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Subcommittee on Domestic Policy

Hearing on
Arbitration or 'Arbitrary':
The Misuse of Arbitration to Collect Consumer Debts

Chairman Kucinich, Ranking Member Jordan, and Members of the Subcommittee:
I appreciate the opportunity to testify on what is known colloquially as "debt collection arbitration" – arbitration claims brought by creditors seeking to recover amounts alleged to be owed by consumers. I am the John M. Rounds Professor of Law at the University of Kansas School of Law, and the Chair of the Consumer Arbitration Task Force of the Searle Civil Justice Institute. I also am an Associate Reporter for the Restatement, Third, of the U.S. Law of International Commercial Arbitration, and have written extensively on the law and economics of arbitration.

I. Overview

My testimony today addresses empirical evidence on two central issues arising out of debt collection arbitration: (1) how consumers fare, in particular relative to how consumers fare in similar cases in court; and (2) whether arbitration is biased in favor of repeat players – i.e., parties that appear more frequently in arbitration. Both critics and supporters of arbitration in consumer settings have come to recognize the importance of empirical evidence in making sound public policy decisions in the area.[1] Indeed, Professor Peter B. Rutledge has recently written that "there now appears to be a consensus that the future of arbitration should be decided by data, not anecdote."[2]

The empirical evidence I discuss is from an ongoing study by the Searle Civil Justice Institute of consumer arbitrations administered by the American Arbitration Association. The study is discussed in more detail below. Key findings from the study (including preliminary results from an examination of debt collection cases in court) are the following:

- In a sample of AAA consumer arbitrations, business claimants won some relief in 83.6% of awarded cases and in those cases recovered an average of 93.0% of the amount claimed. By comparison, in a sample of cases from Oklahoma state courts, business claimants bringing debt collection cases won some relief in 99.7% of the cases going to judgment, and in those cases were awarded 99.5% of the amount sought. Similarly, in a sample of cases in which the federal government sought to recover unpaid student loan debts in federal court, the government won some relief in 99.7% of the cases, and in those cases was awarded 99.3% of the amount sought.

- In addition, the study found mixed evidence as to whether a repeat-player effect exists in arbitration (i.e., whether repeat businesses fare better than non-repeat businesses in arbitration). Using a traditional definition of repeat-player business, the study found no

[1] Peter B. Rutledge, *Whither Arbitration?*, 6 GEO. J.L. PUB. POL'Y 549, 589 (2008) (concluding that "[i]ncreased congressional attention" to consumer and employment arbitration "can be valuable, for it promotes discussion and study about this valuable dispute resolution tool" but also "can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study"); Public Citizen, The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration 2 (2008), *available* at http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf ("Rutledge concludes *Whither* with the warning that congressional scrutiny of arbitration 'can be dangerous if the terms of the debate focus too much on anecdote and too little on systematic study.' We agree.").

[2] Peter B. Rutledge, *Common Ground in the Arbitration Debate*, 1 Y.B. ARB. & MED. 1 (2009).

statistically significant repeat-player effect in arbitration. When an alternative definition was used, the study did find some evidence of a repeat-player effect, but the data suggest that any such effect is due to better case screening by repeat players (i.e., settling stronger consumer claims and arbitrating weaker claims), rather than any bias in arbitration.

II. Creditors in AAA Consumer Arbitrations: Summary of Results from the Searle Study

In March 2009, the Consumer Arbitration Task Force of the Searle Civil Justice Institute – of which I serve as chair – released a Preliminary Report on *Consumer Arbitration Before the American Arbitration Association*.[3] The American Arbitration Association ("AAA") is a leading provider of arbitration services, including arbitrations between consumers and businesses. The study is the most comprehensive empirical research to date on consumer arbitration procedures and outcomes. Funding for the study comes exclusively from the initial grant establishing the Searle Center at Northwestern Law School from the late Daniel C. Searle, longtime philanthropist and Northwestern University trustee. A copy of the Executive Summary is appended at the end of this statement, and a full copy of the Preliminary Report is available at www.searlearbitration.org.

A. Empirical Methodology

The primary dataset studied by the Task Force consists of 301 AAA consumer arbitrations that were closed by an award between April and December 2007.[4] (The focus on cases closed by an award during this time period is based on the availability of the original case files.) Just over twenty percent (61 of 301, or 20.3%) of the cases in the sample involved claims brought by businesses against consumers, typically as creditors seeking to recover amounts allegedly owed by consumers for services rendered or goods supplied. The most common types of business claimants in the sample were law and accounting firms (20 of 61, or 32.8%), home builders (13 of 61, or 21.3%), and real estate brokers (12 of 61, or 19.7%). Credit card companies and other lenders made up another roughly fifteen percent of the business claimants in the sample.

The sample of cases was coded for approximately 200 variables describing various aspects of the arbitration process. The data were analyzed using standard statistical methods in order to describe and evaluate consumer arbitrations as administered by the AAA. Prior to release, the report was reviewed by independent academic experts on arbitration and empirical studies, including both critics and supporters of consumer arbitration. It also was subject to

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3 Searle Civil Justice Institute, Consumer Arbitration Before the American Arbitration Association (Mar. 2009), *available at* www.searlearbitration.org.

4 Beginning in fall 2007, the AAA administered a number of arbitrations brought by a single buyer of consumer debt. Those cases were not covered by the Preliminary Report because no awards were issued until 2008 and insufficient data was available on those cases. We are currently in the process of studying the procedures and outcomes in those cases, and will report our findings when they become available.

review by the SCJI Board of Overseers, which consists of general counsels, plaintiffs' lawyers, defense lawyers, academics, and state and federal judges.

B. Outcomes

A central controversy in discussions of debt collection arbitration is how consumers fare. A number of empirical studies have examined the success rate of consumers in such arbitrations, focusing on claims against credit cardholders and using data on arbitrations administered by the National Arbitration Forum. The studies find a win-rate for business claimants (almost exclusively credit card issuers or their assigns) ranging from 67.9% to 99.6%.[5] Much of the variation in these results is due to differences in how the studies treat cases that are settled or dismissed before an award.

The Searle study, which instead looked at AAA arbitrations involving different types of business claimants, found that business claimants won some relief in 83.6% of the awarded cases and recovered an average of $20,648 in those cases – or 93.0% of the amount claimed. By comparison, consumers won some relief in 53.3% of the cases they filed and recovered an average of $19,255 in those cases, or 52.1% of the amount claimed.

These numbers do not in themselves show that arbitration is a biased means of resolving consumer disputes. Despite suggestions to the contrary, a high win-rate for business claimants by itself does not show bias. The win-rate is only meaningful in comparison to some baseline. A fifty percent win-rate for claimants may be extremely high if claimants bringing similar claims tend to win at a lower rate in court, or extremely low if claimants bringing similar claims tend to win at a higher rate in court. The same is true of a ninety-percent win-rate or even a ninety-nine percent win-rate.

Nor does comparing the win-rates of business claimants to the win-rates of consumer claimants provide evidence of bias in arbitration. As we explained in our Preliminary Report, the differing success rates for business claimants and consumer claimants appear to result from two factors, neither of which are evidence of bias.[6] First, the types of claims businesses in our sample bring differ from the types of claims consumers bring. Businesses tend to bring claims for amounts they are owed for services already rendered (the subject of this hearing). In such cases, the business faces fewer hurdles to establishing liability, and, when it does so, the amount

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[5] Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL, July 2006, at 32 (business claimants "prevail in 77.7% of the cases that reach a decision"); Jeff Nielsen et al., Navigant Consulting, National Arbitration Forum: California Consumer Arbitration Data 1 (July 11, 2008), *available at* http://www.instituteforlegalreform.com/index.php?option=com_ilr_docs&issue_code=ADR&doc_type=STU (businesses prevailed in 67.9% of NAF arbitrations either heard by an arbitrator or dismissed); Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers 15 (Sept. 2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf ("In 19,294 cases in which an arbitrator was appointed, the business won in 18,091 (or 93.8%)"); Answers and Objections of First USA Bank, N.A. to Plaintiff's Second Set of Interrogatories, Ex. 1, Bownes v. First U.S.A. Bank, N.A. et al., Civ. Action No. 99-2479-PR (Ala. Circuit Ct. 2000), *available* at http://www.tlpj.org/briefs/McQuillan%20exhibits%2016-19%20(300dpi).pdf (last visited Dec. 10, 2008) (bank prevailed in 19,618 NAF arbitrations, while credit cardholder prevailed in 87).

[6] Searle Civil Justice Institute, *supra* note 3, at 70.

it should be awarded is relatively easy to calculate and prove. Consumers tend to bring claims alleging delivery of defective goods or improper performance of services. Such cases tend to present more difficult questions of proving both liability and damages. Accordingly, consumers tend to win less often in cases that make it to an award, and, when they do win, tend to recover a lower percentage of the damages they seek. Second, a number of business claims are resolved on an ex parte basis, because the consumer fails to respond to the demand for arbitration.[7] Conversely, the business respondent appeared in every case brought by a consumer. The greater number of defaults is another important factor in explaining the higher success rate of business claimants.

Instead, the proper comparison is between outcomes in cases in arbitration and outcomes in similar cases in court. In the next phase of the Searle study we are seeking to undertake such a comparison. Some preliminary results of that inquiry are reported in Part III of this statement.

C. Repeat-Arbitrator Bias

A related concern is so-called "repeat-arbitrator bias." Unlike judges, who get paid regardless of how many cases they decide, arbitrators get paid only when they are selected to decide a case. These differing compensation structures have given rise to fears that arbitrators will be biased in favor of "repeat players," parties that are more likely to be in a position to appoint the arbitrator in a future case.[8] In debt collection arbitrations, the creditor is a repeat player; consumers are unlikely to be repeat players, although their attorneys may be.

Prior academic studies have found some evidence of a "repeat-player effect" – that repeat players have higher win-rates in arbitration than non-repeat players. But the studies have generally attributed the repeat-player effect to better screening of cases by repeat players rather than bias by arbitrators.[9] The findings of the Searle study are similar.

First, the study found no statistically significant repeat-player effect using a traditional definition of repeat-player business. Consumer claimants won some relief in 51.8% of cases against businesses that appear more than once in the AAA dataset (repeat businesses) and 55.3% of cases against businesses that appear only once (non-repeat businesses) – a difference that is not statistically significant.

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[7] Of the sixty-one cases brought by business claimants, twenty-two (or 36.1%) were resolved on an ex parte basis – i.e., without the consumer appearing in the case. *Id.* at 70 n.59.

[8] *E.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1256 (2001); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60-61; *see also* Public Citizen, Arbitration Debate Trap, *supra* note 1, at 24-26.

[9] *E.g.*, Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, IRRA 50TH ANN. PROC. 33, 39-40 (1998); Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Differenc*e, *in* ALTERNATE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 323 tbl. 2 (Samuel Estreicher & David Sherwyn eds. 2004); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May/July 2003, at 15.

Second, using an alternative definition of repeat player, the study found some evidence of a repeat-player effect. Consumer claimants won some relief in 43.4% of cases against repeat businesses and 56.1% against non-repeat businesses (as defined based on the AAA's categorization of businesses in enforcing its Consumer Due Process Protocol) – a difference that is statistically significant at the 10% level. However, 71.1% of consumer claims against repeat businesses so defined were resolved prior to an award, while only 54.6% of claims against non-repeat businesses were resolved prior to an award. This suggests that any repeat-player effect is attributable to better case screening by repeat players (i.e., settling stronger consumer claims and arbitrating weaker claims) rather than arbitrator bias.

III. Creditors in Court: Preliminary Results

As noted above, the next phase of the Searle study is seeking to compare outcomes in the AAA consumer arbitration cases we studied to outcomes in similar court cases. That phase is underway, and we are able to report some preliminary results. These results are preliminary; that is, they are subject to further analysis and review. Although we do not expect them to change significantly, that remains a possibility. We also will be considering data from other courts than those described below, which may or may not give similar results. Nonetheless, the data below provide some insights into the outcomes of debt collection cases in court.

A. Federal Court Student Loan Cases

Data on federal court cases compiled by the Administrative Office of the U.S. Courts are widely used by researchers studying court outcomes. Included in the dataset are cases brought by the federal government that seek to recover amounts owed on unpaid student loans. In those cases, a creditor (i.e., the federal government) is seeking to recovery an amount (averaging just over $17,000) allegedly owed by a consumer. The cases are debt collection cases in federal court seeking an amount similar to the amount sought in the AAA consumer cases we studied.

We examined all federal court cases terminated between late 2006 and late 2007, the most recent period for which data is available, coded as involving unpaid student loans. Our sample consists of those cases in which a prevailing party and some amount demanded were recorded in the dataset, so that we could calculate win-rates and the percentage of the amount demanded that was recovered by a prevailing plaintiff.[10] To correct obvious coding errors in the data, we examined federal court docket sheets available on Westlaw, and, when necessary, the original court files using PACER.

[10] Because the cases all involved claims for unpaid loans, the amount sought likely is specified in the complaint filed in the case. We have no reason to believe that our focus on those cases in which the amount demanded was coded as a non-zero amount biases our results in any way.

Of the 382 cases in our sample, 286 (or 73.5%) were resolved by default judgment, and another 84 (22.0%) by consent judgment. Another 11 cases were adjudicated by pretrial motion (usually on summary judgment); the government won all 11 of those cases. No case made it to trial, by jury or by judge. In only one case (1 of 382, or 0.3%) did the defendant prevail.[11] Overall, then, excluding consent judgments, the government as creditor won in 297 out of 298 cases (99.7%), with 286 (or 96.0%) of those cases consisting of default judgments.

Moreover, the government recovered the entire amount sought (or more) in 96.6% (285 of 295[12]) cases in which it prevailed. Overall, the government recovered an average of 99.3% of the amount it sought.

B. Oklahoma State Court Cases

The vast majority of debt collection cases are brought in state court, rather than federal court.[13] Unfortunately, the availability of systematic data from state courts is much more limited. As part of the next phase of the Searle study, we collected data from a random sample of court files from cases in Oklahoma district courts for which complete case filings are available online.[14] The sample consists of 421 cases seeking less than $10,000 filed in Oklahoma district courts and closed between March 31, 2007, and December 31, 2007 (the dates covered by our AAA consumer cases).

Of those 421 cases, 419 were brought by creditors seeking to recover unpaid debts. (The other two were brought by consumers; both of the cases with consumer claimants settled). The majority of the creditor claims (245 of 419, or 58.5%) were brought by a party other than the original creditor, either a debt collection agency or debt buyer. This is not surprising, because Oklahoma law precludes such parties from suing in small claims court.[15]

Over two-thirds of the claims brought by creditors (282 of 421, or 67.0%) resulted in default judgments in favor of the creditor. Just over a quarter (108 of 421, or 25.7%) were dismissed (usually either because of a settlement or for inability to serve process, although it is difficult to be certain). An additional twenty-two cases (5.2% of the sample) resulted in agreed awards in favor of the creditor. Nine cases were decided on summary judgment; in eight of those

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[11] In that case, the court originally entered a default judgment against the consumer. Later, the default judgment was vacated and the case was dismissed, based on the parties' agreement that the consumer was not liable for the debt. Arguably, the case should not have been included in the sample at all, because the case was terminated in 2008, rather than in the sample period.

[12] Data on the amount recovered were missing in two of the cases. In a number of the cases, the damages awarded were more than the amount claimed, almost always because interest continued to accrue while the case was pending. In all of those cases, the creditor recovered the full amount of principal sought, and so accordingly we capped the recovery at 100% of the amount claimed.

[13] Federal Trade Commission, Collecting Consumer Debts: The Challenges of Change 55 (Feb. 2009).

[14] A number of states permit online access to court filings. Oklahoma courts are unusual, if not unique, in that they permit a user to search for cases closed in particular months or years. The sole reason we chose Oklahoma courts to study was the ability to search court files online in such a manner.

[15] 12 Okla. Stat. § 1751(B) ("No action may be brought under the small claims procedure by any collection agency, collection agent, or assignee of a claim ...."). We are also studying other divisions of the Oklahoma district courts (including the small claims division), but do not have yet have results to report.

cases the creditor prevailed. No case made it to trial, by jury or by judge. Overall, of the cases that made it to judgment (i.e., were not dismissed or settled), the creditor prevailed 99.7% (290 of 291) of the time, with 96.9% (282 of 291) of those judgments entered by default.

Of the cases in which the creditor had judgment entered in its favor (excluding agreed judgments), the creditor recovered at least 100% of the amount of damages claimed 98.6% (284 of 288 cases) of the time.[16] In the four cases (1.4% of the total judgments) in which the creditor recovered less than 100% of the amount sought, the percent recovered ranged from 30% to 97%.[17] Overall, creditors recovered on average 99.5% of the amount they sought in cases in which judgment was entered in their favor.

IV. Limitations and Conclusions

While the empirical results presented in the Searle study are the most comprehensive available, the study nonetheless has limitations. First, its findings on arbitration are limited to AAA consumer arbitration. Empirical results from studying AAA consumer arbitration do not necessarily apply to other arbitration providers. That said, in setting national policy concerning arbitration, information on consumer arbitrations administered by the AAA, a leading provider of arbitration services, certainly is necessary for making an informed decision. Second, our preliminary findings on debt collection actions in court are, as stated, preliminary, and are limited to particular types of claims and specific courts. The study is ongoing: we are continuing to examine other courts and other types of claims, and any additional findings may vary. Third, cases are not selected into arbitration randomly; thus, finding truly comparable cases between court and arbitration is extremely difficult.

Despite these limitations, the preliminary findings nonetheless appear to be inconsistent with the argument that high win-rates for businesses in debt collection arbitrations show that arbitration is biased in favor of those businesses. Instead, the win-rates, while high in absolute terms and higher than win-rates for claims brought by consumers in arbitration, appear similar to win-rates for comparable claims brought in court. Thus, while the findings are only preliminary, they nonetheless suggest that business win-rates in debt collection cases may be due to the types of claims being brought and not to the forum in which they are adjudicated.

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16 In two of the cases, the judgment document itself was not available in the online database. In a number of the cases, the damages awarded were more than the amount claimed, almost always because interest continued to accrue while the case was pending. In all of those cases, the creditor recovered the full amount of principal sought, and so accordingly we capped the recovery at 100% of the amount claimed.

17 In the case in which the creditor recovered thirty percent of the amount sought, the creditor sought to recover the collateral for the loan as well. The difference between the amount sought and the amount recovered may reflect the value of the collateral.

Northwestern Law
Searle Center on Law, Regulation, and Economic Growth

Searle Civil Justice Institute

CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION

Executive Summary
March 2009

Issues and Background

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

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

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

Searle Civil Justice Institute Task Force on Consumer Arbitration

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

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

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

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

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

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

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

Data and Methodology

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

recording all variables of interest to SCJI. The data were analyzed using standard statistical methods in order to describe and evaluate consumer arbitrations as administered by the AAA.

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

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

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

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

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

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

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

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

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

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

Consumer claimants won some relief in 43.4% of cases against repeat businesses and 56.1% against non-repeat businesses under an alternative definition (based on the AAA's categorization of businesses in enforcing the Consumer Due Process Protocol) – a difference that is statistically

significant at the 10% level. However, 71.1% of consumer claims against repeat businesses so defined were resolved prior to an award, while only 54.6% of claims against non-repeat businesses were resolved prior to an award. This suggests that such effect is attributable to better case screening by repeat players (i.e., settling stronger consumer claims and arbitrating weaker claims).

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

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

Key Findings – AAA Enforcement of the Due Process Protocol

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

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

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

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

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

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

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

In response to AAA review, more than 150 businesses have either waived problematic provisions on an ongoing basis or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol. This is in addition to the more than 1550 businesses identified

by the AAA as having arbitration clauses that comply with the Protocol. By comparison, AAA has identified 647 businesses for which it will not administer arbitrations because of Protocol violations.

Policy Implications and Next Steps

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

1. Not all consumer arbitrations, arbitration providers, or arbitration clauses are alike. Differing results from empirical studies of arbitration may reflect variations associated with case mix, type of claimant, or provider review processes. This suggests the need for a nuanced approach to public policy concerning arbitration.

2. Private regulation complements existing public regulation of the fairness of consumer arbitration clauses. Policy makers should not ignore the role that arbitration providers can play in promoting fairness on behalf of consumers.

3. Courts could usefully reinforce the AAA's enforcement of the Consumer Due Process Protocol by declining to enforce an arbitration clause when the AAA has refused to administer an arbitration arising out of the clause or by otherwise reinforcing the role of the Due Process Protocol.

4. Arbitration may be less expensive for consumers than sometimes believed. For many consumers, the AAA arbitration process costs less than the amount specified in the AAA rules because arbitrators often shift some portion of the costs to businesses. Moreover, arbitrators award attorneys' fees to a substantial proportion of prevailing consumers in AAA consumer arbitrations.

5. Empirical studies have tended to find that repeat players fare better in arbitration than non-repeat players. To the extent such a repeat-player effect exists in arbitration, the critical policy question is what causes it. Our findings are consistent with prior studies in suggesting that any repeat-player effect is likely caused by better case screening by repeat players rather than arbitrator (or other) bias in favor of repeat players. A further as yet unresolved question is whether a repeat-player effect exists in litigation, and, if so, how litigation compares to arbitration in this regard.

While the empirical results presented in the SCJI Preliminary Report on Consumer Arbitration may usefully inform the policy debate on consumer arbitration, the Report nonetheless has limitations. First, its findings are limited to AAA consumer arbitrations. Empirical results from studying AAA consumer arbitration do not necessarily apply to other arbitration providers. Second, its findings on the costs, speed, and outcomes of AAA consumer arbitrations are difficult to interpret without a baseline for comparison, such as the procedures and practices in traditional court proceedings. A future phase of this research project by the Searle Civil Justice

Institute's Task Force on Consumer Arbitration will undertake that comparison. It will seek to compare the procedures in AAA consumer arbitration with procedures available for consumers in court as well as comparing empirically key process characteristics of courts and arbitration.