



How Credit Card Companies Ensnare Consumers



September 2007

Acknowledgments

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“If arbitration were in any way beneficial to consumers, it could be made an option and consumers would choose it.”

Richard Alderman,
Director, Consumer Law Center
University of Houston Law Center¹

Introduction

This report summarizes the results of Public Citizen’s eight-month examination of the use of binding mandatory arbitration by the credit card industry. Due to widespread anecdotal evidence of abuse, we particularly focused on credit card giant MBNA’s reliance on one arbitration company, the National Arbitration Forum (NAF). This report shows that binding mandatory arbitration is a rigged game in which justice is dealt from a deck stacked against consumers.

Consumers are railroaded into arbitration even if their identity was stolen or they never agreed to take disputes to arbitration. In several cases we uncovered, NAF, which routinely handles MBNA’s “collection” arbitrations, ignored repeated consumer protests that identity theft was the source of the alleged debt.

In fact, we found that NAF is today the credit card industry’s go-to dispenser of swift decisions against its customers. The Forum and other arbitration providers obsessively enshroud their work in secrecy. Yet the state of California in 2003 opened a small window into this seedy world by requiring arbitration providers to furnish some limited data on their own corporate Web sites on each consumer arbitration case they handle. Even this information is

obscured by the arbitration firms, which post the records in a manner that makes it difficult to see patterns and analyze results.

For the first time, we have comprehensively crunched data for the nearly 34,000 cases contained in NAF’s California reports. We found the following:

- **Enormous Numbers of Affected Consumers:** With more than 1,600 part-time arbitrators on its national roster, NAF admits to handling more than 50,000 cases a year.² In California alone, NAF handled 34,000 consumer arbitrations between Jan. 1, 2003, and March 31, 2007.
- **Substantial Use of Binding Mandatory Arbitration by the Credit Card Industry:** NAF identified virtually all of its California cases as “collection” cases filed against consumers by credit card companies or firms that buy debts from these companies for cents on the dollar. Fifty-three percent of those cases involved MBNA credit card holders.
- **Corporations – not Consumers – Choose Binding Mandatory Arbitration:** All but 118 of the cases were



filed against consumers by credit card/finance companies or firms that purchase their debts. In other words, consumers chose to bring only 118 cases before NAF while corporations chose this business friendly forum nearly 34,000 times – 99.6 percent of the total cases.

- **Stunning Results that Disfavor Consumers:** In the more than 19,000 cases in which an NAF-appointed arbitrator was involved, 94 percent of decisions were for business.
- **Biased Decision-makers:** Arbitrators have a strong financial incentive to rule in favor of the companies that file cases against consumers because they can make hundreds of thousands of dollars a year conducting arbitrations. The arbitrators are chosen by the arbitration firms hired by MBNA and other corporations, which are unlikely to pick arbitration firms that produce results they do not like. Arbitrators routinely charge \$400 or more an hour. Top arbitrators can charge up to \$10,000 per day and some make \$1 million a year. In comparison, California Superior Court judges earn \$171,648.³
- **The Busiest Arbitrators Produce the Results Corporations Seek:** In California, a small, busy cadre of 28 arbitrators handled nearly 9 out of every 10 NAF cases. This group ruled for businesses 95 percent of the time. Another 120 arbitrators handled slightly more than 10 percent of the cases in which an arbitrator was assigned. They ruled for businesses 86 percent of the time and for consumers 10 percent. Outside of California, there is no infor-

mation that would allow consumers to even begin to assess the bias of an arbitrator.

- **A Race to the Bottom for Arbitration Firms:** Companies track how arbitrators rule, and do not choose arbitrators who do not rule in their favor. One NAF arbitrator, a Harvard law professor, was blackballed after she awarded \$48,000 to a consumer in a case in which a credit card company filed a claim against the consumer. After the same credit card company had her removed from other pending cases, she resigned, citing NAF's "apparent systematic bias in favor of the financial services industry."
- **A Process Shrouded in Secrecy:** NAF is so keen to hide its work from the public and limit information about its decisions that its arbitrators do not generally issue a written decision unless one of the parties specifically requests and pays for it in advance. In one case examined by Public Citizen, the cost of a three-page decision was \$1,500.
- **A Lack of Due Process Safeguards:** NAF also limits the access of parties in arbitration to key information that they would be allowed to obtain in court. And the sad state of the law makes it nearly impossible for consumers to appeal adverse decisions by arbitrators.

This report also takes a close look at the handiwork of a few significant arbitrators. What we found was troubling.

For example, one arbitrator, Joseph Nardulli is a pro-business lawyer who handled 1,332 arbitrations. He signed arbitration



awards on 97 days spread over a 46-month period, sometimes signing dozens of decisions in a single day. He appears to make decisions in most cases based solely on documents supplied by the credit card company. He ruled for business 97 percent of the time (in 1,292 cases), awarding corporate interests \$15 million, and for the consumer only 1.6 percent of the time (in 21 cases). (The remaining 19 cases on his docket were claims against MBNA cardholders that settled without a monetary award to either side.)

On his busiest day, Nardulli signed 68 arbitration decisions, awarding credit card companies and debt buyers every penny of the nearly \$1 million they demanded.

This Introduction explores how millions of consumers are trapped in contracts with businesses and summarizes the serious deficiencies in the arbitration process for consumers, including the lack of due process. Throughout the report are case studies of BMA victims.

Chapter One presents our findings from an investigation of the California data and provides compelling evidence of the unfairness of arbitration to consumers.

Chapter Two gives a brief history of the move to pre-dispute BMA and proves that at every turn, the system is stacked in favor of corporate interests. Congressional action and the influence of money in politics on consumer protection legislation are discussed in Chapter Three.

The last chapter provides a short list of consumer tips for those caught up in the BMA web. Finally, the appendices provide the raw data underlying some of our findings; the remainder of the evidence can be

found in database form on Public Citizen's Web site at www.citizen.org.

In sum, we found that the privatization of our justice system through pre-dispute BMA is being pushed by business interests well aware of its perils for consumers. BMA is, in fact, a deliberate strategy to substitute a secret, pro-business kangaroo court for an open trial on the merits of a claim. The courts provide little protection from this increasing threat.

Bills now pending in Congress in both the House and Senate would do much to remedy this unhappy situation for consumers. Sen. Russell Feingold (D-Wis.) and Rep. Hank Johnson (D-Ga.) recently introduced legislation, the Arbitration Fairness Act of 2007 (S. 1782 and H.R. 3010, respectively) to fix the problem. This report provides both the data and the stories that show why consumers and policy-makers should support this common-sense solution and restore the rights and freedoms of millions of Americans.

How Consumers Are Trapped by the Fine Print

Today, just about every American who has a credit card, builds a house, has a cell phone, gets a job or buys a computer has likely unknowingly agreed to settle any dispute through binding mandatory arbitration (BMA), a for-profit backroom process of settling disputes. This report takes a close look at the credit card industry's abuse of BMA and provides a chilling account of a stealth campaign by big business to undermine the ability of ordinary Americans to seek justice in court.

These days, most Americans owe more than they own. Credit card debt has been



mounting and is estimated to be close to \$800 billion of consumers' \$900 billion in revolving debt.⁴ A recent film, "Maxed Out," depicted a national crisis in credit card industry abuses. So what happens when mistakes are made and the customer has been wronged?

Many consumers will find themselves forced into the shadowy world of binding mandatory arbitration, where their chances of successfully defending themselves are slim to none. Public Citizen found that in a sample of nearly 19,300 California cases decided by one arbitration firm, consumers prevailed in 4 percent of the cases, while companies prevailed in 94 percent. (The prevailing party was not listed in the remaining cases.)

Binding mandatory arbitration is wholly distinct from post-dispute arbitration, non-binding arbitration and mediation or other forms of alternative dispute resolution, particularly because agreements to use them are made *after* a dispute arises, not before and as a condition of receiving the good or service.

Binding mandatory arbitration is big business. Binding mandatory arbitration clauses are found in most boilerplate contracts for everyday needs, including auto insurance, as well as nursing homes or other services like cable television. To receive a good or service, the consumer must sign the contract. According to a legal brief filed by the Chamber of Commerce of the United States in a 2006 Supreme Court case, BMA clauses are in millions of consumer contracts across the United States.⁵

Many consumers would be shocked to learn that a binding mandatory arbitration

clause buried in the fine print strips them of their constitutional right to a trial by jury and an impartial judge.

How is the system rigged? First, credit card and other companies drive millions of dollars in business to arbitration firms, which in turn hire arbitrators to rubber-stamp rulings that favor business and then pass many of the costs onto the consumer. The evidence proves that BMA stacks the deck to favor corporate interests over consumers.

The method is to isolate and conquer, as the cloak of secrecy makes it impossible to see the full picture of corporate wrongdoing or to use the public courts to stop it.

Safeguards built into the justice system are not found in binding mandatory arbitration. For example, arbitrators decide most credit card cases on the basis of documents supplied by the company without the presence – and sometimes without the knowledge – of the consumer. Consumers must pay to have a hearing. Hearings are not open to the public, no transcripts are produced and, unless one of the parties specifically asks – and typically pays an extra fee – written explanations of decisions often are not provided. Even when written decisions are provided, they are not public, which means that consumers cannot learn how or why arbitrators ruled in other cases. And appeal is nearly impossible.

Core principles like the right to discovery of information about the case are severely limited, and due process flies out the window. Instead, for-profit arbitration firms like NAF make up the rules and then choose when to apply them – usually to consumers' detriment.



This is a deeply unfair end-run around the public courts and our civil justice system. This Public Citizen report contains many compelling stories describing the plight of consumers caught in the web of BMA. Even those who found justice at the end had to fight their way through years of costly battles before being vindicated.

And the secrecy about this widespread practice is nearly absolute. The data in this report were indefensibly difficult to uncover. Only one state, California, requires arbitration firms to reveal any information at all about their use of arbitration and the win-lose rate of corporations and consumers. The data are maintained by arbitration providers on their own Web sites, where they are stored in thousands of unwieldy individual records. For example, NAF posts quarterly reports about its California work in a hard-to-find place on its Web site, using a very cumbersome format that makes analysis difficult. For the first time, with this report we are making these data publicly available in an easily searchable and downloadable format. (Available at www.citizen.org/congress/civjus/arbitration/NAFCalifornia.xls.)

Although billed as a neutral alternative that is cheaper and more efficient than the courts, BMA is in fact weighted heavily in favor of companies that pick the arbitration provider. While providers publicly tout arbitration as good for consumers, they market their services to major corporations as a cost-reduction program for them. These clear commercial ties between arbitration providers and corporate interests produce a “repeat player” bias that leaves consumers out in the cold.

^a Bank of America acquired MBNA for \$34.2 billion in 2006. MBNA’s name was changed officially to FIA Card Services Inc. In this report, Public Citizen refers to the credit card firm as MBNA because virtually all documents and Web-based material we used referred to the firm as MBNA.

How Credit Card Companies – and the National Arbitration Forum – Pursue Consumers with BMA

Public Citizen’s investigation found that BMA clauses are used by major credit card companies, and most notably by MBNA, to collect consumer debts.^a MBNA frequently uses the services of one particular arbitration provider, the National Arbitration Forum. This small for-profit Minnesota company has become a major player over the last decade in the efforts of corporations to keep disputes with customers and employees out of court and in binding mandatory arbitration.

NAF, which also calls itself “The Forum,” is arguably the most notoriously unfair of the few major companies that sell binding mandatory arbitration services nationally. While many prominent and respected lawyers are included on NAF’s roster, its Minnesota staff steers the vast majority of its cases to a very small number of hand-picked arbitrators. Naturally, these arbitrators have a financial incentive to move quickly through as many cases as possible.

In 1999, an attorney for what is now part of JPMorgan Chase described NAF in handwritten notes as “appearing to be a ‘creditor’s tool,’” according to an antitrust lawsuit filed in federal court in 2005.⁶

The California disclosures and documents unearthed in court cases provide a small window into the firm’s operations, suggesting that NAF effectively acts as something like a debt collection agency. Between Jan. 1, 2003, and March 31, 2007, NAF handled nearly 34,000 con-



sumer arbitrations in California alone. The firm described 99.9 percent of those arbitrations as “collection” cases – and more than half involved MBNA credit cardholders. If arbitration firms are in fact acting as debt collectors, they should be subject to regulation by the Federal Trade Commission under the Fair Debt Collection Practices Act and other statutes.

In a formal filing with the FTC in June, 2007, two consumers’ rights organizations, the National Consumer Law Center and the National Association of Consumer Advocates, said this about the NAF:

“Certain debt collectors file claims with the NAF simply as data streams rather than fully formed complaints. NAF then formats the data streams into documents and sends the documents to the NAF arbitrators with pre-printed orders. The arbitrators are not sent any original documents establishing that the consumers actually agreed to either the arbitration clauses or the credit contracts, but simply receive flat non-evidentiary assertions from the lenders that the consumers agreed to arbitration and the accounts.”⁷

In its own filing, NAF said, “NAF arbitrators do not receive ‘pre-printed orders’ from case coordinators.”⁸

Yet NAF mounted an aggressive marketing campaign to convince businesses that binding mandatory arbitration reduces their costs and speeds collection efforts. For example, in an October 1997 marketing letter, the National Arbitration Forum’s Edward C. Anderson wrote, “The Supreme Court has cleared the way and major American companies are moving all of their contracts to an arbitration basis as fast as possible. There is no reason for

your clients to be exposed to the costs and risks of the jury system.”⁹

What’s Wrong with BMA?

Consumers are most often locked into binding mandatory arbitration (BMA) by what are known in the law as “contracts of adhesion” – pacts in which one side is so dominant that the other party has no real ability to bargain.

Although some credit card contracts contain an “opt-out” clause that permits consumers to refuse BMA, opting out usually requires notice in writing within a short period of time from initiation of the contract, typically 30 days. As the credit card companies well know, while an opt-out clause creates the appearance of a choice, this appearance is largely a fraud.

These clauses are legalistic and buried in the lengthy fine print that accompanies credit card contracts. It is highly unlikely that most consumers read these documents – or understand the full implications of the contract or the arbitration clause. Nevertheless, many courts have enforced arbitration clauses because consumers did not take the extra steps that would have allowed them to opt out.¹⁰

The shift toward arbitration was enabled by a controversial 1984 Supreme Court decision, *Southland Corp. et al. v Keating*, which proclaimed that “Congress declared a national policy favoring arbitration” when it passed the Federal Arbitration Act (FAA) in 1925, and for the first time said the Act was binding on state courts. With subsequent encouragement from federal courts and promotion by arbitration providers, increasing numbers of businesses require employees and customers to



agree that future disputes will be settled through BMA.

One motivation for the courts' blessing of BMA despite the lack of procedural safeguards appears to be sheer self-interest: to reduce the number of cases in federal court. In *Circuit City v. Adams*, for example, Justice Anthony M. Kennedy noted his concern that exempting employment contracts from BMA would "burden" federal courts.¹¹ But, as Justice John Paul Stevens wrote in a prominent dissent, the Court is playing "ostrich to the substantial history behind" the law.¹² Duke University law professor Paul D. Carrington noted that the "Supreme Court rewrote that statute as a service to corporations that don't like jury trials."¹³

While the 7th Amendment of the Constitution guarantees the right to trial by jury for civil suits at common law, the courts have eviscerated this critical right – a right at the heart of our Founders' concerns about the liberty of citizens – in dealing with BMA. Under normal circumstances, waiving the right to trial by jury requires waivers to be "knowing, voluntary, and intentional." But in the rush to uphold agreements to arbitrate, courts use a much lower standard. "Ignoring the special standards used to determine whether a waiver of jury trial is valid," Professor Jean R. Sternlight, an expert on arbitration, said in 2003, "courts have typically employed an ordinary contractual analysis and simply considered whether there was an agreement to arbitrate, whether it covered the dispute in question, and whether it was void for contractual reasons such as unconscionability or fraud."¹⁴

The sliver of arbitration results that are publicly available reveals that companies

that force consumers into BMA enjoy a staggering success rate. And the system is rife with problems that show its unfairness:

- BMA proceedings are secret.** Hearings are not open, and lack both a transcript and, generally, a written explanation of the decision. With the exception of the California reports, information on the work of the arbitration firms is rarely made public. This secrecy further slants the playing field against consumers. While companies that employ the arbitration firms enjoy a full view of past cases that both an arbitration firm and an individual arbitrator handled on its behalf, consumers have none of this information. "The business defendant resolving disputes secretly knows all about any successful claims and can guide itself accordingly while his or her adversary negotiates in ignorance," one arbitration expert wrote.¹⁵ Businesses enjoy this secrecy because consumers, employees and small businesses stuck in BMA have no idea if others similarly situated were harmed by a similar kind of corporate abuse. Secrecy also means that consumers cannot set a strong public precedent so that the rights of others can be vindicated more easily and efficiently.
- Arbitration providers have a strong incentive to establish anti-consumer rules to attract and retain clients.** Some supposedly neutral arbitration firms go so far as to advertise their pro-business policies to attract corporate clients. Firms that seek to level the playing field face sharp consequences. For example, one arbitration firm briefly said it would permit class-wide



arbitrations even when an arbitration clause prohibited them. After several companies dropped the firm as an arbitration service provider, the firm switched course and joined the other arbitration firms in enforcing clauses prohibiting class-wide arbitrations.¹⁶

- **Individual arbitrators have financial incentives to favor the clients of arbitration companies that hire them.**

Unlike judges, arbitrators are paid only when they are assigned cases by arbitration companies. Rich rewards accrue to arbitrators who receive a steady diet of cases; they can earn upwards of \$1 million a year. Meanwhile, arbitrators who issue pro-consumer rulings risk being blackballed, as one Harvard law professor allegedly was.¹⁷

- **BMA often costs consumers more than court.** Unlike court proceedings, the costs of which are generally covered by a single filing fee, the arbitration process includes a menu of pay-as-you-go fees. Costs can be imposed for issuance of a subpoena; for filing a motion; for a written explanation of an arbitrator's rationale for making a decision and several other stages in the process. The fee structures are on a sliding scale – the higher the amount sought, the higher the costs – creating increased obstacles for those seeking or facing significant damages. Arbitration advocates suggest that, unlike the cost of arbitration, the cost of going to court includes attorney fees. They fail to point out that participants in arbitration are also allowed to retain attorneys – which they should.

- **The right to an appeal is limited and not well communicated.** BMA gives consumers less information on the right to an appeal than the court system. And litigants' rights are very limited because fair rules of procedure and evidence that govern court cases do not apply in BMA. While the Federal Arbitration Act gives losing parties 90 days to appeal an arbitration award – and only on very narrow grounds – arbitration providers and their clients, like the credit card companies, generally do not advise consumers of this deadline. Instead, the companies wait until the 90-day appeal deadline expires before going to court to seek judicial confirmation of the award, leaving the defendant virtually bereft of grounds for appeal.

Even when consumers meet the appeal deadline, satisfaction can be elusive because federal law severely limits the grounds for courts to vacate an award – essentially to fraud or corruption on the part of an arbitrator. An award can only be overturned if a consumer can prove that it was procured by fraud, corruption or other undue means, the arbitrator displayed “evident partiality or corruption,” or the arbitrator was guilty of misconduct.

In very rare cases, we found that consumers can succeed in overturning an award when a judge finds that the credit card company cannot prove the card holder agreed to arbitration.

Because of the lack of better consumer protection laws, mere unfairness – or even gross injustice – is not grounds to overturn an arbitrator's decision. Arbitrators can misconstrue the law, misap-



ply the law or err in their findings of fact. For example, the U.S. Court of Appeals for the Seventh Circuit ruled in 2006 that the fact that an arbitrator's interpretation of a contract is "wacky" is insufficient grounds for court review of a decision.¹⁸ The Supreme Court said in 2001 that there is no review of an arbitrator's decision on the merits even if the decision is "silly."¹⁹ In 1992, the California Supreme Court said a decision can be upheld even if it would cause "substantial injustice."²⁰

- **Parties cannot easily obtain needed information.** Parties' rights to discovery, a pre-trial process that obtains information from one's opponent, are severely limited in arbitration. Arbitration providers actually advertise these limited rights to prospective corporate clients.²¹ Even the limited rights parties enjoy are subject to the whims of arbitrators. The result is that less information is available to consumers. Egregious examples of wrongdoing might never be exposed because critical evidence never surfaces.
- **Arbitration providers do not follow basic due process requirements.** Strong evidence shows that arbitration providers often make their own rules, and they decide when to follow them. When an Alabama lawyer representing a Citibank credit card holder wrote that the arbitrator's resumé suggested that he might have done legal work for financial institutions, the National Arbitration Forum refused her request to disclose information on NAF arbitrations he had done involving Citibank and other financial institutions – even though that might have required his disqualification. The lawyer also asked

– unsuccessfully – for NAF to remove the arbitrator if NAF refused to furnish the information.²²

In a racial discrimination case involving financing of auto purchases, NAF accepted the weeks-late filing of a document by the defendant that had selected NAF, even though the company had not asked for an extension of the deadline. But, when the auto buyers alleging racial discrimination asked for a few extra days to respond to the late filing, NAF turned them down, according to their lawyer.²³

- **BMA clauses usually prohibit class action lawsuits, denying a remedy.** Numerous binding mandatory arbitration contracts ban consumers from joining class action suits or class arbitrations. Consumers whose complaint may only be worth \$500 or \$1,000, for example, are unlikely to find lawyers willing to take their cases on a contingency fee basis. But when they can join with other similarly situated consumers in a class action, the likelihood of getting a lawyer to take the case on a contingency increases. A recent decision by the Washington state Supreme Court struck down an anti class-action clause in a cell phone agreement because, the court found, there would be no way for consumers to vindicate their rights without the ability to act in concert as part of a class action.²⁴
- **BMA clauses sometimes impose an unfair "loser pays" rule.** NAF advertises to corporate clients that it has a "loser pays" rule that allows the arbitrator to assess all costs, including attorneys' fees, against the arbitration loser – almost always a consumer.



Consumers Lack Rights in Binding Mandatory Arbitration: Snapshot of BMA Versus the Courts

In Court

- **Service of process required:** Due process requires actual notice through an official process server to initiate a claim.
- **Neutral decision-maker:** Jury of peers or impartial, publicly employed judge with public record of decisions.
- **Open, public process** that sets precedent.
- **Due process rights to fair and reasonable discovery of information;** hearings and motions filed at little or no cost.
- **Contingency fee system,** generally in negligence cases or product liability cases, means plaintiffs' attorneys, not consumer-plaintiffs, take on financial risks for duration of case.
- **Right to appeal a loss on the merits** of the case or other grounds.

In Binding Mandatory Arbitration

- **Certified mail with signed receipt or by private carrier with receipt signed by "person of suitable age and discretion"** deemed sufficient notice for arbitration even though many consumers remain unaware of cases pending against them.
- **Biased decision-maker:** Arbitrator chosen from a limited panel and paid by an arbitration provider selected and compensated by the company; no public record of prior decisions generally available to consumers.
- **Closed, secretive process** without public record or precedential value.
- **Little discovery, at discretion of arbitrator**; Other due process rights must be paid for on an à la carte basis.
- **Pay-to-play payment system** means individual must shell out costs up-front at every twist and turn in case; Loser pays rule may further financially burden consumers when imposed.
- **Very limited grounds for appeal,** typically limited to fraud or corruption of arbitrator, unconscionable clause or contract, or failure of company to prove that consumer agreed to BMA.



TRAPPED

Troy Cornock: Identity Theft Claims Fall on Deaf Ears

In 1995, as their marriage was breaking up and he was moving out of the house, Troy Cornock's wife opened an MBNA credit card account in his name, adding herself to the account as an "authorized user." In 1999, Cornock first learned of the account when he got a telephone call from an MBNA representative demanding money.²⁵

Bill statements had been going to his wife's address, where he had lived before the separation.²⁶

MBNA ignored Cornock's protests that he had not opened the account.²⁷ It also rebuffed his request to remove his name from the account, saying he would need his wife's permission to do so and that she would have to assume responsibility for the debt.²⁸

In 2001, MBNA filed a case against Cornock with the National Arbitration Forum. It sent an Airborne Express envelope with notification of the arbitration case to his wife's address, where he had lived before the separation. An Airborne Express driver knew he didn't live there anymore and delivered the package to him at the sawmill where he worked.²⁹ Cornock responded with a letter that said his ex-wife had opened the account in his name and that he was unaware of it until getting that 1999 call from MBNA.³⁰

Hearing no more from NAF, he assumed his explanation had been accepted.

He was wrong. NAF mailed a response to Cornock – to the address where he had lived with his wife, not to the address from his Nov. 26, 2001, letter. NAF and MBNA continued to send mail to his former address even after he gave them his new address.³¹

At one point, MBNA acknowledged that it had learned of his new address. The firm claimed, however, that Cornock had not affirmatively ordered MBNA or NAF to send mail to the new address, nor had he told them that he would not get mail if it were sent to the old address.³²

Meanwhile, the arbitration moved forward. The NAF arbitrator, Douglas R. Gray, a retired Associate Justice of the New Hampshire Superior Court, twice asked MBNA for a copy of the credit card application with Cornock's signature on it and for purchase receipts containing his signature.³³

MBNA did not supply the documents, instead responding that it was not required to produce them because the "account stated theory of liability" applied in this case. MBNA wrote, "the account stated theory, a common law cause of action, merely requires a creditor to show that a balance is due and owing by the debtor based on an account established between the parties and that the debtor has failed to object to the balance claimed after having reasonable opportunity to do so."³⁴

The arbitrator then awarded MBNA \$9,446.85 on March 26, 2002.³⁵

When MBNA went to court for confirmation of the award, Cornock did not respond because the documents were sent to his ex-wife's address.³⁶ The court found that Cornock had defaulted and MBNA then petitioned for a default judgment, which it got in May 2003.³⁷

Later, in 2005, Cornock was served with a summons to appear at a court hearing. He hired a lawyer, who had the default judgment set aside and filed a



motion to have the arbitration award tossed out.

MBNA fought this effort, using some dubious arguments, again including the “account stated doctrine of liability.” With Cornock emphatically denying that it was his account, the court rejected the argument and granted summary judgment for him.

Judge Gillian L. Abramson, of the New Hampshire Superior Court, wrote that in the absence of proof that Cornock had signed the application or purchase receipts proving that he had used the account, his name on the account was “insufficient evidence” that he had agreed to arbitration.

“To hold otherwise,” the opinion said, “would allow any credit card company to force victims of identity theft into arbitration, simply because that person’s name is on the account ... MBNA has produced no evidence indicating that the defendant ever agreed to the credit card agreement, especially the arbitration provisions of that agreement....”

In the opinion, the judge cited approvingly a 2006 Kansas Supreme Court opinion in *MBNA Bank America NA v. Loretta K. Credit* that upheld a card holder’s claim that she was not subject to arbitration. That opinion said the facts in

that case and an earlier Kansas case “appear to reflect a national trend in which consumers are questioning MBNA and whether arbitration agreements exist ... Given MBNA’s casual approach to this litigation, we are not surprised that the trend may be growing.”³⁸

Cornock is now pursuing MBNA in court as he struggles to rebuild a credit rating wrecked by the company’s pursuit of him. He managed to get a Capital One credit card with a \$200 limit – and he had to pay Capital One \$100 when he got the card, he said in an interview.³⁹ He paid off the balance every month and eventually was accorded a higher limit.

When he wanted to own a home, he was unable to get a home mortgage. So, he cashed out his pre-tax retirement savings, paid income taxes on the funds, and bought a lot and a partially completed modular home.

Using the equity in the house, he was able to get a loan to finance its completion.

Still, his record has not been cleared.

“I went to a mortgage specialist the other day,” Cornock told Public Citizen. “He said the only bad mark I have is the Bank of America [MBNA] – that I am still liable for \$10,800 or something.”⁴⁰



“You would have to be unconscious not to be aware that if you rule a certain way, you can compromise your future business.”

Richard Hodge,
Judge-Turned-Arbitrator

Chapter I

Data Show BMA Is Stacked Against Consumers

Arbitration companies do not voluntarily disclose records of decisions by arbitrators that would show how often they rule for consumers. Occasionally, individual plaintiffs are able to liberate information through litigation.

But as for general data, sources are scarce. California is the only state in the country that requires arbitration providers to publicly disclose any information at all, and the disclosures cover only cases that occur in California. Outside of California, there is no information that would allow consumers to even begin to assess whether an arbitrator is biased.

Even the California data are difficult to understand – information is posted by NAF in a manner that makes it difficult to put the picture together, *i.e.*, by posting each case on a separate page. So even the few Californian consumers who are aware the data exist would find it extremely challenging to figure out whether a particular arbitrator is fair.

When we imported these data into a searchable database, the resulting picture was not pretty.

Available evidence indicates that the corporate clients of arbitration companies enjoy a truly staggering success rate – between 94 percent and 99 percent – and that individual arbitrators sometimes dispose of dozens of cases in a single day, ruling 100 percent for corporate claimants. Such a record reinforces the impression that arbitrators are essentially rubber-stamping corporate claims.

Data from Alabama Case Show Overwhelming Anti-Consumer Record of NAF

Consider the overwhelming success that First USA Bank, once a major credit card issuer, enjoyed due to the work of NAF arbitrators between early 1998 (when the bank began to force its credit card customers to use arbitration) and early 2000. First USA Bank was forced to turn over statistics on its arbitration cases to a plaintiff who sued the firm in an Alabama court, allowing the information to become public.⁴¹

The bottom line from these data was clear. In the nearly 20,000 cases where NAF reached a decision, First USA prevailed in an astonishing 99.6 percent of cases.



Outcomes of Arbitration Cases Filed by First USA Bank

Outcome	No. of Instances	Pct.
Card member prevailed	87	0.4
First USA prevailed	19,618	99.6
Total	19,705	100

Source: *Michael A. Bownes v. First USA Bank NA*, et al Circuit Court of Montgomery, Ala., Civil Action No. 99-2479-PR.

Those cases represented less than half of the more than 50,000 claims First USA filed against its cardholders. Others were either pending or had fallen by the way-side, usually because documents were not served on the cardholder within a 90-day window.

In the infinitesimal number of cases in which the cardholder filed a claim against First USA, the outcomes were better. Cardholders filed four claims and won two of them. Another case was settled and the fourth was pending when the statistics were submitted in early 2000.⁴²

In a different case in federal court in Dallas, First USA filed papers that showed it paid NAF \$5.3 million between January 1998 and November 1999.⁴³

Citing the fact that First USA filed more than 50,000 cases against customers while customers filed only four cases against the firm, a study published by the University of *Chicago Law Review* in 2006 said, "Every indication is that the imposed arbitration clauses are nothing but a shield against legal accountability by the credit card companies."⁴⁴

Use of NAF Yields Poor Results for Consumers

While the National Arbitration Forum and other arbitration providers are highly secretive, the California law does offer a revealing look at the results of arbitration for ordinary consumers.

In reaction to arbitration firms' reluctance to disclose their arbitrators' records, California's legislature passed a law requiring the firms, beginning in January 2003, to make public quarterly reports on arbitration cases in that state that involved consumers.

NAF resisted disclosure, arguing it was not required to publish the information because the California statute was preempted by federal law, regulations and policy. In 2004, the state assembly woman who wrote the law, Ellen Corbett, and Consumer Action, a San Francisco non-profit, sued NAF.⁴⁵ After a judge dismissed the suit on the grounds that the plaintiffs lacked standing to sue, the San Francisco District attorney opened an investigation.⁴⁶ NAF responded by suing the prosecutor in federal court but subsequently dropped the suit and began publishing the reports on its Web site.⁴⁷

The NAF California reports run to thousands of pages – each page provides only a slim account of a single arbitration case. NAF's public Web site contains 17 reports, covering Jan. 1, 2003, through March 31, 2007. The 17 reports show that MBNA card holders were involved in 53 percent of the nearly 34,000 cases NAF handled in California. (Nationwide, NAF said in 2005 that it handles more than 50,000 cases annually.)⁴⁸



Summary of NAF's Calif. Cases: Jan. 1, 2003-March 31, 2007

Total Cases	MBNA Cases	Pct. of Totals
33,948	18,101	53.3

Source: Public Citizen analysis of NAF reports.

Public Citizen did an extensive computer-assisted analysis of the reports that detailed the one-sided nature of arbitration. It showed that NAF's arbitration business in California is devoted almost exclusively to debt collection. Indeed, all but 15 of the 33,948 cases are labeled "collection" cases.

Consumers filed only 118 cases against corporations – 0.35 percent of all cases – and all but 13 of the consumer-filed cases were labeled "collection."

Of the consumer-filed cases, consumers prevailed in less than half – 30. NAF and businesses prevailed in 61 cases. (It labeled the prevailing party in the remaining cases "N/A.")

The data also indicate that many of the arbitrations – 14,654 of them – were not completed. There is no indication that an arbitrator was assigned to any of these cases, most of which were settled or dismissed without an award to the claimant.

The remaining 19,294 cases involved an arbitrator. In all, 148 arbitrators were named in the NAF reports. Public Citizen's analysis shows that a small cadre of arbitrators handled most of the cases that went to a decision. In total, 28 arbitrators handled 17,265 cases – accounting for a whopping 89.5 percent of cases in which an arbitrator was appointed – and ruled for the company nearly 95 percent of the time.

Another 120 arbitrators handled slightly more than 10 percent of the cases in which an arbitrator was assigned. They ruled for businesses 86 percent of the time and for consumers 10 percent.

Topping the list of the busiest arbitrators was Joseph Nardulli, who handled 1,332 arbitrations and ruled for the corporate claimant an overwhelming 97 percent of the time.

Nardulli is an Irvine, Calif., attorney. His firm's Web site says, "The Nardulli Law Firm represents business and corporate clients...." Among other things, the practices corporate and business litigation in the area of arbitration, according to its Web site.⁴⁹ It also notes that Nardulli is an NAF arbitrator.

The table on the next page provides details about the 28 NAF arbitrators in California

NAF California Cases with an Arbitrator: Outcomes

Disposition	Total	Business Wins	Consumer Wins	N/A Wins
Hearing/default				
– Document hearing	16,056	16,054 (99.9%)	2 (0.01%)	
Hearing	2,019	1,991 (98.6%)	28 (1.4%)	
Dismissed	772	21(2.7%)	751 (97.3%)	
Award by Settlement	25	25 (100%)	0 (0.0%)	
Settled	422	0 (0.0%)	0 (0.0%)	422 (100%)
Totals	19,294	18,091 (93.8%)	781 (4.0%)	422 (2.2%)

Source: Public Citizen analysis of NAF reports.



Records of NAF Arbitrators in California with More Than 100 Cases

Arbitrator	Cases	Amount Claimed	Amount Awarded	Pct. Business Wins	Pct. Consumer Wins
Joseph Nardulli	1,332	\$15,602,571	\$15,039,941	97.0	1.6
James Knotter	1,011	10,635,086	9,509,667	95.4	2.9
Victor Waid	907	9,489,479	9,265,932	97.6	1.4
Steven Schneider	901	9,938,495	9,541,172	96.2	1.4
Sally Williams	899	9,463,649	9,270,870	98.6	1.0
Kendall Reed	877	10,744,175	9,784,554	93.5	3.5
Ronald Kahn	820	9,412,461	9,016,225	96.6	1.7
Joe Henderson	779	9,862,132	9,527,014	96.7	1.4
Venetta Tassopulos	743	9,566,630	9,142,714	96.8	2.0
Sheldon Michaels	699	8,598,671	8,298,062	97.0	1.3
Anita Shapiro	677	7,466,825	6,902,056	96.0	2.1
Bradley Webb	652	7,505,113	6,160,438	95.0	2.3
David Makous	644	7,388,932	6,093,079	94.7	2.6
Stephen Biersmith	625	8,371,955	8,037,046	96.0	1.3
Adrienne Jennings	597	5,091,323	4,297,733	86.3	13.4
Stephen Blumberg	592	8,106,670	7,463,211	93.4	1.9
Jonathan Krotinger	571	7,444,639	5,159,380	72.2	24.7
Robert McMillan	543	6,893,642	6,365,780	92.8	5.3
Steven Bromberg	524	6,427,419	6,193,407	96.2	1.7
Urs Martin Lauchli	504	6,357,672	6,066,713	95.0	2.4
Coralie Kupfer	497	4,977,467	4,656,175	98.2	1.0
Carol Medof	357	4,967,123	4,144,123	92.4	3.9
Patrick Huang	354	3,536,357	2,982,041	87.0	9.0
Jeffery Carlson	334	3,384,014	3,221,544	96.7	2.4
Jeff Ferentz	298	2,997,799	2,902,769	97.9	1.0
Richard Wharton	224	2,559,506	2,368,474	96.0	1.3
C. Ferguson	166	2,278,270	2,140,078	94.6	0.6
Lawrence Crispo	138	2,060,923	1,929,144	95.7	2.9
Total	17,265	200,736,495	185,479,341	94.7	3.3

Source: Public Citizen analysis of NAF reports.

between Jan. 1, 2003, and March 31, 2007, who handled more than 100 cases. Of these top 28, who decided nearly 90 percent of the cases, all had decision records for corporate interests of between 72.2 percent and 98.8 percent – with 25 having a record of 92.4 percent or higher. Their decision rates in favor of consumers ranged from 0.6 percent to 24.7 percent, with only four deciding for the consumer more than 5 percent of the time.

NAF reports show that the firm’s arbitrators frequently crank out arbitrations *en*

masse, handling dozens in a single day. Although NAF refers to these as “document hearings,” no hearing is held. Instead, the arbitrator makes a decision based on documents submitted by the parties.

Joseph Nardulli, NAF’s busiest arbitrator in California, does bulk arbitration. Nardulli’s busiest day was Jan. 12, 2007, when he signed 68 arbitration decisions, awarding debt holders and debt buyers every penny – nearly \$1 million – that they demanded. The same was true for his second-busiest day as well.



Joseph Nardulli's Busiest Days

No. of Cases	Date	Business Wins	Consumer Wins	Amount Claimed	Amount Awarded
68	1/12/2007	68	0	\$919,306	\$919,306
58	6/2/2006	58	0	\$616,665	\$616,665
55	10/5/2006	55	0	\$801,032	\$800,632
52	2/28/2007	52	0	\$276,784	\$276,664
51	11/30/2006	51	0	\$573,243	\$573,173
46	11/22/2006	46	0	\$657,690	\$657,470
332		332	0	\$3,432,919	\$3,432,259

Source: Public Citizen analysis of NAF reports.

Nardulli's prolific record startled one former NAF arbitrator when she was told about it. "I never would have done it at a pace where I would have done 68 in one day," said Elizabeth Bartholet, a former NAF arbitrator. Bartholet, a Harvard law professor, was removed from about a dozen credit card cases by NAF after she found against a credit card company and awarded its cardholder \$48,000.⁵⁰ Bartholet said she generally spent about an hour on uncomplicated cases decided on the basis of documents. (See Chapter Two for an account of Bartholet's negative experience with the National Arbitration Forum.)

Public Citizen examined Nardulli's six busiest days: four in 2006 and two in 2007. On those days, he signed 332 arbitration decisions, awarding the debt holders nearly the full amount that they demanded – more than \$3.4 million. The table above details those six busiest days.

Close Ties: MBNA Claims Were Over Half of NAF's California Cases

MBNA's NAF arbitration cases, including those filed by debt buyers who purchased MBNA accounts, totaled 18,101 and represented 53.3 percent of the NAF California cases. NAF reports included the name of an arbitrator in 10,573 MBNA cases –

more than half of the 19,294 NAF cases with an arbitrator's name attached. Most of the cases with arbitrators' names attached were decided in favor of the company that filed the complaint. Some were decided for the consumer and a few were dismissed.

In cases in which there was a recorded decision and an arbitrator was listed, MBNA won awards in 96 percent of the cases – totaling \$145.8 million in awards.

Eighty-four percent of the MBNA cases were decided by a small cadre of 27 NAF arbitrators. Another 116 arbitrators handled the remaining 16 percent, including 68 arbitrators who handled fewer than 10 cases.

The small group of MBNA's 27 very busy arbitrators ruled for the company 94 percent of the time and for consumers 2.8 percent. (The prevailing party was listed as "N/A" in the remaining cases.). The 116 arbitrators who decided fewer than 100 MBNA cases ruled for MBNA 87.9 percent of the time and for consumers 8 percent.

The chart on the next page shows the work of the busiest arbitrators in MBNA cases – those who handled 100 or more of the ar-



Records of NAF Arbitrators with More Than 100 MBNA Cases

Arbitrator	MBNA Cases	MBNA Wins	% MBNA Wins	Consumer Wins	% Consumer Wins
Joseph Nardulli	772	737	95.5	16	2.1
Joe Henderson	511	490	95.9	7	1.4
Venetta Tassopoulos	468	448	95.7	12	2.6
Steven Schneider	464	439	94.6	7	1.5
Kendall Reed	460	424	92.2	13	2.8
Sally Williams	450	444	98.7	3	0.7
James Knotter	448	426	95.1	8	1.8
Stephen Blumberg	445	412	92.6	8	1.8
Ronald Kahn	422	408	96.7	4	0.9
Stephen Biersmith	406	387	95.3	6	1.5
Victor Waid	363	354	97.5	4	1.1
Sheldon Michaels	342	327	95.6	5	1.5
Anita Shapiro	334	313	93.7	9	2.7
Urs Martin Lauchli	328	307	93.6	8	2.4
Bradley Webb	294	272	92.5	10	3.4
Jonathan Krotinger	293	250	85.3	32	10.9
David Makous	283	260	91.9	10	3.5
Steven Bromberg	278	267	96.0	4	1.4
Carol Medof	233	212	91.0	9	3.9
Robert McMillan	231	205	88.7	17	7.4
Patrick Huang	181	150	82.9	17	9.4
Jeffery Carlson	161	153	95.0	5	3.1
Coralie Kupfer	158	152	96.2	3	1.9
Richard Wharton	146	137	93.8	3	2.0
Adrienne Jennings	139	112	80.6	26	18.7
C. Ferguson	132	125	94.7	1	0.8
Lawrence Crispo	105	102	97.1	1	1.0
Total	8,847	8313	94.0	248	2.8

Source: Public Citizen analysis of NAF reports.

bitrations. Again, Joseph Nardulli, the Irvine, Calif., business attorney, led the pack.

What NAF Tells Its Clients and Prospective Clients

The Forum frequently boasts about how it can help corporations skirt the court system and provides a guide on its Web site for drafting arbitration clauses.⁵¹ The opening sentence of the 20-page guide suggests that consumers favor arbitration, saying, “Due to the high costs and time de-

lays of lawsuits, businesses and individuals are turning to dispute resolution in record numbers.” It offers “practical tips and simple language” on writing arbitration clauses to withstand court challenges and includes 15 pages of sample clauses.

Over the years, NAF has relentlessly touted the benefits of arbitration:

- “By including a pre-dispute mediation and arbitration clause in contracts, parties can be assured that future disputes will be routed into efficient, fair, effec-



tive forums – mediation and arbitration – rather than the lawsuit system,” the on-line guide says.⁵²

- Anderson, NAF’s managing director, raved about the benefits NAF offers corporations. In a 2001 interview with The Metropolitan Corporate Counsel, Anderson said, “Corporate counsel should take advantage of arbitration to minimize their companies’ exposure to abusive lawsuits. Current developments in the law have made arbitration an even more effective tool for these purposes.”⁵³

Anderson’s other comments emphasized that discovery is limited by the arbitrator. In a 2002 deposition, he admitted that the

NAF discovery rules may be more restrictive than discovery law in the state where arbitration is being conducted.⁵⁴ And, he said, NAF has a “loser pays” rule that allows the arbitrator to assess all costs, including attorney costs, against the arbitration loser.

Public Efforts by NAF to Defend Arbitration

The NAF pitch to the public is much different. It strains to pass its services off as a less costly and more expeditious substitute for the courts that, at the same time, offers protections afforded by the courts.

“We are impartial, and more importantly our arbitrators – former judges, lawyers

COMPARE and CONTRAST

What NAF Tells The Public

“As in court, the parties may request relevant documents and information from the other party (known as discovery), and parties are entitled to the same range of legal remedies and awards that are available to them in court.”⁵⁶

“A 2003 American Bar Association study of employment arbitration found that claimants prevailed more often and received larger awards in arbitration than in litigation.”⁵⁷

“In no event will you be required to reimburse us for any arbitration filing, administrative or hearing fees in an amount greater than what your court costs would have been if the Claim had been resolved in a state court with jurisdiction.”⁵⁸

What NAF Tells Prospective Clients

“Limited Discovery – Very little, if any, discovery and pre-hearing maneuvering.”⁵⁹

“The Alternative to the Million dollar lawsuit reasonable costs rational results ... real reform.”⁶⁰

“There is no reason for Saxon Mortgage Inc. to be exposed to the costs and risks of the jury system.”⁶¹

“Awards limited – Awards may not exceed claim for which fee paid.”⁶²

“Loser pays. Prevailing party may be awarded costs.”⁶³

“Arbitration can save up to 66 percent of your collection costs.”⁶⁴



and law professors – are impartial,” Anderson told *The Washington Post* in 2000, at a time when NAF’s work was being challenged in a number of lawsuits.⁵⁵

Five years later, apparently desperate to convince the public of the fairness of arbitration, NAF publicized a 2004 study financed by the American Bankers Association and conducted by Ernst & Young. The study touted the alleged fairness of arbitration. The study’s results, indicating that consumers often succeed in arbitration, contrast sharply with NAF’s reports to the state of California and the statistics provided by First USA Bank, which show that consumers succeed less than 5 percent of the time.

In a February 2005 press release, NAF drew sweeping conclusions about the study: “Based on consumer arbitration data spanning four years from the National Arbitration Forum, this independent study conducted by Ernst & Young confirms that consumers win 55 percent of the time in arbitrations against businesses, and that consumers find the arbitration process beneficial for resolving legal claims.”⁵⁶

But the press release omitted some crucial details buried in the report.

Ernst & Young examined only 226 “lending-related” cases. All of the 226 cases were initiated by consumers, not companies. These were the only “consumer lending” cases that debtors filed with NAF between January 2000 and January 2004 – during a time when NAF routinely handled “tens of thousands” of arbitrations annually, according to testimony in 2002 by Anderson.⁶⁶

The study claims that consumers prevailed 79 percent of the time in the 226 cases examined. But the authors assumed that a consumer “won” if the case was dismissed at the consumer’s request (or by agreement). Yet, there are many reasons why a consumer might end a case; for example, the arbitration might be too costly to pursue, as the study found in at least one case. And the report’s assertion that 69 percent of consumers were satisfied with arbitration was based on telephone interviews with just 29 of the 226 claimants – less than 13 percent – hardly a sample significant enough to support its sweeping claim.

The study’s other major conclusion – that consumers prevailed in 55 percent of the subset of 97 cases that involved a hearing – is also flawed. Because the authors acknowledged that assuming consumer satisfaction based merely on a dismissal is a biased measure, they included this second metric. The vast majority of credit card arbitrations, however, are not decided by hearings, but rather on the basis of documents submitted by the company.

According to the Ernst & Young study, Wilmer Cutler Pickering Hale and Dorr LLP, a major Washington, D.C., law firm now known as WilmerHale, hired the firm to do the ABA-financed study.⁶⁷ This is the same law firm that allegedly co-sponsored a 1999 meeting of credit card companies that, according to a federal lawsuit, was a prelude to formation of an alleged coalition of credit card companies in an effort to impose arbitration requirements on customers.⁶⁸



The National Arbitration Forum: Its Origins and History

NAF was founded in 1986 as a subsidiary of another company, Equilaw Inc., which subsequently went bankrupt. NAF, headed by a former Equilaw official, survived the bankruptcy and appears to have grown rapidly in recent years.

In 1992, the National Association of Credit Management (NACM) began to promote the use of Equilaw's arbitration services to its members – 40,000 corporate credit managers.⁶⁹ “All that is needed to use the NACM/Equilaw Alternative Dispute Resolution forum is an arbitration clause in an agreement or transaction,” Bill Idzorek, Equilaw's vice president and marketing director, wrote in *Business Credit*.⁷⁰

While NAF has a small administrative staff, the firm relies on a nationwide roster of more than 1,600 part-time arbitrators who are paid by the case.⁷¹ That roster appears to be expanding rapidly. In 2001, NAF Managing Director Edward C. Anderson, testified that the firm had about 550 arbitrators in the U.S. on its roster.⁷² Sixteen months later, he said NAF had “just short of a thousand” arbitrators in the U.S., mostly former judges.⁷³ The firm's Web site now says it has more than 1,600 U.S. arbitrators.⁷⁴

Anderson testified in 2002 that NAF has about a dozen owners, all lawyers; two executives and 33 employees. He said he owned about 30 percent of the stock.⁷⁵

NAF also had close ties with ITT Consumer Financial, a large consumer lending firm that agreed to pay tens of millions of dollars to settle complaints of fraudulent lending practices. In fact, around the time of NAF's founding, Anderson was a senior attorney for ITT. He

has testified that ITT Consumer Financial chose Equilaw to handle arbitrations with its borrowers.⁷⁶

In 2000, the head of the National Association of Consumer Advocates drew a link between ITT and NAF. Patricia Sturdevant, the NACA executive director and general counsel, testified on Capitol Hill that NAF “was established as a mechanism for resolving ITT Consumer Financial Services' claims against its consumer borrowers across the country by default judgments in Minnesota.”⁷⁷ Indeed, according to a 1993 court decision, a clause in borrowers' agreements with ITT Consumer Financial in California said conflicts would be “resolved by binding arbitration by the National Arbitration Forum, Minneapolis, Minnesota.”⁷⁸

Anderson has testified that he worked for ITT Consumer Financial from 1985 or 1986 until early 1991.⁷⁹ In 1994, he testified that he was “assistant general counsel” throughout his tenure there.⁸⁰ In 2002, he said he was “litigation counsel.”⁸¹

In 1989, *The American Lawyer* reported that Anderson helped to defend ITT Consumer Financial in what was described as one of the biggest consumer fraud cases in California history.⁸² The state attorney general and a local prosecutor accused ITT Consumer Financial of fraudulently inducing tens of thousands of borrowers to pay for insurance and other extras in violation of California law. Without admitting wrongdoing, the firm agreed to pay \$19 million in civil penalties and to reimburse borrowers. Officials estimated that the settlement could cost



the company as much as \$50 million or more.⁸³

A state lawsuit – filed simultaneously with the settlement – said ITT Consumer Financial had previously been penalized in other states. “Numerous lawsuits or other law enforcement actions were brought by governmental agencies in other states alleging similar practices,” the lawsuit said, citing settlements in Wisconsin, Iowa, Colorado, Oklahoma, Minnesota, Arizona and Alabama.⁸⁴

NAF is located in Minneapolis, which was also the home of ITT Consumer Financial and Equilaw.

Anderson also worked for Equilaw, according to a 1994 document filed as part of Equilaw’s bankruptcy case. It lists Anderson as an Equilaw officer and director and the owner of a large bloc of the firm’s stock.⁸⁵

Subsequently, Anderson has seemingly tried to play down his role with Equilaw. Asked in a 2001 deposition about his “relationship” with Equilaw, he responded, “I was engaged to help the owners of Equilaw raise money in 1993 or 19 – I don’t recall the exact date.”⁸⁶

Asked about the percentage of ownership he held in Equilaw, Anderson replied, “I don’t think I did.”⁸⁷ He then was asked, “You didn’t acquire any stock in Equilaw?” He responded, “I really don’t recall.” In a 2002 deposition, he did not mention Equilaw when questioned about his employment history.⁸⁸

He has also given different versions of the ITT Consumer Financial relationship with the National Arbitration Forum. In 1994, he testified that he first became aware of NAF in the mid 1980s when “our office...the general counsel’s office of Consumer Financial Corporation” was looking for an arbitration provider.⁸⁹ He described NAF as a “wholly owned subsidiary” of Equilaw.

Seven years later, Anderson seemed to distance himself from the ITT-Equilaw relationship.

“My understanding was that the National Arbitration Forum provided arbitration and was owned by Equilaw,” he testified in a deposition.⁹⁰ He also denied that Equilaw had a relationship with ITT in the same deposition.⁹¹



Looking Closely: A Case Study of an Arbitrator-Turned-Judge

NAF boasts that many of its arbitrators are former judges. Indeed, its Web site's main page includes a frame where pictures of retired-judges-turned-arbitrators appear, one at a time, in a rolling display.⁹²

In at least one case, however, the revolving door has swung the other way, sending one of NAF's busiest California arbitrators, Steven Bromberg, to the bench. Public Citizen decided to study Bromberg's work after reviewing a California court case in which National Credit Acceptance Inc. tried to collect a debt from the wrong person, Anastasiya Komarova. That occurred after Bromberg issued an arbitration award against another person with a nearly identical name who was an authorized user of an MBNA account that National Credit, a debt buyer, had purchased.

With Arbitrator Steven Bromberg: MBNA Won 96 Percent of the Time

MBNA certainly got results that favored its interests from Steven Bromberg, a local mayor and busy arbitrator until his ascension to the California bench.

A search of the NAF California reports turned up 521 consumer finance cases that Bromberg decided between

July 2, 2003, and June 10, 2005. Businesses were successful in 504 of the cases versus only 9 for consumers – a win rate for consumers of only 1.7 percent. (The remaining 8 cases were settled or otherwise were not resolved in favor of either side.)

Bromberg did "bulk" arbitrating, sometimes handling dozens of cases in a single day. He handled a total of 77 cases in just two days, ruling against consumers in every case, and awarding nearly a million dollars (\$947,975.35) to NAF's corporate clients:

- On Oct. 1, 2003, Bromberg signed 40 arbitration rulings in cases involving businesses and consumers. Each ruling favored the business. Awards totaled \$428,200.83. MBNA or Bank One Delaware were the claimants in 39 of the 40 cases. [For details, see Appendix B.]
- On May 16, 2005, Bromberg signed 37 awards – totaling \$519,774.52 – in cases involving businesses and consumers. Every ruling favored the business. All 37 cases involved MBNA credit card customers. [For details, see Appendix B.]

Cases Handled By Arbitrator Steven Bromberg, July 2003 - June 2005

Cases	Business Wins	Consumer Wins	Other	Pct		Total
				Business Wins	Consumer Wins	
521	504	9	8	96.7%	1.7%	\$6,193,407

MBNA Cases Handled By Arbitrator Steven Bromberg, July 2003 - June 2005

Cases	Business Wins	Consumer Wins	Other	Pct		Total
				Business Wins	Consumer Wins	
276	267	4	5	96.7%	1.4%	\$4,234,419

Source: Public Citizen analysis of NAF reports.



None of these arbitration cases involved a hearing. Instead, each decision was made on the basis of documents submitted by the company seeking an award against the consumer.

Former NAF Arbitrator in MBNA Cases Now a Judge Handling MBNA Cases

NAF reports show that Bromberg handled 521 arbitration cases for NAF between July 2, 2003, and June 10, 2005 – an average of nearly 24 cases a month. After that, NAF reports name him as arbitrator for three cases that were settled: one on Nov. 1, 2005, in which Chase Manhattan sought \$865.25 but was awarded nothing, one on March 6, 2006, in which MBNA asked for \$10,900.19, but was awarded nothing, and one on Nov. 29, 2006, where MBNA sought \$17,672.79 and received no award.⁹³

Bromberg suddenly stopped doing arbitration when he became a judge on a court that rules on the requests by MBNA and other credit card companies to confirm arbitration awards. On May 19, 2005, California Gov. Arnold Schwarzenegger announced he had appointed Bromberg, then mayor of Newport Beach, Calif., to a seat on the California Superior Court in Orange County, a post that now pays \$171,648.⁹⁴ Between his appointment to the bench and his swearing-in, Bromberg continued to make arbitration awards to credit card companies, handling about two dozen cases for NAF. And NAF reports include his name on three cases that were concluded after Bromberg ascended to the bench – all “settled” cases where the lender was awarded no money.

In his announcement, Schwarzeneg-

ger noted that Bromberg focused his legal practice on “civil litigation with an emphasis on employment law” and also was an arbitrator for Judicate West, an arbitration firm.⁹⁵ Schwarzenegger’s announcement did not mention Bromberg’s work for NAF.

Judicate West, an arbitration firm, published disclosures for California that show Bromberg handled 48 cases for them between mid-1999 and June 21, 2005, most of them consumer claims against insurance companies.⁹⁶

Since ascending to the bench, Bromberg has confirmed at least four arbitration awards that NAF arbitrators made in favor of MBNA.⁹⁷

At least one attorney raised this as an issue as he appealed Bromberg’s confirmation of an NAF award against his client and in favor of MBNA. In January 2005, MBNA went to Orange County Superior Court, seeking confirmation of an NAF arbitrator’s decision. Arbitrator Thomas Hogan had found that Kent Swahn, a Huntington Beach auto repair shop owner, owed MBNA \$14,886.76.⁹⁸

Six months after MBNA filed its suit, Bromberg became a judge and soon thereafter, the Swahn case came before him.⁹⁹ Swahn argued that the arbitrator’s award should be overturned. Bromberg affirmed the award.¹⁰⁰ Later, Joseph Ribakoff, Swahn’s attorney, learned that Bromberg had been an NAF arbitrator handling MBNA cases.¹⁰¹

Ribakoff appealed Bromberg’s confirmation of the NAF arbitration award on several grounds. Among other things, the appeal asserted that MBNA had not proved that Swahn ever agreed to arbitrate.¹⁰² At a hearing before a three-judge appellate panel, Ribakoff raised the issue of whether Bromberg’s work as an NAF



arbitrator in MBNA cases constituted a conflict of interest.¹⁰³

On Aug. 11, 2006, the panel ruled in Swahn's favor, finding that MBNA "failed to establish the existence of an agreement to arbitrate with admissible evidence." The judges ordered Bromberg's affirmation of the arbitration award overturned.

In a footnote, the judges wrote, "This court need not reach appellant's other issues, including his contention, first made at oral argument, that Judge Bromberg had a conflict of interest due to his prior work as an arbitrator for NAF in matters concerning [MBNA]."¹⁰⁴

Interestingly, the California Code of Judicial Ethics prohibits appellate justices from presiding in arbitration confirmation cases within two years of having been an arbitrator but the provision apparently does not apply to trial court judges.¹⁰⁵

Months before the appellate ruling, in January 2006, Ribakoff had filed suit against MBNA on behalf of Swahn. The complaint said, "Until recently, Judge Bromberg had been an NAF arbitrator and, in that capacity, adjudicated many MBNA consumer debt credit card cases. Neither MBNA nor Judge Bromberg disclosed these facts to Mr. Swahn. Never disclosing his bias, Judge Bromberg granted MBNA's petition, even though the court lacked jurisdiction and the arbitrator lack [sic] jurisdiction."¹⁰⁶

Ribakoff is seeking damages against MBNA for violations of two California laws and for abuse of process. He is also seeking an order "vacating all judgments in the state of California in favor of MBNA based on NAF consumer arbitration awards, and an injunction barring MBNA from seeking to enforce any NAF judgments in favor of MBNA." A jury trial is scheduled for Dec. 10, 2007.¹⁰⁷

Kilgore v. Keybank, Nat'l Ass'n, No. 10-15934, archived on April 18, 2013



TRAPPED

Anastasiya Komarova: Lack of MBNA Account Does Not Appear to Matter

Hers was a classic case of “mistaken identity.” A single letter – “y” – led to years of harassment of the wrong woman.

In November 2004, National Credit paid 9 cents on the dollar for a portfolio of \$10 million to \$15 million in debts owed to MBNA, according to documents filed in Anastasiya Komarova’s suit against MBNA and National Credit. Among the debtors National Credit pursued were Christopher Propper and Anastasiya Komarova of Long Beach, Calif.¹⁰⁸

In February 2005, Anastasiya Komarova, a San Francisco art student, got the first of a series of phone calls about a delinquent MBNA account. The callers brushed off her protests that she had no MBNA account, telling her they were certain it was her account. According to Komarova’s suit, a receptionist at her job took the first call and was told that Komarova had a joint account with Christopher Propper. Komarova immediately called back to say that she had never heard of Propper and she had never had an MBNA account. This was the first of numerous times that her protests were dismissed out-of-hand. She continued to get harassing phone calls at the rate of one or two a month. It was not until July 2005 that one of the callers told her husband that National Credit Acceptance Inc. was the organization that was trying to collect the debt.

Meanwhile, in June 2005, NAF arbitrator Steven Bromberg issued an award of \$11,214.33 in favor of National Credit and against Christopher S. Propper and Anastasiya Komarova of Long Beach. A month later, Komarova, the San Fran-

cisco art student, was still trying to convince National Credit that it was targeting the wrong person. She called MBNA and learned that no one with her Social Security number had ever had an MBNA account.

In July 2005, National Credit wrote to the San Francisco art student at her home sending her a verification of debt for \$7,872.98. That letter included Propper’s credit card account number. In February 2006, after being served court papers that sought confirmation of the arbitration award against the Long Beach couple, Komarova again called MBNA and gave the representative Propper’s account number. An MBNA representative “indicated that a person named Komarova appeared as an authorized user on Christopher Propper’s account, but that Komarova was not responsible for the debt since she was not the primary account holder,” according to Komarova’s court suit. The person on Propper’s account was Anastasiya Komarova – first name without the “y.” Subsequently, MBNA sent the art student a letter that said Anastasiya Komarova was not responsible for the debt.

Komarova’s problems were not over. In February 2006, a man delivered to the art student’s door court papers in which National Credit sought to confirm Bromberg’s arbitration award against Propper and Anastasiya Komarova.

After trying unsuccessfully to get the lawsuit dropped, Anastasiya Komarova filed her own action against MBNA America Bank NA, National Credit Acceptance and FIA Card Services NA, the new name for MBNA.



MBNA admits in court papers that Komarova was wrongly targeted but blames National Credit Acceptance for going after her. And the firm alleges that National Credit Acceptance “continued to attempt to collect the debt....after knowing that she was not the right person.”

Komarova is seeking an injunction against MBNA and National Credit Acceptance prohibiting further debt-collection efforts against her, compensatory and punitive damages, interest and attorney fees.

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“Arbitrators in the United States have no enforceable duty to inquire into the facts.”

Paul D. Carrington,
Duke University law professor

Chapter II

BMA Rife with Problems for Consumers

I. Arbitration Proceedings Are Secret

Much of what NAF and other arbitration companies do is secret. NAF’s rules decree, “arbitration proceedings are confidential unless all parties agree or the law requires arbitration information to be made public.”¹⁰⁹

The American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services Inc. (JAMS), two of the major arbitration firms, have similar rules.¹¹⁰

Most cases are decided based on documents that the arbitration company sends to the arbitrator. When full-scale hearings are held, they are behind close doors. Transcripts of the hearings are not allowed except under limited circumstances. NAF, for example, prohibits them unless all parties agree. American Arbitration Association rules say, “generally, there will be no stenographic record.”¹¹¹ JAMS allows transcripts under certain conditions.¹¹²

Written decisions often list only the winner – or “prevailing party” in NAF parlance – and the amount of money that must be paid by the loser. NAF’s rules provide for written explanations of decisions if requested, but require payment of a fee in

advance for such a decision. The fee is based in part on the amount of money at stake in the arbitration and can be thousands of dollars. (JAMS rules provide for a brief written explanation unless the parties waive it. And AAA requires some written explanation when an award is made.)

The lack of a written record certainly lessens the chances that an arbitration ruling will be overturned.

“Arbitration is not an open public process,” Paul D. Carrington, a Duke University law professor, observed in 2002. He continued:

“It is clear that this is one of its attractions to predatory or risk-taking business because it diminishes the likelihood that the success of one claim by a consumer or employee will encourage others like it A public enforcement proceeding serves to alert the general public to the need for regulation and enables them to measure the usefulness of their legal institutions. Secret proceedings or suppressed discovery material conceal from the public not only the risk of the harm at issue, but also an awareness that they are being served by the law enforcement efforts of their fellow citizens. Meanwhile, the business respon-



dent resolving disputes secretly knows all about any successful claims and can guide itself accordingly while his or her adversary negotiates in ignorance.”¹¹³

Not only are proceedings secret, information on arbitrators is minimal. NAF gives parties to arbitration a limited voice in choosing an arbitrator or panel of arbitrators to hear a case. Each party in arbitration is allowed to strike one prospective arbitrator, but NAF is reluctant to disclose information on individual arbitrators with the exception of those in California, where the legislature forced its hand. When the names are given to the parties, they also receive each arbitrator’s resumé. Still, they are given no information on the cases they have handled or their win-loss records.

Anderson, the NAF managing director, made clear in a 2002 deposition how lax NAF rules are regarding potential conflicts of interests. He said the organization’s rules do not require arbitrators to disclose if they have previously been an arbitrator in a proceeding involving one of the parties or to disclose the results of cases that they have arbitrated.¹¹⁴

“It would require none of those things unless it creates a bias or the risk of bias as described by the rules,” he said. Yet, whether there is a risk of bias is a decision left to the arbitrator.¹¹⁵

Information on bias is usually unavailable to consumers. In a St. Louis case, an attorney took MBNA to arbitration after it refused to cancel a \$3,972.20 charge on his client’s credit card even though the client had cancelled the time-share purchase the charge had helped to finance. Saying he had a bad experience in a previous case with an NAF arbitrator, Mitchell B. Stod-

dard, the lawyer, asked NAF for information on the arbitrator who would hear the case, including his or her record of rulings for companies and for consumers.¹¹⁶

NAF replied curtly, “The information you have requested is not provided by the Forum, nor required by the Code of Procedure.”¹¹⁷

II. Arbitrators Have Financial Incentives to Favor Firms that Hire Them

One of the major selling points hawked by arbitration companies is that their process keeps disputes away from juries. The process also puts decisions in the hands of arbitrators who have a strong incentive to favor the arbitration companies’ clients.

Paul D. Carrington, a Duke University law professor, drew some important distinctions between juries and the court system in a 2002 article. Arbitrators, he wrote, are “generally screened by an arbitration organization accustomed to serving business interests [and] almost all formerly connected to business enterprise, or they are former judges whose judicial work was approved by businessmen.”

Carrington continued, “Prospective jurors with the same connections would be excused from sitting on many of the cases that the arbitrators decide More fundamentally objectionable than the appearance of conflicts of interest of arbitrators is that they are not jurors selected to represent the community at large.”¹¹⁸

Arbitrators Are Paid Only When Assigned Cases

Unlike judges, who are paid the same salary no matter how many cases they han-



dle or how they rule, arbitrators are paid by the case. The more cases they handle, the more they get paid, Anderson confirmed during a 1993 deposition.¹¹⁹

NAF maintains tight control of the selection of arbitrators. It does allow the parties to agree on an arbitrator or, in cases over \$75,000, to a panel of arbitrators. NAF does not publish its roster of arbitrators, so the parties have to rely on NAF to provide names of candidates to handle each case.

NAF picks a single arbitrator – in cases under \$75,000 – while giving each party one chance to eliminate an arbitrator. NAF presumably submits names one-at-a-time until all strikes are used. After an arbitrator is chosen, the parties have the opportunity to file a motion seeking disqualification of the arbitrator.¹²⁰ In at least some cases, NAF provides a list of arbitrators while allowing the parties an opportunity to strike one name.¹²¹

In a perverse twist, Anderson defended the system as one that assures the arbitrators' neutrality. In a sworn deposition in 2001, Anderson was asked about arbitrator pay. He responded, "If they don't handle any cases that come through our system, we don't pay them anything."¹²²

Asked if he had ever "contemplated putting the arbitrators on salary," he responded, "No. One of the issues that comes up if the arbitrators are on salary is the issue of neutrality ... we think it's important that the arbitrators be independent contractors and have their obligations or their code of professional responsibility obligations as lawyers."¹²³

Ruling Against the Company Has Consequences

Elizabeth Bartholet's brief career as an NAF arbitrator ended abruptly after she ruled against a credit card company.

A Harvard Law School professor and veteran arbitrator, Bartholet said in an interview that she was recruited by NAF.¹²⁴ Beginning in 2003, she handled about 19 cases involving one credit card company in a 14-month period, as she testified in a sworn deposition in September 2006.¹²⁵ She ruled for the company 18 times and the 19th case was dismissed. Then came the 20th case. After the company filed an arbitration claim, the debtor asserted a counterclaim. She awarded the debtor about \$48,000.¹²⁶

Subsequently, she said, NAF removed her from seven credit card cases she was scheduled to handle and told the debtors Bartholet could not handle them because she had a scheduling conflict, an assertion she denied. In addition, she testified that credit card companies voluntarily dismissed another four cases that had been on her agenda.¹²⁷

Bartholet testified that she asked an NAF employee if "there could be any reason for them disqualifying me other than the fact that I ruled against them in Case Y" – the \$48,000 award to the credit card holder. "She said no," Bartholet testified. "She basically agreed that that was the reason and in response to my concern about this misleading letter about my unavailability having been sent out, she said that it was a form letter that was simply regularly sent out in all of the cases."¹²⁸



Bartholet resigned as an arbitrator in February 2005, citing concern for NAF ethics and “its apparent systematic bias in favor of the financial services industry.”¹²⁹

She acknowledged in her testimony that she became troubled about NAF even before her resignation, saying she had “developed some increasing anxiety as I decided these cases and got briefing in some cases indicating problems that had been raised about NAF and it is true that I worried given that all these cases were just on the papers and that it seemed as if one side was represented and the other wasn’t that I worried about the fairness so I did my best and I did feel capable of rendering a decision in all of those cases I decided that I felt comfortable with.”¹³⁰

Richard Hodge, a judge-turned-arbitrator, expressed a similar sentiment.

“I have had an insurance company that very noticeably did not hire me further after I ruled against them in arbitration,” Hodge said. “You would have to be unconscious not to be aware that if you rule a certain way, you can compromise your future business.”¹³¹

Said J. Anthony Kline, a California appellate justice: “Private judging is an oxymoron because those judges [in arbitration] are businessmen. They are in this for money.”¹³² The stakes are high. While California Superior Court judges earn \$171,648, top arbitrators charge up to \$10,000 per day. Some make \$1 million a year.¹³³

A Consumer Lawyer’s Experience in Michigan

Rochelle E. Guznack is an attorney in Plymouth, Mich., whose practice includes representation of consumers in debt collection cases. She told Public Citizen about two recent experiences with NAF arbitrators that she found troubling.¹³⁴

In each case, Guznack represented a credit card holder who had been taken to arbitration. Both clients wanted an in-person hearing and paid a \$250 fee.

In one case brought by MBNA, the Forum assigned an arbitrator located more than three hours from Guznack’s office. After she objected, NAF substituted an arbitrator who was an hour away. MBNA failed to send anyone to the hearing – or to have a representative appear by phone, as NAF rules allow, she said. So the arbitrator had no information on the case. And, she added, “He said he didn’t have a copy of the [credit card] agreement – he never does. And he asked me what my client owed.”

Guznack told him she would not help MBNA make its case and she demanded that he dismiss the case with prejudice.

“I said, ‘If we were in court, this case would be thrown out, dismissed with prejudice.’ He agreed,” Guznack said.

When the arbitrator wanted to reschedule the hearing, Guznack said, “I told him I would not agree to reschedule and that I believed he had no choice but to find an award in favor of my client.”

Guznack said the arbitrator refused to take any action, instead saying he would have



to consult NAF. Several weeks later, Guznack received notification that the case against her client had been dismissed with prejudice.

In the second case, in late August, Guznack had an arbitrator who exhibited what she called “astounding bias in favor of the creditor,” Chase Bank.

Guznack learned just prior to the hearing that the lawyer for Chase had sent her client documents the firm planned to use at the hearing, but had not sent them to her. “I complained and asked that the documents be stricken,” Guznack said.

The arbitrator refused to strike the documents, even after Guznack reminded her that NAF rules required that they be sent to the respondent’s attorney 10 days before the hearing.

“She responded that she had the discretion to disregard that rule,” Guznack said. Then, after calling NAF to discuss the situation, the arbitrator claimed that the Chase attorney was not aware that Guznack’s client had an attorney.

Guznack noted that she had told NAF she represented the cardholder and that NAF had addressed several letters both to her and to the Chase attorney. However, Guznack said, nothing in her address on the letters indicated that she represented client. “Apparently, I did not warrant an ‘Esq.’ or the mention of my law firm name,” she said.

The arbitrator ruled that the documents would be admitted. “I was given the choice of one hour to review the documents or rescheduling the hearing. We opted for rescheduling the hearing

I have not yet found anything unbiased about the NAF,” Guznack said.

‘Repeat Player’ Bias at NAF

One of the major problems with arbitration is a documented lack of neutrality on the part of arbitration firms that is called the “repeat player effect.” This is a situation in which a built-in bias develops in favor of the claimant that frequently sends business to the arbitration firm in the form of claims against its customers, who are usually participating for the first-time.

- In California, the state Court of Appeal ruled in 2002 that an arbitration clause involving an employment contract – in which the employer designated NAF as the arbitration forum – was unconscionable in part because of the repeat player effect.¹³⁵

“The fact that an employer repeatedly appears before the same group of arbitrators conveys distinct advantages over the individual employee,” the court said in a 2002 opinion.¹³⁶ It cited an earlier case where the court majority wrote, “Various studies show that arbitration is advantageous to employers not only because it reduces the costs of litigation, but also because it reduces the size of the award that an employee is likely to get, particularly if the employer is a ‘repeat player’ in the arbitration system.”¹³⁷

The opinion was published by the court, meaning that it could be cited as precedent in future cases. That obviously troubled NAF, which unsuccessfully asked the California Supreme Court to “depublish” the opinion – a step that would not have affected the



outcome of that case but would have eliminated the opinion as a precedent to be cited in future court cases.¹³⁸

- In another case, this one involving a temporary hearing officer hired on an “ad hoc” basis, the California Supreme Court said in 2002, “While the adjudicator’s pay is not formally dependent on the outcome of the litigation, his or her future income as an adjudicator is entirely dependent on the goodwill of a prosecuting agency that is free to select its adjudicators and that must, therefore, be presumed to favor its own rational self-interest by preferring those who tend to issue favorable rulings.”

The court strongly suggested that the repeat player effect is a threat to fundamental rights, saying, “The requirements of due process are flexible, especially where administrative procedure is concerned, but they are strict in condemning the risk of bias that arises when an adjudicator’s future income from judging depends on the goodwill of frequent litigants who pay the adjudicator’s fee.”¹³⁹

- Academic research shows strong proof of a “repeat player effect” in BMA, providing evidence that companies that use an arbitration provider repeatedly tend to do better than a party that appears only once.
 - o Michael Geist, a law professor at the University of Ottawa, did a statistical analysis of more than 3,000 arbitrations of disputes over Internet domain names that were conducted between 1999 and July 2001. He concluded that NAF and

another arbitration firm used a process for designating arbitrators for these cases that “appears to be heavily biased toward ensuring that a majority of cases are steered toward complainant-friendly panelists.”¹⁴⁰

“I concluded that the NAF disproportionately assigned arbitrators who issued pro-complainant rulings, and thus exerted influence over the outcomes of arbitrations in the UDRP [Uniform Domain-Name Dispute Resolution Policy] system in order to market itself favorably to complainants, who have the exclusive power to choose whether the NAF or a different provider will earn their business,” Geist said in a sworn declaration filed in 2005 in a North Carolina court case.¹⁴¹

- o In a 1997 study of employment cases, Lisa B. Bingham, now Professor of Public Service at Indiana University’s School of Public and Environmental Affairs, found that employees facing a repeat-player employer in arbitration recovered 11 percent of what they demanded while those facing non-repeat-players recovered 48 percent of what they demanded.¹⁴²

The record of NAF shows the risk of a repeat-player effect is substantial. The firm handles many cases for its major clients – for example, MBNA, which provided it with more than 18,000 arbitration cases in California alone between Jan. 1, 2003, and March 31, 2007.¹⁴³



Paul D. Carrington, a Duke University Law professor, wrote about the repeat-player effect in a 2002 article: “Many pre-dispute arbitration agreements, as they are written, load the dice to the advantage of the repeat player drafting” the arbitration agreement.¹⁴⁴

III. Arbitration Often Costs Consumers More than Court

The limited information available on the cost of going before NAF makes it clear that arbitration is not a cheaper alternative to the courts – at least not for the consumer. Indeed, the consumer pays dearly when forced into arbitration.

The NAF fee schedule is daunting for the average person. If a consumer brings a complaint against a vendor before the NAF, fees can run into the thousands of dollars – far more than it would cost to bring the same complaint in a federal or state court.

NAF’s fee schedule is set to a sliding scale – the higher the amount a claimant seeks in arbitration, the higher the fees – creating a deterrent to pursuing large claims. And NAF requires advance payment of fees for virtually any step that a party takes in an arbitration proceeding – for example, obtaining a written explanation that lays out the rationale for the arbitrator’s decision. NAF’s system also includes a “loser pays” rule, creating a risk of liability for those who pursue cases in the system of for-profit justice.

Sometimes, the corporation responding to a consumer complaint picks up part or all of the tab. But there is no guarantee.

In one case, Alex Karakhanov used two credit cards to pay for a time share contract in Mexico – \$6,200 on a Citibank card and \$3,972.20 on an MBNA card. The contract included a 10-working-day cancellation window with full refund. After the seller refused to accept a cancellation, Karakhanov persuaded Citibank to charge back the \$6,200 to the seller but MBNA refused his request for a charge back. Karakhanov sued MBNA in federal court and the judge forced him to go to arbitration under his credit card agreement. He filed a case against MBNA at the National Arbitration Forum seeking \$200,000 in damages. MBNA agreed to pay the arbitration fees, which amounted to more than \$8,000.¹⁴⁵

For the \$1,500 paid for the “written findings of fact/ conclusions of law and reasons for award,” the arbitrator produced a three-page decision. (Interestingly, when the written decision arrived, it wasn’t signed by the arbitrator who held a hearing. Instead, another arbitrator with a similar name signed it. After Mitchell B. Stoddard, Karakhanov’s attorney, pointed

NAF Fees in Karakhanov Case¹⁴⁶

Filing fee (Based \$200,000 claim)	\$1,075
Hearing Procedural Fee	\$100
Participatory Hearing Fee, first 3-hour session	\$4,000
Participatory Hearing fee, second 3-hour session	\$1,500
Request for written findings of fact/conclusions of law and reasons for award	\$1,500
Total	\$8,175



this out, NAF sent a new copy signed by the arbitrator who heard the case.)¹⁴⁷

In another case, involving racial discrimination claims against a Washington-area auto dealer over the financing terms of car sales, the lawyer for a half-dozen claimants calculated that each of his clients would have to pay more than \$14,000 in NAF fees.

Four individuals and two couples, all African American, filed suit in federal court against Jim Koons Automotive Companies, a major Washington D.C. dealership. They alleged that they had been victims of racial discrimination because they were charged higher interest rates than similarly situated white customers when they financed their purchases through the dealership. The court required them to take the case to arbitration before NAF because the “Buy Order” for their purchases (though not the financing agreement that was the focus of their complaints) contained a binding mandatory arbitration clause.¹⁴⁸

They filed six individual claims with NAF ranging from \$153,650.94 to \$170,364.11 and totaling nearly \$1 million.¹⁴⁹

Their attorneys estimated that the NAF fees for each of the six individual claims would be \$14,300. If the complaints were consolidated into a single case, the fees would be \$7,908 each. Under NAF rules, the attorneys asked that NAF require Koons to pay their clients’ fees because their clients could not afford them.¹⁵⁰

NAF appointed three arbitrators to make a decision on the requests for fee-shifting. One arbitrator handled three complaints, one handled two and one handled a single

complaint. The arbitrator handling the single case, Carroll E. Dubuc, granted a complainant’s request for fee-shifting, while the other two arbitrators turned down all the requests.¹⁵¹

Subsequently, Koons asked for reconsideration of Dubuc’s decision. According to Bradley Blower, one of the claimants’ attorneys, Koons also “moved to disqualify” Dubuc from deciding the fee-shifting request.¹⁵²

Dubuc then reversed the decision and in February 2007 denied the request for fee-shifting.

The claimants then sought an injunction to prevent Koons from pursuing arbitration on the grounds that the NAF fees were unconscionable. Faced with the possibility that the judge would grant the request and allow the case to be tried in court before a jury, Koons agreed to pay the complainants’ NAF fees. As a result, the request for an injunction was denied.¹⁵³

In August 2007, the parties settled and the court case was dismissed with prejudice.¹⁵⁴

In Ohio, a former television anchor sued, claiming age discrimination, after being fired. The consumer countered that his employment contract required that disputes be settled in arbitration under American Arbitration Association procedures. The plaintiff, Peter B. Scovill, estimated that arbitration would cost him between \$15,000 and \$20,000 at a time when he was without a salary. In addition, he was threatened, under the “loser pays” terms of his employment agreement, with having to pay the consumers’ arbitration costs if he lost the case.



Agreeing that arbitration would cost Scovill at least \$15,000, the judge contrasted that with the \$150 federal court filing fee (now \$350). He wrote, “In contrast with the arbitral forum, a litigant never incurs a room rental fee or hourly fee from the judge when litigating.”¹⁵⁵

In a ruling upheld on appeal, the judge decided that the cost provisions of the arbitration agreement were unenforceable and essentially agreed with arbitration critics who say the high fees are designed to discourage challenges to corporations.

He wrote, “The provisions for cost-shifting and potential payment of the employer’s attorney’s fees contained in the arbitration provision in this case present a

substantial deterrent to arbitration for the defined class of potential litigants in this case.”¹⁵⁶

In 2004, Mark E. Budnitz, a professor of law at the Georgia State University College of Law, looked askance at the NAF fee schedule for claims of more than \$75,000. “The substantial increase in the fees for claims of \$75,000 and higher may create a strong incentive for consumers to claim less than the law would allow,” he wrote. “This perverse incentive undermines important objectives underpinning consumer protection legislation: deterring and remedying egregious commercial conduct, and compensating consumers for injuries suffered.”¹⁵⁷ The differences in fees are significant, as these charts show.

Filing Fees for Arbitration Compared to Various Court Systems						
	NAF	AAA	Mich.	Calif.	Md.	Federal
Filing Fee	\$1,750	\$6,000	\$150	\$320	\$105	\$350

National Arbitration Forum Fees				
Claim Amount	Filing Fee	Commencement Fee	Administrative Fee	Participatory Hearing Session
\$2,500 or less	\$25	\$25	\$200	\$150
\$2,501-5,000	\$35	\$35	\$250	\$150
\$5,001-10,000	\$35	\$35	\$350	\$300
\$10,001-15,000	\$35	\$35	\$450	\$300
\$15,001-30,000	\$60	\$60	\$650	\$500
\$30,001-50,000	\$110	\$110	\$950	\$750
\$50,001-74,999	\$240	\$240	\$1,250	\$950
\$75,000 -125,000	\$300	\$300	\$500	Arbitrator hourly rate
\$125,001-250,000	\$400	\$400	\$750	Arbitrator hourly rate
\$250,001-500,000	\$500	\$500	\$1,000	Arbitrator hourly rate
\$500,001-1,000,000	\$1,000	\$1,000	\$1,250	Arbitrator hourly rate
\$1,000,001-5,000,000	\$1,750	\$1,750	\$1,500	Arbitrator hourly rate

Source: National Arbitration Forum

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*NAF May Be Concealing Fees as
Part of Awards*

NAF records suggest that the company is concealing fees paid by consumers in the public disclosures about consumer arbitration it must make in California.

Documents obtained in one California case – and NAF’s limited public disclosures in the same case – suggest that NAF works with at least one major debt collection firm, Wolpoff & Abramson, to secretly slap credit card holders with a big bill that covers arbitration costs beyond attorney fees.

In that case, Wolpoff & Abramson initiated arbitration against an MBNA account holder by electronically transmitting a form to NAF. On that form, Wolpoff sought an award of \$17,524.49, the amount of the cardholder’s debt; interest of \$508.93 “as of the date of filing, and at 10.00% thereafter”.... “plus all arbitration fees incurred, Process of Service fees and Attorney Fees of \$2,628.67.” The total came to \$20,662.09.¹⁵⁸

On Nov. 29, 2005, an arbitrator signed a document that awarded MBNA \$22,022.64 in this case. In a publicly available report on the same case, NAF said that this was the amount that MBNA

Award in California Case	
Principal balance	\$17,524.49
Interest	\$508.93
Process of service and attorney fees: (15% of principal balance)	\$2,628.97
Subtotal	\$20,662.09
Arbitration Fees	Amount not listed
Grand Total	\$22,022.64
(Apparent Arbitration Fee	\$1,360.55)

had sought in the arbitration, even though the Wolpoff & Abramson filing showed that MBNA was seeking \$20,662.09.¹⁵⁹

This suggests that NAF tacked on \$1,360.55 for its fee. Yet the public report said “business fees” in the arbitration were \$770 and that there were no “consumer fees.”

This kind of hidden fee may violate MBNA’s consumer agreement, which tells the cardholder, “In no event will you be required to reimburse us for any arbitration filing, administrative or hearing fees in an amount greater than what your court costs would have been if the Claim had been resolved in a state court with jurisdiction.”¹⁶⁰

In another case, a California man, Kent Swahn, complained in a lawsuit that an NAF arbitrator’s award to MBNA of \$14,996.76 “fails to disclose that it includes not only the amount of MBNA’s bill, but also approximately \$3,000 more for attorney fees and arbitration costs, both of which are not allowed under California law.”¹⁶¹

IV. Arbitration Lacks Civil Courts’ Safeguards to Ensure Fairness

“There are significant procedural and substantive distinctions between arbitration proceedings and litigation,” a Federal Trade Commission official told Congress in 2000.

“By signing a mandatory arbitration agreement, borrowers waive their right to a jury trial, and the ability to pursue claims through class action litigation,” David Medine, the FTC’s associate director for financial practices, testified before the



House Banking and Financial Services Committee.¹⁶² “In arbitration, there is also limited factual discovery, and remedies such as punitive damages and injunctive relief are typically unavailable. A decision by an arbitrator in one case has no precedential value; indeed, there is no requirement that the decision-maker give any reasons for the decision. Thus, predatory lenders can shield their abusive practices from public scrutiny.

“Perhaps most importantly, mandatory arbitration agreements undermine consumers’ ability to exercise statutory rights which were passed to protect consumers in the credit marketplace. Review of arbitration awards is very limited.”

Quoting a 1994 book on arbitration, Medine concluded, “Arbitrators can misconstrue contracts, make erroneous decisions of fact, and misapply law, all without having their awards vacated.”¹⁶³

Parties Have Reduced Discovery Rights

Discovery, the process in which parties in a dispute seek information from each other prior to trial, is limited. In cases in which the parties do not cooperate in exchanging information, NAF rules severely limit the information that can be sought.

A party may seek sworn answers to no more than 25 written questions and one or more depositions with the provisos that:

- The information is “relevant reliable and informative to the arbitrator.”
- Cost has to be “commensurate with the amount of the claim.”
- The request for the information “is reasonable and not unduly burdensome and expensive.”

If a party refuses to answer a discovery request, the arbitrator “shall promptly determine whether sufficient reason exists for the discovery and issue an order.” The arbitrator is also allowed to draw “unfavorable, adverse inference” from the failure to provide discovery and may impose sanctions.

Witnesses can be subpoenaed, but the arbitrator must issue the subpoena and an arbitrator has the discretion to turn down the request for a subpoena if the request does not demonstrate “the relevancy and reliability of the documents, property or testimony” sought by the subpoena.¹⁶⁴

“Arbitrators in the United States have no enforceable duty to inquire into the facts,” Carrington wrote in 2001. “While they have a subpoena power, they need not use it and parties presenting their cases to an arbitrator have no right to compel the testimony of witnesses or the production of documents unless the arbitrator chooses to require it.”¹⁶⁵

The detrimental effects of weak discovery provisions are compounded by the fact that arbitration’s secrecy prevents litigants from learning the history of cases similar to theirs, inhibiting the development of legal precedent.

Other due process rights, such as the constitutional right to a jury trial enshrined in the 7th Amendment, also suffer. The California Court of Appeal slapped down Bank of America in 1998, saying that a bill stuffer that the bank began using in 1992 was not sufficient for making an important change in an agreement between two parties. The court acted after four Bank of America credit card holders and two consumer organizations sued.



“The Bank’s interpretation of the change of terms provision would dispense with the requirement for a clear and unmistakable indication that the customer intended to waive the right to a jury trial. Because we find no unambiguous and unequivocal waiver of that right here, and because the right to select a judicial forum, whether a bench trial or a jury trial, as distinguished from arbitration or some other method of dispute resolution, is a substantial right not lightly to be deemed waived the Bank’s interpretation of the change of terms provision must be rejected.”¹⁶⁶

*Arbitration Appeals Process is Limited,
Confusing and Extremely Difficult*

Arbitration systems provide litigants less information on their rights to appeal than the court system and litigants’ rights are also severely limited.

Under the Federal Arbitration Act, losers in arbitration have three months to appeal. The NAF document that informs consumers that they have lost in arbitration does not inform them of this deadline.¹⁶⁷ Public Citizen’s examination of documents in numerous arbitration cases shows that victorious credit card companies and debt collectors usually wait until the 90-day deadline has passed before they go to court seeking confirmation of the award. By then, consumers’ appeal options are over.

Even when consumers meet the appeal deadline and successfully navigate the process, satisfaction can be elusive because the Federal Arbitration Act and caselaw severely limit the grounds for courts to vacate an award. Awards can be overturned if they were procured by fraud, corruption or other undue means; if the arbitrator displayed “evident partiality or

corruption,” or “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”¹⁶⁸

In many other cases, appeals have proven futile.

- The U.S. Court of Appeals for the Seventh Circuit ruled in 2006 that the fact that an arbitrator’s interpretation of a contract is “wacky” is insufficient grounds for court review of the decision. “It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not,” a three judge panel of the Seventh U.S. Circuit Court of Appeals ruled in 2006. “When parties agree to arbitrate their disputes they opt out of the court system.... That is why in the typical arbitration, which ... is concerned with interpreting a contract, the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all,” the opinion said.¹⁶⁹
- Other appeals court decisions have found that there were insufficient grounds for review of an arbitration decision even if it was “silly,” or would “cause substantial injustice,” or “merely misinterpreted, misstated or misapplied the law.”¹⁷⁰
- In one case, an evidently angry federal appeals court harshly criticized appeals from arbitration awards. In a chilling statement that would make a prospective appellant think twice, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit wrote



in 2006 that it “is exasperated by those who attempt to salvage arbitration losses through litigation that has no sound basis in the law applicable to arbitration awards. The warning this opinion provides is that in order to further the purposes of the Federal Arbitration Act and to protect arbitration as a remedy we are ready, willing, and able to consider imposing sanctions in appropriate cases.”¹⁷¹

- After MBNA sought court confirmation of three arbitration awards against a Maryland woman totaling more than \$50,000, a judge affirmed the award after the credit card company’s lawyer argued that she had missed the appeal deadline.¹⁷²

Case closed – even though MBNA and NAF had gone ahead with the arbitration despite Patricia Meisse’s assertion that she was the victim of identity theft, disregarding her demand that MBNA prove that they were her accounts.¹⁷³

The National Consumer Law Center, which publicized Meisse’s case in 2005, said, “She also did not participate in the arbitration because it was her understanding that she’d be required to travel from her home in Maryland to NAF’s Minneapolis headquarters to attend three separate arbitration proceedings. The fact that most consumers reading the NAF arbitration notice assume they will have to travel to Minneapolis is yet another aspect of mandatory arbitration’s gross unfairness to consumers.”¹⁷⁴

Asked if she had filed an appeal within the 90-day deadline, Meisse subse-

quently testified in a deposition, “No. I thought, I have to tell you, I was naïve enough when this whole thing started that I believed that the laws were there to protect the consumers. As it turns out, the laws are not there to protect the consumers.”¹⁷⁵

Richard Hodge, a former California judge turned arbitrator, put it this way, “The fact is that arbitrators make mistakes ... and there is no appeal if I make a stupid or diabolical mistake, or one that is made in bad faith. The parties are on their own.”¹⁷⁶

Only the Rare Appeal Succeeds, with High Costs for Consumers

Sometimes, an arbitration award is overturned on appeal, as shown by the Troy Cornock case in New Hampshire described at the beginning of this report. In Cornock’s case, the judge found that MBNA failed to prove that he – not his estranged wife – had opened the account or to show that he had used the account. Cornock succeeded because he had an attorney who pursued the appeal vigorously.

In a more recent case, a New York judge threw out an arbitration award to MBNA on similar grounds even though the credit card holder had not responded to the arbitration proceeding or the subsequent court case in which MBNA sought confirmation of the award. Even without the credit card holder’s participation in the arbitration or court case, Judge Philip S. Straniere of the Civil Court of the City of New York, closely scrutinized MBNA’s documents. He listed seven separate grounds for rejecting the NAF arbitration award of \$9,459.70 against Paul E. Nelson.¹⁷⁷



Staniere wrote in a June 19, 2007, decision that he often analyzes evidence presented by credit card companies seeking confirmation of arbitration awards and finds “fatal procedural and substantive defects” in the company filings.¹⁷⁸ Alluding to the fact that arbitration cases often involve accounts that have been sold for mere pennies per dollar, Staniere wrote, “the incentive therefore, for the firm purchasing the debt, is to herd these cases into arbitration and churn out papers seeking their confirmation as quickly as possible. The entire industry is a game of odds, and in the end as long as enough awards are confirmed to make up for the initial sale and costs of operation the purchase is deemed a successful business venture.”

“However, during this process mistakes are made, mistakes that may seriously impact consumers and their credit,” he wrote. The Nelson case he was reviewing “is a specimen replete with such defects and the Court takes this opportunity to analyze the filing in detail in hopes to persuade creditors, not simply to take more care in dotting their ‘i’s’ and crossing their ‘t’s’ in their filings, but to assure a minimum level of due process to the respondents.”¹⁷⁹

*While Arbitration Firms Make the Rules,
They Don’t Always Follow Them*

Arbitration firms have elaborate rules of procedure for handling disputes – and, in practice, near-total freedom to ignore these rules.

The experience of an Alabama lawyer in 2007 raises questions about how seriously – if at all – NAF takes its rules. NAF Rule of Procedure 21 states, “an Arbitrator shall be disqualified if circumstances exist that create a conflict of interest or cause the Ar-

bitrator to be unfair or biased, *including but not limited to* the following ...” [Emphasis added.]

The second item listed is: “The Arbitrator has served as an attorney to any Party, the Arbitrator has been associated with an attorney who has represented a Party during that association, or the Arbitrator or an associated attorney is a material witness concerning the matter before the arbitrator.”¹⁸⁰

In Alabama, attorney Penny Hays Cauley represented a Citibank credit card holder in an arbitration case. When she received the resumé of the NAF arbitrator in the case, a business lawyer, she wondered if he had represented Citibank. So, she wrote to NAF, saying that his “resumé indicates that he has represented financial institutions such as Citibank, as well as creditors in bankruptcy proceedings.”

Saying that his “resumé creates the appearance that [he] has a bias in favor of financial institutions,” she asked for information on all arbitrations he had handled for Citibank and other financial institution and asked that his appointment be held in abeyance pending disclosure. In the alternative, she wanted him replaced by a new arbitrator.¹⁸¹

NAF turned her down on three grounds: 1) Cauley did not meet the deadline for such requests; 2) Her request did not state the “circumstances and specific material reasons” for the request as required by the NAF Code of Procedure; and 3) “Finally, please note that the National Arbitration Forum is not required to provide the additional information about the Arbitrator that you requested.”¹⁸²



And then, as if to rap Cauley on the knuckles for her audacity, Kelly M. Wilen, an NAF case coordinator, wrote, “the Respondent’s request and this correspondence will be forwarded to the Arbitrator for review during the Hearing.”¹⁸³

A “Moving” Experience

Gregory Duhl has had his own problems with NAF. In 2003, when the law professor moved from Illinois to Pennsylvania, some of his property was damaged by the moving company, he explained in a declaration filed in a court case. Under terms of his contract with the mover, he filed a claim with NAF against Suburban Moving & Storage Company.¹⁸⁴

“My experience with NAF was deeply troubling,” he wrote. “In a variety of ways, I found that the NAF implemented (or refused to follow) its rules in ways that favored Suburban and disfavored me, the consumer.”

Duhl wrote that NAF:

- Allowed Suburban to file a late submission without following NAF rules for late submissions.
- Refused to consider motions on “procedural irregularities” that he filed. “An NAF program administrator refused to even accept my motions, and the NAF clerk refused to permit me to be heard, notwithstanding the NAF rules that authorized these motions.”
- Required him to hand-write the case number on each page of a 150-page document and required him to copy and mail copies of his documents to NAF and Suburban – while allowing Suburban to file documents by fax.

“After some time,” Duhl wrote, “I found the NAF’s procedural bias against me to be so pervasive and blatant that it no longer made sense to go forward. As a result, I was forced to abandon my claim, and I settled the matter with Suburban for far less than it was worth.”¹⁸⁵

NAF’s rules accord its staff broad powers that in court cases often would be entrusted only to judges – not to clerks. Staff members are allowed to rule on motions, requests for time extensions, requests for stays and disqualification of arbitrators.

In Orange County, Calif., attorney Aurora Dawn Harris, representing a credit card holder in an NAF arbitration, was surprised recently when she filed a brief requesting attorney fees and was “immediately” turned down by an NAF employee, Jill Surine.

She wrote back to case-coordinator Surine: “The documents I just filed were not intended for you but for the proposed Arbitrator ... Since you are ruling on these matters, I would like a copy of your resumé. There is no information about you available on the Internet.”¹⁸⁶

Harris said Surine responded that she had the authority under the NAF Code of Procedure to make such rulings and that NAF was “not required to submit to the parties the resumé of any of its employees.”

In an e-mail to Public Citizen, Harris said that in California courts, “a judge, not a clerk, rules on all motions or requests” unless all parties agree to allow a lawyer serving as an interim judge to make the ruling. She said she was unable to find Surine’s name on state bar listings in California and Minnesota.



“I can’t believe it,” Harris wrote. “This woman has denied at least 7 or 8 ‘requests’ I have made in the case...”¹⁸⁷

Arbitration Agreements Typically Prohibit Class Action Lawsuits

The same contracts that require binding mandatory arbitration often ban customers from joining class action lawsuits and class arbitrations. Such a ban means that corporate fraud and abuse may go utterly unchecked.

A consumer whose complaint may only be worth, for example, \$1,000 or \$2,000, is unlikely to find a lawyer willing to take the case. But if the same consumer joins with similarly situated people in a class action, the likelihood of getting a lawyer to bring the claim increases considerably. Thus, a prohibition on class action suits or arbitrations can mean that credit card or other companies do not have to answer for misdeeds that garner millions of dollars for them while harming thousands of their customers.

“When consumers are overcharged a modest amount but it affects many people, then a class-action suit is the only way to go against credit card companies in an efficient way,” Jean Ann Fox, director of consumer protection for the Consumers Federation of America, said in 2001.¹⁸⁸

Six years later, the Supreme Court of the State of Washington put it this way: “When consumer claims are small but numerous, a class-based remedy is the only effective method to vindicate the public’s rights.... Class remedies not only resolve the claims of the individual class members but can also strongly deter future similar wrongful conduct, which benefits the com-

munity as a whole Without class actions, many meritorious claims would never be brought.”¹⁸⁹

JAMS, a 28-year old national arbitration firm founded by a retired California judge, briefly bucked the “no class-action” trend in its arbitration practice. In November 2004, JAMS announced it would allow class-wide arbitrations even where its clients’ arbitration clauses explicitly banned them, indicating that the prohibition unfairly curtails consumer rights.¹⁹⁰

“JAMS unequivocally takes the position that it is inappropriate for a company to restrict the right of a consumer to be a member of a class action arbitration or to initiate a class action arbitration,” the firm’s press release said. “JAMS will not enforce these clauses in class action arbitrations and will require that they be waived in individual cases.”¹⁹¹

The move immediately sparked a backlash from the companies that had designated JAMS as their arbitration provider.

“A number of these clients, including Discover and Citibank, swiftly changed their contracts to remove JAMS as an acceptable forum for arbitrating disputes,” Myriam Gilles, a professor at the Benjamin N. Cardozo School of Law, wrote in the *Michigan Law Review*.¹⁹² Subsequently, in March 2005, JAMS abandoned the policy, saying that the policy “suggested to some that JAMS had deviated from its core value of neutrality” and had “created concern and confusion about how the policy would be applied.”¹⁹³

The policies of the arbitration providers matter in this area, because the Supreme Court decided in 2003 that in cases where



Judge Rules Arbitration Awards Are Denial of Due Process

In April 2006, a California judge sharply criticized MBNA, Bank One and other unnamed credit card companies, along with NAF, saying their “so-called arbitrations” amounted to a denial of due process.

San Mateo County Superior Court Judge Gerald J. Buchwald criticized Bank One Delaware NA and NAF for holding arbitration proceedings far from the homes of credit card holders and denied Bank One’s request for confirmation of an arbitration award of approximately \$10,000 against Edric E.A. Greene. The judge noted that the faulty arbitration proceeding was a “document hearing” by arbitrator Steven Bromberg in Los Angeles on March 25, 2004.¹⁹⁴

(NAF California reports show that Bromberg, now a Superior Court judge in Orange County, signed 27 NAF arbitrations on that day, awarding Bank One, MBNA and a third firm, Appleton Capital LLC, every penny they sought.)¹⁹⁵

In his decision in the Greene case, Judge Buchwald wrote, “This was a document review of account information submitted by Bank One without any appearance by Mr. Greene, without any submission of documents from Mr. Greene, and without any actual evidentiary hearing.”

He noted that the location of the “so-called arbitration” violated Bank One’s credit card agreement with Greene to hold arbitration proceedings in the federal judicial district where he lives.¹⁹⁶

Greene lives in Burlingame, in the jurisdiction of the U.S. District Court for the Northern District of California, while Los Angeles is in the Southern District, nearly 400 miles from Burlingame.¹⁹⁷

“Approximately ten or so substantially identical other Petitions to Confirm Arbitration” involving NAF arbitrations of “collection claims” by credit card companies against San Mateo County residents were done at about the same time in Southern California, Buchwald wrote.

He continued: “Given this context, it appears that the arbitration procedures which Bank One used here, in Mr. Greene’s case, are consistent with a broader approach by which Bank One and other credit card issuers using NAF arbitrators are actively discouraging credit cardholders in San Mateo County from having any actual evidentiary arbitration hearing by routinely setting such arbitrations in Southern California, or at some other patently inconvenient venue, where the cardholder’s ability to take off work to travel to an arbitration hearing and the costs of doing so are often disproportionate to the amount of past due balance in dispute.”

“That is, it is not just in this one case of Mr. Greene’s, but in several other cases that Bank One and other NAF users are systematically denying San Mateo County cardholders the due process of a full and fair hearing in the San Francisco Bay area as per their own cardholder agreements.”¹⁹⁸

Buchwald concluded, “Bank One’s failure to afford its San Mateo County resident cardholders the opportunity of an actual evidentiary arbitration hearing, while at the same time using its arbitration clause in the cardholder agreement to effect a waiver of the cardholder’s access to the court’s usual process for civil collection actions, is a denial of due process The denial of due process is particu-



larly clear here, where Mr. Greene received neither notice of the arbitration nor advice of the award prior to his receipt of this petition.”

“When there is such a denial of due process and a party has been denied the opportunity of a fair and full Arbitration hearing, the usual deference paid to arbitration agreements by the courts does not apply and it is clear that the Court should decline to honor the Arbitration award.”¹⁹⁹

In a footnote, the judge wrote that Greene acted as his own counsel in the court case “and also gave sworn testimony that service of notice of hearing on this petition was the first actual notice he received

of any arbitration proceedings, let alone an adverse award. The fact that fair notice of the so-called arbitration is thus disputed reinforces this court’s conclusion that the arbitration award was obtained by ‘...other undue means...’ within the meaning of’ California law.²⁰⁰

In a similar case decided on the same day, Buchwald denied MBNA’s request for confirmation of an arbitration award, writing, “The Court believes that the alleged arbitration award here was likely procured by undue means, with the cardholder Ms. Baker being denied appropriate due process.”²⁰¹

the arbitration agreement does not mention class action arbitration, it is up to the arbitrator to decide whether the class action moves forward.²⁰²

Another national arbitration firm, the American Arbitration Association (AAA), says it permits class arbitrations only in cases where the arbitration agreement between the parties does not mention “class claims, consolidation, or joinder of claims.”²⁰³ AAA maintains a database of class arbitrations on its Web site.²⁰⁴

Yet AAA also buckled when the corporate heat was applied, earning a verbal lashing from a federal judge. Customers across the country filed at least 70 class action lawsuits against long distance telephone service providers, alleging that the companies overcharged them. The cases were consolidated in a U.S. District Court in Kansas and the judge granted the motions of Sprint and AT&T to send some of the cases to arbitration.²⁰⁵

One plaintiff, Thomas F. Cummings, asked the AAA to handle his case against AT&T

as a class arbitration.²⁰⁶ The association staff agreed to take the first step toward making the arbitration a class proceeding by presenting Cummings’ request to an arbitrator who would make that decision.²⁰⁷

A lawyer representing AT&T then wrote an angry letter to AAA’s president, demanding that he block the move for a class proceeding by overturning the staff decision to allow an arbitrator to decide that issue.

In a barely veiled threat, the letter cited the JAMS decision four months earlier to allow class arbitrations, and observed that, as a result, JAMS “appears” to be losing business as companies switch arbitration providers.²⁰⁸ “To our knowledge, the AAA has not seen an exodus of ADR [Alternative Dispute Resolution] users similar to that experienced by JAMS,” William J. Nissen, the AT&T attorney wrote on March 7, 2005. He suggested that AAA clarify its policy so that companies that include arbitration clauses in their contracts “can make an informed decision whether to include the AAA in their clauses.”²⁰⁹



His timing was ironic. Three days after Nissen wrote the letter, JAMS yielded to the pressure and announced that it was abandoning its new policy on class arbitrations.²¹⁰

Nissen's letter sparked an immediate response from plaintiff Cummings. In a court filing, he branded the letter "a clear threat by AT&T to use its economic power, and that of its law firm, to cause a mass 'exodus of ADR users' from AAA if the decision of the AAA staff is not overturned." Saying the AT&T "threat ... taints the impartiality of the arbitration process," he asked the judge to vacate his arbitration order and allow the case to proceed in court.²¹¹

Three days after Cummings filed his motion, AAA also surrendered to the pressure from AT&T and reversed the case manager's decision, blocking the possibility that an arbitrator would allow the arbitration as a class proceeding.²¹²

Subsequently, in May 2005, Judge John W. Lungstrum denied the request to vacate his arbitration order and hear the case in court, saying "the court may not interfere with the ongoing arbitration proceeding."²¹³ But he observed that the initial AAA staff decision to send the request for a class proceeding to an arbitrator appeared to have been proper and agreed with the plaintiff's counsel that "the appearance has been created that counsel for AT&T used AT&T's economic power to successfully persuade the AAA to prematurely bend its own rules."²¹⁴

State Court Vindicates Consumer Rights, Overturns Class Action Ban

The Supreme Court of Washington State emphasized the importance of class action lawsuits in striking down a cell phone company's ban on the procedure in July 2007.

Cingular Wireless customers filed a class action suit alleging that they had been overcharged between \$1 and \$40 a month. Citing the ban on class actions in the arbitration clause of the standard Cingular subscriber contract, a state trial court ordered individual arbitrations. The plaintiffs appealed and the state Supreme Court struck down the ban – and the entire arbitration clause – and sent the case back to the trial court.²¹⁵

The Supreme Court concluded that the class action waiver "effectively denies large numbers of consumers the protection of Washington's Consumer Protection Act" and "effectively exculpates Cingular from liability for a whole class of wrongful conduct. It is therefore unenforceable. Since the arbitration clause itself provides that if any part is found unenforceable, the entire clause shall be void, there is no basis to compel arbitration."²¹⁶

The court also made the following compelling points about class action lawsuits and Cingular's ban – points that apply to any class action waiver that is part of a pre-dispute binding mandatory arbitration clause imposed on consumers:

- "Without class actions, many meritorious claims would never be brought."
- The waiver "drastically forestalls attempts to vindicate consumer rights."



- The Cingular waiver freed the firm of “legal liability for any wrong where the cost of pursuit outweighs the potential amount of recovery.”
- “Claims as small as those in this case are impracticable to pursue on an individual basis even in small claims court, *and particularly in arbitration.*” [Emphasis added.]

Emphasizing the one-sided nature of arbitration clauses, the court wrote that “It appears that no claims from Washington customers have been brought to arbitration against Cingular in the past six years.”²¹⁷

The Supreme Court of the State of Illinois overturned the Cingular class action waiver in 2006 on the grounds that it was unconscionable.

“It is not unconscionable merely because it is contained in an arbitration clause,” the court ruled. “It is unconscionable because it is contained in a contract of adhesion that fails to inform the customer of the cost to her of arbitration, and that does not provide a cost-effective mechanism for individual customers to obtain a remedy for the specific injury alleged in either a judicial or an arbitral forum.”²¹⁸

Antitrust Allegations Leveled Against Credit Card Industry over Arbitration Agreements

It may have been no accident that the major credit card companies moved at the same time to impose binding mandatory arbitration on their customers, if the allegations in an antitrust lawsuit filed in federal court in New York against eight credit card companies in 2005 are correct.²¹⁹

The suit suggests that it is also no accident that the National Arbitration Forum is perhaps the main arbitration player helping credit card companies collect debts from cardholders.

At a time when NAF was marketing its services to credit card companies, the suit alleges, the firm was also involved in helping the defendants and others encourage credit card companies to adopt clauses requiring arbitration.

The antitrust suit, filed in New York federal court, claimed that the defendants conspired, through establishment of an “arbitration coalition,” to impose an arbitration requirement on their customers beginning in 1998 and 1999.²²⁰ The suit

contained specific allegations about times and dates of “arbitration coalition” meetings and also alleged that a “Consumer Class Action Working Group” met twice “to consider methods to deflect consumer class action litigation in light of the Federal Arbitration Act.”

The suit alleges that a major Washington law firm, Wilmer, Cutler, Pickering Hale and Dorr LLP, hosted a meeting in 1999 that was a prelude to formation of the alleged coalition. The 1999 meeting was attended by representatives of at least seven companies and the agenda “included a planned discussion about arbitration clauses,” according to the complaint filed in the suit.

“The meeting provided an opportunity for Defendants and their co-conspirators to conspire concerning the adoption and implementation of arbitration clauses on an industry-wide basis,” stated the complaint.

Furthermore, the complaint stated that at that time, only two of the meet-



ing’s co-sponsors, First USA and American Express used “arbitration clauses containing class action bans.” American Express’s arbitration clause had not taken effect and Bank of America had an arbitration clause that did not include a class action ban. The complaint noted that “None of the other Defendants had imposed arbitration clauses, in any form, on their cardholders.”

At the meeting, the group allegedly agreed to form an “Arbitration Coalition” or “Arbitration Group” with an “express purpose...to defend and foster arbitration and promote the imposition of mandatory clauses.”

After the preliminary meeting, First USA tried to identify other companies to invite to the inaugural meeting of the group. Among others, the firm asked NAF to help identify likely participants. “NAF did, in fact, identify and provide First USA with the names of other companies who might be willing to participate in the coalition.”

The complaint quoted from e-mails and other documents and also cited specific meeting dates and described what had occurred at those meetings. Among other things, the suits alleged that:

- On Aug. 4, 1999, Wilmer Cutler Pickering e-mailed coalition members proposing a September meeting and emphasizing that they should “continue to work together to develop arbitration clauses.” The e-mail, apparently referring to the earlier meeting, said, “We agreed to take a number of steps going forward, including sharing our thoughts and materials (including FAQ responses,

customer information materials, and legal briefs) on the issues regarding arbitration that come up most frequently and pose the greatest difficulty.”

- On Sept. 29, 1999, the group met to discuss arbitration clauses and the “need to control class action litigation” and “explored the possibility of all members of the coalition adopting set criteria for their arbitration clauses, which many of the Arbitration Coalition members had not yet adopted as of that date.”

According to the suit, “the arbitration clauses ultimately implemented by Defendants are materially identical because they are mandatory clauses which ban class actions.”

The suit called NAF “the most egregious example” of an arbitration company that enforces “the conspiratorially imposed class action ban” in arbitration clauses.

“It is the only for-profit arbitration administrator used by Defendants,” the suit said. “In handwritten notes of Chase’s in-house counsel, written during the September 20, 1999, Coalition meeting, NAF was referred to as appearing to be a ‘creditor’s tool.’ ” The suit added, “NAF’s record on arbitration reveals an inordinate tendency to favor defendants.”

The suit was dismissed in September 2006, when a judge ruled that the plaintiffs lacked standing to bring an antitrust case because their suit did not claim that they had suffered actual harm as a result of the alleged conspiracy. Plaintiffs have appealed the dismissal.



TRAPPED

Beth Plowman: Identity Theft in Nigeria Follows her Home

Beth Plowman was a victim of identity theft but that didn't stop MBNA and a debt buyer, Asset Acceptance Inc., from taking her to arbitration to collect more than \$26,000 in principal and interest rung up on her credit card account by thieves. And, it didn't stop NAF from finding against her.

Plowman said her last use of the MBNA card was on a business trip in Lagos, Nigeria, in September 2000 when she paid a hotel bill with it.²²¹

After that, she never received an account statement again. Instead, she said, in March 2001, an MBNA representative contacted her and said she owed \$26,296.28 on the account. MBNA explained that a person claiming to be her sister – Plowman says she has no sister – called and had the billing address changed to London. MBNA told her the account was being used across Europe to buy “sporting goods.”²²²

“I never received an account statement with the fraudulent charges,” Plowman said in a letter to the Montgomery County, Md., Circuit Court. “The account statements were being sent to the criminals themselves at their request.”²²³

After changing the mailing address based on the word of someone who admittedly was not the account holder, MBNA failed to contact Plowman to tell her of the charges in Europe and to verify the change of address. “I would have taken immediate action to cancel the credit card,” she wrote. “Instead, they waited for months before contacting me.”²²⁴

Eventually MBNA's calls stopped and Plowman assumed the matter was

settled in her favor.²²⁵ Two years later, her assumption was shattered.

“It is our pleasure to welcome you as a new customer,” said a May 2, 2003, letter from Asset Acceptance, a company that buys debts and then relentlessly pursues alleged debtors. It told Plowman she had a past due balance of \$26,296.28.²²⁶

Plowman disputed the debt in a letter to Asset Acceptance, which had told her it would provide “verification of the debt” if she challenged it. Asset Acceptance never sent documentation on the debt and claimed months later that it had not received her letter. She mailed it again and also faxed it.²²⁷

The letter didn't matter. Asset Acceptance had Plowman in its sights and, with visions of collecting \$26,296.28, the firm recruited NAF as a crucial ally. On Aug. 27, 2003, Professor Marvin E. Johnson Esq., an NAF arbitrator, awarded Asset Acceptance \$27,240.73.²²⁸

On Feb. 3, 2004, well beyond the deadline for Plowman to appeal an arbitration decision, Asset Acceptance went to court in Maryland seeking confirmation of the award.²²⁹

Plowman hired a lawyer, Scott C. Borison, who challenged the effort to confirm the debt, arguing that Asset Acceptance had violated the Truth in Lending Act, the Federal Debt Collection Practices Act, the Fair Debt Collection Practices Act and the Maryland Consumer Debt Collection Act.²³⁰

The firm finally decided to settle with Plowman after her lawyer's vigorous defense, dropping its effort to collect. But she had to spend \$2,000 in attorney fees to get the debt collectors off her back.²³¹



“Every indication is that the imposed arbitration clauses are nothing but a shield against legal accountability by the credit card companies.”

University of Chicago Law Review, 2006

Chapter III

Congressional Action on BMA and Credit Cards

Members of Congress have been hearing complaints from constituents about the abusive practices of credit card companies. Congress recently held several hearings, which uncovered evidence that credit card companies routinely bilk consumers for millions of dollars in fees and penalties, and that these charges are a major profit center for the banking industry. Clearly, a statutory remedy is needed.

Congressional committees held at least five hearings on the various aspects of credit cards, including shifting interest rates, high fees and the teaser interest rates that lure people into credit card accounts.

At one hearing, an Ohio man served as a poster child for abusive credit card company practices.²³² Wesley Wannemacher testified on March 7, 2007, before the Senate Permanent Subcommittee on Investigations. He began his journey into credit-card hell when he opened a Chase Bank account with a \$3,000 limit in 2001 and soon exceeded the limit by \$200, charging his wedding expenses. He then stopped using the card. He never used the card again and struggled for more than five years to pay a mounting debt as Chase slapped him repeatedly with high interest

rates, late fees and 47 charges totaling \$1,500 for exceeding his card limit by \$200.

By February 2007, he had been billed \$10,700 and had made payments of \$6,300, nearly double the original charges, and he still owed \$4,400. After Wannemacher agreed to testify, Chase decided to cancel the debt. The company announced the decision and provided an apology at the hearing.

As unfair as binding mandatory arbitration is to credit cardholders, it managed to largely elude the spotlight that Capitol Hill trained on the credit card industry until a June 2007 hearing when the House Judiciary Committee Subcommittee on Commercial and Administrative Law heard moving testimony about the victims of BMA.

A month later, legislation to fix the law on binding mandatory arbitration was introduced in the Senate as S. 1782 by Sen. Russ Feingold (D-Wis.) and Assistant Majority Leader Sen. Dick Durbin (D-Ill.) and in the House as H.R. 3010 by Rep. Hank Johnson (D-Ga.). The House bill has 14 co-sponsors.²³³ The legislation would



amend the Federal Arbitration Act to outlaw pre-dispute binding mandatory arbitration in consumer, employment and franchise contracts, along with statutes that protect civil rights and contracts or transactions between parties of unequal bargaining power.²³⁴

As Feingold noted in introducing the bill, arbitration “can be a fair and efficient way to settle disputes.” But he added that it is “a fair way to settle disputes between consumers and lenders only when it is entered into knowingly and voluntarily by both parties to the dispute after the dispute has arisen.”²³⁵

Feingold’s bill, in his own words, is intended to “prevent a party with greater bargaining power from forcing individuals into arbitration through a contractual provision. It will ensure that citizens once again have a true choice between arbitration and the traditional civil court system.”²³⁶

Feingold’s bill was referred to the Senate Judiciary Committee, while Johnson’s measure was directed to the House Judiciary Committee. No further action has yet been taken on them – or on ten bills on credit card reform that were introduced this year and referred to various committees.

In March, the movie “Maxed Out,” which was shown in the Capitol, offered the public a scathing indictment of an industry that inflicts exorbitant fees, unconscionable charges and high interest rates on the financially troubled after bombarding them with alluring offers and teaser interest rates.

The hearings and movie followed a September 2006 Government Accountability Office (GAO) report that suggested the companies were increasingly relying on penalty interest rates and fees to boost the bottom line. The GAO found that while interest rates on the whole are lower than they were in 1990, credit card companies use a complex structure of fees and interest rates (sometimes three rates on the same card, depending on the kind of borrowing) and do a poor job of disclosure to their customers. The GAO said that “the increased revenues gained from penalty interest and fees may be offsetting the generally lower amounts of interest that card issuers collect from the majority of their cardholders.”²³⁷

Arthur E. Wilmarth Jr., a George Washington Law School professor, told a House subcommittee in April that:

- Credit card fees totaled \$24 billion in 2004, an increase of 18 percent from 2003;
- Penalty fees totaled \$17.1 billion in 2005, a 10-fold increase in 10 years;
- Penalty interest rates averaged 24.2 percent in 2005, an increase of more than 10 percent from the previous year.²³⁸

Elizabeth Warren, a Harvard law professor, put it bluntly in a January 2007 hearing. “It is clear that the sweet spot is the customer who stumbles and pays late fees and high rates of interest,” Warren said. “Nearly eight out of every ten dollars of revenue comes from the customers who cannot pay off their bills in full every month.”²³⁹



Despite the interest in credit cards and arbitration on Capitol Hill, the prospects for meaningful action are uncertain. As simple as it is, the Feingold-Johnson legislation faces a daunting array of opponents who have shown they are ready to reach into deep pockets for millions of dollars to defend their interests on Capitol Hill.

Credit card companies and other firms in the credit and finance industry have given nearly \$29 million in campaign funds to members of Congress and candidates since 1990, according to the Center for Responsive Politics.²⁴⁰

And the major credit card players send legions of lobbyists to Capitol Hill to protect them, spending more than \$200 million on the endeavor since 1998.²⁴¹

The last time the industry relied on its financial might was in 2005, when it pushed the notoriously anti-consumer bankruptcy bill through Congress.

Aware of the stiff opposition facing any comprehensive bill, in June 2007, Rep. Carolyn Maloney (D-N.Y.), who chairs the Financial Institutions and Consumer Credit Subcommittee of the House Financial Services Committee, encouraged regulators to “to enforce the laws that already exist” and held a “credit card summit” to find “a way to use private forces to keep the spotlight on issuers and encourage best practices.”²⁴²

Days after her summit, on Aug. 3, 2007, Maloney announced her “‘Gold Standard’ Credit Card Principles,” saying she plans to incorporate them into legislation.

Rep. Barney Frank (D-Mass.), chairman of the House Financial Services Committee,

said he hopes to move legislation by October.²⁴³

Arbitration was not mentioned in Maloney’s principles, which included requiring issuance of credit cards “on terms that the individual can repay” by:

- Eliminating any-time, any-reason re-pricing;
- Eliminating universal default, the practice of raising a cardholder’s interest rate to the default rate if the customer is late with a payment to another creditor;
- Offering the option of a card with a fixed rate for a fixed period of time; and
- Providing cardholders notice of all rate increases, including default and non-default based increases, and the right to cancel the card and pay off the balance at the original rate.²⁴⁴

Maloney also proposed that the companies clearly explain account features, terms and pricing; give customer notice and choice on changes in terms; and encourage “responsible, successful credit use” by their customers.

Even before Maloney issued her principles, Sen. Thomas R. Carper (D-Del.), a member of the Senate Banking Committee, dismissed the possibility of legislation,

A “Big Deal”: Top Contributors to Sen. Thomas R. Carper Since 1989

MBNA Corp	\$131,447
JPMorgan Chase & Co	\$109,929
Citigroup Inc	\$69,800

Source: Center for Responsive Politics.



Campaign Contributions by Credit/Finance Industry 1990-2006

Election Cycle Rank	Total \$	\$ from Individuals	\$ from PACs	Soft Money \$	\$ to Dems	\$ to Repubs	% to Dems	% to Repubs
2006* 47	\$6,775,952	\$2,653,378	\$4,122,574	N/A	\$2,830,274	\$3,881,008	42%	57%
2004* 43	\$8,762,353	\$4,698,052	\$4,064,301	N/A	\$3,316,560	\$5,433,900	38%	62%
2002 47	\$7,870,032	\$1,239,152	\$3,328,938	\$3,301,942	\$3,005,441	\$4,850,993	38%	62%
2000 42	\$10,148,126	\$3,549,687	\$2,558,398	\$4,040,041	\$3,234,164	\$6,906,923	32%	68%
1998 51	\$4,698,402	\$1,309,425	\$2,205,918	\$1,183,059	\$1,371,696	\$3,319,706	29%	71%
1996 51	\$4,662,184	\$1,213,765	\$1,746,947	\$1,701,472	\$1,488,119	\$3,170,365	32%	68%
1994 46	\$3,441,687	\$1,219,412	\$1,337,933	\$884,342	\$1,624,407	\$1,813,780	47%	53%
1992 62	\$1,896,003	\$702,032	\$655,803	\$538,168	\$963,854	\$930,149	51%	49%
1990 70	\$731,400	\$216,753	\$514,647	N/A	\$418,354	\$312,946	57%	43%
Total 50	\$48,986,139	\$16,801,656	\$20,535,459	\$11,649,024	\$18,252,869	\$30,619,770	37%	63%

Source: Center for Responsive Politics

saying that banking industry opposition makes it “hard to get anything passed today.” Instead, he latched on to Maloney’s idea for a set of voluntary “best practices” by the card companies.²⁴⁵

“In my state, credit cards are a big deal,” said Carper, who sits on the Senate banking committee, which has jurisdiction over the industry.²⁴⁶ His political donations [see previous page] reflect both the significance of the state of Delaware for com-

mercial interests and his position on the banking committee.

Overall campaign finance spending by the credit and finance industry has also been substantial, judging from the following information from the Center for Responsive Politics.²⁴⁷

MBNA was the largest single contributor to George W. Bush’s first presidential campaign – both through its PAC and its employees.

MBNA Campaign Contributions by Source of Funds 1990-2004

Election Cycle	Total \$	\$ from Individuals	\$ from PACs	Soft Money \$ (Indivs)	Soft Money \$ (Orgs.)
2004	\$1,542,972	\$796,847	\$746,125	\$0	\$0
2002	\$1,507,569	\$355,475	\$511,500	\$594	\$640,000
2000	\$3,691,705	\$1,759,800	\$696,000	\$500,000	\$735,905
1998	\$1,358,850	\$529,850	\$574,000	\$0	\$255,000
1996	\$834,605	\$186,701	\$465,404	\$25,000	\$157,500
1994	\$876,555	\$670,423	\$205,632	\$0	\$500
1992	\$293,750	\$133,750	\$60,000	\$0	\$100,000
Total	\$10,106,006	\$4,432,846	\$3,258,661	\$525,594	\$1,888,905

Source: Center for Responsive Politics

MBNA Campaign Contributions by Recipient of Funds 1990-2004

Election Cycle	Total \$	\$ to Dems	\$ to Repubs	% to Dems	% to Repubs
2004	\$1,542,972	\$396,672	\$1,141,050	26%	74%
2002	\$1,507,569	\$407,075	\$1,100,494	27%	73%
2000	\$3,691,705	\$553,765	\$3,137,940	15%	85%
1998	\$1,358,850	\$141,050	\$1,217,800	10%	90%
1996	\$834,605	\$122,350	\$712,255	15%	85%
1994	\$876,555	\$58,750	\$817,805	7%	93%
1992	\$293,750	\$53,000	\$240,750	18%	82%
Total	\$10,106,006	\$1,732,662	\$8,368,094	17%	83%

Source: Center for Responsive Politics



In 2000, the MBNA donations to Bush totaled \$240,675. In 2004, MBNA fell to No. 6 on the Bush hit parade even though contributions from the firm increased by 48 percent, to \$356,350.

Overall, MBNA ranks 62nd among American corporations in its political giving. Its contribution record over seven election cy-

cles is shown in the charts on the previous page.²⁴⁸

Edward C. Anderson, managing director of the National Arbitration Forum, has also been a generous campaign contributor over the years, giving \$26,970 to political candidates, mostly Republicans.²⁴⁹

**Top 10 Congressional Recipients of Contributions
from the Credit Finance Industry in the 2006 Election Cycle
(current members only)**

Rank	Candidate	Amount
1	Sen. Tim Johnson (D-S.D.)	\$95,300
2	Sen. Hillary Clinton (D-N.Y.)	\$83,330
3	John Boehner (R-Ohio)	\$75,000
4	Sen. Tom Carper (D-Del.)	\$74,620
5	Rep. Richard Baker (R-La.)	\$72,750
6	Sen. Jon Kyl (R-Ariz.)	\$70,343
7	Rep. Paul Kanjorski (D-Pa.)	\$67,089
8	Sen. Ben Nelson (D-Neb.)	\$65,050
9	Sen. Joe Lieberman (I-Conn.)	\$64,020
10	Rep Patrick Tiberi	

Kilgore v. Keybank, Nat'l Ass'n, No. 10-15934 archived on April 18, 2013



TRAPPED

Javier Beltran: Lack of MBNA Account Does Not Dissuade NAF

In October 2006, CACV of Colorado LLC, a debt buyer, filed a petition in California Superior Court in Orange County to confirm an arbitration award of \$10,100.64 against Javier Beltran for allegedly defaulting on an MBNA credit card debt. Beltran never was knowingly party to an agreement to arbitrate with MBNA.²⁵⁰

According to Beltran's sworn declaration filed with his response to the CACV petition, he is from Mexico, did not complete third grade and does not read English. When his brother died in August 2000, he went to a Fresno funeral home, Funeraria La Paz, and arranged for a casket, burial suit, burial service and headstone at a cost of \$3,700. He had only \$1,200, so the funeral home arranged for him to finance the balance.

Although the discussion was in Spanish, he signed a contract written in English. He was not told that the interest rate on the \$2,500 balance was 26.99 percent. He said he was making payments to MBNA Consumer Services Inc., but that he was never mailed a credit card, and was never, that he was aware, given a line of credit. He later learned that the headstone had not been put on the grave. He called the funeral home, which said it wanted more money for the headstone. He claims that MBNA Consumer Services began to automatically deduct payments from his checking account – without his permission.²⁵¹

Beltran said he was unaware of the arbitration proceedings and did not receive the official service of arbitration documents. The signature on the UPS proof of service is not his.²⁵²

In December 2006, after CACV went to court seeking confirmation of the arbitration award, Beltran was served papers by a man who told him, in Spanish, that they were about “a credit card that you owe.” He said they were in English and he could not read them, so he sought legal help.²⁵³

Aurora Dawn Harris, Beltran's lawyer, said in a declaration filed with her Feb. 8, 2007, response to the CACV petition that she searched the NAF's quarterly report for April-June 2006 and found that Urs Martin Lauchli, the arbitrator who signed the award against Beltran on April 26, 2006, “‘reviewed’ and decided 37 other CACV cases against consumers on April 26, 2006.”²⁵⁴

After Beltran responded to CACV's petition, the firm filed an affidavit two days before a Feb. 28, 2007, hearing that changed key facts of the case. It said that Beltran had a credit line, not a credit card account, that the credit line was established with Bank of America, not MBNA, and that Bank of America sold the debt to CACV of Colorado.²⁵⁵

In May, a judge dismissed the CACV of Colorado request for confirmation of the arbitration award, ruling that the firm “has failed to present sufficient, admissible evidence that Javier D. Beltran entered into an agreement that contained an arbitration clause.”

However, the judge, Linda Marks, refused to vacate the arbitration award.²⁵⁶

A *Christian Science Monitor* story containing the sad details of Beltran's case ran in July 2007, shortly after he settled. Beltran's debt has been wiped out and he has been promised that his credit report will be repaired.²⁵⁷



“I have not yet found anything unbiased about the NAF.”

Rochelle Guznack,
Consumer lawyer, Plymouth, Mich.

Chapter IV

What Consumers Can Do to Fight BMA and Protect Themselves

Consumers can take some measures to protect themselves. They should be aware that the fine print in consumer contracts may include a clause stripping away their rights and forcing them into expensive binding mandatory arbitration. Once a service or product is provided, consumers have few options.

To avoid being trapped by a binding mandatory arbitration clause, consumers should:

- **Use Credit Cards with Care:**

- o Read all credit card terms to discover whether the policy contains a binding mandatory arbitration agreement. If it does, terminate the card when you can and cite the BMA clause as your reason.
- o If obtaining a new credit card that includes BMA, sign an arbitration opt-out if one is available or strike the clause from the contract and initial the change.
- o Try to obtain a credit card that does not require binding mandatory arbitration. AARP says its cards do not require the clause. Some small banks and credit unions also do not

require arbitration clauses.

- o Pay attention. If you receive a change-of-terms document in the mail, read it carefully. Check the contents of the envelope accompanying the monthly statement to assure there has not been a change. If the proposed change is unclear, call the card issuer and demand an explanation. Any changes that you do not approve can be rejected by not using your card again.
- o Reduce credit card debt as much as possible to avoid costly fees, penalties and credit disputes.

- **Examine All Consumer Contracts for Arbitration Clauses:**

- o Read *all* of the fine print before signing a contract – especially one for a credit card, mortgage, installment loan or new car.
- o If applying for an installment loan or buying a new car, make sure the loan agreement (and, in the case of a car, the purchase agreement and loan agreement) does not include an arbitration clause. If it does, opt-out or walk away from the deal. Consider financing the car



- through a credit union that does not require BMA.
- o If you are looking for a mortgage, make sure the lender does not require BMA. Seek a mortgage that qualifies for a Fannie Mae or Freddie Mac loan. Neither organization allows BMA.
- **Put Up a Fight:**
 - o If you receive a notice that a company has filed an arbitration case against you, do not ignore it, even if you know that there is a mistake. Respond immediately in writing and send the response by a method that requires a signed delivery receipt. If you do not get a response to your response, do not assume that your explanation has been accepted. Demand a response. Also, seek legal help. The National Association of Consumer Advocates
 - o (NACA), a nationwide organization of more than 1,000 attorneys who represent and have represented hundreds of thousands of victims of fraudulent, abusive and predatory business practices, may be able to help you find a lawyer. Go to the NACA Web site at www.naca.net and click on “find an attorney” on the home page. You can also contact NACA at (202) 452-1989.
 - o Help organizations like Public Citizen (www.citizen.org), the StopBMA Coalition (www.givemebackmyrights.com) and the Americans for Fairness in Lending coalition (www.affil.org) to ban binding mandatory arbitration. Support efforts in Congress to exempt consumer and employment contracts from binding mandatory arbitration.

Kilgore v. Keybank, Nat'l Ass'n, No. 10-15934 argued on April 18, 2013



Appendix A

A Brief History of the Move to BMA

The trend toward widespread use of binding mandatory arbitration in consumer lending, business contracts, sales transactions and employment, among other things, began with a 1984 Supreme Court decision that some scholars view as deeply flawed.

In a 6-3 decision in *Southland Corp. et al. v. Keating*, the Court said that in adopting the Federal Arbitration Act (FAA) in 1925, “Congress declared a national policy favoring arbitration” by barring the states from requiring court adjudication of disputes “that the contracting parties agreed to resolve by arbitration.”²⁵⁸

That conclusion rested on a huge assumption. “Since the overwhelming proportion of civil litigation in this country is in the state courts, Congress could not have intended to limit the Arbitration Act to disputes subject only to federal-court jurisdiction,” the majority opinion said. “In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”

In dissent, Justice Sandra Day O’Connor wrote that the decision “utterly fails to recognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements.”

She concluded, “Today’s decision is unfaithful to congressional intent, unnecessary, and, in light of the FAA’s antecedents

and the intervening contraction of federal power, inexplicable.

“Although arbitration is a worthy alternative to litigation, today’s exercise in judicial revisionism goes too far,” O’Connor wrote.²⁵⁹

David S. Schwartz, an associate professor at the University of Wisconsin Law School, is a fierce critic of Southland. In 2004, he wrote, “In deciding whether the FAA created substantive law that preempts state limitations on arbitration agreements, Southland should have been guided by the original intent of the FAA. Instead, Southland flouted the FAA’s historical record, which showed as clearly as possible, given the lack of explicit mention of preemption, that Congress intended the FAA to be a procedural statute that neither applies in state court nor preempts state law.”²⁶⁰

Since that decision, federal courts have shown great deference to arbitration, relying on Southland and subsequent decisions to toss out court challenges to arbitration when state court decisions have curbed its use.

In a 1987 case involving the securities industry, the Supreme Court said the FAA required courts to “rigorously enforce arbitration agreements.” The court said that in cases where a party to an arbitration agreement asserts that its rights are being violated, it must show “that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.”²⁶¹



The Supreme Court followed up in 1995 by invalidating state laws that outlawed written pre-dispute arbitration agreements, saying that the Federal Arbitration Act “has the basic purpose of overcoming judicial hostility to arbitration agreements and applies in both federal diversity cases and state courts, where it pre-empts state statutes invalidating such agreements.”²⁶²

In 2006, the Supreme Court again deferred to arbitration, overruling a Florida Supreme Court decision that said a court, not an arbitrator, must make the decision when a party to a contract that includes an arbitration clause challenges the legality of the entire contract.

Borrowers had filed a class action lawsuit against Buckeye Check Cashing Inc., charging that the payday lender’s high interest rates made their borrowing agreement illegal. Buckeye said the issue should be decided in arbitration.

The Florida Supreme Court ruled that it would violate state policy and law to enforce an arbitration agreement in a contract being challenged as unlawful.²⁶³

The U.S. Supreme Court in *Buckeye Check Cashing Inc. v. Cardegna* over-turned the Florida decision, saying, “Whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.”²⁶⁴

In his 2004 article, Professor Schwartz wrote, “Southland and its progeny are the result of bad statutory interpretation and even worse federalism. The historical evidence demonstrates that Congress never intended to preempt state law regulating arbitration agreements. To the contrary, the best interpretation of the FAA is that ... federal courts should normally be bound by state-law restrictions on arbitration enforcement.”

“The evidence against Southland is so strong that it seems that no one defends it on the merits anymore: Southland lives on only because of the Court’s reluctance to overrule a statutory interpretation precedent, its desire to spread arbitration far and wide, or a combination of the two. Neither justifies continuing the regime of Southland’s preemption of state law.”²⁶⁵

Gradually, following the series of decisions, U.S. companies began in the late 1990s to force customers to agree in advance to binding mandatory arbitration. By the end of 2001, nine of the top ten credit card companies had told their customers of the change, usually with oft-ignored bill-stuffers.²⁶⁶ Making the change were Capital One, Citibank, Discover, Bank One/First USA, American Express, MBNA America, Bank of America, U.S. Bancorp, and Household.²⁶⁷



Appendix B

Statistical Analysis

Summary of California Arbitrator Steven Bromberg Cases July 2003- June 2005

Quarter	No. of Cases	Business Wins	Consumer Wins	Other	Business Wins	Consumer Wins
2003 Q3	21	20	0	1	95.2%	0.0%
2003 Q4	77	77	0	0	100.0%	0.0%
2004 Q1	27	27	0	0	100.0%	0.0%
2004 Q2	30	30	0	0	100.0%	0.0%
2004 Q3	39	35	2	2	89.7%	5.1%
2004 Q4	100	95	4	1	95.0%	4.0%
2005 Q1	93	91	0	2	97.8%	0.0%
2005 Q2	134	129	3	2	96.3%	2.2%
Total	521	504	9	8	96.7%	1.7%

Source: National Arbitration Forum

Summary of California Arbitrator Steven Bromberg MBNA Cases July 2003- June 2005

Quarter	No. of Cases	Business Wins	Consumer Wins	Other	Business Wins	Consumer Wins
2003 Q3	13	13	0	0	100.0%	0.0%
2003 Q4	27	27	0	0	100.0%	0.0%
2004 Q1	10	10	0	0	100.0%	0.0%
2004 Q2	5	5	0	0	100.0%	0.0%
2004 Q3	26	23	1	2	88.5%	3.8%
2004 Q4	50	49	1	0	98.0%	2.0%
2005 Q1	80	78	0	2	97.5%	0.0%
2005 Q2	65	62	2	1	95.4%	3.1%
Total	276	267	4	5	96.7%	1.4%

Source: National Arbitration Forum



Cases Handled By Arbitrator Steven Bromberg, Oct. 1, 2003

Claimant	Amount Claimed	Amount Awarded To Claimant
1 Bank One Delaware	\$5,580	\$5,580
2 Bank One Delaware	\$7,866	\$7,866
3 Bank One Delaware	\$6,728	\$6,728
4 Bank One Delaware	\$6,719	\$6,719
5 Bank One Delaware	\$6,622	\$6,622
6 Bank One Delaware	\$7,929	\$7,929
7 Bank One Delaware	\$5,348	\$5,348
8 Bank One Delaware	\$4,507	\$4,507
9 Bank One Delaware	\$3,764	\$3,764
10 Bank One Delaware	\$3,192	\$3,192
11 Bank One Delaware	\$6,704	\$6,704
12 Bank One Delaware	\$7,953	\$7,953
13 Sarasota CCM Inc.	\$21,960	\$21,960
14 Bank One Delaware	\$10,607	\$10,607
15 Bank One Delaware	\$5,009	\$5,009
16 MBNA	\$28,759	\$28,759
17 MBNA	\$11,114	\$11,114
18 MBNA	\$8,198	\$8,198
19 MBNA	\$5,983	\$5,983
20 Bank One Delaware	\$18,094	\$18,094
21 Bank One Delaware	\$7,680	\$7,680
22 Bank One Delaware	\$6,032	\$6,032
23 Bank One Delaware	\$6,770	\$6,770
24 MBNA	\$35,712	\$35,712
25 Bank One Delaware	\$10,260	\$10,260
26 Bank One Delaware	\$12,256	\$12,256
27 Bank One Delaware	\$11,332	\$11,332
28 Bank One Delaware	\$12,699	\$12,699
29 Bank One Delaware	\$13,158	\$13,158
30 Bank One Delaware	\$10,383	\$10,383
31 Bank One Delaware	\$3,496	\$3,496
32 Bank One Delaware	\$13,369	\$13,369
33 Bank One Delaware	\$15,772	\$15,772
34 Bank One Delaware	\$16,005	\$16,005
35 Bank One Delaware	\$16,139	\$16,139
36 Bank One Delaware	\$9,918	\$9,918
37 Bank One Delaware	\$9,444	\$9,444
38 Bank One Delaware	\$8,850	\$8,850
39 Bank One Delaware	\$13,153	\$13,153
40 Bank One Delaware	\$13,137	\$13,137
Total	\$428,201	\$428,201

Source: National Arbitration Forum



Cases Handled By Arbitrator Steven Bromberg, May 16, 2005

Claimant	Amount Claimed	Amount Awarded To Claimant
1 Advantage Assets Inc. (assignee of MBNA)	\$16,577	\$16,577
2 Advantage Assets Inc. (assignee of MBNA)	\$16,280	\$16,280
3 Advantage Assets Inc. (assignee of MBNA)	\$15,562	\$15,562
4 MBNA	\$12,783	\$12,782
5 MBNA	\$14,610	\$14,610
6 MBNA	\$33,090	\$33,089
7 MBNA	\$8,294	\$8,294
8 MBNA	\$13,730	\$13,730
9 MBNA	\$14,630	\$14,630
10 MBNA	\$16,532	\$16,532
11 MBNA	\$22,194	\$22,194
12 MBNA	\$15,465	\$15,465
13 MBNA	\$3,366	\$3,366
14 MBNA	\$7,541	\$7,541
15 MBNA	\$26,938	\$26,938
16 MBNA	\$3,893	\$3,893
17 MBNA	\$13,167	\$13,167
18 MBNA	\$8,751	\$8,751
19 MBNA	\$6,987	\$6,987
20 MBNA	\$16,253	\$16,253
21 MBNA	\$16,372	\$16,372
22 MBNA	\$16,117	\$16,117
23 MBNA	\$28,391	\$28,271
24 MBNA	\$5,931	\$5,931
25 MBNA	\$8,701	\$8,701
26 MBNA	\$14,211	\$14,141
27 MBNA	\$3,768	\$3,767
28 MBNA	\$9,786	\$9,786
29 MBNA	\$41,072	\$41,072
30 MBNA	\$6,976	\$6,976
31 MBNA	\$27,639	\$27,639
32 MBNA	\$4,155	\$4,155
33 MBNA	\$6,313	\$6,313
34 MBNA	\$17,212	\$17,212
35 MBNA	\$6,156	\$6,156
36 MBNA	\$10,705	\$10,704
37 MBNA	\$9,813	\$9,813
Total	\$519,964	\$519,774

Source: National Arbitration Forum



Appendix C

Legislation Pending in Congress

At least 10 bills that would bring needed reform to the credit card industry have been introduced in Congress this year – bills with titles that hold promise for the consumer:

- S. 1782, the Arbitration Fairness Act of 2007, introduced July 12, 2007, by Sen. Russell Feingold (D-Wis.) and referred to the Senate Judiciary Committee.
- H.R. 3010, the Arbitration Fairness Act of 2007, introduced July 12, 2007, by Rep. Hank Johnson (D-Ga.). Referred to the House Judiciary Committee.
- S. 1925, Student Card Protection Act of 2007, introduced Aug 1, 2007, by Sen. Herb Kohl (D-Wis.) and four co-sponsors and referred to the Senate Banking, Housing and Urban Affairs Committee.
- H.R. 3347, Student Card Protection Act of 2007, introduced Aug 2, 2007, by Rep. Louise Slaughter (D-N.Y.) and referred to the House Subcommittee on Financial Institutions and Consumer Credit.
- S. 1395 Stop Unfair Practices in Credit Cards Act of 2007, introduced May 15, 2007, by Sen. Carl Levin (D-Mich.) and referred to the Senate Banking, Housing and Urban Affairs Committee.
- H.R. 873, the Credit Card Payment Fee Act of 2007, introduced Feb. 7, 2007 by Reps. Gary Ackerman (D-N.Y.) and Carolyn Maloney (D-N.Y.), referred to the Financial Services Committee.
- S. 1309 and H.R. 2146, Universal Default Prohibition Act of 2007, introduced May 3, 2007, by Sen. Jon Tester (D-Mont.) in the Senate and by Rep. Keith Ellison (D-Minn.) and 27 co-sponsors in the House. Referred to the Senate Banking, Housing and Urban Affairs Committee and the House Financial Services Committee.
- H.R. 1461, Credit CARD Act of 2007, introduced March 9, 2007, by Rep. Mark Udall (D-Colo.) and 33 co-sponsors, referred to the House Financial Services Committee.
- H.R. 3421, Credit Protection Act of 2007, introduced Aug. 3, 2007, by Rep. Nita M. Lowey (D-N.Y.) and referred to the House Subcommittee on Financial Institutions and Consumer Credit.
- S. 1176, Credit Card Minimum Payment Warning Act of 2007, introduced April 20, 2007, by Sen. Daniel Akaka (D-Hawaii) and three co-sponsors and referred to the Senate Banking, Housing and Urban Affairs Committee.
- H.R. 1510, Credit Card Repayment Act of 2007, introduced March 13, 2007, by Rep. David E. Price (D-N.C.) and 15 co-sponsors and referred to the House Financial Services Committee.



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