT LOCATION

In the case of face-to-face proceedings, the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances. If the parties are unable to agree on a location, the determination should be made by the Independent ADR Institution or by the Neutral.

PRINCIPLE 8. REASONABLE TIME LIMITS

ADR proceedings should occur within a reasonable time, without undue delay. The rules governing ADR should establish specific reasonable time periods for each step in the ADR process and, where necessary, set forth default procedures in the event a party fails to participate in the process after reasonable notice.

PRINCIPLE 9. RIGHT TO REPRESENTATION

All parties participating in processes in ADR Programs have the right, at their own expense, to be represented by a spokesperson of their own choosing. The ADR rules and procedures should so specify.

PRINCIPLE 10. MEDIATION

The use of mediation is strongly encouraged as an informal means of assisting parties in resolving their own disputes.

PRINCIPLE 11. AGREEMENTS TO ARBITRATE

Consumers should be given:

- a. clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character;
- b. reasonable access to information regarding the arbitration process, including basic distinctions between arbitration and court proceedings, related costs, and advice as to where they may obtain more complete information regarding arbitration procedures and arbitrator rosters;
- c. notice of the option to make use of applicable small claims court procedures as an alternative to binding arbitration in appropriate cases; and,
- d. a clear statement of the means by which the Consumer may exercise the option (if any) to submit disputes to arbitration or to court process.

PRINCIPLE 12. ARBITRATION HEARINGS

1. Fundamentally-Fair Hearing. All parties are entitled to a fundamentally-fair arbitration hearing. This requires adequate notice of hearings and an opportunity to be heard and to present relevant evidence to impartial decision-makers. In some cases, such as some small claims, the requirement of fundamental fairness may be met by hearings conducted by electronic or telephonic means or by a submission of documents. However, the Neutral should have discretionary authority to require a face-to-face hearing upon the request of a party.

2. Confidentiality in Arbitration. Consistent with general expectations of privacy in arbitration hearings, the arbitrator should make reasonable efforts to maintain the privacy of the hearing to the extent permitted by applicable law. The arbitrator should also carefully consider claims of privilege and confidentiality when addressing evidentiary issues.

PRINCIPLE 13. ACCESS TO INFORMATION

No party should ever be denied the right to a fundamentally-fair process due to an inability to obtain information material to a dispute.

Consumer ADR agreements which provide for binding arbitration should establish procedures for arbitrator-supervised exchange of information prior to arbitration, bearing in mind the expedited nature of arbitration.

PRINCIPLE 14. ARBITRAL REMEDIES

The arbitrator should be empowered to grant whatever relief would be available in court under law or in equity.

PRINCIPLE 15. ARBITRATION AWARDS

1. Final and Binding Award; Limited Scope of Review. If provided in the agreement to arbitrate, the arbitrator's award should be final

and binding, but subject to review in accordance with applicable statutes governing arbitration awards.

2. Standards to Guide Arbitrator Decision-Making. In making the award, the arbitrator should apply any identified, pertinent contract

terms, statutes and legal precedents.

3. Explanation of Award. At the timely request of either party, the arbitrator should provide a brief written explanation of the basis for the award. To facilitate such requests, the arbitrator should discuss the matter with the parties prior to the arbitration hearing.

For further detail and commentary please see WWW.ADR.ORG , Consumer Arbitration Rules

Annex C

Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship

The following protocol is offered by the undersigned individuals, members of the Task Force on Alternative Dispute Resolution in Employment, as a means of providing due process in the resolution by mediation and binding arbitration of employment disputes involving statutory rights. The signatories were designated by their respective organizations, but the protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.

Genesis

This Task Force was created by individuals from diverse organizations involved in labor and employment law to examine questions of due process arising out of the use of mediation and arbitration for resolving employment disputes. In this protocol we confine ourselves to statutory disputes.

The members of the Task Force felt that mediation and arbitration of statutory disputes conducted under proper due process safeguards should be encouraged in order to provide expeditious, accessible, inexpensive and fair private enforcement of statutory employment disputes for the 100,000,000 members of the workforce who might not otherwise have ready, effective access to administrative or judicial relief. They also hope that such a system will serve to reduce the delays which now arise out of the huge backlog of cases pending before administrative agencies and courts and that it will help forestall an even greater number of such cases.

A. Pre or Post Dispute Arbitration

B. The Task Force recognizes the dilemma inherent in the timing of an agreement to mediate and/or arbitrate statutory disputes. It did not achieve consensus on this difficult issue. The views in this spectrum are set forth randomly, as follows:

Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but any agreement to mediate and/or arbitrate disputes should be informed, voluntary, and not a condition of initial or continued employment.

Employers should have the right to insist on an agreement to mediate and/or arbitrate statutory disputes as a condition of initial or continued employment. Postponing such an agreement until a dispute actually arises, when there will likely exist a stronger predisposition to litigate, will result in very few agreements to mediate and/or arbitrate, thus negating the likelihood of effectively utilizing alternative dispute resolution and overcoming the problems of administrative and judicial delays which now plague the system.

Employees should not be permitted to waive their right to judicial relief of statutory claims arising out of the employment relationship for any reason.

Employers should be able to create mediation and/or arbitration systems to resolve statutory claims, but the decision to mediate and/or arbitrate individual cases should not be made until after the dispute arises.

The Task Force takes no position on the timing of agreements to mediate and/or arbitrate statutory employment disputes, though it agrees that such agreements be knowingly made. The focus of this protocol is on standards of exemplary due process.

B. Right of Representation

1. Choice of Representative

Employees considering the use of or, in fact, utilizing mediation and/or arbitration procedures should have the right to be represented by a spokesperson of their own choosing. The mediation and arbitration procedure should so specify and should include reference to institutions which might offer assistance, such as bar associations, legal service associations, civil rights organizations, trade unions, etc.

2. Fees for Representation

The amount and method of payment for representation should be determined between the claimant and the representative. We recommend, however, a number of existing systems which provide employer reimbursement of at least a portion of the employee's attorney fees, especially for lower paid employees. The arbitrator should have the authority to provide for fee reimbursement, in whole or in part, as part of the remedy in accordance with applicable law or in the interests of justice.

3. Access to Information

One of the advantages of arbitration is that there is usually less time and money spent in pre-trial discovery. Adequate but limited pre-trial discovery is to be encouraged and employees should have access to all information reasonably relevant to mediation and/or arbitration of their claims. The employees' representative should also have reasonable pre-hearing and hearing access to all such information and documentation.

Necessary pre-hearing depositions consistent with the expedited nature of arbitration should be available. We also recommend that prior to selection of an arbitrator, each side should be provided with the names, addresses and phone numbers of the representatives of the parties in that arbitrator's six most recent cases to aid them in selection.

C. Mediator and Arbitrator Qualification

1. Roster Membership

Mediators and arbitrators selected for such cases should have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment. The roster of available mediators and arbitrators should be established on a nondiscriminatory basis, diverse by gender, ethnicity, background, experience, etc. to satisfy the parties that their interest and objectives will be respected and fully considered.

Our recommendation is for selection of impartial arbitrators and mediators. We recognize the right of employers and employees to jointly select as mediator and/or arbitrator one in whom both parties have requisite trust, even though not possessing the qualifications here recommended, as most promising to bring finality and to withstand judicial scrutiny. The existing cadre of labor and employment mediators and arbitrators, some lawyers, some not, although skilled in conducting hearings and familiar with the employment milieu is unlikely, without special training, to consistently possess knowledge of the statutory environment in which these disputes arise and of the characteristics of the non-union workplace.

There is a manifest need for mediators and arbitrators with expertise in statutory requirements in the employment field who may, without special training, lack experience in the employment area and in the conduct of arbitration hearings and mediation sessions. Reexamination of rostering eligibility by designating agencies, such as the American Arbitration Association, may permit the expedited inclusion in the pool of this most valuable source of expertise.

The roster of arbitrators and mediators should contain representatives with all such skills in order to meet the diverse needs of this caseload.

Regardless of their prior experience, mediators and arbitrators on the roster must be independent of bias toward either party. They should reject cases if they believe the procedure lacks requisite due process.

2. Training

The creation of a roster containing the foregoing qualifications dictates the development of a training program to educate existing and potential labor and employment mediators and arbitrators as to the statutes, including substantive, procedural and remedial issues to be confronted and to train experts in the statutes as to employer procedures governing the employment relationship as well as due process and fairness in the conduct and control of arbitration hearings and mediation sessions.

Training in the statutory issues should be provided by the government agencies, bar associations, academic institutions, etc., administered perhaps by the designating agency, such as the AAA, at various locations throughout the country. Such training should be updated periodically and be required of all mediators and arbitrators. Training in the conduct of mediation and arbitration could be provided by a mentoring program with experienced panelists.

Successful completion of such training would be reflected in the resume or panel cards of the arbitrators supplied to the parties for their selection process.

3. Panel Selection

Upon request of the parties, the designating agency should utilize a list procedure such as that of the AAA or select a panel composed of an odd number of mediators and arbitrators from its roster or pool. The panel cards for such individuals should be submitted to the parties for their perusal prior to alternate striking of the names on the list, resulting in the designation of the remaining mediator and/or arbitrator.

The selection process could empower the designating agency to appoint a mediator and/or arbitrator if the striking procedure is unacceptable or unsuccessful. As noted above, subject to the consent of the parties, the designating agency should provide the names of the parties and their representatives in recent cases decided by the listed arbitrators.

4. Conflicts of Interest

The mediator and arbitrator for a case has a duty to disclose any relationship which might reasonably constitute or be perceived as a conflict of interest. The designated mediator and/or arbitrator should be required to sign an oath provided by the designating agency, if any, affirming the absence of such present or preexisting ties.

5. Authority of the Arbitrator

The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute.

The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

6. Compensation of the Mediator and Arbitrator

Impartiality is best assured by the parties sharing the fees and expenses of the mediator and arbitrator. In cases where the economic condition of a party does not permit equal sharing, the parties should make mutually acceptable arrangements to achieve that goal if at all possible. In the absence of such agreement, the arbitrator should determine allocation of fees. The designating agency, by negotiating the parties' share of costs and collecting such fees, might be able to reduce the bias potential of disparate contributions by forwarding payment to the mediator and/or arbitrator without disclosing the parties' share therein.

D. Scope of Review

The arbitrator's award should be final and binding and the scope of review should be limited.

Dated: May 9, 1995

Signatories

Christopher A. Barreca, Co-Chair
Partner
Paul, Hastings, Janofsky & Walker
Rep., Council of Labor & Employment Section, American Bar Association

Max Zimny, Co-Chair
General Counsel, International
Ladies' Garment Workers' Union Association
Rep., Council of Labor & Employment Section, American Bar Association
Arnold Zack, Co-Chair
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Carl E. VerBeek
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Robert D. Manning
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Annex D

ADDITIONAL INFORMATION AND COMMENTS ON STATISTICS AND DATA

EMPLOYMENT

In 2006 there were 1,235 AAA employment arbitrations resolved. Employees received a favorable outcome in 77% of these cases. Seventy-one percent (71%) of these cases were resolved by settlement or withdrawal prior to an award. The remaining 29% or 354 cases proceeded to an award. Employees received a monetary award in 22% of the cases that proceeded to an award. The employee was selfrepresented in 100 of the cases that proceeded to an award (28% of the 354 awarded cases). On average, employment cases that were awarded in 2006 were resolved in less than one year (11.7 months). Pursuant to AAA rules, AAA fees are paid by the employer, and arbitrator compensation paid by the employee is capped at \$125.

Notes:

1. AAA employment statistics and information presented in this testimony are based on employment cases determined by the AAA to arise out of employer-promulgated plans and do not include case statistics that involve individually-negotiated employment agreements.

2. When an employment arbitration is filed, the AAA makes an initial administrative determination as to whether the dispute arises from an employer-promulgated plan or an individually-negotiated employment agreement or contract. This determination is made by reviewing the documentation provided to the AAA by the parties, including, but not limited to, the demand for arbitration, the parties' arbitration program or agreement, and any employment agreements or contracts between the parties. The AAA's review is focused on two primary issues. The first component of the review focuses on whether the arbitration program and/or agreement between the individual employee and the employer is one in which it appears that the employer has drafted a standardized arbitration clause with its employees. The second aspect of the review focuses on the ability of the parties to negotiate the terms and conditions of the parties' agreement. If a party disagrees with the AAA's initial determination, the parties may bring the issue to the attention of the arbitrator for a final determination.

CONSUMER

In 2006 there were 987 AAA consumer arbitrations resolved in which the consumer initiated the case. Fifty-eight percent were resolved prior to an award. The remaining 42% (414 cases) proceeded to an award. Consumers received a monetary award in 48% of the cases that proceeded to an award. On average, consumer cases are resolved in 3.8 months for cases proceeding on documents alone (34% of awarded cases) and in 7.4 months for cases with an in-person hearing (66% of awarded cases). Pursuant to AAA rules, AAA fees are to be paid by the business and arbitrator compensation is capped for consumers at \$125 for claims up to \$10K and \$375 for claims up to \$75K.

Notes:

1. AAA consumer statistics presented in this testimony are based on cases that were administered under the AAA's Supplementary Procedures for Consumer-Related Disputes and initiated by the consumer.

2. In 2006, 1,294 consumer arbitration cases were filed with the AAA and 77% of these cases were filed by consumers.

3. AAA applies Supplementary Procedures for Consumer-Related Disputes when an arbitration clause exists in an agreement between an individual consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features or choices. The product or service must be for personal or household use. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction.