

**NATIONAL ROUNDTABLE
ON CONSUMER AND EMPLOYMENT
DISPUTE RESOLUTION**

**CONSUMER ARBITRATION ROUNDTABLE
SUMMARY REPORT**

**Co-sponsored by
Pepperdine School of Law, The Straus Institute for Dispute
Resolution and Penn State University, Dickinson School of
Law**

**Pepperdine University
Malibu, California
Thursday, Feb. 2, 2012 to Saturday, Feb. 4, 2012**

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INTRODUCTION: CONVENING OF THE NATIONAL ROUNDTABLE

Organization

In mid-2011 an ad hoc Planning Committee comprised of Professors Thomas J. Stipanowich and Nancy Welsh (co-chairs), Professor Lisa Blomgren Bingham and Larry Mills, with advice and assistance from Professor Homer LaRue, invited scholars, business and consumer advocates, agency representatives, policymakers, and dispute resolution providers to participate in a national conversation regarding consumer and employment dispute resolution. This conversation was inspired in part by, and intended to build upon, the facilitated discussions of the Consumer Arbitration Study Group convened in Washington, D.C. in early 2010 under the auspices of the American Bar Association Section of Dispute Resolution.

Goal

The Planning Committee's goal was to provide an opportunity for a structured, facilitated discussion among thoughtful people about the current state of U.S. policy and practice regarding consumer and employment dispute resolution. As explained to invitees,

A recent informal canvas of interested colleagues (including scholars, advocates, agency representatives and policymakers) reflected considerable interest in the idea of a structured, facilitated discussion among thoughtful people about the current state of U.S. policy and practice, in order to identify: areas of current or possible consensus, promising procedural initiatives, and gaps in knowledge that require empirical research. Ideally, our efforts will "move the ball forward."

Focus of Initial Roundtable

The first facilitated National Roundtable discussion was held on February 2-4, 2012, at the Graziadio Conference Center on Pepperdine University's Malibu campus. The roundtable focused on (1) disputes involving consumers and consumer financial services and (2) disputes between investors and securities brokers. The arbitration of these disputes is currently under review by the Consumer Financial Protection Bureau ("CFPB") and the Securities and Exchange Commission ("SEC").

Invitees were informed that possible areas of discussion for our February roundtable would include:

1. Understanding the landscape of consumer dispute resolution. What do we know about the operation and effects of arbitration and other options in this setting? Can we draw any helpful conclusions? What don't we know that would be helpful in evaluating and improving dispute resolution options?

2. Evaluating the range of possible solutions for different scenarios. For each major transactional/relational scenario, what are the respective costs, concerns and benefits of binding arbitration (including “regulated” arbitration per the securities arbitration model, and under some form of “due process” regime like the AAA Employment or Consumer Rules); litigation, including small claims and class actions; unilaterally binding private adjudication (per lemon laws, Magnuson-Moss); other administrative or ADR approaches.
3. Considering the future direction of arbitration law and policy.
4. The role of class or consolidated action (which for many is the nub of the current debate).

Participants

Approximately thirty individuals, drawn from the stakeholder groups identified above, participated in the conversation. A list of the participants and their organizational affiliations can be found at Attachment A.

Chatham House Rules

Participants engaged in the roundtable discussions as individuals interested in promoting sound and effective policy and practice in consumer dispute resolution and not as official representatives of any institution, firm, or client. The facilitated discussions were conducted subject to a modified version of the Chatham House Rules. Specifically, although a list of attendees will be available to the public, there will be no public identification of individuals with specific statements made during the course of the proceedings.

Pre-Roundtable Interviews

There was a tremendous depth of knowledge and wide variety of perspectives represented among the attendees at the Roundtable. To prepare for the first roundtable and to make the time together as productive as possible, the Planning Committee borrowed a best practice often employed in the mediation of broad-based conversations on public policy questions: In advance of the Roundtable, the Planning Committee members had informal conversations with the participants about their perspectives, ideas, and suggestions. Each participant was randomly assigned to a member of the Planning Committee for a confidential telephone interview. Everyone's comments were combined in an informal aggregate report, without revealing individually identifiable information or attribution of comments to anyone. A summary of the interview questions and responses is attached. (Attachment B)

Resources

Participants were also asked what resources they believed would be helpful to other members of the group, including particularly useful empirical studies, articles, books, reports or other resources. In addition, participants were asked for examples of

successful models used elsewhere to resolve consumer disputes and information about such models that could be provided to the group in a concise way. The responses to these questions resulted in a body of resources that were posted to a folder for the group as a whole. These resources are summarized in a briefly annotated bibliography appended to this report. (Attachment C)

Work Plan

Based on these responses, the organizing committee developed a work plan for the Roundtable. Over the course of a two-day meeting conducted pursuant to this plan, the Roundtable attendees:

1. Developed a general taxonomy for consumer disputes.
2. Reviewed the variety of different models used to address consumer disputes in different contexts.
3. Discussed available empirical research regarding consumer arbitration and class actions.
4. Identified needed research.
5. Identified promising procedural innovations.
6. Developed working groups focused on research and on practical alternatives to class action and class action preclusion.

Development of Summary Report

The following report was prepared by the members of the Planning Committee. The report is intended to be a summary of the discussions at the Roundtable. It should not be understood to represent the views of all participants.

SUMMARY OF ROUNDTABLE DISCUSSIONS (FEB. 3-4, 2012)

A Taxonomy of Consumer Disputes

The Planning Committee thought it would aid the clarity of the group's conversation to distinguish among major types of consumer disputes. After discussion, the group tentatively agreed to use the Planning Committee's following taxonomy of consumer disputes:

1. Company-initiated claims—debt collection claims that companies bring against consumers.
2. Consumer-initiated claims--claims that consumers tend to identify, raise, and present on their own.
3. Difficult consumer-initiated claims--claims that consumers “have” but tend to find difficult to identify, raise, and present on their own (e.g., individually or without the assistance of legal counsel).

System Design

The Planning Committee also asked participants to think analytically in terms of dispute system design and the structure, context, and administration of consumer dispute resolution programs. The elements¹ suggested are:

- **Structural Features**
 - Location
 - Who initiates, how and when
 - Who chooses neutral
 - Notice to defendant
 - Information exchange/discovery
 - Formality, character of proceeding
 - Availability of aggregate claims
 - Decision standard
 - Available remedies and form of award
 - Access to counsel
 - Opportunity for access to other processes, appeal
- **Context**
 - Type of consumer dispute
 - Sector or setting (public, private, non-profit, hybrid)
 - Participants eligible or required to use
- **Administration of System**
 - Stakeholder participation in design and redesign
 - Selection and characteristics of pool of neutrals
 - Payment of neutrals, administrative costs

¹ Adapted from Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1 (2008).

- Mechanism for assessment, evaluation

Existing Consumer Dispute Resolution Programs

Keeping in mind the taxonomy and elements of dispute system design, participants made presentations regarding the following processes, programs and models for the resolution of consumer disputes, supplemented by group discussion:

American Arbitration Association Consumer Arbitration

JAMS Consumer Arbitration

Debt Collection Litigation and Arbitration

FTC Report on Debt Collection Litigation and Arbitration

FINRA Securities Arbitration

Class Actions

Consumer Dispute Resolution under the Magnuson Moss Act

Better Business Bureau Autoline Program

Online Dispute Resolution (“ODR”)

Small Claims Courts, Court-Connected Non-binding Arbitration and Mediation

The descriptions of the presentations are attached (Attachment D).

Summary of Small Group Discussions

After the presentations regarding various dispute resolution programs and models for resolving consumer disputes, the participants divided into small groups to discuss how dispute system design relates to the goals of consumer dispute resolution. The groups reported discussion of the following various perspectives:

- There were concerns about whether some of the programs or models might not work universally because they have evolved to fit the needs and characteristics of the particular populations that are served. There is not a “one size fits all” process solution, and that there are different systems needed for different situations. As one example, there is no evidence that debt collection arbitration benefits consumers, particularly when the real issue is the inability of the consumer to make required payments and costs may be increased if the creditor is forced to enforce the award in court.

- “Small claims” mean different things to different people and in different contexts. Small claims can mean less than \$250, \$1,000, or \$25,000. Meanwhile, the dollar amount is not a good proxy for case complexity.
- There were concerns that the descriptions of how processes are supposed to work are not always consistent with how the processes actually work in individual cases—and about the absence of mechanisms to correct for inappropriate arbitral behavior or exercise of discretion.
- There were concerns that consumers need means to access legal advice in order to learn that they had been wronged and could seek redress. Meanwhile, however, there was recognition that different kinds of cases require different types of legal advice, and the structure of lawyers’ fees creates different incentives that can be quite influential.
- There were concerns that consumers were unknowingly entering into agreements to arbitrate. This was of particular concern when the consumers had suffered serious harms.
- There were concerns that consumers need access to mechanisms designed to prevent or deter bad behavior, such as companies’ collection of small fees of questionable legality which can add up to large amounts of money, and that the programs and models presented focused on compensation for harm, not the prevention or deterrence of bad behavior. There was a desire to learn more about whether class actions do or do not serve a deterrent function. There was a desire to learn more about how many consumers are members of the class in class actions and how many actually collect in class actions.
- There was considerable surprise that the number of consumer-initiated cases going to arbitration is so small, and speculation about why this was so.
- There was a desire for a more efficient debt collection system.
- There were suggestions that technology could be relevant in various contexts and could change dispute resolution practice significantly. Perhaps technology could be used to reduce the caseload of simple cases. Perhaps technology could help to eliminate 20-30% of case volume and free up resources to address other cases. Could the technology used by eBay or PayPal be applied to cases involving disputes over whether a particular investment was suitable for a given investor? At the same time, there was a desire for more information regarding consumers’ perceptions of ODR.
- There were suggestions that the compensation mechanisms that exist for dispute resolution providers can also create incentives to behave in certain ways, with intended and unintended consequences.
- There was desire to learn more about the individual company arbitration systems—e.g., AT&T, Verizon. In fact, it was suggested that an industry might agree on minimum and best practices for dispute resolution within that industry. Autoline and FINRA represent industry-wide agreements, but also exist within regulated contexts. Obviously, it would be essential to avoid violating antitrust laws.
- There was a desire for greater clarity in distinguishing between those claims that require the class action device for effective redress and those claims that do not. Are there some types of claims that a consumer would currently find very difficult to bring on his or her own and thus needs assistance to bring in court, but that

would be much easier for a consumer to initiate with ODR or some forms of arbitration? With different and more accessible forms of dispute resolution, could some claims be moved from the third category in the taxonomy into the second category?

Before the group turned to the next topic regarding recent empirical research, the Planning Committee asked participants to indicate whether all three categories in the taxonomy should be our focus. The participants decided that the two categories of consumer-initiated claims, not debt collection, should be the focus of this Roundtable.

Recent Empirical Studies

A number of participants had conducted empirical research on consumer dispute resolution. Participants were asked to share what they had learned in brief summaries. We introduced this segment with a discussion about what would be useful for the new Consumer Financial Protection Bureau (“CFPB”), which has statutory authority to study arbitration in consumer contracts. The Dodd-Frank Act is part of an ongoing conversation between Congress and the Supreme Court about arbitration, with arbitration being banned in some contexts.

The Dodd-Frank Act contains four relevant provisions. The SEC may write rules on consumer arbitration in the securities arena. The Act bans arbitration in consumer mortgage contracts. It bans arbitration in whistleblower actions in a financial context. It grants the CFPB the authority to make regulations that prohibit or impose limitations on the use of arbitration by a consumer in the financial context if the CFPB finds such restriction to be in the public interest or for the protection of consumers. It requires, however, that the CFPB must first do a study.

The Planning Committee asked our participants to think about what questions the CFPB should be asking and what criteria it should use to review the answers. It has monitoring authority and power to require data from banks, non-banks and perhaps others. There was discussion of some initial thinking regarding the scope and methodology of the CFPB’s study, focusing on the consumer-initiated disputes in the second and third categories of the taxonomy. There are mechanical questions about the use of arbitration—e.g., prevalence of clauses in contracts for consumer financial services, prevalence of certain features such as class action waivers. There are also historical questions about when such clauses and particular features first appeared and in what context. There are also questions about the impact of pre-dispute mandatory arbitration clauses on consumers and financial services providers when such clauses or features are used offensively by the company (debt collection), offensively by the consumer (consumer-initiated), or defensively by the company (blocking litigation or class action litigation). Various impacts to be examined include: impact on consumer perceptions of arbitration² (as differentiated above and perhaps also based on different forms of consumer consent); impact on claim incidence; impact on process evaluation (speed,

² For an overview of research and theories explaining the relationship between procedures’ characteristics and parties’ perceptions of procedural justice, as well as the profound influence of perceptions of procedural justice, see Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What’s Justice Got To Do With It?*, 79 WASH. U. L. Q. 787 (2001).

cost); second-order effects (impact on price of financial services, availability of credit, cost of credit, and quality of product offered in absence of pre-dispute arbitration clause).

Consideration of use of arbitration for certain types of contracts, but not for others, might yield some interesting information. The regulation of arbitration in some contexts is also likely to be relevant. The study would lend itself to a multi-method, multi-stakeholder approach, but this requires significant resources to collect extensive data and conduct in-depth and intensive interviews in the field with stakeholders and consumers.

There were then presentations regarding existing empirical studies of consumer dispute resolution (Attachment E), followed by group discussion. The studies and reports described here are among many documents listed in the annotated bibliography (Attachment C):

- Study of Arbitration Clauses in Credit Card Agreements
- Searle Study of Results in AAA Consumer Arbitrations
- Study of Perceptions of Fairness in FINRA Securities Arbitrations
- Study of Arbitration Clauses in Consumer Contracts
- FTC Report Comparing Litigation and Arbitration in Debt Collection

Brainstorming and Prioritization of Empirical Research.

To identify the broadest range of research questions related to consumer dispute resolution, the group conducted a “story-boarding” process. Participants imagined what research and data would help inform the dialogue—that is, what research and data they would like to see in a perfect world with no budget or other constraints. Participants recorded each separate research question or idea on a separate sheet of paper. Participants then posted their questions/ideas on walls around the room. In this decentralized process, participants also discussed with each other, one-on-one, how their ideas related to each other’s and clustered related ideas. What follows is a list of the participants’ questions/ideas as they organized them. For the sake of readability, all bullet points have been framed as questions. Not surprisingly, some questions show up under more than one topic heading.

1. Class Actions

Participants focused considerable attention on the question of class actions and their role in relation to consumer arbitration:

- How do other countries protect the rights of consumers who may not know they have been harmed/treated illegally or may not be able to pursue such claims?
- What is the deterrent effect in practical terms of class actions?

- Do class action bans increase violations of civil rights law or consumer protection law or decrease the net compensation to claimants where such violations are found?
- What are the transaction costs (defense lawyers fees, plaintiffs lawyers fees, and e-discovery and related costs) created by class action lawsuits?
- How have arbitration agreements evolved since *Concepcion*? Are they more or less “consumer friendly”?
- Can we get metrics on consumer experience with AT&T Mobility’s new (*Concepcion*) system and others with class action waiver provisions?
- How many consumers initiated arbitration through AT&T’s program in 2011?
- What is the effect in practice of “consumer friendly” arbitration agreements a la AT&T? How many claims are brought, how do overall payouts compare to class actions, and do they allow consumers access to counsel?
- Does the use of arbitration clauses in adhesion contracts increase prices for consumers or affect the quality of goods and services?
- What universe or set of claims is extinguished by virtue of arbitration clauses containing class action bans and what violations of law are under-deterred as a result?
- What percentage of class actions are dismissed without recoveries for class members?
- In class actions, how frequently are claims actually resolved on the merits?
- What factors drive a business to settle class action litigation?
- Would the prices of goods and services increase if arbitration were limited and the transaction costs from litigation were forced on businesses?
- Are there dispute resolution programs that use arbitration that allow consumers with small claims to secure fair resolution?
- What percentage of consumers seek and get a remedy only when they get class action notice? Are consumers even aware of a class action if they never get class action notice?
- What percentage of class actions follow governmental action?
- Do consumers consider it fair that they release claims in a class action without their informed consent?
- In class actions, what percentage of class members actually understand they are part of a class?
- If consumers do not have access to free or low-cost arbitration, what are their alternatives and are they workable?
- How does the amount of attorneys’ fees awarded in consumer class actions compare to the benefits achieved by class members?
- In typical class settlements, how much does a consumer receive in compensation, e.g., as a percentage of claimed damages?
- How many consumers were members of class actions (consumer) in various years, and how has this number changed with the growth of mandatory binding arbitration and now, *Concepcion*?
- What are the take rates (the percentage of class members that receive recoveries) in consumer class actions?
- What percentage of consumer claims are suitable for class treatment?

- Is there data on the numbers of lawsuits or arbitrations initiated by individual consumers (not class actions)?
- Do class action bans impede access to attorneys for consumers with meritorious claims?
- How do consumers make out in class actions compared to individual arbitration?
- What happens to claims brought as class actions when an arbitrator determines a class is not permitted under Stolt-Nielsen? Do they get arbitrated individually?
- Is the class action/arbitration preclusion issue the central reason why companies use arbitration provisions? Would there be no arbitration in the absence of class action waiver? Would companies keep pre-dispute arbitration clauses if class litigation must be allowed?

2. Frequency of Class Action Preclusion

Related to the question of class actions and consumer arbitration, is the question of whether consumer arbitration effectively precludes collective action, and what impact that has on consumers:

- Data on class actions: How much money do consumers get? How is businesses' behavior affected by the threat of class actions (defensive medicine)
- Is the inclusion of a class action waiver in arbitration clauses the only (or primary) reason that businesses include arbitration clauses in their consumer contracts?
- Do businesses collect data on consumer complaints/claims to make changes in operation, billing, etc.? At what point do they make these changes?
- What is the average recovery in consumer class actions expressed as a percentage of the quantifiable damages sought?
- Are there different rates of decline in the use of class actions in different categories of cases? Are there fewer class actions for financial consumer disputes than product liability?
- Are there data on the number and outcomes of class action arbitrations, as opposed to class actions in court?
- Are there data comparing results by attorneys for claimants, for respondents in securities arbitration?
- Have class actions declined at a rate faster than the vanishing trial?
- Would businesses currently inserting arbitration clauses continue to do so if they could not include class action waivers?
- What reasons, other than class action preclusion, drive businesses to use arbitration provisions (e.g., securities industry)?
- What role does the ability to limit remedies, select decision-makers, or preclude aggregate proceedings play in drafters' decision to impose arbitration?

3. Alternatives to Pre-dispute Arbitration

Participants brainstormed alternative processes for resolving consumer disputes:

- How likely is it (as an empirical matter) that parties will agree to post-dispute arbitration?

- If virtually all consumers would not elect arbitration if given the choice post-dispute of arbitration or court, what does that say about the fairness of compelling consumers to arbitrate?
- What is the effect of an opt-out?
- How common is it for businesses to enforce arbitration agreements for claims brought by consumers while simultaneously pursuing claims against consumers in court?

4. Frequencies and Outcomes

Participants wanted to compare the prevalence and outcomes of various processes for addressing consumer disputes:

- Can we obtain data on outcomes in securities arbitration compared to what would have been available if law applied?
- Can we compare outcomes in arbitration versus court for similar claim types?
- Do arbitrators decide similar cases similarly?
- Do arbitrators decide similarly to judges in similar cases?
- Can we obtain outcome reports for consumer arbitrations organized by quarter?
- Can we find out the percentage of securities disputes dismissed before a hearing by a fact finder – court versus arbitration?
- What data from arbitration (or another DR process) could CFPB require be collected and reported that would alert it to engage in regulatory or enforcement action against bad actors?
- Are there geographic differences for consumer win-loss awards?
- Do recovery percentages to consumers decrease as settlement rates increase?
- In what types of cases are punitive damages awarded?
- What are the characteristics of claims successfully brought in the FINRA process – how large do they have to be to make arbitration viable?
- Can we create a central database of arbitration decisions, including rationales for the decision?
- Can we do a study on the standards for arbitration decisions and the impact of written rationale/statement of reasons?
- Can we obtain data on award dollar outcomes versus neutral expert’s evaluation of actual damages?
- How often do consumer arbitrations result in injunctive relief with application to general conduct by company (i.e., not just to conduct directed at the arbitrating consumer)?
- What are the characteristics of consumer claims brought at AAA? How large must a claim be to make arbitration worthwhile?
- Could we conduct experiments based on random assignment of disputes to court and arbitration?
- How often are claims compelled by courts to arbitration?
- How can “underemployed” new attorneys best serve consumers?
- How many consumers file claims in arbitration not just with AAA and JAMS, and what is the nature of these claims (type, amount, represented or not)?

- Can we obtain real time metrics indicating how many consumer arbitration processes are initiated each day?
- How many consumer arbitrations take place within the United States?

5. Arbitration Clauses, Terms, Notice, and Consumer Understanding

Participants wanted to research the specific design elements of consumer dispute resolution plans and programs, as reflected in the following questions:

- Can we obtain data on changes in contract terms [arbitration provisions] over time?
- Can we determine why consumers fail to respond to summons/arbitration notices?
- Can we study the range of arbitration programs (perhaps for key sectors) and compare them?
- Could we develop a central directory of consumer arbitration clauses arranged by company and industry?
- Consent: What types of contract language and/or terms are most likely to result in “bargaining” over arbitration?
- Can we obtain data on the use of arbitration clauses by car dealers, real estate brokers, and in other non-mass contracting processes? How often do they use arbitration? Do clauses include class arbitration waivers?
- How many consumers are aware of mandatory arbitration clauses – how many challenge the clause, and what is the success rate for challenges?
- Can we obtain information regarding regulatory methods for providing consumers with information regarding dispute resolution systems?
- Can we study the efficacy of service of process in litigated matters? In arbitrated matters? Can we develop data on why people fail to respond to notices for arbitration or court?
- At what point do consumers become aware of the existence of an arbitration agreement?

6. Clauses and Consumer Awareness

Related to terms and conditions are questions regarding how much consumers know about their dispute resolution alternatives:

- If consumers knew the impact of mandatory arbitration clauses on their options, would they oppose or support them?
- What is the profile of arbitrators that would be most acceptable to parties (consumers and business)?
- What predicts a consumer’s decision to [make a] claim (besides education)?
- Any company that has a mandatory arbitration clause in its contracts should make those contracts available before consumers are expected to sign up for services. How many do that now?
- How many consumers don’t pursue claims because of mandatory arbitration?
- How does the existence of a mandatory arbitration provision affect plaintiff’s attorney’s likelihood to take a case (in various categories of cases)?

- How important is process choice to consumers?

7. Costs, Benefits, and Consumer Dispute Resolution

Participants were interested in comparing processes and programs by examining their costs and benefits to users and the public:

- Are there differences in resolution amounts, user satisfaction, etc. when “professional” arbitrators are used versus “volunteers” or occasional arbitrators?
- How much have businesses saved after Class Action Fairness Act (CAFA) passed and how much do they project to save after *Concepcion*?
- Can we look at impact of “aggregate funding” by firms or industries of arbitration, as opposed to pay-by-case?
- Can we do a cost-benefit (or cost effectiveness) analysis or study based on random assignment of cases to arbitration or litigation?
- AAA consumer claims are 1100 to 1400 a year. Is that a lot or a little? What is the size of the universe and where are the claims?
- Is it more or less efficient (in terms of transaction costs for consumers, merchants, or taxpayers) to arbitrate claims on an individual basis rather than aggregate them (in court or arbitration)?
- Can we obtain data on dispute resolution costs and how they compare in court and arbitration?
- What is the cost of handling securities arbitration defense in house versus with outside counsel?
- What are the average attorneys’ fees to defend a securities dispute—court versus arbitration?
- What is the impact of arbitration provisions on prices for consumer services, i.e., do service providers who use arbitration clauses charge less for their services?
- How much does the maintenance of a consumer arbitration system actually cost businesses?

8. Online Dispute Resolution

Participants were interested in the potential for online mechanisms to address consumer disputes:

- Are there examples of mandatory ODR systems?
- Why isn’t ODR the response to aggregating low dollar amount claims?
- How can ODR be adapted to handle consumer-initiated claims?
- What kinds of disputes are easy to automate with an algorithm?
- What are the possibilities for ODR, and for gathering information on all ODR systems currently in use and successes and failures?

9. Small Claims and Alternatives

Participants raised questions about small claims court programs, chargeback systems, and how other countries handle consumer dispute resolution:

- How do we make arbitration understandable to consumers?
- What type of educational efforts could be undertaken to educate consumers about the arbitration process, and is it possible to do so?
- How can consumers come to understand when they need professional help with a claim?
- Can we analyze the use of charge backs by consumers?
- Are there any model dispute resolution processes from other countries for consumers that should be studied?
- What information is available regarding mandatory mediation of small claims cases (for example the Florida program)? Has it proven effective?
- Small claims: How can it be improved? What's broken? Where's the data?
- Can we analyze outcomes in small claims/"desk"/ simplified arbitration versus small claims courts for similar claim types.
- How does satisfaction with small claims court compare to arbitration?

10. Fairness Issues

Participants wanted research and data on the fairness of consumer dispute resolution:

- How do we equalize complaint and remedy mechanisms to bridge the divide between "haves" and "have nots" in obtaining relief on claims?
- At what point do consumers' perceptions of fairness change?
- How does one eliminate perception of bias?
- Should the CFPB develop an arbitration system like FINRA with an enforcement mechanism?
- What disputes require a private attorney general? What disputes can an agency pursue?
- What are the best attributes for arbitrators in consumer arbitration?
- How do we get/provide information on arbitrators?

Proposed Research Projects—Small Group Reports

Following this brainstorming exercise, participants formed groups around the clusters of research questions that most interested them, and then conducted small group discussions on how they might get the data and design the research they felt was most useful. These small groups then reported out to the participants as a whole. A summary of each group's report and the discussion follows. Again, different groups identified some of the same research questions or issues.

1. Class Actions

There was a wide-ranging discussion of research on class actions and class action preclusion. The group started with questions about whether, in order to measure arbitration and its impact, you also need to measure the impact of the civil justice system more generally. They tried to separate the impact of arbitration from the impact of the civil justice system more generally, and could not. One of the questions was whether

there is a claim-enhancing or claim-suppressing effect of arbitration agreements and class waivers; that is, what is the effect of each on the incidence of claims? To compare that effect, you need to look not just at members of the putative class, but who actually makes claims; what is the “take rate” (claim filing rate) and compensation rate? Answering these questions, however, does not capture the effect of class actions in deterring wrongdoing. And many class actions provide relief without a need to make a claim, and 100% of the class then gets relief. Even then, though, you can measure the percentage of checks cashed. Can the CFPB get data from class action administrators on realized benefits to class members and the take rate? Those numbers are jealously guarded. Objectors to class certification want the numbers and so do defendants. Is this within CFPB’s jurisdiction?

Next, the group discussed deterrence and how one goes about measuring it—a subject that has sparked debate in the death penalty context. What is the relationship between private and government enforcement? Does private class action enforcement lead to federal agency action, publicity, and a cluster of events that generate enforcement and deterrence? Does government enforcement have a greater deterrent effect on wrongdoing than private enforcement? Can we get relevant information by asking in-house lawyers? It seems likely that businesses have their eye on what a government agency might do. Anecdotal experience suggests that companies are not deterred by class actions. Is there any way to test this?

The group also discussed issues relating to the incidence of claims. One concern is how one compares the “take rate” (claim filing rate) in a class action and the presumably much smaller group of people who come forward and make claims through individual arbitration. Should an incidence rate or compensation rate be based only on claims submitted to arbitration, or should it include those accessing a broader customer service process? Furthermore, can we determine whether and to what extent the availability of class actions had an impact on companies’ willingness to provide better informal dispute resolution? The AT&T case is an example of where the threat that the class action waiver would be invalidated motivated the company to provide a really robust form of informal dispute resolution. When the government brings an action, it was argued, the primary purpose is deterrence and law enforcement; individual redress is the icing on the cake. The private class action bar has different incentives and purposes.

Others disagreed with these characterizations. For example, in the case of Household Finance, state attorneys general extracted half a billion for consumers. Similarly, in the case of Sears, there was a public/private partnership settlement and the provision of financial relief was the prime directive (several hundred million). There was also mention of anecdotal evidence regarding positive responses by companies to private class actions. Prudential was hit with class actions in 1990s, and it started an ethics office and integrated conflict management system. Coca Cola had a huge discrimination class action suit and responded by enhancing and introducing progressive dispute resolution procedures. There are many instances of corporations hit by major class action law suits; they do something radical in-house to respond, often good things, and dramatically change course. Participants were not aware of anything systematic beyond anecdotes and case studies to inform us of the deterrent effect of class actions.

Some stated that the corporate initiatives may not be the result of the threat of class actions, though. Coca Cola was responding to bad publicity and a threat to the goodwill associated with its brand. The company would have responded the same way to adverse newspaper coverage, without the filing of a class action. Because class actions are so frequent, they are simply considered a cost of doing business. If a company gets a notice of an investigation from an attorney general or law enforcement or an inquiry from a newspaper reporter that he or she is about to write something, then companies will kick it into high gear. The filing of a class action may trigger the newspaper's or agency's interest, but it is the bad publicity that triggers response and reform.

2. Arbitration Clauses and Programs

How often do businesses use arbitration clauses and how and why? How widespread is the use of arbitration? Why do some use arbitration and others do not? With respect to such issues, the group thought it important to talk not just about arbitration clauses but about arbitration programs: which provider is involved, how the program is administered, the degree of balance and evenhandedness in the creation and maintenance of procedures and panels of arbitrators, the kind of information provided to consumers to back up what is in writing, etc. The clause tells you what they say they are going to do, but it is not "the life of the program." We should be asking, what happens in the real world?

There are many contexts in which arbitration clauses may be found, including car dealer/consumer contracts, nursing home contracts, medical services provider contracts, home builders, and real estate agents. It was stated that a number of these are categories of contracts in which claims are most likely to be pursued individually and less likely to be subject to class actions. This in turn, means that involved companies are less likely to use arbitration to avoid class actions, but may be employing arbitration for different reasons. Other contexts for arbitration include deposit account agreements, payday loans, and user license agreements. We could look at iPad apps; for every such app that consumers download, they can click on the user agreement. Sources of data on these things and other Internet sources are fruitful. It is harder to find contracts that car dealers use. Real estate agents may have standard forms involving real estate associations. State regulators may have data; this is how franchise-related data was accessed.

A variety of potential sources of data were mentioned. It was suggested that we may have to do a survey of small businesses and get copies of their forms. Apparently, however, few small businesses draft their own forms, but buy them from a company. Another source of contracts and clauses is arbitration providers, but it is unclear how widely their non-modified clauses are used. It might also be fruitful to reach out to consumer groups. For example, Consumer Reports buys all sorts of things; are they getting contracts? Another source would be regulators. Possibly, the CFPB can get the information directly through the definition of covered persons.

3. Online Dispute Resolution

The ODR group began their “top ten list” with an overarching question: How do we classify ODR, and is it different from electronically assisted ADR? Other questions raised by the group include (1) How many small claims courts use ODR? How often, how much? (2) What types of disputes are more likely to be effectively resolved through ODR? Are there very specific criteria that can be identified for such disputes? (3) What percentages of consumers who are eligible for ODR actually use it? If they have the option, do they use it? (4) Will companies with existing ODR systems make available their data on user satisfaction? Companies that have used it have data and extensive information in databases; if we asked would they share it? (5) What kinds of disputes can be automated via algorithm? (6) Do users perceive ODR processes to be fair, and if not, why not? (7) Does satisfaction correlate with outcome? If they think the process is fair, does such perception correlate with outcome? (8) What percentage of consumers have access to ODR or know about it? (9) Do users who use ODR understand it and know what they are doing? (10) Can we survey user demographics? (Final note: there was also a brief discussion of using the history of the ICANN domain name dispute resolution system as a case study in the evolution of a system, and addressing fairness issues.)

4. Data Collection, Arbitration Awards, and Outcomes

The data collection group focused to some extent on FINRA arbitrations, but recognized that different contexts are reflected in different arbitration processes. Among the questions raised by the group: (1) Do arbitrators decide similarly to judges in similar cases? (2) Do different arbitrators decide similar cases similarly? (3) Can we get data comparing outcomes in arbitration versus court proceedings for similar claim types? (4) Is there data on outcomes in securities arbitration that describes what remedies were available if the law was strictly applied? What kind of damages might have been available if FINRA arbitrators applied law strictly? (5) What are the express standards, if any, for arbitrator decisions? (6) What is the impact of having a written rationale for the decision? (7) Do equity-based outcomes result in more favorable outcomes? What is the impact of equity? (8) Can we get a central database of arbitrator decisions as well as rationales? (9) Are there reasons for geographic differences in consumer win/loss awards? (10) What are the claims that are characteristic of successful FINRA outcomes and how big do they have to be to make arbitration viable? (11) Is there a particular floor for the economic viability of a FINRA claim? (12) What types of cases result in punitive damage awards?

5. Costs and Benefits to Participants and the Public

This group observed that it is easier to determine costs than benefits and suggested different studies to determine costs. It is also easier to determine costs that have been spent (or not) by the organization that is providing/requiring the arbitration process than the cost to the consumer; and this does not capture costs to society. The group raised a number of questions: (1) Thinking about the CFPB and the portal that is supposed to list complaints received, the group queried whether we could do some sort of comparison using a control group and experimental group. (2) Could we do something descriptive, describing various organizations and the variety of approaches they use to

respond to consumer issues, including integrated case management or redress systems (i.e., the sequence of processes used to resolve consumer complaints), not only arbitration? (3) Could we do a “measured mile” comparison within an individual organization regarding costs, including attorneys’ fees and amounts paid to consumers, before and after implementation of a conflict management system? (4) Could we randomly sample people within a population using the “paths to justice” approach, and determine whether they have had a legally cognizable complaint regarding a consumer product or service within a set period of time (and perhaps whether the claim might be appropriate for a class action); whether they made a claim in some fashion or “lumped” it; taking into account the identity and characteristics of the company from which they received the product or service and the arbitration program, if any. The group did not hammer down how to capture not just cost to corporations, but to consumers and society. An abiding question is how to establish the benefits to the corporation beyond cost savings, benefits to consumers, and benefits to society using these different approaches. Finally, the group wondered what kind of crisis is needed to trigger a corporation’s adoption of an integrated conflict management system.

After prioritizing potential research projects (Attachment F), the group moved to a consideration of promising alternatives to class actions and class action preclusion.

Alternatives to Class Actions and Class Action Preclusion—Brainstorming Exercise

After further discussion of the deterrent effect of class actions, the group engaged in an open brainstorming discussion of practical alternatives to either promoting class actions as they currently exist or precluding class actions through consumer arbitration. The discussion is summarized below. Later, through “dot-voting,” members of the entire group identified priorities for further action. (See Attachment F.)

1. More on Deterrent Effect of Class Action and Other Factors

The group returned to discussion of the deterrent effect of class actions. There were different views regarding the question of whether the class action is dying, and the potential effect of its demise. Some argued that the empirical evidence for the deterrent effect of class actions does not exist, and that the merit (or lack of merit) of the claim, as well as the nature of the claim itself, determine its deterrent effect more than the fact of a class action or government proceeding. One example illustrating the importance of the nature of the claim is the Denny’s discrimination class action. If the substance of a class action or other action undermines the premise of a publicly-traded company’s brand, that changes the market, damages the brand, and translates directly to a reduction in the company’s share price. If the *New York Times* publishes an article charging discrimination, the company’s share price can go down by billions of dollars in a day. The potential for this sort of impact is the source of a deterrent effect (“Follow the money.”) Perhaps research could be done of event studies (including government action, shareholder action, class action, consumer action, publication) and correlate these events to impact on share price. Has such research been done?

Alternatively, perhaps the amount of publicity should be the focus. It might be possible to examine what particular class actions received significant media attention and those that got little or no publicity, and assess the consequences. Again, perhaps the class action does not have a direct and major effect on companies. For any consumer-focused company (i.e., some are not consumer-focused or do not sell to the public), bad publicity is the issue. Corporate officials are not thinking “we should avoid discrimination” because they fear a class action; they want to comport with the law. But they want to avoid bad publicity.

Meanwhile, there are examples of class actions that have received a lot of media attention in which it is not clear that the publicity had a deterrent effect. Wal-Mart, for example, defended itself very aggressively against women who claimed gender discrimination, though their claims appeared strong and were splashed on the front pages of national newspapers. Similarly, when women were denied pregnancy leave and credits toward their pensions and the pension discrimination act had not yet passed, a company defended itself aggressively and won the case. Most people did not know about the case and it has not hurt the company. Class actions thus do not necessarily have a deterrent effect in and of themselves. On the other hand, perhaps class actions—like the other collective actions of strikes, protests, boycotts, mass gatherings, etc.--have an expressive and narrative effect which results in the passage of needed legislation or promulgation of needed rules. Moreover, because consumer complaints can be widely publicized in a short period of time through social media such as Facebook or Twitter, consumers as a class have increasing ability to influence business policies.

2. Consumer Access to Legal Advice and Counsel

The group also focused attention on the need for consumers to have access to legal advice and lawyers—and the need for lawyers to be sufficiently incentivized to represent consumers in these matters. In individual, low value consumer matters, it does not make sense for a lawyer to take cases to arbitration. Providing legal representation only makes financial sense once sufficient numbers of claims are aggregated. Class actions certainly incentivize lawyers, although it is also important to recognize that plaintiffs’ counsel are taking a contingency risk. Perhaps companies requiring consumers’ use of arbitration could provide an incentive to lawyers by offering a premium if the consumer wins. AT&T’s clause provides that if AT&T has not settled the claim, the consumer goes to arbitration, and gets even \$1 more than AT&T offered, then the customer gets a \$10,000 premium and AT&T reimburses the attorney for expenses and pays a premium fee. Other participants noted, of course, that in small value claims, AT&T need only pay the face amount of the very small claim in order to avoid the payment of these premiums. There were questions about whether AT&T’s system has actually incentivized lawyers’ representation of consumers. Nonetheless, participants expressed interest in trying to find reasonable ways to assure that class actions are only used when necessary, companies provide consumers with real redress, and consumers with valid claims get access to legal representation.

3. Short List of Alternatives to Class Actions

The group then generated a list of potential alternatives to class actions, including:

- Companies' provision of a premium to encourage lawyer representation
- Government funding for attorneys
- Better, more accessible legal services
- Beefing up federal regulation
- Increased state regulation
- State attorneys general bringing *parens patriae* suits to protect consumers

4. Online Options

The participants also focused on the relevance of online options. It was stated that consumer advocates and others can use the internet to inform consumers about problems they did not know they had or behaviors they did not know were illegal, but that is not sufficient. There has to be promotion of consumer action and easy, cost-effective access to a forum that will provide a remedy. Companies offering redress need to publicize it. Another idea is that, perhaps once the information is made public, consumers could sell their claims. Third parties could buy many consumers' individual small claims and pursue them individually or in the aggregate. All of these approaches have strengths and weaknesses.

Although some participants firmly disagreed with the acceptability of class action waivers, they acknowledged *Concepcion* as a motivation to consider alternatives that could be implemented by private actors, without the need for federal or state action. They framed their goals as finding ways to foster consumers' ability to seek redress for their small value claims in a way that better the compensatory value of class actions. ODR seems to have particular potential here, particularly for individual claims. There might be actual participation in ODR that would exceed some class action participation rates. At a certain level of participation, lawyers might be able to earn sufficient contingent fees to make assistance to consumers in bringing ODR claims financially viable. A certain level of participation might trigger another form of redress approximating collective or class actions.

Some participants suggested that another option is to structure ODR options so that they do not require legal representation to bring small claims. This could require limiting the types of claims that may be brought through ODR, and stating them in non-legal terms. Unsophisticated consumers looking for relief on a \$500 claim would probably be confused by a list of potential claims that includes express warranty, implied warranty, etc. and uses sophisticated legal language. Rather, the available claims could be more factual—e.g., defective goods, late delivery, charged twice, already paid, etc. Each system could be limited to 8-10 basic claims that can be asserted by ordinary people who are not trained.

5. Considering Other Nations' Approaches

In addition to examining ODR's potential, some participants suggested looking in other parts of the world that do not have class actions, for models to provide consumers with redress. Mexico's ODR initiative and others provide examples of consumer laboratories. They do not just provide incentives for the attorneys but also for companies to create easy-to-use mechanisms such as Trustmarks. France, meanwhile, does not have a class action mechanism, but the French version of the Consumers Union brought a legal action involving tens of thousands of consumer claims. If we use this model, could nongovernmental organizations in the U.S. stand in for consumers and represent them (i.e., third party standing)?

Other options might be to rely on governmental agencies to bring actions on behalf of consumers or to find a way to coordinate separate claims in arbitration that have identical facts and disputes. There might be a way of creating efficiencies if these sorts of cases are substantially the same. Note, however, that arbitrators cannot normally consolidate in the absence of some form of agreement to that effect.

Some of the alternatives raised by participants involve governmental action as a substitute for private action. The U.S., though, tends to incentivize private actors to accomplish the sorts of things that are accomplished through regulation elsewhere. If the U.S. does not find a way to incentivize private actors, we will have to resort to heavy-handed public regulation. And that is unlikely to happen. We have many justice issues resolved in our courts, both in terms of resolving the presenting dispute and announcing a rule of law. How does arbitration generate precedent? Could and should arbitration generate comparable precedent? Will there need to be more demanding judicial review?

6. Rating System/Arbitration Fairness Index/Trustmark

There was considerable discussion about the value to consumers of information about the arbitration process prescribed in an arbitration clause accompanying a consumer product. It was asserted that consumers do not care about arbitration clauses but care very much about the price and quality of the product and any warranties and return policies. Therefore, because most people do not actually read the arbitration provisions and certainly cannot negotiate the terms anyway, there may be merit in having a *Consumer Reports*-like reputable rating system for consumer arbitration procedures, which would not only have an educational component for consumers but also might encourage corporations to strive for better social behavior.

For example, if a respected organization were to rate business arbitration programs on a multi-dimensional rating system and then give a grade or ranking to various companies, the rating system may cause companies with lower ratings to improve their consumer dispute resolution programs. In fact, by publishing the ratings, similar to the Health Department letter grade system that requires the grade be posted in a restaurant's window, consumers will be alerted to a company's relative ranking in the "Arbitration Fairness Index" (see Attachment G) and can avoid dealing with companies with low rankings. It might also be possible for a respected organization or regulatory agency to issue the equivalent of a "Good Housekeeping Seal of Approval" for a

business's consumer dispute resolution system. There was a good deal of interest in providing an incentive for business corporations to adopt consumer-friendly arbitration procedures by developing a public rating system for business arbitration programs, perhaps using the "Trustmark" concept.

7. Published Awards

There was also discussion of the fact that arbitration awards cannot make law and create legal precedent. Several participants expressed the view that it might be good public policy to encourage the publication of arbitral awards, as FINRA does. More arbitration service providers are publishing opinions of arbitrators, which have no precedential value but may have the power to persuade a subsequent arbitrator or judge. It was suggested by one participant that it might be desirable to allow an outcome in arbitration to act as an estoppel or have a preclusive effect in another arbitration proceeding. Another participant expressed a strong desire for more demanding judicial review of arbitral awards, at least under certain circumstances.

The Federal Trade Commission is advocating nationwide reporting and disclosure of debt collection arbitration awards. The FTC is committed to monitoring and evaluating debt collection proceedings and will report to the public regarding its findings.

8. Incentives/Disincentives to Bring Claims

There was also considerable discussion regarding incentives and disincentives for consumers to bring claims against businesses. The availability of attorneys' fees to a successful consumer in arbitration would tend to encourage consumer arbitrations. Likewise, however, there needs to be a disincentive for a consumer to bring a frivolous or unmeritorious claim that can have a negative impact on consumers because the costs of defending such claims are passed on to consumers or consumer-investors in the defendant companies.

A participant mentioned that more attention should be given to final offer arbitration, which is often used in labor disputes. Because the arbitrator would have to choose between the final offer of the consumer and the final offer of the business, this dynamic would promote reasonable positions on the part of disputants, who may be able to settle and never go to arbitration.

9. User-Friendly Online Claims Process

It was also suggested that businesses might be able to decrease claims that go into arbitration by having an easily accessible and transparent on-line claims process. There are promising developments in on-line dispute resolution that, if properly utilized, could significantly reduce the number of arbitration proceedings filed by consumers. In the current UNCITRAL discussions of on-line, cross-border dispute resolution, there is serious consideration of developing a standardized protocol that would allow an arbitrator or arbitration service provider to refer systemic problems to a regulatory authority.

NEXT STEPS AND WORKING GROUPS

The participants in the roundtable engaged in respectful and constructive dialogue regarding a myriad of aspects of consumer dispute resolution. The most contentious issue continues to be the public policy implications of the U. S. Supreme Court's decision in *Concepcion* that class action waivers in consumer arbitration agreements are valid and enforceable under the Federal Arbitration Act.

Importantly, the Planning Committee did not seek consensus of the full group on priorities or particular projects, but it was the sense of the Committee that participants shared some areas of common ground. The Planning Committee considered it noteworthy, for example, that a range of participants expressed interest in working together to make it easier for consumers to identify, raise and present claims that consumers currently find difficult to identify and pursue on their own. (In other words, a range of participants expressed interest in identifying the consumer-initiated claims that could be moved from the third category to the second category terms in the taxonomy of consumer disputes presented earlier in this Summary Report.) Similarly, a range of participants expressed interest in trying to find reasonable ways to assure that class actions are used only when necessary, consumers with valid claims get access to needed information and legal representation, and companies provide consumers with real redress.

Working Groups

The group also identified numerous areas in which empirical research would be useful to guide the design of consumer dispute resolution systems, as well as promising initiatives. (See Attachment F for identification and prioritization.) Obviously, much remains to be done. The participants formed several Working Groups to follow up on promising research and procedural initiatives. Those Working Groups that have achieved a sufficient critical mass of volunteers are listed below. (Chairpersons are noted where they have been determined; chairpersons for the remaining Working Groups will be determined soon.)

- Working Group 1—Identification of the kinds of disputes that are amenable to ODR and development of online dispute resolution platform with a participation mechanism that would trigger another, aggregate form of redress (chaired by Larry Mills and Trish Cowart)
- Working Group 2—Identification of sources of data for information regarding arbitration clauses and programs and identification of categories of contracts that involve arbitration clauses and programs (chaired by Chris Drahozal)
- Working Group 3—Development of private alternatives such as the Arbitration Fairness Index, another form of rating system, mechanism for initiating regulatory monitoring or action (chaired by Tom Stipanowich and Kathy Bryan)
- Working Group 4—Development of final offer arbitration for consumer disputes (chaired by Trish Cowart)
- Working Group 5—Development of options for improved consumer access to attorneys (chaired by Jean Sternlight)

Next Roundtable Meeting (Fall 2012)

Finally, in recognition that the issues involved in consumer dispute resolution cross over into the employment context, the Planning Committee plans a follow-on National Roundtable at Penn State University, Dickinson School of Law in the Fall of 2012 to address employment dispute resolution.

ATTACHMENT A

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ATTACHMENT B

Summary of Pre-Roundtable Interviews with Participants

There was a tremendous depth of knowledge and wide variety of perspectives represented among the attendees at the Roundtable. To prepare for the first workshop and to make our time together as productive as possible, the organizing committee borrowed a best practice often employed in the mediation of broad-based conversations on public policy questions: we had an informal conversation with each of our participants about their perspectives, ideas and suggestions in advance of the Roundtable. We randomly assigned each participant to a member of the organizing committee for a telephone interview. These were confidential interviews. Though we combined everyone's comments in an informal aggregate report, we assured participants that we would not reveal individually identifiable information or attribute comments to anyone. What follows is a general summary of responses to the substantive questions.

1. What are your goals for participating in the Roundtable?

- Learn from others about other forms of arbitration, dispute systems
- Participate in a dialogue with knowledgeable individuals
- Be realistic about advantages and disadvantages of consumer arbitration, class actions, online ODR, other options
- Share information on practical issues, best practices, regulation
- Determine what fair, ethical consumer arbitration looks like
- Reach consensus on actions to improve arbitration of consumer disputes
- Explore mechanisms to provide compensation, detect patterns, deter bad behavior

2. What do you believe are the important questions for us to discuss?

- What is a “consumer dispute”?
- What category of consumer disputes is most important?
- What are the best methods of dispute resolution for the various categories of consumer disputes?
- Who should decide what form of dispute resolution should be used?
- What is the spectrum of choices of dispute resolution processes?
- What are the needs of businesses and the needs of consumers?
- What empirical information do we know about the extent, reality, impact of consumer dispute resolution?
- What information don't we know that would be useful to know?
- Is the real issue in consumer arbitrations the enforceability of class action waivers?
- Can consumer arbitrations be expedited and streamlined?
- What is the role of online dispute resolution (“ODR”), mediation, ombuds, consumer tribunals, integrated conflict management (“ICM”) in resolving consumer disputes?
- On the assumption that nothing in the current legal framework is going to change, what's next?

3. What gaps in knowledge do you think will or should matter to the attendees as they consider the effects and possible changes to consumer arbitration? Is your answer different if you think more broadly—in terms of consumer “dispute resolution”?
 - What is the difference between outcomes of consumer cases in arbitration and in court?
 - Are there claim suppressive effects of class action waivers and procedural requirements of arbitration?
 - How do consumer arbitration processes actually work in practice?
 - How many consumer debt collection claims exist and how are these claims being resolved at this time?
 - Are there workable dispute resolution models that may be able to deliver fairness and speed at a low cost?
 - How effective are consumer class actions?
 - Can consumers get legal representation to pursue claims in litigation or arbitration?
 - To what extent are consumer arbitrations biased in favor of repeat player businesses?
 - Are there examples of class arbitrations [??] that have benefited consumers?

4. What options or possible solutions related to the practice, policy or law of consumer arbitration would you like to see discussed at the Roundtable? Is your answer different if you think more broadly—in terms of consumer “dispute resolution”?
 - Know little about other processes, would like to know more
 - Consumer-friendly arbitration plan (e.g., AT&T model)
 - Consumer-driven arbitration, lemon law-type systems
 - Due Process protocols—recommended, required, incorporated into FAA
 - Collective action—class action, private attorneys general, targeted to health and safety concerns
 - Global small claims online dispute resolution process
 - Default rules for arbitration
 - Arbitration governed by private contract vs. judicial review vs. regulation vs. prohibition
 - Regulation of arbitration, with limitations and conditions, focus on fairness
 - Public-private hybrid
 - Public rating system for arbitration
 - Mediation, hybrids

5. Are there obstacles or barriers to reaching consensus on options or solutions among the group? Please explain.
 - Class action issue
 - We/they attitudes, partisanship, ideology among business and consumer counsel
 - Economic incentive structures for lawyers and their clients
 - Entrenched views on economic efficiency versus procedural rights
 - Disagreement on predispute or mandatory versus post-dispute arbitration
 - Lack of counsel for consumers

6. Are there any forces that are encouraging the development of consensus on options or solutions among the group? Please explain.

- *Concepcion* and Supreme Court Jurisprudence
- Existence of CFPB agency and its legislative mandate and doing a study
- Legislative/judicial stalemate and Congressional gridlock
- Perception that arbitration is unfair to consumers and issue of legitimacy
- Demise of NAF's program; temporary moratorium on debt collection arbitration by AAA,
- Costs of defending arbitration and of volume of consumer disputes nationwide
- Good people with open minds willing to collaborate at Roundtable

7. Is there anything else you would like to add or that you think we should know?

- Let's do more than TALK. Let's get something DONE!
- Let's make the process work for everyone.
- Create space in the hallways for us to talk.
- Need small group work so we can exchange views.
- What happens after the Roundtable?

We also asked what resources participants believed would be helpful to other members of the group, including particularly useful empirical studies, articles, books, reports or other resources. We also asked for examples of successful models used elsewhere to resolve consumer disputes and information about such models that could be provided to the group in a concise way. The responses to these questions resulted in a body of resources that we posted to a folder for the group as a whole. These resources are summarized in a briefly annotated bibliography appended to this report (Appendix A).

Attachment C

List of Resources for the National Roundtable

Statutes

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1028 (2010).

The Dodd-Frank Act directs the Consumer Financial Protection Bureau to conduct a study and provide a report to Congress on the use of agreements providing for arbitration of future disputes between covered persons and consumers in connection with consumer financial products or services. The Act authorizes the Director of the Bureau to prohibit or impose conditions or limitations on such arbitration agreements by regulation if it would be in the public interest, for the protection of consumers, and consistent with the study performed.

Protocols

COMM'N ON HEALTH CARE DISPUTE RESOLUTION, HEALTHCARE DUE PROCESS PROTOCOL (1998), *available at* <http://www.adr.org/sp.asp?id=28633>.

The leading associations involved in alternative dispute resolution, law, and medicine collaborated to form a Commission on Health Care Dispute Resolution and issued this Final Report. The Commission recommends that, with the proper protocols and protections in place, alternative dispute resolution can and should be used to resolve disputes over health care coverage and access arising out of the relationship between patients, health care providers, private health plans and managed care organizations.

NAT'L CONSUMER DISPUTES ADVISORY COMM., CONSUMER DUE PROCESS PROTOCOL (1997), *available at* <http://www.adr.org/sp.asp?id=22019>.

The Consumer Due Process Protocol is a Statement of Principles developed by the National Consumer Disputes Advisory Committee, a national group convened by the American Arbitration Association and consisting of consumer advocates, representatives of attorney general's offices, corporate counsel, agency representatives, scholars and a retired judge. The Protocol is an extensive set of guiding principles covers many different elements of procedural fairness including independent administration, access to information, impartiality and competence of neutrals, costs and awards. The Protocols determined the shape of the AAA's consumer arbitration procedures and have been influential in other ways as well. The accompanying Reporter's Commentary is an extremely valuable resource on procedural fairness issues and standards.

NAT'L TASK FORCE ON THE ARB. OF CONSUMER DEBT COLLECTION DISP., CONSUMER DEBT COLLECTION DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES (2010), *available at* <http://www.adr.org/si.asp?id=6248>.

Under the auspices of the American Arbitration Association ("AAA"), a National Task Force on the Arbitration of Consumer Debt Collection Disputes was convened to consider the efficacy of arbitration to resolve consumer debt collection disputes and to propose fairness and due process standards for the equitable resolution of such consumer debt disputes. The Task Force developed

these Principles to define “due process” or procedural protections above and beyond those that were already contained in the Consumer Protocol.

TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, EMPLOYMENT DUE PROCESS PROTOCOL (1995), *available at* <http://www.adr.org/sp.asp?id=28535>.

The American Arbitration Association’s Employment Due Process Protocol was developed by the Task Force on Alternative Dispute Resolution in Employment as a means of providing due process in the resolution by mediation and binding arbitration of employment disputes involving statutory rights. The Protocol outlines standards for access to information, mediator and arbitrator qualifications, and conflicts of interest to help ensure the efficient and fair resolution of employment disputes.

Reports & Pamphlets

AM. ARBITRATION ASS’N, COMPARISON OF THE AAA HEALTHCARE PAYOR PROVIDER RULES AND THE AAA COMMERCIAL ARBITRATION RULES (2007).

A chart detailing the similarities and differences between the AAA Healthcare Payor Provider Rules and the AAA Commercial Arbitration Rules, including procedures for filing a claim, the selection of arbitrators, and the dissemination of awards.

AM. BAR ASS’N SECTION OF DISPUTE RESOLUTION, REPORT OF THE DISCUSSIONS OF THE CONSUMER ARBITRATION STUDY GROUP (January 15-16, 2010, Washington D.C.).

The American Bar Association Section of Dispute Resolution (“the Section”) decided to bring together a small group to talk about interests and options to ensure that consumers have reasonable access to an effective and affordable dispute resolution process. “The Consumer Arbitration Study Group” was formed to educate the Section on issues regarding consumer access to justice. The resulting action report explores the current landscape of consumer access to justice and advises the Section on the role it may play in this process.

AM. BAR ASS’N TASK FORCE ON PRESERVATION OF THE JUSTICE SYS., REPORT TO THE HOUSE OF DELEGATES.

The American Bar Association Task Force on Preservation of the Justice System issued a report on the current crisis of under-funding of our courts. The report urges state, territorial, and local bar associations to document the impact of funding cutbacks to the justice systems in their jurisdictions, to publicize the effects of those cutbacks, and to create coalitions to address and respond to the ramifications of funding shortages to their justice systems. A multi-pronged approach to dealing with this crisis is needed, including the fostering of alternative dispute resolution programs.

COUNCIL OF ECON. ADVISERS, WHO PAYS FOR TORT LIABILITY CLAIMS? AN ECONOMIC ANALYSIS OF THE U.S. TORT LIABILITY SYSTEM, (2002).

This paper pursues an analogy between inefficient tort litigation and taxes, and examines the question of “who pays” for excessive tort costs. It finds that the cost of excessive tort may be quite substantial, with intermediate estimates equivalent to a 2 percent tax on consumption, a 3 percent tax on wages, or a 5 percent tax on capital income. As with any tax, the economic burden of the “tort tax” is ultimately borne by individuals through higher prices, reduced wages, or decreased investment returns.

FED. TRADE COMM'N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 41-43 (2010), *available at* <http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf>.

The Federal Trade Commission concludes that neither litigation nor arbitration currently provides adequate protection for consumers. Federal and state governments, the debt collection industry, and other stakeholders should make a variety of significant reforms in litigation and arbitration so that the system is both efficient and fair. Consumers should be given meaningful choice about arbitration, arbitration forums and arbitrators should eliminate bias and the appearance of bias, and arbitration forums should conduct proceedings in a manner which makes it more likely consumers will participate.

Rebecca Love Kourlis, Executive Dir., Inst. for the Advancement of the Am. Legal Sys., Univ. of Denver, Written Statement on The Costs and Burdens of Civil Discovery before the Subcommittee on the Constitution, Committee on the Judiciary, United States House of Representatives (Dec. 13, 2011), *available at* <http://www.du.edu/legalinstitute>.

The Executive Director of IAALS, the Institute for the Advancement of the American Legal System at the University of Denver, presents the significant research IAALS has conducted on the costs, delays and gamesmanship that plague the civil litigation process. In controlling the costs of discovery, IAALS' focus is on rules changes, which it believes must comprise part of the solution in order to avoid the expenditure of unnecessary time and money.

Memorandum by the N.Y. State Bar Ass'n. Dispute Resolution Section, Comments to the Consumer Financial Protection Bureau in Connection with its Review of Arbitration for Consumer Financial Products or Services (April, 2011).

This report is submitted by the Dispute Resolution Section of the New York State Bar Association to provide background and highlight issues the Consumer Financial Protection Bureau may wish to consider in responding to the Congressional mandate under the Dodd-Frank Act. The report finds that assessment of the public interest should include consideration of fairness to consumers, as well as the impact of any changes on price setting by affected businesses, potential impacts on the economy, the impact on the courts, and the impact on global competitiveness.

SEARLE CIVIL JUSTICE INST. TASK FORCE ON CONSUMER ARBITRATION, NORTHWESTERN LAW SCH., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION (2009).

The Searle Civil Justice Institute, based at Northwestern University School of Law, issued this executive summary detailing the results of a large-scale study of consumer arbitrations administered by the American Arbitration Association. Empirical evidence has become a central focus of the policy debate over consumer and employment arbitration and this study attempts to fill gaps in the empirical record. The executive summary outlines the key findings of the study and discusses the policy implications.

SEC. INDUS. AND FIN. MKTS. ASS'N, WHITE PAPER ON ARBITRATION IN THE SECURITIES INDUSTRY (2007).

Securities arbitration affords investors the opportunity to have their claims heard close to home, before highly trained and experienced arbitrators, in a forum that has proven to resolve disputes at least as fairly as the judicial system, and much faster and less expensively. As Congress recognized approximately twenty years ago, securities industry arbitration serves the interests of both investors and the industry; this paper argues it should not now disrupt a system that not only

continues to work well, but also continues to provide an ever-expanding array of safeguards for investors.

Periodical Materials: Journal & Magazine Articles

Lisa Blomgren Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221 (2004).

Critics have identified a series of concerns regarding the fairness of mandatory arbitration systems, yet this article argues that mandatory arbitration is not itself the problem. The problem is instead that in some instances, one party to the dispute has exclusive control of the design of the dispute-resolution system. Consequently, research on mandatory arbitration should concentrate on who is structuring it, how they structure it, why this is so, and how these choices affect dispute outcomes.

Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RES. 1 (2009).

This article introduces the field of institutional analysis and design in social science and surveys how scholars have discussed varieties of justice in relation to legal institutions and other systems for managing conflict. It is concluded that the most significant issues for the future are becoming more mindful of how designing institutions and systems to manage conflict affects justice, moving more knowingly and intentionally to assess justice in DSD, and teaching the next generation of lawyers how to serve ethically in their new role as designers of justice.

Stephen J. Choi & Theodore Eisenberg, *Punitive Damages in Securities Arbitration: An Empirical Study*, 39 J. LEGAL STUD. 497 (2010).

This article provides the first empirical analysis of punitive damages in securities arbitrations and finds that the pattern of punitive awards is more consistent with a traditional view of punitive damages that incorporates a retributive component than with a law and economics emphasis on efficient deterrence. Also tested was whether securities arbitration results in different punitive damages compared with litigation before juries and judges. The relation between punitive and compensatory awards did not differ substantially between the securities arbitrators' data and data on juries.

Sarah Rudolph Cole, *On Babies and Bath Water: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457 (2011).

The proposed Arbitration Fairness Act amendments to the FAA extend the moratorium on predispute arbitration agreements to consumers, yet these changes do not remedy arbitration's shortcomings. Rather than attempt to eliminate arbitration in its entirety, a better approach would be to amend the FAA to permit class action arbitration, or to prohibit businesses from precluding class action arbitration or class actions in court through the use of a predispute arbitration agreement.

Sarah R. Cole and Theodore Frank, *The Current State of Consumer Arbitration*, 15 DISP. RES. MAG. 30 (2008).

Although problems with consumer arbitration exist, this review of the available empirical evidence suggests that claims by Public Citizen and others that consumer arbitration is inherently unfair to consumers are overstated. Contrary to these claims, the data suggest that compared to litigation, arbitration is a relatively inexpensive and fair mechanism that produces positive outcomes for consumers.

Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. OF EMPIR. L. STUD. 1 (Mar. 2011).

This article examines outcomes of employment arbitration, finding that employee win rates and award amounts resulting from arbitration were lower than those reported in employment litigation trials. The study also analyzed whether there is a repeat player effect in employer arbitration, finding strong evidence of a repeat employer effect in which employee win rates and award amounts are significantly lower where the employer is involved in multiple arbitration cases.

Scott Cooper, et al., *From Lex Mercatoria To Online Dispute Resolution: Lessons From History In Building Cross-Border Redress Systems*, 43 UCC L. J. 749 (2011).

This article examines the 12th century system of Lex Mercatoria, a merchant court system of adjudication for “global” trade that served the needs of merchants for quick and fair resolutions of disputes and the needs of dukes and kings because it created a trusted system that induced trade, and thus taxes, that would not exist otherwise. Much like the expansion of cross-border trade in the 12th century, the current growth of electronic and mobile commerce has created millions of cross-border disputes that require reliable resolution systems. The lessons learned throughout history can provide helpful guidance in determining how best to build the global resolution systems of tomorrow that ensure that cross-border transactions in electronic and mobile commerce will be adjudicated quickly, fairly and cheaply.

Louis Del Duca, et al., *Facilitating Expansion of Cross-Border E-Commerce - Developing A Global Online Dispute Resolution System*, (The Pa. State Univ. Legal Studies, Research Paper No. 25, 2011) available at

<http://ssrn.com/abstract=1970613> or <http://dx.doi.org/10.2139/ssrn.1970613>.

This article explores the lessons to be derived from existing online dispute resolution systems in developing a global online dispute resolution system. As the prevalence of the internet and e-commerce grows, there is an increasing need for online dispute resolution that can handle low value, high volume fast track claims fairly and efficiently.

Linda J. Demaine & Deborah R. Hensler, *“Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience*, 67-SPG LAW & CONTEMP. PROBS. 55 (Thomas B. Metzloff, ed. 2004).

The purpose of this article is to help build the empirical foundation necessary for an informed debate regarding arbitration clauses in consumer contracts by providing preliminary insight into how businesses' use of these clauses affects consumers' ability to pursue their legal rights. The article reports the results of a study investigating, in a wide variety of consumer purchases, the frequency with which the average consumer encounters arbitration clauses, the key provisions of these clauses, and the implications of these clauses for consumers who subsequently have disputes with the businesses they patronize.

Jo DeMars, et al., *Virtual Virtues Ethical Considerations for an Online Dispute Resolution (ODR) Practice*, DISP. RESOL. MAG., Fall 2010, at 6.

This short article describes several types of ethical dilemmas online dispute resolution (ODR) practitioners encounter and presents solutions neutrals can utilize to ameliorate them, either through education or systems design.

Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (and Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433 (2010).

Recent scholarship contends that arbitration is failing in its attempts to compete with litigation in attracting customers and when it does succeed, such as with businesses that include arbitration clauses in their consumer contracts, that it has done so illegitimately, such as by enabling businesses to evade class actions and other forms of aggregate relief. However, we caution against expanding this conclusion to businesses in industries these scholars did not study, and this article contends that Eisenberg et al. are too quick to dismiss non-class reasons why other businesses use consumer arbitration clauses.

Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843 (2010).

This article presents results from the first detailed empirical study of consumer arbitration as administered by the AAA and considers such issues as the costs incurred by consumers in arbitration, the speed of the arbitral process, and the outcomes of the cases. The results found no statistically significant repeat-player effect using a traditional definition of repeat-player business. Utilizing an alternative definition of repeat player, some evidence of a repeat-player effect was identified; the data suggest this result may be due to better case screening by repeat players rather than arbitrator bias or other bias in favor of repeat players.

Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77 (2011), available at <http://www.uchastings.edu/hblj/docs/Drahozal.pdf>.

This article examines the outcomes of AAA debt collection arbitrations, as well as the outcomes of debt collection cases in court. The research provides possible insights into how consumers might fare if debt collection cases are resolved in court instead of in arbitration and adds new information to the policy debate over consumer arbitration. Nothing in the study provides any evidence of biased outcomes in arbitration, with the outcomes observed appearing to be the result of the type of case being adjudicated, rather than differences between arbitration and litigation.

Theodore Eisenberg, et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008).

This article is a study of the varying use of arbitration clauses across contracts within the same firms, comparing the use of arbitration clauses in firms' consumer and nonconsumer contracts. The results found the absence of arbitration provisions in the vast majority of material contracts, suggesting that many firms value, even prefer, litigation over arbitration to resolve disputes with peers. The frequent use of arbitration clauses in the same firms' consumer contracts may be an effort to preclude aggregate consumer action rather than an effort to promote fair and efficient dispute resolution.

Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. (forthcoming 2012).

While following *AT&T* some plaintiffs will be able to successfully challenge class waivers under certain circumstances, most class cases will not survive the impending tsunami of class action waivers. As this great mass of consumer protection, antitrust, employment and other cases is swept away, this article suggests that state attorneys general are now uniquely positioned to represent the interests of their citizens in the very cases that have long provided the staple of private class action practice.

Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174 (2010), available at <http://digitalcommons.pace.edu/plr/vol30/iss4/5>.

This essay argues that, because securities arbitration is markedly different from other forms of consumer arbitration, the SEC should not exercise its new power to ban pre-dispute arbitration agreements in securities customer account agreements, nor should Congress, if it passes the AFA, extend it to encompass arbitration of securities customer disputes. FINRA arbitration, whose fairness is regulated with substantial oversight by the SEC, does not suffer from the same features and flaws that critics of arbitration in other forums have excoriated as oppressively unfair and eliminating mandatory securities arbitration would have significant adverse consequences for investors and for the vitality of the dispute resolution mechanism.

Jill I. Gross and Barbara Black, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RESOL. 349 (2008).

This study gathers empirical research of perceptions of fairness by the participants, especially investors, in securities arbitrations. The study concludes that investors have a far more negative perception of securities arbitration than all other participants, investors have a strong negative perception of the bias of arbitrators, and investors lack knowledge of the securities arbitration process. Customers' negative perceptions transform the reality faced by policy-makers and mandate reform of the process, including the elimination of the industry arbitrator requirement and further public deliberation on the value of the explained award.

Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872 (2006).

This article raises questions about the proper relationship between aggregation and underlying substantive law. By regarding aggregation from the standpoint of institutional authority, the law may discern with greater precision when class settlement pressure is illegitimate and when it raises no normative concern, and help to pinpoint the questions that courts should ask when confronted with challenges to waivers of class-wide arbitration. The essay closes by relating these topics to an emerging debate over the application of choice of law principles to proposed nationwide class actions in the federal courts, pursuant to the Class Action Fairness Act of 2005.

Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. (forthcoming 2011), available at http://ssrn.com/abstract_id=1670722.

This article takes the contrast between *Shady Grove* and *Stolt-Nielsen* as a point of departure for a broader engagement of the relationship between litigation and arbitration. The article then steps back from doctrine to reflect in broader institutional terms upon the litigation-arbitration dichotomy, creating a much needed dialogue to inform both judicial decisions and any future engagement by Congress with proposed amendments to the FAA.

Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78 (2011), available at <http://ssrn.com/abstract=1946328>.

This article examines three Supreme Court cases, *AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers*, in which Justices evaluated the fairness of particular procedures when making choices about the meaning of governing legal regimes. Courts have to grapple with economically disparate claimants and a vast volume of eligible rights holders, and if constitutional entitlements to open courts are to remain relevant to ordinary litigants, the question is not whether to aggregate, subsidize, and reconfigure process, but how to do so "fairly," in terms of what groups, which claims, by means of which procedures, and offering what remedies. Without public disclosures and oversight of dispute resolution, in and out of court, single file and aggregated, one has no way to know whether fairness is either a goal or a result.

Colin Rule, *Making Peace on E-Bay: Resolving Disputes in the World's Largest Marketplace*, AC RESOL. MAG., Fall 2008, at 8.

This article explores the expanding need for online dispute resolution (ODR) and predicts that as information and communication technology expands, the field will grow. The author uses his experience of designing an ODR system for eBay to explain how ODR can be a successful solution for both businesses and consumers.

Colin Rule and Chittu Nagarajan, *Leveraging the Wisdom of Crowds: The E-bay Community Court and the Future of Online Dispute Resolution*, AC RESOL. MAG., Winter 2010, at 4.

While the number of online disputes has risen with the expansion of the internet, online dispute resolution (ODR) systems remain limited. Such systems have had trouble with speed, manpower, and pricing for settling often very low value disputes. eBay's ODR system is explored as a model for overcoming these ODR system hurdles.

Colin Rule, et al., *Designing a Global Consumer Online Dispute Resolution (ODR) System for Cross-Border Small Value-High Volume Claims—OAS Developments*, 42 No. 3 UCC L. J. ART 1 (2010).

This article explores a recent proposal that has been made at the Organization of American States (OAS) regarding the creation of a regional online dispute resolution (ODR) system to handle cross-border e-commerce disputes. As similar initiatives are taking root elsewhere in the world as well, the timing might be right for the creation of a global ODR system. This article details the challenges confronting the design of a global consumer ODR system, and offers details about the proposed ODR process flow that is being advanced at the OAS.

Amy J. Schmitz, *Arbitration Ambush in a Policy Polemic*, 3 PENN ST. YEARBOOK ON ARB. & MEDIATION 52 (2011).

This article discusses the competing arbitration policies of the Court and legislators, and urges a truce in the policy polemic through adoption of an alternative to all-or-nothing enforcement of arbitration contracts. Instead, companies should remain free to require arbitration in their business to consumer contracts, conditioned on their compliance with clear procedural fairness rules.

Amy J. Schmitz, *Curing Consumers' Warranty Woes Through Regulated Arbitration*, 23 OHIO ST. J. ON DISPUTE RESOL. 627 (2008), available at <http://ssrn.com/abstract=1270827>.

This article proposes legislative procedural reforms accounting for the realities of consumer arbitration that have threatened and denied consumers' access to remedies for companies' violations of public, or statutory, warranty remedies under the Magnuson-Moss Warranty Act (MMWA). The article proposes to clarify and expand the MMWA's current dispute resolution template in order to resolve judicial disagreement regarding the template's application and foster beneficial use of binding arbitration.

Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR*, 2010 BAYLOR L. REV. 178 (Winter 2010).

This Article explores the potential for binding online arbitration to resolve consumers' disputes with online merchants. Binding online arbitration's finality, binding nature, and evidentiary focus sets it apart from other online processes. When properly regulated, binding online arbitration can empower consumers with cost-effective and fair access to remedies on their e-contract claims, while fostering companies' cost savings and efficiency benefits from avoiding court and class actions.

Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115 (2010).

This article focuses on how varied research, including the author's own empirical studies, may inform policies regarding arbitration disclosure regulations. The article also offers suggestions for regulations tailored to have the most impact for the cost in light of this research.

David. S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009).

This article argues there is no "fairness" justification for imposing a dispute resolution system through adhesion contracts. The economic incentives of the mandatory arbitration system only work by reducing the prospects of plaintiffs with high-cost/high-stakes cases. And while shifting the empirical "burden of proof" onto critics is clever rhetorical strategy, in fact it is the egalitarian argument for mandatory arbitration that is empirically unfounded as well as illogical.

Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005).

This article examines the phenomenon of mandatory binding arbitration in the United States, analyzing its actual impact on individuals, as well as its broader societal impact. The conclusion reached is that while informal private processes such as arbitration are not inherently unjust, mandatory arbitration is problematic both because of its lack of consent and lack of public scrutiny.

Jean R. Sternlight, *Tsunami: AT&T Mobility v. Concepcion Impedes Access to Justice*, OR. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1924365>.

This essay explores the *AT&T Mobility v. Concepcion* decision, how it is being interpreted by lower courts, the decision's impact on parties to such litigation, and how, if not legislatively limited, this case will substantially harm consumers, employees, and perhaps others. By permitting companies to use arbitration clauses to exempt themselves from class actions, *Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued.

Thomas J. Stipanowich, *Behind the Neutral: The Critical Role of Provider Institutions*, in AM. ARB. ASS'N, HANDBOOK OF COMMERCIAL ARBITRATION 47 (Thomas Carbonneau & Jeanette A. Jaeggi eds., 2010), available at <http://ssrn.com/abstract=1982221>.

Providers play a primary role in determining the quality of the user's ADR experience. Yet providers often enjoy immunity, raising the question of alternative ways to ensure accountability. Provider institutions are in a position to do great good, or to do ill, and fairness concerns have stimulated a variety of private as well as public responses.

Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, U. KAN. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=2004543>.

The Arbitration Fairness Index would be an "independent, standardized, third-party assessment" of arbitration under the auspices of specific corporate consumer contracts or individual employment agreements. An Arbitration Fairness Index would help educate the public and would shed additional light on the policies and practices of organizations providing arbitration services, creating incentives to businesses to develop and maintain fair, effective programs. Several existing norms that could provide the foundation for an Index and a possible template that would grade consumer and employment programs on each of twenty-three elements are outlined.

Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323 (2012), available at <http://ssrn.com/abstract=1919936>.

This article examines three recent Supreme Court decisions which reflect the increasingly extreme pro-arbitration slant of the Court, which has vastly expanded the power of companies to impose and control arbitration procedures while tying the hands of state legislatures and courts. These decisions raise concerns about boilerplate provisions directing consumers and employees into arbitration and are fundamentally out of line with the broad run of national laws limiting or regulating the use of arbitration in the contracts for consumer goods and services, or in individual employment contracts. The article also examines recent Congressional legislation and proposed enactments, summarizes legal standards affecting arbitration agreements in consumer and employment contracts in other countries, and reviews what we know and don't know about the resolution of consumer and employment disputes. It concludes by calling for carefully crafted legislation or administrative regulations limiting or regulating the use of arbitration agreements in consumer and employment contracts.

Thomas J. Stipanowich, "Considering the Future of Arbitration in the Context of a Broader Dialogue Regarding Consumer and Employment Disputes," excerpt from *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 421-434 (2012).

This excerpt from Thomas J. Stipanowich's *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, explores the future of arbitration in the context of disagreement over the ability of binding arbitration to provide justice for consumers and employees. In assessing process options, policymakers should consider the potential future role of statutory due process standards for arbitration, regulated arbitration, and arbitration that gives individuals the option of proceeding to court. Special attention should be given to the opportunities afforded by online dispute resolution ("ODR") and to the primary hot-button issue, the role of class or collective action.

Nancy Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to Do with It?*, 79 WASH. U. L. Q. 787 (2001).

This article argues that, particularly within the context of the courts, mediation should be expected to deliver to disputants an experience of procedural justice, which affects disputants' perceptions of the distributive justice that is delivered by a dispute resolution process, their compliance with the outcome, and their perceptions of the legitimacy of the institution providing the process. The research findings from the procedural justice literature are applied to the current evolution of court-connected mediation and analysis reveals that changes that streamline bargaining are not necessarily inconsistent with procedural justice considerations.

Nancy A. Welsh, *Perceptions of Fairness in Negotiation*, in THE NEGOTIATOR'S FIELDBOOK 165 (Andrea K. Schneider & Christopher Honeyman, eds., 2006).

Because fairness perceptions are so significant in understanding people's negotiating behaviors, this essay examines the criteria that undergird differing fairness judgments - both distributive and procedural - and the social, psychological and cognitive variables that influence people's perceptions of fairness.

Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. OF LEGAL EDUC. 49 (2004).

This article examines the role that procedural and social justice play in dispute resolution. The author calls law teachers to infuse dispute resolution courses with a commitment to both resolution and justice, emphasizing that real resolution and peace can only be achieved if justice is also considered.

Nancy A. Welsh, *The Place of Court-Connected Mediation in a Democratic Justice System*, 5 CARDOZO J. CONFLICT RESOL. 117 (2004).

This article considers mediation as just one innovation within the larger evolution of the judicial system of the United States. It goes on to suggest that today's sprawling and multi-tiered structure is increasingly disengaged from its democratic roots and examines the place of court-connected mediation in this evolution.

Nancy A. Welsh, *What is "(Im)Partial Enough" in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 395 (2010).

As dispute resolution becomes a lucrative private business, the corrupting influence of repeat business and money on the ability of embedded neutrals to remain fair and neutral has become a concern, while the Supreme Court has encouraged deference to the decisions and settlement agreements these neutrals produce. This Article explores whether the analysis in *Caperton v. A. T. Massey Coal Co.* and its antecedents could be applied to assess the sufficiency of the impartiality offered by embedded neutrals and private dispute resolution organizations when they are treated as adequate—and sometimes superior—replacements for independent and public trial courts.

Working Papers/Works in Progress

Christopher R. Drahozal & Peter B. Rutledge, *Arbitration and Consumer Credit*, (Univ. of Kan. Sch. of Law, Working Paper No. 3, 2011).

This paper uses a database of consumer credit card agreements to take the first, in-depth empirical look at why credit card issuers use arbitration clauses and finds that, while most credit card loans outstanding are subject to cardholder agreements with arbitration clauses, the substantial majority of credit card issuers do not use arbitration clauses in their credit card agreements. Credit card issuers are more likely to use arbitration clauses when they specialize in making credit card loans, make riskier credit card loans, and have a larger credit card portfolio. These empirical findings have important implications for policy questions, such as: how increased regulation of arbitration might affect the market for consumer credit and how businesses are likely to respond to the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*.

Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration* 44-45 (Univ. of Kan. Sch. of Law, Working Paper No. 2011-04), available at <http://ssrn.com/abstract=1904545>.

This article reports the results of the first empirical study of the AAA's enforcement of its Consumer Due Process Protocol and finds that the AAA's review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations. The findings support the proposition that private regulation by the AAA complements existing public regulation of the fairness of consumer arbitration clauses and any consideration of the need for future legislative action should take into account the effectiveness of this private regulation.

Paul J. Hinton & David L. McKnight, *Creating Conditions for Economic Growth: The Role of the Legal Environment* (U.S. Chamber Inst. For Legal Reform, Working Paper, 2011).

This study showed how liability costs vary by state and how great potential cost savings could be from incremental improvements in the legal environment in individual states. By simply raising the bar in the states with the costliest legal environments, and achieving savings that some states have already been able to achieve, tort costs in individual states could be reduced by up to 26%. Changes in the legal environment may be hard to achieve and may only be realized over many years; however, the results of this study show that improving the legal environment would lower tort costs and could materially increase employment.

Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice* (work in progress Sept., 2011).

This article provides an examination of the use of arbitration clauses in credit card agreements. It examines trends in the use of arbitration clauses, exploring to what extent issuers provide for arbitration of disputes and cardholders opt out of the obligation to arbitrate. It then takes a detailed look at the provisions included in arbitration clauses in credit card agreements and compares the use of arbitration clauses in business credit card and deposit account agreements to the use of arbitration clauses in consumer credit card and deposit account agreements.

Unpublished Materials

AT&T ARBITRATION AGREEMENT.

This section of the AT&T consumer contract spells out that any disputes arising between AT&T and the customer are to be resolved by binding arbitration or small claims court, rather than in courts of general jurisdiction. The agreement requires waiving one's right to a trial by jury and prohibits class actions and class arbitrations.

DATA COLLECTION, QUESTIONS COLLECTED, NAT'L CONSUMER & EMPLOYMENT ARBITRATION ROUNDTABLE, PEPPERDINE UNIV. (Feb., 2012).

Roundtable participants discussed possible sources for data collection and developed questions on the subject of consumer and employment arbitration where more research was needed.

MODEL ARBITRATION ACT.

The Model Arbitration Act, developed by group associated with the National Academy of Arbitrators and headed by Lewis Maltby, outlines due process requirements to be met in order for an agreement to arbitrate an employment or consumer dispute to be enforceable. The right to counsel, statute of limitations, discovery, neutrality, fees, and class actions are some of the topics discussed.

Thomas J. Stipanowich, Proposal for an "Arbitration Fairness Index": A Rating System for Consumer and Employment Arbitration Programs (2012).

The Arbitration Fairness Index would be an "independent, standardized, third-party assessment" of arbitration under the auspices of specific corporate consumer contracts or individual employment agreements. Developed and implemented by a respected institution with broad-based input, perhaps coupled with highly visible ratings and rankings that hold up appropriate programs to public acclaim or public shame, an Arbitration Fairness Index would help acquaint and educate the public regarding the impact of class action waivers and other terms on consumer or employee rights and would provide a basis for comparison among programs. It would shed additional light on the policies and practices of organizations providing arbitration services, creating incentives to businesses to develop and maintain fair, effective programs.

TRANSCRIPTION OF BRAIN DUMP ON DATA QUESTIONS, NAT'L CONSUMER & EMPLOYMENT
ARBITRATION ROUNDTABLE, PEPPERDINE UNIV. (Feb., 2012).

A series of questions were posed by participants of the National Consumer and Employment Arbitration Roundtable and then transcribed. Participants discussed information they wanted access to and current trends in arbitration they believed were interesting or in need of greater research. Topics included class actions, cost/benefit analysis, online dispute resolution and fairness.

ATTACHMENT D

Summary of Presentations Regarding Existing Consumer Dispute Resolution Programs and Models

Keeping in mind the taxonomy and elements of dispute system design, the group discussed the following processes, programs and models for the resolution of consumer disputes:

American Arbitration Association Consumer Arbitration: The AAA supports the use of arbitration to resolve a broad range of dispute types, but does not actively seek to administer consumer arbitration caseloads. The AAA's administration of consumer arbitration is guided by the Consumer Due Process Protocol and the AAA's Consumer Rules Supplement. The AAA uses a fee schedule for consumer claims, with most fees paid by businesses. For a claim of less than \$10,000, the consumer pays a fee of \$125. This payment goes to the arbitrator, and if the case settles, the consumer receives reimbursement of the fee. The business pays \$750, plus an additional fee if the case goes to hearing. For a claim of more than \$10,000, the fee to the consumer is \$375. There is also a hardship waiver. Consistent with the Due Process Protocol, consumers can opt to go to small claims court if the jurisdictional requirements are met. The locations for arbitrations are available throughout the country and thus convenient to the consumer; consumers have the right to representation; all remedies must be made available if they are made available in court; and there is no waiver of punitive damages. Importantly, AAA reviews arbitration clauses for their compliance with the Due Process Protocol. When AAA has found deviation from the Protocol, it has rejected cases or has required the company to agree to correct deficiencies. In AAA's experience, most of these cases are filed by consumers. AAA handled 1,400 such cases last year; the previous year, it handled 1,100. The cases can be difficult to administer in part because of the burdens associated with them (e.g., associated lawsuits, subpoenas).

JAMS Consumer Arbitration. JAMS has minimum standards applicable to arbitration involving consumers. JAMS does not have different fees applicable to consumer disputes. If a consumer files, he or she pays \$250; if company files, the consumer pays nothing. This is the fee for matters under \$250,000. Arbitrators then charge \$500-600 an hour. JAMS does not handle debt collection matters. Since *Concepcion*, JAMS has also experienced a rash of consumer demands for arbitration hearings.

Place of Arbitration in Traditional Debt Collection Industry. Most of the debt collection industry operates in a manner that is fundamentally fair, straightforward, and makes common sense. Arbitration is not needed for most debt collection matters because most debtors do not deny that they owe the debt. There is no need to resolve a dispute, but rather a need to determine a repayment program. If the action has been brought against the wrong party, there is primarily a need to determine the correct party, not arbitrate. The extremely high rate of default in both litigated and arbitrated matters suggests that there is not a dispute to be adjudicated. The cost of arbitration also is disproportional to the size of the claims. Arbitration can cost \$1,000 for a small case while the cost of filing the same case in court is \$300. Meanwhile, relevant statutes of limitations and costs of enforcement do not favor arbitration—i.e., the credit card statute of limitation is five years long while only one year is provided to enforce an arbitral award, and the

creditor still has to go to court for enforcement and to pursue garnishment. The only reason to use arbitration rather than courts for debt collection is the potential for limiting class actions.

Debt Collection Litigation and Arbitration. The report, *Repairing a Broken System*, was published by the FTC in July 2010. Even though many consumers unfortunately think that reality TV accurately depicts small claims court and courts suffer from clogged dockets, consumers remain more familiar with the courts than arbitration and perceive the courts as unbiased. There are significant problems with the notice provided to consumers in debt collection matters. Often debtors do not respond even if served with notice, but there are also examples of failure to provide service. There are also problems with the proportionality of filing fees. A fee of \$150 is reasonable for a \$10,000 claim but not for a \$500 claim. In California, parties filing claims pay only \$10 for their first six claims, but pay up to \$500 for subsequent filings. Consumers also are unaware of available affirmative defenses and unlikely to pay for legal assistance to discover them. An example is the statute of limitations defense that is available when collection agencies sue for time-barred debt. The cost and time required to defend against a debt collection claim may help to explain the high default rate. An hourly worker will have to take time off from work to attend court, and may find the action continued. It is important to consider what an agency such as the FTC can do that is not possible for consumers. For example, if a franchisor is making grossly deceptive statements regarding profitability but the franchisor points to the integration clause in the franchise agreement, this represents a very strong defense to a standard breach of contract claim. If the FTC is made aware of a pattern of these sorts of allegations, however, the agency can pursue the franchisor for unfairness or deception or violation of federal consumer protection statutes.

FINRA Securities Arbitration. The Financial Industry Regulatory Authority (FINRA) was created through the merger of the regulatory, examination, and dispute resolution functions of NASD and NYSE. It is a self-regulatory organization (SRO) which is also highly regulated by the SEC and, at times, the GAO. The SEC conducts routine examinations of FINRA's programs. Every rule adopted by FINRA for its arbitration forum (e.g., fee adjustments, discovery deadlines, processes for selection of arbitrators) is subject to notice and comment and must be approved by SEC before it can become effective. The SEC is guided by its enabling statute which requires it to consider investor protection. Everyone who sells securities to the public—brokerage firms and broker-dealers, not issuers--must be a member of FINRA and comes within its jurisdiction. FINRA's rules require all firms and individual brokers to arbitrate through FINRA at the election of the investor. One third of FINRA's arbitrations involve intra-industry claims (intra-firm, employer-employee), while remaining two-thirds are investor cases, with most initiated by the investor. Very few brokerage firms initiate claims against an investor, for example, to collect margin debt. In 1987, the Supreme Court ruled that the Security Exchange Act of 1934 did not preclude firms from requiring investors to agree to arbitration as a condition of doing business with the firm. FINRA handles 4,400 to 9,000 claims annually; the number of claims is generally inverse to the fortunes of the S&P500. Although FINRA does not require customers to enter into predispute arbitration clauses, it has certain protective requirements for such agreements. For example, FINRA does not permit class action waivers. There is pending litigation and disciplinary action on this issue. FINRA also does not permit limits on punitive damages or the inconvenient location of the forum. FINRA has an elaborate process for the selection of arbitrators in which investors participate equally with firms. For claims of up to

\$100,000, one public arbitrator will preside; for claims over \$100,000, there are three arbitrators. They may be all public or majority public (i.e., two public arbitrators and one industry arbitrator)—at the election of the investor. FINRA has 72 hearing locations with at least one in each state so that there is venue near the customer’s residence. FINRA handles the service of process for the investor. The fee structure favors investors, with the industry paying in the aggregate about 75% of the cost of running the forum, while investors pay 25%; FINRA will waive the investor’s fee upon showing of need. Firms may not move to dismiss an investor’s claim until the investor has presented its case in chief. This rule was instituted after FINRA found there were repetitive motions to dismiss that were delaying the hearing and costing investor substantial funds to defend. If there is a close call on the removal of an arbitrator for bias, the presumption favors the investor. With some limited exceptions for bankruptcy or moving to vacate, FINRA will suspend a brokerage firm or broker that fails to pay an arbitral award within 30 days. FINRA has extensive rules regarding discovery, including lists of documents that are presumed discoverable. FINRA has also funded and works with law school clinics to help investors whose claims are too small to attract legal representation. FINRA’s largest arbitral award was for \$400 million. All awards are made public through a free, easily accessible online database; the information can be accessed by arbitrator name, party and legal counsel names, date, case number or name, or subject matter, such as punitive damages.

Class Actions. Class action procedures are no longer peculiar to the U.S., although in other countries, associations sue on behalf of consumers. Defendants favor this device if it permits mass closure on claims in which liability is clear. Defendants disfavor the device, however, if there are many small claims. Consumers with small claims, however, need the device because they are unlikely to be aware of violations of the law and cannot afford to hire a lawyer. Empirical data suggests that courts are being careful in their management of class actions, and many such cases are not certified and therefore disappear. Rand and FJC studies found that only 12% of claims filed as class actions ever proceeded past the initial stages; the vast majority were dismissed, many on summary judgment with only a small percentage proceeding to certification. Indeed in most instances, these cases were certified at the request of defendants and plaintiffs for purposes of settlement only, with no decision on the merits. Data does not support the sense that the country is awash in class actions and that all are settled due to plaintiffs’ blackmail strategies. The time period when these studies were conducted matters, of course, as class action jurisprudence has evolved. Despite this lack of empirical support, defendants generally express ongoing resistance to the class action device in the U.S. and its spread elsewhere. Of course, the insertion of arbitration clauses now permits class waiver. There could be real value in agencies’ close examination of consumer contracts, especially if their informed consent is assumed—i.e., examining reasonableness of provisions (cost of arbitration, location of forum, etc.), language of provisions, whether consumers should be expected to understand them, etc. There are also reasonable due process concerns about arbitrators who are selected and paid by parties then making complex procedural determinations and determinations regarding the selection of class counsel, class representatives, payment of fees to attorneys, etc.

Consumer Dispute Resolution Under the Magnuson Moss Act. The statute applies to actions for defects and warranty claims and provides for “informal dispute resolution.” Different states have adopted different lemon law programs as a result. The Act has been interpreted by the FTC, though, to provide that the outcome of the procedure is binding only if the consumer wins; the

outcome is advisory if the consumer loses. The consumer may choose to be bound by the outcome, but may also resort to the courts. Currently, however, there is a federal circuit split regarding whether Magnuson Moss claims may also be made subject to mandatory and binding predispute arbitration. The analysis requires consideration of the FAA, the Magnuson Moss Act and Chevron deference to be accorded to the FTC.

Better Business Bureau Autoline Program. The BBB encourages and supports an ethical marketplace and is thus neither exclusively pro-consumer nor exclusively pro-business. BBB receives 1 million consumer complaints and provides shuttle diplomacy, information-sharing, conciliation, mediation, and arbitration. The BBB administers the national autoline arbitration program; it also has offices in California and Florida where dispute resolution specialists provide mediation services. Under the autoline program, auto manufacturers commit to certain terms (e.g., scope of remedies, decision standards that apply); the program uses voluntary arbitrators who are paid a small stipend; and the program operates pursuant to FTC Rule 703 which provides that the outcome is not binding until the consumer accepts it. The arbitrator determines a fair outcome, which may include an award of repair, reimbursement, lemon law repurchase, replacement, etc. The manufacturer must pre-commit the necessary funds. The process is very fast, with provision of a decision within 40 days. Not all cases result in a hearing; many settle with the staff's scheduling of settlement teleconferences and sharing of information. BBB staff and arbitrators are insulated from the manufacturers; there is no contact outside the forum. Funding is based on based on case volume, not decision type. Arbitrators are not passive; they ask for information from the parties. BBB is transparent regarding its rules and the bases for arbitral decisions. There is a special booklet just for California. Perhaps because the program is voluntary, there has been a downward trend in the number of cases. About 40% of the cases opened after customer contact never result in full-blown dispute resolution. Companies are being more proactive in responding to consumer complaints. Alternatively, could be that cars are better-built, or people are not buying as many new cars. BBB had 18,000 autoline cases last year. BBB does not publish its outcomes or other data; it is a private.

Online Dispute Resolution. ODR began in the mid-1990s. In 2000, the Federal Trade Commission and Department of Commerce convened a meeting to discuss whether online merchants should be required to provide ODR services to their users. The result of the meeting was to adopt a voluntary approach that allowed the ODR industry to self-regulate. These discussions were particularly difficult in connection with consumer disputes. In 2003, however, Global Business Dialogue on eSociety and Consumers International reached an agreement to call for greater use of ODR and consensus standards that should govern ODR providers and systems. ODR has expanded dramatically since then. EBay and PayPal require use of their e-dispute resolution program as a condition of using their services and currently handle 60 million disputes each year. The outcomes are enforced by EBay and PayPal; they would not be binding in court. The virtual nature of the dispute resolution program is essential for international commerce. The Organization of American States (OAS) now has an online cross-border dispute resolution system. UNCITRAL currently has a working group that is trying to develop rules for global online consumer dispute resolution. In response to the UNCITRAL initiative, the European Union has announced support for a region-wide ODR system. The BBB has been far ahead on ODR and has demonstrated great leadership. The FTC works with ICEPEN and econsumer.gov, which is forward looking. ODR got traction because existing judicial mechanisms do not work

well for high volume, low value cross border disputes. The average case at eBay and PayPal is for a claim of \$100. The courts are largely irrelevant for disputes that are this small. A purely private ODR system would be adequate. Modria, a spinoff of eBay and PayPal, is one such system and is ready to build ODR for all areas of the internet. Modria has partnered with CPR in New York. Modria is taking a modular approach, e.g., med-arb. Mediation is not effective with low dollar disputes due to time and effort required. It is likely to be more practical to turn to technology focused solutions—e.g., technology-assisted problem diagnosis, algorithmic models, evaluation where a third party or panel renders a decision that the parties accept. Ninety percent of eBay's disputes are resolved amicably, using software only, and without any human involvement. ODR can address high volume low value disputes that are likely to arise in the consumer context.

Small claims courts, non-binding arbitration, and mediation. These processes are used for both debt collection and consumer initiated disputes. Judge Judy is not representative of small claims courts; Judge Judy is actually conducting arbitrations. Small claims courts operate in different ways in different states. In some states, all parties show up on one day for a “cattle call”-type procedure; the judge is often a referee; the parties appear before the referee for a very brief period of time. In other states, hearings on parties' claims are scheduled individually. In some states, lawyers are permitted to attend small claims courts; no lawyers are permitted in other states. Different states have different jurisdictional caps; some states also have jurisdictional floors. In general, awards in small claims cases can be appealed to district/trial court, but very few appeals take place. Some states also have non-binding arbitration programs for cases below a particular jurisdictional cap. The case may be heard before one arbitrator or a panel of three. The arbitrators' award is binding if accepted by the parties; either party may seek trial de novo, however. In some states, the party who refused to accept the arbitral award may be required to pay the other side's costs if he or she fails to improve upon the arbitral award. Mediation is also used in some small claims courts. Volunteers from community mediation programs or students from law school clinics sit in the small claims court room, and the judge or clerk will announce the availability of mediators. Some courts strongly encourage the use of mediation; other simply offer it as an option. In general, if the parties mediate, there are no time limits; in some courts, however, the mediation sessions may last only an hour. In some courts, if the parties reach a settlement, the judge will announce the settlement as her decision and put it on the record; in other courts, the settlement is a contract. The approach to mediation that is used may vary from purely facilitative to transformative to evaluative.

ATTACHMENT E

Summary of Presentations Regarding Empirical Studies of Consumer Dispute Resolution

There were then presentations regarding existing empirical studies of consumer dispute resolution:

Study of arbitration clauses in credit card agreements. As of the end of 2009, 95% of credit card loans were by issuers that use arbitration clauses. But only 17% of all issuers use arbitration clauses. Thus, most issuers actually do not use arbitration clauses. This disparity exists because most credit card loans are issued by big banks that are also using arbitration clauses. But credit unions and other banks also issue credit card loans—and have not included arbitration clauses. As of 2010, the percentage of credit card loans with arbitration clauses had gone from 95% down to 48%. This is probably due to the Ross settlement and NAF's settlement. There were almost no punitive damage waivers or inconvenient forums specified in these clauses.

Searle Study. This study involved data from 2007-2008 AAA consumer arbitration. In about 80% of the cases, consumers were the claimants; only 20% of the cases involved business claimants. In contrast, in small claims court, the vast majority of the cases (well over 90%) are collection matters in which businesses are the claimants. In the AAA cases, consumers won about 50% of the time, while businesses won about 80% of the time. In federal court cases, one study found very similar win rates. In debt collection arbitrations in the AAA sample and in a specialized one-time debt collection program that AAA ran for a debt buyer, businesses won 86-97% of their cases, consistent with NAF results as reported by Public Citizen. In courts, businesses win 98-100% of their debt collection matters. These win rates do not reveal whether arbitration is fair or unfair. Businesses win debt collection cases whether they are in arbitration or court. Searle study also found some evidence of the repeat player effect and that big businesses settled more cases. These results do not necessarily mean there is bias in the arbitration process. Rather businesses may be settling strong cases and only arbitrating the weak ones.

FINRA Securities Arbitration. This study examined parties' (i.e., investors and brokers/firms) perceptions of the fairness of securities arbitration process. Parties perceived that the arbitrators listened, were competent, and understood the legal arguments. A significant majority of investors perceived the process as unfair and perceived the arbitrators as biased. These results may have contributed, in part, to FINRA's creation of all-public arbitral panels. The researchers also recommended an increase in the transparency of arbitration awards. There are some arbitrators who provide their reasoning, but there is a general disinclination to do so because it forces arbitrators to apply the law when they should just do the right thing. There may be relevant, parallel data from the court context.

Stephen Choi and Ted Eisenberg have also conducted a study of punitive damage awards in securities arbitration compared to punitive damage awards in courts. There are significant numbers of punitive awards in securities cases, but the incidence of punitive awards in arbitration is generally lower than in court.

Study of arbitration clauses in consumer contracts. There are broadly based behavioral and psychological issues (e.g., overconfidence bias) that impact not only acceptance of arbitration clauses but also consumer behavior in asserting complaints. There are also several studies examining how frequently arbitration clauses appear in consumer and employment contracts (e.g., papers published by Eisenberg, Drahozal, Gross and Black, and Hensler). Schmitz has gathered wireless and credit card contracts to study evolution of arbitration clauses. It's very difficult to get such credit card contracts *before* applying for a credit card or being accepted for credit. Schmitz ended up with 13 out of the 20 contracts she sought; of those, seven had arbitration clauses. Wireless contracts all contained arbitration clauses. Over time, these clauses became much more user friendly; AT&T's clause really changed over time. Schmitz found no correspondence between inclusion of an arbitration clause and better rates; companies did not necessarily pass any savings along to consumers. Focus groups revealed that people knew very little about arbitration, but had negative perceptions. Results from an electronic survey revealed that arbitration was second-to-last as something people consider in deciding whether to enter into a contract; about half noticed the existence of an arbitration clause; 4.4% said they tried to negotiate over the arbitration clause. When asked what terms were important when they last had a complaint or dispute, 88% did not think the arbitration clause was important. Most people do not even know they have a claim; those who are highly educated are much more likely to claim or arbitrate or litigate.

Some businesses are now attaching a discount to consumer's willingness to agree to an arbitration clause. Many members of the defense bar agree that the primary purpose of arbitration clauses is to preclude class actions. Much useful information about the effects of arbitration clauses is probably available within the financial institutions' market research departments.

Federal Trade Commission. This highly recommended report compares litigation and arbitration, primarily in the debt collection context. Consumers with category 2 claims against businesses tend to use the credit card chargeback system. (Perhaps the user friendliness and effectiveness of the credit card chargeback system helps to explain the existence of category 2 consumer disputes.) There is no cost to the consumer, and the system provides for systemic monitoring. If a business significantly exceeds the average, this will catch the credit card issuer's (or bank's) attention. Merchant banks then contact the FTC to suggest an investigation. The credit card chargeback system works.

The FTC report emphasizes the consumers' need for greater transparency. When consumers go to court, they assume the judge will be unbiased. When they go to arbitration, they do not know what they will get. Consumer as one off users will have no access to arbitral outcomes to determine if the forum is biased or not. Repeat users, on the other hand, are likely to keep track of their outcomes. Also, consumers need to know the rationale for decisions and not just tallies. Information should be equally accessible to consumers and businesses. This has been discussed in connection with the UNCITRAL Working Group.

Regarding the debt collection claims to be arbitrated by NAF, it is unclear what has happened to them. The debt collection firm of Mann Bracken declared bankruptcy at the same time that NAF

stopped handling debt collection matters. Therefore, there may be no collection activity occurring on the NAF arbitral awards. Chase just announced it is not collecting debts any more. It is selling the debts.

Businesses explain that they do not want postdispute mandatory arbitration because they are concerned that claimants will cherry pick the disputes to go to litigation vs. arbitration. Also, if arbitration is to work effectively for consumers with small claims, businesses will be expected to subsidize the arbitration system. In return for providing this subsidy, businesses want the certainty of knowing disputes will go to arbitration.

Attachment F

Prioritization of Research Projects and Practical Initiatives

Prioritization of Research Projects

To identify the broadest range of research questions related to consumer dispute resolution, the group conducted a “story-boarding” process. Participants imagined what research and data would help inform the dialogue—that is, what research and data they would like to see in a perfect world with no budget or other constraints. Participants recorded each separate research question or idea on a separate sheet of paper. Participants then posted their questions/ideas on walls around the room. In this decentralized process, participants also discussed with each other, one-on-one, how their ideas related to each other’s and clustered related ideas. Later, participants were invited to post dots next to the research questions or ideas in which they were particularly interested. The following prioritization is the result of the “dot voting.”

Category	Topic	Number of Dots
ODR	What kinds of disputes are amenable to ODR?	12
	Perceptions of fairness in ODR	6
	What disputes can be automated (algorithm)?	6
	What is ODR?	4
	What kinds or what percentage of consumers use it and have access?	4
	Is there data available on ODR?	2
	Can you use ODR in small claims court?	1
	Satisfaction/outcome correlation?	1
	Understanding by users, demographics of users	1
	Data Collection/Arbitration Awards/Outcomes	Arbitration versus court for similar claim types
Do arbitrators decide similarly to judges?		5
What is the impact of having written rationales?		3
Helpful to have central database of arbitrators' decisions with rationales?		2
What types of cases result in punitive damages awards?		2
Do arbitrators decide similar cases similarly?		1
Are there geographic differences in consumer win/loss?		0
Impact of "equity", Data on outcomes of security arbitration if law applied strictly		0
What are claims that are most "viable" for FINRA arbitration?		0
What are express standards for arbitrators' decisions?		0

Cost/Benefit Analysis	Costs to consumers and society? How to est. benefits?	4
	Comparison using control group and experimental group (CFPB Portal as "pool")	1
	Corporations with case management systems - Do comparison pre and post system	0
	Surveying random sample of people in population - "Legal" complaint? How resolved?	0
Arbitration Clauses and Programs	Categories of Contracts: Car dealers, health care/nursing, home builders, real estate agents, financial services (deposit account agreements, business/consumer, payday loans), Ipad apps	10
	Sources of data: Internet, trade assn., state regulators, forms sold as templates, arb. providers, buy products, survey consumers, survey businesses, interviews, CFPB	7
	Contract language versus how arbitration works in practice	0
Class Actions	Is there a claim suppressing or enhancing effect of arbitration? Look at number of claims, "take" rate; other deterrence aspects	18
	Does availability of class actions promote better dispute resolution programs by companies? (Coca-Cola, etc.)	11
	How to measure deterrence? What is deterrent effect of class action? Private vs. gov't enforcement?	11
	Relative "compensation rate" of class action vs. individual arbitration	8
	Comparison b/tw arbitration and civil justice system approaches?	3
Sources of Data	Blogs, paths to justice, gov't, consumer groups for data - what info. is available and what incentivizes people?	2
	Pre-arbitration? ODR data information - use of "clicks"	1
	ICANN Study?	0

Prioritization of Practical Initiatives

After further discussion on the deterrent effect of class actions, the group engaged in an open broadly focused brainstorming discussion of practical alternatives to focusing on the promotion of class actions as they currently exist or to precluding class actions through consumer arbitration. The discussion is summarized below. Later, through “dot-voting,” members of the entire group identified priorities for further action, as indicated below.

Category	Topic	Number of Dots
Practical Alternatives to Class Actions the Class Action Preclusion Dichotomy	“Arbitration fairness index” or rating system/stamp of approval; rating system as component of other rating systems (BBB, Consumer Reports, Corp. Social Responsibility Index, FTC monitoring, EU); incentives to corporation like Trustmark	17
	Online Platform, trigger mechanism at a "threshold" for different treatment of mass claims, other internet models to examine - UNCITRAL, eBay; using non-legal, factual language	15
	Internet - use to inform, for publicity, boycotting, selling claims; can internet foster attorney action, facilitate assertion of claims?; Facebook & twitter as collective consumer bargaining power	13
	Disincentives for frivolous claims	10
	Improve access to attorneys; premium system; payment by government; legal services; incentives; premium for lawyers if they win or get more than settlement offer; ATT’s plan; how arbitration can “pay” for (incentivize) lawyers; differentiated courts based on nature and value of claim	10
	Increases in regulation generally; increased state regulation; regulation of providers; attorneys general as <i>parens patriae</i> (as in tobacco cases)	9
	Final offer arbitration in consumer disputes - promote reasonable positions	6
	Exploring non-governmental alternatives for deterrence; importance of nature of claim; effect on share price; effect of bad publicity; impact of class action	6
	Repetitive small value claims - don't undercut incentive; paying face value of the claim may not be enough; opportunity to think about bonus; research on incentives	5
	Research other countries’ mass claims approaches; French Consumer’s Union bringing together claims	3
	Change in judicial review; ways to identify similar claims and bring together; arbitration purely private	2

	More focus on providers; AAA and JAMS have standards; other providers also?; providers could create additional requirements	2
	Issues of precedential problems; Hall Street; "legitimacy"; published opinions like ICANN, FINRA	1
	Better claims process; more transparency by company; consumer claims resolution	1
	Nationwide reporting and disclosure	1
	One-off claims may be best for good "individual approach"?	0
	Collective consumer bargaining; protocols	0
Employment & Labor/Management Relations Meeting	Class action issue overlaps - CA waiver unfair practice	
	Credibility of the forum issue overlap	
	Statutory rights vs. contract b/tw employer/employee issues	
	Differences, Consequences?	
	EEOC, FLRA, NLRB?	
	Participants that can move the discussion forward	

Attachment G

Arbitration Fairness Index© (for Binding Arbitration Programs under Pre-dispute Arbitration Agreements in Consumer and Employment Contracts)

		Terrible	Poor	Fair	Good	Very good	Points
		0	1	2	3	4	
Meaningful Consent, Clarity and Transparency	Meaningful consent to arbitration	0	1	2	3	4	
	Adequate notice, disclosure	0	1	2	3	4	
	Accessible procedures	0	1	2	3	4	
	Clear guidance for program users (“roadmap”); access to helpline/hotline	0	1	2	3	4	
	Ease of court oversight	0	1	2	3	4	
	Published program statistics	0	1	2	3	4	
Independent and Balanced Administration	Independence, impartial administration	0	1	2	3	4	
	Balanced input in rules and policies	0	1	2	3	4	
Qualified, Suitable Arbitrators	Balanced input in pool of arbitrators	0	1	2	3	4	
	Diversity	0	1	2	3	4	
	Experience & Training	0	1	2	3	4	
	Neutrality; Disclosure and challenge mechanism	0	1	2	3	4	
	Ethics standards, complaint mechanism	0	1	2	3	4	
Fair Hearing	Reasonable costs and fees;	0	1	2	3	4	
	Legal counsel	0	1	2	3	4	
	Reasonable hearing location	0	1	2	3	4	
	Limitations period	0	1	2	3	4	
	Access to information/discovery	0	1	2	3	4	
	Expeditious process	0	1	2	3	4	
	Fair hearing	0	1	2	3	4	
	Availability of class or collective action	0	2	4	6	8	
Fair Outcomes (Awards, Remedies)	Availability of remedies	0	1	2	3	4	
	Reasoned awards	0	1	2	3	4	
	Outcomes	0	1	2	3	4	
TOTAL out of 100 possible points							

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