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Empirical Research on Consumer Arbitration: What the Data Reveals

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Empirical Research on Consumer Arbitration: What the Data Reveals

Sarah R. Cole* & Kristen M. Blankley**

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I. INTRODUCTION

In 2007, Public Citizen, a “national, non-profit public interest organization,”¹ issued a report entitled “The Arbitration Trap: How

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1. See Public Citizen, <http://www.citizen.org/>.

Credit Card Companies Ensnare Consumers,”² concluding that the arbitration process routinely exploits consumers.³ Public Citizen drew this sweeping conclusion after analyzing approximately 34,000 points of data the National Arbitration Foundation (“NAF”) collected about its California arbitrations.⁴

Unfortunately, Public Citizen’s analysis of the NAF data does not support its conclusions primarily because its conclusions cannot be extended beyond the set of cases the data contains, i.e., collection cases filed by creditors, including credit card companies, against consumers with outstanding balances on their accounts. Rather than attempt to draw conclusions based solely on this data, Public Citizen instead extrapolates its conclusions to all consumer arbitration cases even though collections cases are unique.⁵ Public Citizen ultimately concludes that binding, mandatory arbitration is bad for consumers in all situations based on a data set comprised of practically all—upwards of 99.9%—collections cases.⁶

Given the sweeping nature of the Public Citizen Report’s conclusions, we believe that additional data analysis is warranted. In fact, our data analysis establishes that many of Public Citizen’s claims are exaggerated and should be considered in context.⁷ In addition, and perhaps more importantly, our analysis of this data reveals that the

2. See Public Citizen, “The Arbitration Trap: How Credit Card Companies Ensnare Consumers,” <http://www.citizen.org/documents/ArbitrationTrap.pdf> (Sept. 27, 2007) [hereinafter Public Citizen Report].

3. See Public Citizen Report, *supra* note 2, at 1 (“This report shows that binding mandatory arbitration is a rigged game in which justice is dealt from a deck stacked against consumers.”).

4. See *id.* (“For the first time, we have comprehensively crunched data for the nearly 34,000 cases contained in NAF’s California reports.”).

5. See *id.* (“NAF identified virtually all of its California cases as ‘collection’ cases filed against consumers by credit card companies or firms that buy debts from these companies for cents on the dollar.”); see *id.* at 1-2 (“All but 118 of the cases were filed against consumers by credit card/finance companies or firms that purchase their debts. In other words, consumers chose to bring only 118 cases before NAF while corporations chose this business friendly forum nearly 34,000 times—99.6 percent of the total cases.”); see *id.* at 5-6 (“Between Jan. 1, 2003 and March 31, 2007, NAF handled nearly 34,000 consumer arbitrations in California alone. The firm described 99.9 percent of those arbitrations as ‘collection’ cases.”); see also Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 DENV. U. L. REV. 357 (1990) (finding consumers prevailed in Small Claims and Conciliation Branch of the Superior Court of the District of Columbia only 4% of the time; the vast majority of cases were default judgments); Matthew C. McDonald & Kirkland E. Reid, *Arbitration Opponents Barking Up Wrong Branch*, 62 ALA. LAW. 56, 60 (2001) (“[V]irtually all of these cases were collection cases filed by the bank against customers more than six months behind on their credit cards bills. Unquestionably, the result in collections court would have been the same.”).

6. Public Citizen Report, *supra* note 2, at 5-6.

7. See *infra* Sections II and III.

consumer arbitration process provides a more pro-consumer environment for claims adjudication than does the traditional court system. This conclusion suggests that consumers should be less wary of the arbitration process even if the proposed Arbitration Fairness Act of 2009⁸ is never enacted.

This article sets forth in Section II the primary arguments and conclusions of the Public Citizen Report, followed in Section III by a more detailed look at the underlying data. Section IV examines recent court decisions in which consumers claim that the NAF is an unfair forum, and the courts' rulings that generally reject that argument. Finally, Section V sets forth these authors' conclusions regarding the data.

II. PUBLIC CITIZEN'S CRITICAL VIEW OF ARBITRATION

A review of the Public Citizen Report reveals that Public Citizen's agenda is to convince others that arbitration is bad for consumers because they frequently lose when a party to the arbitration process. In the opening paragraph of its Report, Public Citizen proclaims: "[t]his report shows that binding mandatory arbitration is a rigged game in which justice is dealt from a deck stacked against consumers."⁹ The first chapter boasts the following conclusions:

- "Enormous Amount of Consumers Affected"¹⁰
- "Substantial Use of Binding Mandatory Arbitration by the Credit Card Industry"¹¹
- "Corporations—not Consumers—Choose Binding Mandatory Arbitration"¹²
- "Stunning Results that Disfavor Consumers"¹³
- "Biased Decision-Makers"¹⁴

8. H.R. 1020, 111st Cong. (2007). The Arbitration Fairness Act of 2009 § 2(b) would render unenforceable pre-dispute arbitration agreements of consumer, employment, or franchise disputes.

9. Public Citizen Report, *supra* note 2, at 1.

10. *Id.* Public Citizen reaches this conclusion because the NAF data set includes data points for approximately 34,000 cases between the dates of January 1, 2003 and March 31, 2007.

11. *Id.* This conclusion is based on the NAF data set that includes virtually all "collection" cases, which are typically cases based on a debt owed or claimed to be owed.

12. *Id.* at 1-2. Public Citizen reaches this conclusion because the data set shows that the vast majority (more than 99%) of claimants are businesses, as opposed to consumers.

13. *Id.* at 2. This conclusion is based on Public Citizen's interpretation of consumers "winning" 94% of cases that proceeded to the point at which an arbitrator is appointed.

14. *Id.* This conclusion is based on Public Citizen's speculation that arbitrators are inclined to rule in favor of businesses because the businesses are "repeat players" and because the arbitrators are interested in continuing to receive repeat business by ruling in favor of the corporations.

- “The Busiest Arbitrators Produce the Results Corporations Seek”¹⁵
- “A Race to the Bottom for Arbitration Firms”¹⁶
- “A Process Shrouded in Secrecy”¹⁷
- “A Lack of Due Process Safeguards”¹⁸

These “conclusions,” however, read more like headlines,¹⁹ and the report contains surprisingly little data analysis in light of its extreme conclusions. The Public Citizen Report’s major criticisms of consumer arbitration can be summarized as follows: 1) consumers always lose in arbitration; 2) repeat arbitrators favor corporate clients; and 3) consumers pay more in arbitration fees than they would in court fees. Given the headline-grabbing conclusions Public Citizen draws, a closer examination of Public Citizen’s data analysis is worthwhile.²⁰

15. *Id.* This conclusion is based on Public Citizen’s examination of the record of arbitrators who handle large volumes of the NAF consumer arbitrations.

16. *Id.* This conclusion is based on anecdotal evidence that arbitrators who rule in favor of consumers do not receive any additional work from the businesses the arbitrators ruled against. Accordingly, this point is not based on the NAF arbitration data.

17. *Id.* Public Citizen appears to reach this conclusion because arbitration is a confidential process, and because of the confidentiality, the businesses will likely have more institutional knowledge about arbitrators and their decisions than “one shot” consumer disputants. Again, the data available from NAF does not speak to this point.

18. *Id.* This conclusion is based on an allegation that the NAF procedures are insufficient to adjudicate a claim in arbitration. As with the last two points, this conclusion is not based on the arbitration data NAF makes available but by Public Citizen’s interpretation of the NAF procedures.

19. In addition, the first chapter of the Public Citizen Report sets forth a bullet-point list of the reasons why the consumer group thinks that the arbitral process—any arbitral process—is bad for consumers. Those reasons are: 1) the proceedings are “secret,” i.e., confidential; 2) the arbitral forums have an incentive to create business-friendly rules in order to attract business clients; 3) individual arbitrators have an interest in continued employment so they are likely to rule in favor of the businesses; 4) arbitration costs more than court proceedings; 5) the right to appeal is limited by statute and allegedly not well communicated to the consumers; 6) the parties have a limited right to discovery in arbitration; 7) arbitral forums do not provide due process for consumers; 8) the arbitral forums do not allow for class-action procedures; and 9) the NAF has a “loser pays” rule that could shift fees in certain situations. *Id.* at 7-10.

The NAF arbitration data supports none of these points. Thus, some of these points involve overreaching on Public Citizen’s part. For example, in point number 9, Public Citizen claims that the “loser pays” rule makes arbitration bad for consumers. Public Citizen, however, neglects to explain that the “loser pays” rule only applies in situations in which fee shifting “is permitted by law.” NAF Code of Procedure Rule 37C. In other words, fee shifting under NAF procedure would only occur if the fee shifting is permitted in a court, making the consumer no better or worse off than if that consumer were in court.

20. The Public Citizen Report states that the group spent as many as eight months “comprehensively crunch[ing] data.” Public Citizen Report, *supra* note 2, at 1. However, the Report contains little statistical analysis. Where statistical support is lacking, the Report tends to buttress its arguments with anecdotal evidence.

A. *Public Citizen Claims that Consumers Always Lose in Arbitration*

Public Citizen claims that consumers fare quite poorly in arbitration. To support that claim, Public Citizen emphasizes that consumers filed only 118 out of the approximately 34,000 cases collected.²¹ Businesses brought the remainder (over 99%) of these disputes. That more businesses than consumers take advantage of the arbitration process is no surprise, however, especially when one learns that 99% of the cases brought are “collections” cases. If a business has a dispute, it must bring its claim in the arbitral forum pursuant to its arbitration agreement with the consumer.²² Moreover, NAF has no control over who chooses to bring a claim. The lack of evidence articulating why more consumers do not file suggests no ulterior motive on NAF or any other arbitral organization’s part.²³

In addition, Public Citizen claims that consumers are most likely to fare poorly when an arbitrator is assigned to the case. The Report notes that for cases resulting in a document hearing, consumers won only two out of 16,056 cases,²⁴ and in cases resulting in what is described as a “hearing,”²⁵ consumers win in only twenty-eight of 2,019 cases.²⁶ Once again, most of these cases involve collections disputes, so a consumer victory is unlikely. Moreover, focusing on these cases ignores that consumers “win” cases brought by businesses when these cases are later dismissed, just as businesses “win” cases brought by consumers that are

21. *Id.* at 15 (“Consumers filed only 118 cases against corporations—0.35 percent of all cases—and all but 13 of the consumer-filed cases were labeled ‘collection.’”).

Of the 118 claims consumers filed, the NAF data shows that consumers dismissed approximately 62 of these 118 cases, or approximately 52%. These cases were labeled “business wins.” The data, however, does not indicate what constitutes a dismissal and what does not. It is possible that some of these “dismissals” are actually settlements, even though the NAF data specifically labels a large number of cases as “settled.”

22. *See id.* at 3 (noting the fact that many consumer transactions include arbitration agreements). If the businesses brought suit in court, presumably such an action would be in breach of the consumers’ contracts.

23. The Public Citizen Report alleges that NAF markets its services directly to businesses. *See id.* at 18-19. According to the Report, NAF advertises that it provides the following benefits to businesses: 1) limited discovery; 2) lower costs; 3) no jury trials; 4) awards limited by the amount of the claim; 5) the possibility for fee-shifting to the losing party; and 6) the ability to save on collection costs. *Id.* at 19 (citing a document claimed to have been admitted into evidence in the case *Toppings v. Meritech Mortgage Inc.*, 569 S.E.2d 149 (W. Va. 2002)).

24. *Id.* at 15. In this category, the business “won” in 99.9% of cases.

25. The data is unclear as to whether the “hearing” is a hearing in person or a hearing based on documents submitted.

26. *Id.* In this category, the business “won” in 98.6% of the cases.

later dismissed.²⁷ Cases that settle, of course, do not designate a prevailing party.²⁸

The Public Citizen Report places significant emphasis on “wins” and “losses” for that portion of the NAF data that includes a “prevailing party” designation. For the reasons stated below, this emphasis is short-sighted.²⁹ In a significant number of cases, the arbitrator’s award is lower than the amount that the business initially sought.³⁰ In many ways, a reduction in the amount claimed is, at least, a partial win for the consumer, and not an outright victory for the business.³¹ In this sense, the conclusions drawn in the Public Citizen Report are incomplete and

27. The NAF data appears to make these categorical “win/loss” designations as they relate to dismissals. The NAF has an additional category of “Award by Settlement” which almost always lists the business as the “prevailing party.” In a handful of these “Award by Settlement” cases, though, the NAF would not name a prevailing party. In contrast, all cases with a disposition of “Settled,” the NAF does not name a prevailing party—instead, the data designates “N/A” where the prevailing party should be listed. Given the fact that no “Settled” case names a prevailing party, it is curious that a case involving an “Award by Settlement” would nearly categorically be called a business “win.”

28. *Id.*; see also *supra* note 25. Analysis of the “prevailing party” can be summarized in the following chart:

Prevailing Parties by Dispute Resolution Categories

Dispute Disposition	Prevailing Party					Totals
	N/A	NA	Business	Consumer	Settled	
Settled	7194	4	0	0	0	7198
Hearing/Default:***	0	0	16054	2	0	16056
Hearing	0	0	1991	28	0	2019
Dismissed	0	0	32	8528	1	8561
Award by Settlement Agreement	5	0	79	0	0	84
Totals	7199	4	18156	8558	1	33918

29. See *infra* notes 64-70 and accompanying text.

30. *Id.*

31. See *infra* notes 38-44, 64-66, and accompanying text. In July 2008, Navigant Consulting provided the NAF with a Memorandum analyzing the NAF data in light of the Public Citizen Report. See Nielson et al., *National Arbitration Forum: California Consumer Arbitration Data* (Navigant Consulting, July 11, 2008), available at http://www.instituteforlegalreform.com/get_ilr_doc.php?docId=1212 [hereinafter Navigant Report]. The Navigant Report concludes:

In total, out of 26,665 cases in the Public Citizen Data for which the disposition was identified as “Hearing,” “Hearing/Default,” or “Dismissed,” consumers were reported to have prevailed or had the case against them dismissed in 8558 cases. There were also an additional 4376 cases in which claims against consumers were reduced by the NAF.

Id. at 4.

might not fully and accurately describe how consumers fare in arbitration.

B. Public Citizen Infers that Allegedly Self-Interested Arbitrators Rule Against Consumers

Public Citizen claims that the arbitrators who hear the most cases are the ones who are most biased in favor of the corporations. Public Citizen claims that the “repeat player effect” is one of the “major problems with arbitration.”³² According to the Report, “28 arbitrators handled 17,265 cases—accounting for a whopping 89.5 percent of cases in which an arbitrator was appointed—and ruled for the company nearly 95 percent of the time.”³³ These twenty-eight arbitrators handled between 138 cases and 1,332 cases, with “decision records for corporate interest of between 72.2 percent and 98.8 percent—while 25 arbitrators had a record of 92.4 percent or higher” in favor of the business client.³⁴

Public Citizen is particularly critical of the most prolific arbitrator, Joseph Nardulli, who handled 1,332 cases between January 1, 2003 and March 31, 2007.³⁵ According to the Public Citizen Report, the total amount claimed in those 1,332 cases was \$15,602,571 and the total amount awarded was \$15,039,941, with the business winning in 97.0% of the cases and the consumers winning in 1.6% of the cases.³⁶ The win/loss numbers for Mr. Nardulli, however, must be viewed in perspective. Of Mr. Nardulli’s 1,332 assigned cases, only nineteen were identified as settled; two were resolved through “award by settlement agreement;” the business claimant dismissed twenty of the cases; and hearings resolved another fifteen.³⁷ NAF used the curious title

32. Public Citizen Report, *supra* note 2, at 32 (“One of the major problems with arbitration is a documented lack of neutrality on the part of arbitration firms that is called the ‘repeat player effect.’ This is a situation in which a built-in bias develops in favor of the claimant that frequently sends business to the arbitration firm in the form of claims against its customers, who are usually participating for the first-time.”).

33. *Id.* at 15. The Public Citizen Report then claims that another “120 arbitrators handled slightly more than 10 percent of the cases in which an arbitrator was assigned. They ruled for businesses 86 percent of the time and for consumers 10 percent.” *Id.* These statistics are misleading because they include cases that were settled or dismissed. Not all cases assigned to an arbitrator resulted in an adjudicated award. As presented, the Public Citizen Report does not make clear which cases were considered in generating these statistics, whether these statistics include the settled and/or dismissed cases, or whether they only include the cases that were adjudicated through a hearing or document hearing.

34. *Id.* at 16. Again, the way in which the Public Citizen Report characterizes “wins” is unclear and not explained in the report.

35. *Id.* at 15-16.

36. *Id.* at 16. Presumably, the difference between the win percentages takes into account that some portion of Mr. Nardulli’s cases settled.

37. *Id.* at 2-3.

“Hearing/Default” for the final 1,275 cases. The data does not indicate whether those cases went to hearing or involved respondents who simply did not participate in the arbitration. If a large portion of the 1,275 cases involved non-participating consumers, which would be typical in collections cases,³⁸ Mr. Nardulli’s win/loss numbers would appear considerably less problematic. Unfortunately, the data that would provide this information was not collected.

Even looking at the bare win/loss numbers for Mr. Nardulli’s assigned cases, the consumers did gain something—Nardulli reduced the prevailing parties’ damages by over half a million dollars.³⁹ Stated another way, Mr. Nardulli did not grant over 3% of claimed damages to the claimants, who, as noted above, were overwhelmingly the business party.⁴⁰ Although these numbers appear low, they should not be dismissed outright. These numbers demonstrate that the arbitrator gave consideration to consumers’ claims.

The top twenty-eight arbitrators, including Mr. Nardulli, also did not award all of the amounts businesses claimed in the arbitrations. According to the Public Citizen Report, the top twenty-eight arbitrators handled cases in which claimants sought \$200,736,495, but only awarded \$185,479,341—a difference of over \$15 million.⁴¹ The difference between these numbers suggests that the consumer received a cumulative break of approximately 7.6%.⁴²

Just as Mr. Nardulli is notable for the large number of cases he adjudicated, arbitrator Jonathan Krotinger is notable for the large number of consumer wins he allowed. The Public Citizen Report acknowledges that Mr. Krotinger ruled in favor of the business interest in 72.2% of cases and in favor of the consumer in 24.7% of cases.⁴³ In Mr. Krotinger’s cases, the amount claimed was \$7,444,639, yet he awarded

38. See Sterling & Schrag, *supra* note 5 (concluding that consumers prevailed in Small Claims and Conciliation Branch of the Superior Court of the District of Columbia only 4% of the time, with the vast majority of cases ending in default judgments).

39. The precise difference between the amount claimed and the amount awarded is \$562,630. Public Citizen Report, *supra* note 2, at 16.

40. See *supra* note 20 and accompanying text for a discussion regarding the number of business claimants as opposed to consumer claimants.

41. Public Citizen Report, *supra* note 2, at 16. The actual difference between the two numbers is \$15,257,154. *Id.*

42. The 7.6% is derived from the difference of the amount claimed and amount awarded (\$15,257,154) divided by the total amount claimed (\$200,736,495). This calculation assumes, however, that the consumers—as opposed to the businesses—received the benefit of the reduced awards. Because consumers only filed 118 of the claims, any reduction in the amount awarded to businesses would likely be negligible in the context of the data set as a whole. *Id.* at 2.

43. *Id.* at 16. These two figures leave approximately 3.1% of cases unaccounted for. Although the Report is not clear, the discrepancy can likely be explained by the presence of cases that settled for which the NAF did not declare a prevailing party.

\$5,159,380—a difference of over \$2 million.⁴⁴ This difference indicates a “discount” of approximately 30%.⁴⁵ What makes these numbers significant is that Mr. Krotinger handled a large number (571) of cases.⁴⁶ Despite this data, the Public Citizen Report relies on anecdotal evidence to suggest that arbitrators who rule, even once, in favor of consumers are systematically pushed out of NAF and not assigned any additional cases.⁴⁷ The data, however, suggests that this is not the case and that the Public Citizen Report overstates its claim on this issue.

Although the Public Citizen Report rightfully raises the issue of “repeat player” bias, the data does not necessarily support the Report’s strident conclusions. Nevertheless, one way to reduce the perception of “repeat player” bias would be to ensure that adequate reporting and disclosure take place.⁴⁸ In California, for example, arbitrators must disclose to disputants a wide variety of professional and personal information.⁴⁹ Adopting a nationwide policy that repeat arbitrators

44. The exact difference in the figures is \$2,285,259. *Id.*

45. Again, this figure is calculated by dividing the difference in the two by the total amount claimed. *Id.*

46. *Id.* In addition, two other arbitrators ruled in favor of the business less than 90% of the time. Those two arbitrators, Patrick Huang and Adrienne Jennings, participated in 354 and 597 cases, respectively. *Id.*

47. *See id.* at 30-31. The report claims that arbitrator Elizabeth Bartholet was assigned as an arbitrator in twenty cases. In the first eighteen, she ruled in favor of the business and the nineteenth case was dismissed. In the twentieth case, however, she ruled in favor of the consumer and awarded the consumer approximately \$48,000. She claims that after this twentieth case, the NAF removed her from seven cases and businesses voluntarily dismissed another four cases. *Id.* at 30.

48. For instance, the NAF Code of Conduct for Arbitrators states: “An Arbitrator should disclose any interest or relationship that affects impartiality or creates an unfavorable appearance of partiality or bias.” NAF Code of Conduct for Arbitrators, Canon Two. In addition, the AAA has a Consumer Due Process Protocol that specifically addresses the issue of an arbitrator’s previous appointment. Under “Principle 3: Independent and Impartial Neutral; Independent Administration,” the Code provides:

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

AAA, Consumer Due Process Protocol (2008), <http://www.adr.org/sp.asp?id= 22019> (emphasis added).

49. *See* CAL. CIV. PROC. CODE § 1281.9(a) (2008). That statute provides:

(a) In any arbitration pursuant to an arbitration agreement, when a person is to serve as a neutral arbitrator, the proposed neutral arbitrator shall disclose all

disclose previous cases handled for the business party, may alleviate some concern about “repeat player” bias and “secret proceedings.”⁵⁰

C. *Public Citizen Claims that Consumers Pay Higher Costs in Arbitration Than They Would Pay in Court*

The Public Citizen Report also claims that arbitration costs consumers more than they would have to pay if they went to court.⁵¹ The

matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial, including all of the following:

(1) The existence of any ground specified in Section 170.1 for disqualification of a judge. For purposes of paragraph (8) of subdivision (a) of Section 170.1, the proposed neutral arbitrator shall disclose whether or not he or she has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years, has participated in, discussions regarding such prospective employment or service with a party to the proceeding.

(2) Any matters required to be disclosed by the ethics standards for neutral arbitrators adopted by the Judicial Council pursuant to this chapter.

(3) The names of the parties to all prior or pending noncollective bargaining cases in which the proposed neutral arbitrator served or is serving as a party arbitrator for any party to the arbitration proceeding or for a lawyer for a party and the results of each case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the names of the parties' attorneys and the amount of monetary damages awarded, if any. In order to preserve confidentiality, it shall be sufficient to give the name of any party who is not a party to the pending arbitration as “claimant” or “respondent” if the party is an individual and not a business or corporate entity.

(4) The names of the parties to all prior or pending noncollective bargaining cases involving any party to the arbitration or lawyer for a party for which the proposed neutral arbitrator served or is serving as neutral arbitrator, and the results of each case arbitrated to conclusion, including the date of the arbitration award, identification of the prevailing party, the names of the parties' attorneys and the amount of monetary damages awarded, if any. In order to preserve confidentiality, it shall be sufficient to give the name of any party not a party to the pending arbitration as “claimant” or “respondent” if the party is an individual and not a business or corporate entity.

(5) Any attorney-client relationship the proposed neutral arbitrator has or had with any party or lawyer for a party to the arbitration proceeding.

(6) Any professional or significant personal relationship the proposed neutral arbitrator or his or her spouse or minor child living in the household has or has had with any party to the arbitration proceeding or lawyer for a party.

Id.

50. The Public Citizen Report assumes that arbitration confidentiality would preclude a reporting/disclosure requirement. Public Citizen Report, *supra* note 2. Contracted-for arbitration confidentiality, however, could not waive disclosure requirements set forth in statutes, rules, and arbitral forum ethical rules.

Report notes that the NAF administrative fees are charged on a sliding scale, i.e., the amount of the fee is based on the amount of the claim.⁵² However, NAF fees may not necessarily be the fees that the *consumer* pays in a consumer arbitration. Certainly the parties are not required to pay the fees on a 50/50 basis if the parties have made other arrangements for fee payment.⁵³

Not surprisingly, the Public Citizen Report does not cite the NAF data regarding consumers' fees. Instead, the Report relies on anecdotal evidence and default fee charts to support its proposition that consumers pay more in arbitration than they would in court.⁵⁴ As explained in more detail below,⁵⁵ the NAF data demonstrates that consumers rarely pay a fee at all, and that the average fee is approximately \$75.00⁵⁶—not the thousands of dollars the Public Citizen Report would like its readers to believe consumers are paying to resolve their disputes in the arbitral forum. Despite a lack of evidence, the Public Citizen Report then accuses the NAF arbitrators of “concealing” their fees by including the fees in the total award.⁵⁷ However, the report contains no data showing

51. *Id.* at 34 (“Arbitration Often Costs Consumers More than Court”).

52. *Id.*

53. The NAF recognizes that consumer contracts may dictate the payment of arbitration fees. In the absence of such an agreement, the NAF general rules (for claims less than \$75,000) provide:

Consumer Claimants: A Consumer Claimant pays the Filing Fee and one-half the fee for a Participatory Hearing selected by the Consumer up to a total of \$250 (two hundred fifty dollars), unless otherwise provided by agreement of the Parties or by applicable law. A Business Respondent pays the Commencement and Administrative Fees and the fee for a Participatory Hearing if selected by the Business Respondent, or, if selected by the Consumer, the amount of the Participatory Hearing Fee that remains unpaid after the Consumer Claimant has paid the Consumer's portion of the Participatory Hearing Fee.

Consumer Respondents: A Consumer Respondent pays one-half of the fee for a Participatory Hearing if selected by the Consumer Respondent up to a maximum of \$250 (two hundred fifty dollars), unless otherwise provided by agreement of the Parties or by applicable law. A Business Claimant pays the amount of the Participatory Hearing Fee that remains unpaid after the Consumer Respondent has paid the Consumer's portion of the Participatory Hearing Fee.

NAF Fee Schedule (Aug. 1, 2008), at 2, <http://www.adrforum.com/users/naf/resources/2008FeeSchedule-FinalPrint1.pdf>.

54. Public Citizen Report, *supra* note 2, at 34-36.

55. *See infra* notes 71-76 and accompanying text.

56. *See* Navigant Report, *supra* note 31, at 3 (“An arbitration fee was indicated to have been paid in 33,935 of the total 33,948 cases in the Public Citizen Data. Of the 33,935 cases when a fee was paid, the consumer did not pay any fee in 33,689 cases or 99.3% of those cases. In the 246 cases when the consumer paid a fee, the median consumer fee paid was \$75.”).

57. *See* Public Citizen Report, *supra* note 2, at 37. As support for its assertions, Public Citizen cites undisclosed “Documents from National Arbitration Forum arbitration

that the consumer actually pays more in arbitration than she would pay in court.

As noted in this section, the Public Citizen Report bases its broad conclusions on a limited amount of available data. For this reason, this article presents additional statistical analysis to put the report in perspective.

III. WHAT THE DATA REALLY SAYS

Although the data presented in the Public Citizen Report is generally accurate, the report draws the wrong conclusions from too little information. The purpose of this section is to show that a more accurate data analysis puts in perspective many of the conclusions in the Public Citizen Report.⁵⁸ In addition, this analysis will help identify those conclusions that the data does *not* support. Further, this section identifies notable omissions from the data. Finally, this section provides an analysis of the arbitration awards, consumer fees, and the length of time from the filing of the claim to disposition.

A. *What the Data Doesn't Show*

Although the collection of data on approximately 34,000 cases is impressive,⁵⁹ the type of information collected does not include some of the most basic information. The categories of data collected include: case number, case name,⁶⁰ case filing date, arbitrator selection date, case disposition date, dispute resolution,⁶¹ prevailing party, the amount claimed, the amount awarded, the name of the arbitrator, the amount of fees the consumer paid, the amount of fees the business paid, total fees, and whether counsel represented the consumer. Yet the data has serious gaps. In particular, the NAF data does not describe the claims involved

decision awarded to MBNA Nov. 29, 2005, name of consumer-respondent redacted" and one California complaint. *See id.* at 70 n.158-61.

58. The data utilized by the Public Citizen Report is available on Public Citizen's website. *See* <http://www.citizen.org/congress/civjus/arbitration/> (follow "NAF California data" hyperlink). These Authors analyzed the data file made available at this website for the analysis set forth in this Article.

59. In fact, 34,000 data points are more than necessary to create accurate prediction and other statistical models. *See* GLENN J. MYATT, MAKING SENSE OF DATA: A PRACTICAL GUIDE TO EXPLORATORY DATA ANALYSIS AND DATA MINING 215-16 ("The quality of the data is the most important aspect that influences the quality of the results from the analysis. . . . Where appropriate, the data set should be partitioned into smaller sets to simplify the analysis. At the end of the data preparation phase, one should be very familiar with the data and should already start identifying aspects of the data relating to the problem being solved.").

60. The name of the consumer is never used, only an indication that one of the parties is a "consumer." The business party, however, is identified by name.

61. The types of resolutions are: dismissed, settled, hearing, and hearing/default.

in each case nor does it indicate whether the respondent, typically the consumer, filed counterclaims.

Despite the absence of critical data, the Public Citizen Report concludes that arbitration is bad for consumers at all times.⁶² In fact, the NAF data consists overwhelmingly (well over 99%) of collection cases in which the consumer is the defendant.⁶³ Although empiricists who analyze this data may draw some conclusions from the data, those conclusions can only be extrapolated over a similar population.⁶⁴ In other words, analysis of the NAF data can be used to draw conclusions about collection cases, but not other types of cases.⁶⁵ For example, the NAF data does not establish how a consumer would fare as a plaintiff in a case involving any number of claims, such as an alleged violation of the Truth in Lending Act, a claim of fraud or misrepresentation, or even a claim for breach of contract.

Another important missing piece of information is whether parties filed counterclaims during an arbitration. Because the NAF data does not include this information, it is not possible to calculate how a consumer—even in a collection action—would fare if, for example, she counterclaimed for a violation of the Fair Debt Collection Act or breach of contract. The lack of information relating to counterclaims applies equally to business defendants. Because the NAF data contains little information about business defendants,⁶⁶ it does not predict how a business defendant would fare on a counterclaim either.

62. See Public Citizen Report, *supra* note 2, at 56-57. In fact, the Public Citizen Report has an entire chapter entitled: “What Consumers Can Do to Fight BMA and Protect Themselves.” *Id.* at 56. The Report suggests that consumers should refuse to agree to arbitration clauses in any contexts, including situations involving credit cards, mortgages, cars, or any other type of consumer debt. See *id.* at 56-57.

63. See *supra* note 24 and accompanying text.

64. One of the fundamental tenets of statistics is that the sample (i.e., the data collected from the study) has to be representative of the population as a whole. See MYATT, *supra* note 58, at 54 (defining “sample” as a “portion of the population that is representative of the entire population”). In other words, if the sample is not representative, then it cannot be used to make statements about the population as a whole.

65. The NAF data labeled all but 15 cases as “collection” cases. In fact, only 13 of the 118 cases filed by consumers are not also labeled as “collection” cases. See Public Citizen Report, *supra* note 2, at 15. The NAF, however, does not define what it means by a “collection” case. It is puzzling to think that 105 *consumer claimants* brought “collection” actions. Certainly, those consumers were likely not seeking to collect a debt against the corporate defendant. Perhaps those consumers had counterclaims against them for collection of a debt, or perhaps the consumers brought an action to determine how much debt they owed (similar to a declaratory judgment action), but there is no way to know with certainty. That 105 consumers brought “collection” actions should raise questions as to the facts and claims involved in those consumer-initiated “collection” actions.

66. See *supra* note 56.

Further, some of the information NAF collected could be clarified in order to give a better picture of the arbitral process. For instance, as mentioned above,⁶⁷ the NAF categorizes a significant number of cases as proceeding to “Hearing/Default.” The difference between a case proceeding to hearing and a case ending as a result of default is significant. In some ways, the characterizations are diametrically opposed. Cases that proceed to hearing involve active respondents, while cases ending in default involve respondents who do not participate.

Because of this missing information, analysis of the NAF data cannot successfully be extrapolated to all uses of consumer arbitration. In addition, the Public Citizen Report overlooks some information that is positive for consumers. In the next sections, this paper deals with consumer awards, consumer fees, and the length of the proceeding from start to finish.

B. The Data Shows that Consumers Receive Some Breaks

As discussed above, the data shows that the arbitrators do not always award the full amount claimed. In fact, in a majority of cases, the consumer respondents (defendants) do not have to pay the full amount that the business claimant (plaintiff) claimed. If the consumers do not have to pay the full amount claimed—presumably the full amount of the debt—this is evidence that consumers are not, in every situation, worse off in arbitration than in court.

Moreover, the arbitral forum allows for a broader scope of potential awards than those that a court can provide. Arbitrators, whose judgment is not bound by the law, may consider any number of equitable factors before rendering a creative award.⁶⁸ By contrast, a court is restricted in the types of judgments it can award—which are typically limited to money damages, and injunctive or declaratory relief.

Here, the NAF data demonstrates that in well over half of the cases, the difference between the amount claimed and the amount recovered is greater than zero, suggesting that the arbitrators are utilizing their equitable powers in crafting awards. Independent analysis of the NAF data, however, shows that of the nearly 34,000 (33,918) reported cases, 20,195 of those cases involved situations in which the amount claimed

67. See *supra* note 34.

68. See, e.g., Note, Julia A. Martin, *Arbitrating in the Alps Rather Than Litigating in Los Angeles: The Advantages of International Intellectual Property-Specific Alternative Dispute Resolution*, 49 STAN. L. REV. 917, 930 (1997) (“Finally, arbitration offers one often overlooked advantage—the tribunal has considerable discretion when designing awards. ADR can offer sensible or creative options that are not generally available in litigation.”).

was not fully recovered. In other words, in over 59.5% of the cases, the claimant did not receive the amount sought.

A closer look at these cases, however, shows that not all of these cases involved an adjudicated reduction of claim. The claimants dismissed 8,561 of the 20,195 cases. Stated another way, the party bringing the claim dismissed just over 25% of the cases filed with the NAF. When a business dismisses a claim against a consumer, the consumer receives a 100% discount on his case. Of course, the data does not disclose the reason for the dismissals⁶⁹ or whether the cases were ultimately re-filed, but this data shows that approximately 25% of the consumer respondents were relieved of their obligations through the arbitral process.

In addition, many cases settled. The NAF data shows that 7,175 of the cases settled, which represents another approximately 21% of the total cases. As with the dismissals, the data does not contain all of the information necessary to make a full assessment of the situation. Admittedly, the cases that settled do not include information regarding the amount of the settlement. A settlement is most often the product of a negotiated compromise, as opposed to a “win” or “loss.”⁷⁰ While a precise accounting of concessions present in a compromise is difficult to determine, this data suggests that another 21% of the respondents also completed the consumer arbitral procedure owing less than the claimant initially sought.

Even cases that went to hearing sometimes resulted in an award that was less than what the claimant initially sought. The data reveals that 762 cases that proceeded to hearing resulted in awards requiring payment of less than the total amount claimed. Although the 762 cases only represent approximately 2% of the total cases, only 2,019 of the total cases are labeled as proceeding to a “hearing.” Among this group of cases proceeding to a “hearing” the 762 cases represent more than 37% of the “hearing” cases. Additional data supports that consumers proceeding through a hearing do receive some sort of discount on the amount claimed. The NAF has another dispute disposition category labeled “Hearing/Default,” and, in this category, 3,632 of the 16,056 cases were resolved with the respondent owing an amount less than the

69. Presumably, a party’s reasons for dismissing a case would be privileged, so the chances of obtaining this type of information would be slight.

70. See Bruce Patton, *Negotiation*, in *THE HANDBOOK OF DISPUTE RESOLUTION* 279 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (“Negotiation can be defined as back-and-forth communication designed to reach an agreement between two or more parties with some interests that are shared and others that may conflict or simply be different.”).

full amount the plaintiff claimed.⁷¹ Stated as a percentage, more than 22% of these claimants were not required to pay the full amount claimed. As noted above,⁷² this “Hearing/Default” label is ambiguous, and there is no indication of how many of these cases went to hearing and how many of these cases included default respondents. Certainly, for cases involving a default, the arbitrator would find no reason to discount an award given the respondent’s lack of participation. If the defaults could be excluded, the percentage of active respondents (most likely consumers) receiving some amount of debt forgiveness would only increase.

In the rarest of cases, arbitrators awarded more than the amount claimed. Our analysis of the data reveals that this situation occurred in thirty-three of the approximately 34,000 reported cases, constituting considerably less than 1% of the total cases. In five of the thirty-three cases, the difference between the amount claimed and the amount awarded was less than \$10.00.⁷³ The total difference was less than \$100 in another eleven cases. Thus, in sixteen of the thirty-three cases involving a difference, the difference was less than \$100. In thirteen cases, the difference was between \$100 and \$500. And in four cases, the difference was more than \$1000, with the highest difference at \$2,043.88. Interestingly, in eighteen of the nineteen cases with the biggest differential (including the four biggest differentials), the disposition of the dispute is labeled “Award by Settlement Agreement.”⁷⁴ Only fourteen of these cases had the dispute resolution label of “Hearing” or “Hearing/Default.”

In all, the NAF data demonstrates that consumers benefit when they participate in arbitration because the arbitrator is very likely to reduce their debt obligation. Although the data is robust in terms of the number

71. The NAF includes one other potential dispute disposition: Award by Settlement Agreement. This category only consists of 84 cases, but, of those cases, 65 include situations in which the amount awarded was less than the amount claimed. If these cases are settlements (which is implied, but not entirely clear), then the high percentage of discounts (77%) makes sense.

72. See *supra* note 63 and accompanying text.

73. Although unclear, such small differences could constitute clerical errors or constitute other types of non-substantive reasons for the difference.

74. That some of the cases with the largest difference are cases labeled as “Settlement by Agreement” might lend some credence to the Public Citizen Report’s allegations that arbitrator fees are lumped in with the award amount. See *supra* note 54 and accompanying text. If the amount awarded is greater than the amount claimed, then some of the difference might be explained if the payment of fees is governed by the settlement agreement. Additionally, in the “Settlement by Agreement” category, only 3 consumers are reported to have paid any arbitration fees at all, perhaps lending additional, albeit circumstantial, evidence that arbitrator fees, in some situations, are incorporated into settlement awards. See *supra* notes 71-76 and accompanying text for additional information regarding the payment of fees by consumer.

of cases, it is also limited in the ways set forth above. Even with the noted limitations, one can still conclude that the overwhelming majority of respondents (consumers) did not have to pay the full amount claimed in the arbitration. This result constitutes at least a partial “win” for the consumer.

C. Consumers Pay Few or No Fees in the Reported NAF Arbitrations

While Public Citizen is particularly critical of consumer arbitration when it addresses the potential fees that parties may have to pay in an arbitration, the NAF data supports *none* of the report’s conclusions.⁷⁵ In fact, the NAF data shows that most consumers paid few or no fees in these arbitrations, seriously undercutting the Public Citizen Report’s conclusions.

Further analysis of the data shows that in all but five of the approximately 34,000 total cases, the consumer paid under (and usually well under) \$500 in arbitration fees. In fact, the data shows that in 33,691 cases (99.6% of cases), the consumer paid absolutely no fee. In 33,811 cases, the consumer paid fees in an amount less than \$100 (many of these consumers paid a \$75 fee), and 33,913 cases involved consumer fees of less than \$500. Fees in these types of modest numbers are certainly comparable to court costs, even those cited in the Public Citizen Report.⁷⁶

The five cases involving consumer fees greater than \$500 are extraordinary cases. Two of these cases involved consumer claims of more than \$50,000 that the arbitrator ultimately dismissed.⁷⁷ Two of the five cases settled. One involved a claim for \$610,000 and a consumer fee of \$5,000; and the other a claim of \$5,117,000 and a consumer fee of \$7,000. Again, consumers initiated both these claims. The fifth of these cases went to hearing. In that case, the amount claimed was \$142,957, and the consumer paid a fee of \$4,000 (while the business paid a fee of \$1,959.39). The arbitrator ultimately awarded the claimed amount. The data, however, also shows that counsel represented all five of these consumers. The last case, in particular, may be an anomaly. The following table summarizes the information regarding consumer fees in arbitration, offering additional proof that consumers do not pay high fees in NAF arbitration:

75. See *supra* notes 48-54 and accompanying text regarding the Public Citizen Report’s discussion of payment of fees.

76. See *supra* notes 48-50 and accompanying text regarding the Public Citizen Report’s discussion of court costs.

77. Specifically, one consumer paid \$590 in fees on a claim of \$50,590 that was later dismissed. The second consumer paid \$940 in fees on a claim of \$54,881 that was also dismissed.

Summary of Fees Paid by Consumers in NAF Arbitrations

Dispute Disposition	Count	Mean (Consumer Fees)	Mode (Consumer Fees)	Minimum (Consumer Fees)	Maximum (Consumer Fees)
Settled	7198	2.27	0	0	7000
Hearing/Default ***	16056	0.0264	0	0	185
Hearing	2019	8.21	0	0	4000
Dismissed	8561	1.1	0	0	940
Award by Settlement Agreement	84	7.74	0	0	250

By contrast, the business party paid fees in most cases. The data shows that the business paid some fee in 33,887 cases, or approximately 99.9% of the cases. The amount of fees businesses paid is also relatively low. For example, in 10,595 cases, the business paid a fee of \$70, and in another 8,769 cases, the business paid a fee of only \$25. The business paid less than \$100 in 25,860 cases, or 76% of total cases.⁷⁸ The following table summarizes the fees business parties paid:

Summary of Fees Paid by Businesses in NAF Arbitrations

Dispute Disposition	Count	Mean (Business Fees)	Mode (Business Fees)	Minimum (Business Fees)	Maximum (Business Fees)
Settled	7198	65	35	0	3670
Hearing/Default ***	16056	87.5	70	35	1600
Hearing	2019	706	770	0	51530
Dismissed	8561	69.9	35	0	3980
Award by Settlement Agreement	84	154	70	50	2480

78. Given the number of settlements and dismissals, low fees are not particularly surprising. *See supra* notes 26, 67-68 and accompanying text regarding the dispute disposition for more information regarding how the cases were resolved. Most arbitration fees occur as a result of arbitrator participation (such as ruling on motions or writing awards), and if the arbitrator is not very involved in the dispute, then the fees would be low.

Businesses rarely escaped payment of fees.⁷⁹ The business party paid no fee in only thirty-one cases. In twenty-nine of those cases, however, the consumer paid some fee. Two of those cases are mentioned above, the two consumer-initiated cases resulting in consumer fees of \$5,000 and \$7,000. The remaining cases involved consumer fees of less than \$500. In twenty-two of the cases, the fees were less than \$60. The other fees consumers paid totaled between \$110 and \$940, with different amounts in between.

The highest reported fee a business paid is \$51,530.⁸⁰ This case involved a dispute in which the business originally sought \$173,362.72. The case went to hearing, and the arbitrator ultimately awarded \$118,886.68 (\$54,000 less than the claim). The consumer, although found liable for part of the debt, paid approximately \$10 in arbitration fees. While this case is interesting, it also appears to be an anomaly. It demonstrates that significant fees may be involved in arbitration—for either party—but that arbitrators sometimes reduce significantly the amount the consumer owes.

Because arbitration fees often depend on the services the arbitrator provides, fees generally increase the longer the proceeding takes. The following table gives statistics for fees depending on the dispute disposition:

79. The NAF's data that businesses pay fees in the overwhelming majority of cases undercuts the Public Citizen Report's argument that fees are simply incorporated into arbitration awards. *See supra* note 54 and accompanying text. If the data reports that parties are paying fees, the question is how those fees could also be included in the award? Perhaps the answer to this question depends on what is characterized as a "fee." The numbers reported may include any number of types of fees, such as filing fees, administrative fees, and fees associated with arbitrator time. Without additional detail, it is impossible to know, however, whether some fees, like administrative fees and filing fees, are reported as "fees," while arbitrator expenses may be included in the arbitration award.

80. The data reports two nearly identical cases with identical amounts claimed, amounts awarded, business fees, etc., with two exceptions. First, the data shows two different case ID numbers. Second, the data shows that the consumer paid no fees under one ID number and a fee of \$10 in another ID number. Presumably, two identical claims and awards in the hundreds of thousands of dollars cannot be a coincidence, leading to two possible reasons for the anomaly. The figures could be the result of a clerical error or the claim could have more than one issue (perhaps a counterclaim?) causing the case to be reported twice in the data. No matter the reason for the anomaly, this paper will treat the two ID numbers as a single case.

Fees Involved in NAF Arbitrations

Dispute Disposition	Count	Mean (Business Fees)	Mode (Business Fees)	Minimum (Business Fees)	Maximum (Business Fees)
Settled	7198	65	35	0	3670
Hearing/Default ***	16056	87.5	70	35	1600
Hearing	2019	706	770	0	51530
Dismissed	8561	69.9	35	0	3980
Award by Settlement Agreement	84	154	70	50	2480

This data reveals that cases proceeding to hearing have significantly larger average fees (\$706) compared to any other type of dispute disposition.

In sum, the NAF data shows that consumers are not paying significant fees in NAF arbitration, if they are paying fees at all. The cases involving the biggest consumer fees are those cases *consumers bring*. The businesses, too, generally pay low fees. Overall, the data is best viewed in the context of the length of time the case was pending and the amount of arbitrator involvement.

D. Arbitration Cases Are Generally Short in Duration

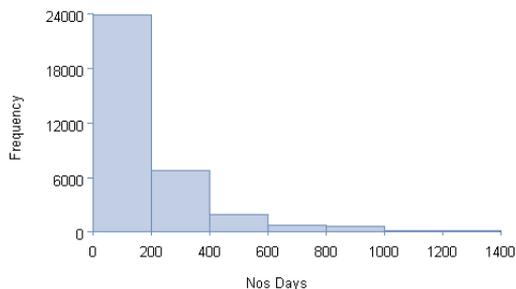
Finally, this section considers the amount of time consumers spend in arbitration, which, based on available data, is roughly the same or less than they would spend in court. Although arbitration should be quicker and more efficient than court, as arbitration becomes more like litigation, the procedure also takes more time.⁸¹ Consumers, however, presumably benefit from a typically shorter process and the ability to move on with their lives.⁸²

81. See Brian Levine, *Preclusion Confusion: A Call for Per Se Rules Preventing the Application of Collateral Estoppel to Findings Made in Nontraditional Litigation*, 1999 ANN. SURV. AM. L. 435, 460 (1999) (“[A]rbitration has gradually become more formal, expensive, and time-consuming, to the point where it now closely resembles courtroom litigation.”).

82. The Public Citizen Report does not address the issue of the length of the arbitration proceedings. Instead, the Report takes some issue with perceived discovery limitations in arbitration. See Public Citizen Report, *supra* note 2, at 9-10 (reporting that the due process rights, including discovery rights, of consumers are not protected in the arbitral forum). Of course, the more discovery that occurs in arbitration, the longer the arbitration will take. In other words, this area is a double-edged sword. If the process allows for comprehensive discovery, then the process can be described as too long and onerous. If the proceedings are streamlined and quicker, then the process can be described as depriving consumers of their due process.

The NAF data shows that a majority of arbitration cases are settled within 200 days, or in under seven months. To be more exact, 23,915 cases fall into the under 200-day category, and another 6,713 cases are resolved within 400 days, or under fourteen months. A chart showing the length of time for the data set as a whole is as follows:

Length of Time of NAF Arbitrations



The longest case in this data set lasted 1,385 days, or over three and a half years. That case went to a hearing where the arbitrator awarded the business claimant the full \$7,859.14 it sought.⁸³

As expected, cases that proceed to hearing generally last longer than those resolved in other fashions. The following chart provides statistics for the length of the proceeding grouped according to dispute disposition:

Another factor to consider is how much discovery is needed in a “collection” case? If the dispute really concerns the payment of a debt owed, the consumer should have most—if not all—of the information already in his or her possession. Certainly the amount of necessary discovery depends on the type of case, but in nearly all situations, the more discovery that occurs, the longer and more involved the process becomes.

83. The business paid the full \$420 in arbitration fees.

Average Length of NAF Arbitration by Dispute Resolution

Dispute Disposition	Count	Mean (Nos Days)	Mode (Nos Days)	Minimum (Nos Days)	Maximum (Nos Days)
Settled	7198	310	365	1	1379
Hearing/Default ***	16056	181	85	48	1260
Hearing	2019	204	126	77	1385
Dismissed	8561	189	183	42	1292
Award by Settlement Agreement	84	423	726	27	1306

Perhaps the most striking statistic is the length of time it takes for cases to proceed through hearing. In the “Hearing” category, cases resolved in an average of 204 days, or less than seven months. The category of “Hearing/Default” resulted in a slightly shorter average. Interestingly, according to these statistics, the cases that settled apparently did so late in the process. The mean⁸⁴ and mode⁸⁵ length of arbitrations of settled cases is greater than every other category, with the exception of “Award by Settlement Agreement.” This information leads to a curious conclusion that a case would take longer to settle than it would to proceed to hearing. Otherwise, the data generally shows that the more involved the process is, the longer the process will take.⁸⁶ According to this data, consumers appear to spend less time in arbitration than they would in court. Comparing the NAF data to the publicly available data regarding the federal courts in California is useful, recognizing that some percentage of these cases would be brought in state rather than federal

84. Mean is the average of all of the points of data. The mean is calculated by adding all of the values and then dividing by the total number of values. Although the mean, or average, is a very common statistic, it is very easily influenced by outliers, or data points that are extreme in one direction or the other. *See* MYATT, *supra* note 58, at 57 (“The mean (also referred to as average) is the most commonly used indication of central tendency for variables measured on the interval or ratio scales. It is defined as the sum of all of the values divided by the number of values.”).

85. Mode is the “most commonly reported value for a particular variable.” *Id.* at 56.

86. The difference between the mean, median, and the mode for the category “Hearing/Default” is another interesting statistic. The mode is only 84 days (less than three months), the median is 139 days (less than five months), while the mean is 181 days (approximately six months). Because a default can occur if a respondent does not answer within a set number of days, cases resulting in default awards would presumably be resolved quickly. Because the median is 139 days, half of the cases must have resolved in 139 days or less—suggesting that this category includes a significant number of default awards.

court.⁸⁷ In particular, the federal courts maintain statistics showing the number of months that cases remain pending in their courts, including a special category of cases that proceed to trial.⁸⁸

As a general matter, NAF arbitrations are resolved more quickly than federal cases in California, particularly when compared to the cases that proceed to trial.⁸⁹ The federal court data shows:

Average Length of California Court Cases in Months (filing to disposition on top—filing to trial on bottom)

Court	2007	2006	2007	2004	2003	2002
C.D. Cal	6.8	7.2	7.4	7.3	7.5	7.9
	21.3	21.3	20.5	17.8	21.2	20.0
E.D. Cal	9.3	10.1	10.7	9.3	9.7	9.1
	38.0	34.0	32.5	27.5	34.0	26.0
N.D. Cal	6.7	7.4	9.8	8.2	10.6	9.5
	24.9	25.0	28.0	22.5	30.3	23.5
S.D. Cal	5.9	6.6	6.3	6.9	6.5	6.4
	24.0	33.0	25.4	30.0	23.5	21.0

Based on this information, consumers in arbitration spend less time in arbitration than the average litigant in federal court with respect to both the total amount of time and the time from filing to a hearing. The difference is particularly telling when the time it takes to get to trial is compared to the time it takes to get to a hearing.

87. The U.S. courts maintain statistics on each court in the United States. *See* Federal Court Management Statistics, <http://www.uscourts.gov/fcmstat/index.html>. The reason why this article discusses the statistics relating to California is because the NAF data concerns only California cases.

88. The U.S. courts maintain separate data for civil and criminal cases. This article only discusses the civil cases.

89. The U.S. court data shows trends over six-year periods, which is particularly helpful here where the NAF data spanned from 2003 to 2007.

IV. EVEN THE COURTS DO NOT PERCEIVE NAF BIAS

Given the nature of the NAF data, it is not surprising that courts addressing issues related to consumer arbitrations before the NAF have almost uniformly enforced NAF-administered pre-dispute arbitration clauses. As a general matter, courts find that the NAF provides a fair and adequate forum for consumers.

A common consumer argument is that pre-dispute arbitration clauses are unconscionable. To prove unconscionability, a party must establish both that the contract is procedurally unconscionable, i.e., the parties do not have equal bargaining power; and that it is substantively unconscionable, i.e., the terms of the contract are inherently unfair to the party with the inferior bargaining position.⁹⁰ Generally speaking, the courts addressing the issue hold that the consumer arbitration agreements requiring arbitration before the NAF are not so inherently unfair as to make the contracts substantively unconscionable.⁹¹

In some cases, the consumer explicitly argues that the use of the NAF as the arbitration provider renders an arbitration clause unconscionable. In fact, some of these cases involve claims similar to those types of cases reported in the NAF arbitration data—claims by or against credit card companies. In 2008, the court in *Cronin v. Citi-Financial Services, Inc.*⁹² compelled arbitration despite a claim of unconscionability.⁹³ The court found that the costs of arbitration were not unduly burdensome for the consumer.⁹⁴ As a result, it upheld the

90. See, e.g., *Cronin v. Citi-Fin. Servs., Inc.*, No. 08-1523, 2008 U.S. Dist. LEXIS 57356, at *7 (E.D. Pa. July 25, 2008) (“In Pennsylvania, a party challenging a contract for unconscionability has the burden of establishing both procedural and substantive unconscionability.”) (citing *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999)); *March v. Tysinger Motor Co.*, No. 3:07-CV-508, 2007 U.S. Dist. LEXIS 91202, at *11 (E.D. Va. Dec. 12, 2007) (“A contract is unconscionable if it is one that no man in his senses and not under a delusion would make, on the one hand, and [that] no fair man would accept, on the other.”).

91. The test for unconscionability requires satisfaction of both prongs of the test. Thus, even if the parties are assumed to have unequal bargaining power (and generally the consumers and corporations have unequal bargaining power), the contract is still valid and enforceable if the terms are not unfair. See *Cronin*, 2008 U.S. Dist. LEXIS 57356, at *8 (“Disparity in bargaining power does not itself support a finding of unconscionability.”); *Miller v. Equifirst Corp. of WV*, No. 2:00-0335, 2006 U.S. Dist. LEXIS 63816, at *22 (S.D.W.Va. Sept. 5, 2006) (“However, a finding that a contract is one of adhesion does not automatically render the contract unenforceable; rather, ‘[f]inding that there is an adhesion contract is the beginning point for analysis, not the end of it.’”) (citation omitted).

92. No. 08-1523, 2008 U.S. Dist. LEXIS 57356.

93. *Id.* at *1.

94. See *id.* at *12 (“The agreement places most of the cost of arbitration on the defendant, not the plaintiff. The only way the plaintiff would bear more costs than the equivalent of a court filing fee (an amount he already paid, when he filed suit in this Court) is if an arbitrator determined that he made an unjustified or bad faith claim against

requirement that the consumer use the NAF or the American Arbitration Association (“AAA”), despite the consumer’s argument that the two organizations are “repeat players” who frequently arbitrate claims for the defendant.⁹⁵ Indeed, without proof that an arbitral provider actually prefers the “repeat player,” courts are hesitant to find an arbitration agreement requiring arbitration before NAF (or AAA for that matter) unconscionable.⁹⁶ In a 2007 case, the Northern District of California held that the “NAF has been recognized by other courts as a viable alternative to the judicial system,”⁹⁷ despite the consumer’s claim of “repeat player” preference.

the defendant.”); *see also* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91 (2000) (requiring a showing that arbitration expenses are likely to be prohibitive); *March*, 2007 U.S. Dist. LEXIS 91202, at *13-15 (rejecting consumer claim that the fees under NAF rules were unconscionable); *Schiano v. MBNA*, No. 05-1771, 2007 U.S. Dist. LEXIS 59694, at *6 (D.N.J. Aug. 14, 2007) (finding moot the consumer’s claim regarding fees when the credit card company actually paid all of the fees); *Jaimez v. MBNA Am. Bank, N.A.*, No. 05-2478-KHV, 2006 U.S. Dist. LEXIS 7526, at *10 (D. Kan. Feb. 27, 2006) (finding the agreement not unconscionable when, under the agreement, MBNA agreed to pay all costs beyond the costs the consumer would have been required to pay in court); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 412 (S.D. N.Y. 2003) (“This fee schedule in the NAF Code has been upheld as adequate and fair by numerous courts.”) (citations omitted); *see supra* notes 71-76 for a discussion of the fees actually paid by consumers in the NAF arbitration data. *But see* *Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099, 1107 (D. Neb. 2007) (finding arbitration clause with NAF unconscionable when the NAF is silent on class action procedures and when the contract required “financially impaired Nebraska residents” to resolve their disputes in Dallas, TX).

95. *Cronin*, 2008 U.S. Dist. LEXIS 57356, at *14. The *Cronin* court cited the U.S. Supreme Court decision *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991) for the proposition that courts should not “indulge the presumption that the parties and the arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators.” *Id.* at *15 (quoting *Gilmer*, 500 U.S. at 30); *see also* *March*, 2007 U.S. Dist. LEXIS 91202, at *20 (“So, the fact that Tysinger picked the NAF—an organization that, according to the Marches, favors creditors—does not invalidate the parties’ arbitration agreement.”).

96. *See* *Oestreich v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1071 (N.D. Cal. 2007) (“Apart from its categorical assault on the NAF as an allegedly industry-friendly forum, however, Oestreich makes no specific, compelling arguments showing that the NAF would be inappropriate in this action. Accordingly, Oestreich has made only a weak showing of non-mutuality, and in light of Oestreich’s minimal showing of procedural unconscionability Oestreich has failed to establish that the NAF provision is unenforceable.”); *see also* *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 898 (Ill. Ct. App. 2003) (rejecting the “repeat player” and other arguments made by consumers trying to escape an arbitration agreement). In *Oestreich*, however, the court found the entire agreement to be unenforceable because of the presence of an unenforceable class-action waiver. *See* 502 F. Supp. 2d at 1071-72. Interestingly, the defendant corporation agreed that a finding that the class-action waiver is unenforceable would make the entire agreement unenforceable. *Id.*

97. *Carmack v. Chase Manhattan Bank (USA)*, 521 F. Supp. 2d 1017, 1026 (N.D. Cal. 2007) (citing *Randolph*, 531 U.S. at 95 n.2) (listing the NAF as a dispute-resolution forum with fair fee-shifting provisions).

Courts have enforced agreements to arbitrate consumer disputes before the NAF in other contexts as well. For example, in *Davis v. Dell, Inc.*,⁹⁸ the plaintiff consumer alleged that the pre-dispute arbitration clause with the defendant computer company “is unconscionable because of the inherent unfairness of the NAF, the arbitration forum provided for in the Terms and Conditions.”⁹⁹ The District Court flatly rejected this argument, however, because the “NAF has been repeatedly held up as a fair and reasonable forum” and because plaintiffs presented “no evidence whatsoever” that the plaintiff “would be unfairly treated by any arbitrator.”¹⁰⁰ The court in *Davis* held: “[t]he Court does not find that requiring arbitration through the NAF is unconscionable.”¹⁰¹ In *Provencher v. Dell, Inc.*,¹⁰² the court went as far as to state that the NAF

98. No. 07-630, 2008 U.S. Dist LEXIS 62490 (D.N.J. Aug. 15, 2008).

99. *Id.* at *14.

100. *Id.* at *14-15 (citing *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 929 (N.D. Tex. 2000)) (“The Court is satisfied that NAF will provide a reasonable, fair, and impartial forum within which Plaintiffs may seek redress for their grievances.”); *see also Vera v. First USA Bank, N.A.*, No. Civ. A. 00-89, 2001 U.S. Dist. LEXIS 9052, 2001 WL 640979, at 1 (D. Del. Apr. 19, 2001) (“NAF is a model for fair cost and fee allocation.”); *Marsh*, 103 F. Supp. 2d at 925 (“Plaintiffs’ accusations of bias are directed toward NAF, not the independent arbitrators who actually conduct the arbitration. Aside from the Plaintiffs’ conclusory allegations, there is no evidence whatsoever that they would be unfairly treated by any arbitrator.”); *Oestriecher*, 502 F. Supp. 2d at 1070 (rejecting the consumer’s arguments that “the NAF is an industry-friendly forum that is structurally biased against consumers”); *Gorokhovskiy v. MBNA Am. Bank NA*, No. 06C1120, 2007 U.S. Dist. LEXIS 46238, at *3-4 (E.D. Wis. June 25, 2007) (“Plaintiff’s claim that Wolpoff controls the NAF is based entirely on highly speculative information gleaned from the Internet.”).

In at least one case, *Toppings v. Meritech Mortgage Servs., Inc.*, 140 F. Supp. 2d 683 (S.D. W.Va. 2001), the court entertained the consumers’ claims that arbitrations in front of the NAF had the potential for bias. Rather than dismiss the case entirely, though, the court denied the motion to compel pending additional discovery on the issue. *Id.* at 686.

101. *Davis*, 2008 U.S. Dist LEXIS 62490, at *15. The *Davis* case is also noteworthy because the court upheld the arbitration clause despite the presence of a class-action waiver. *See id.* at *11-14. Specifically, the court stated: “Therefore, the arbitration clause is not against a fundamental public policy of New Jersey.” *Id.* at *14. Although the NAF arbitration data makes no mention of class-action issues, the Public Citizen Report takes serious issues with the potential for a class-action waiver. *See* Public Citizen Report, *supra* note 2, at 43-46 (“The same contracts that require binding mandatory arbitration often ban customers from joining class action lawsuits and class arbitrations. Such a ban means that corporate fraud and abuse may go utterly unchecked.”).

In addition to the *Davis* case, the case of *Sherr v. Dell, Inc.*, No. 05 CV 10097, 2006 U.S. Dist. LEXIS 51864 (S.D.N.Y. July 28, 2006), also required a consumer to arbitrate a claim under Dell’s consumer arbitration clause. The *Sherr* court refused to find the arbitration unconscionable when Dell agreed to pay the fees of the arbitration, *id.* at *16, and despite the presence of a class-action ban, *id.* at *20-21. *See also* *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 126 (Ill. Ct. App. 2005) (upholding Dell consumer arbitration clause requiring arbitration before the NAF).

102. 409 F. Supp. 2d 1196 (C.D. Cal. 2006).

“is without question an inexpensive, efficient, and convenient forum for resolving commercial disputes.”¹⁰³ These cases demonstrate that courts generally regard the NAF as an acceptable alternative for those consumers who agree to binding arbitration.

The courts, however, do not uniformly uphold arbitrations in front of the NAF simply *because* NAF is the arbitral provider. For some courts, the ability to waive a class action under NAF rules is enough to make an arbitration agreement unenforceable¹⁰⁴—but these cases turn on the class-action waiver, not on the alleged bias of NAF arbitrators. Other courts find provisions *other than* (or in addition to) the fact that the NAF is the chosen provider to be the reason why the clause is found unconscionable.¹⁰⁵

Even where a valid agreement to arbitrate exists, a consumer may claim bias on the part of the arbitrator in an attempt to vacate the arbitrator’s award.¹⁰⁶ Some courts consider the NAF’s rules and codes of ethics when determining whether the NAF provided them a fair hearing. For instance, in *Carmack*, the Northern District of California held that the NAF Rules of Procedure provided consumers with due process.¹⁰⁷

103. *Id.* at 1198. Ultimately, the court concluded: “Simply put, Mr. Provencher made a deal with Dell to arbitrate his disputes with Dell before the NAF and waive his right to proceed by way of class action. There is no legitimate reason under Texas law for not holding Mr. Provencher to that deal. He must arbitrate his claims before the NAF and he cannot proceed by way of this class action.” *Id.* at 1206.

104. *See, e.g.*, *Klussman v. Cross Country Bank*, 134 Cal. App. 4th 1283, 1299-1300 (Cal. Ct. App. 2005) (finding the class-action waiver unconscionable, but not addressing other issues relating to NAF, including arbitrator bias).

105. *See, e.g.*, *Mercuro v. The Superior Ct. of Los Angeles County*, 96 Cal. App. 4th 167, 178-79 (Cal. Ct. App. 2002) (expressing concern over “repeat player” bias but holds that this employment arbitration agreement is unconscionable under the theory that statutory rights could not be vindicated in arbitral forum); *see also Hollins v. Debt Relief of Am.*, 479 F. Supp. 2d 1099 (D. Neb. 2007).

106. *See Bellavia v. First USA Bank, N.A.*, No. 02 C 3971, 2003 U.S. Dist. LEXIS 18907, *8 (N.D. Ill. Oct. 20, 2003) (“[I]f the arbitration panel in fact renders an award that is based on arbitrator bias, [plaintiff] has a remedy—he may seek to vacate the award.”); *see also* 9 U.S.C. § 10.

107. *Carmack v. Chase Manhattan Bank (USA)*, 521 F. Supp. 2d 1017, 1025 (N.D. Cal. 2007) (“the National Arbitration Forum provides all of these procedural safeguards in its Code of Procedure.”). The *Carmack* court stated:

Plaintiff has failed to plead any facts indicating improper motives by the NAF arbitrator. As stated, the National Arbitration Forum provides the procedural protection of a neutral arbitrator; plaintiff had the opportunity to challenge the neutrality of her arbitrator during the course of arbitration, yet she chose not to do so. Moreover, in *Woods*, the Ninth Circuit upheld as impartial an arbitration panel with a much more obvious source of bias than the NAF arbitrator here—the arbitrators there were employees and business associates of one of the parties. Here, the only business relationship pleaded by plaintiff is defendant’s regular use of the NAF as an arbitrator in credit card disputes. Without pleading facts that specifically indicate improper motives by the NAF

Similarly, in *Bank One, N.A. v. Coates*,¹⁰⁸ the court held that, in the absence of further evidence, the NAF code of ethics derailed an argument that NAF arbitrators were biased.¹⁰⁹ In *Miller v. Equifirst Corp.*, the District of West Virginia compared the plaintiffs' fears about arbitration with those the Supreme Court rejected in *Gilmer v. Interstate/Johnson*, noting that NAF procedures require that:

(1) prior to the selection of the arbitrator the names and qualifications of potential arbitrators are provided to the party; (2) the arbitrator is required to be "neutral and independent" and disclose any circumstances that might constitute a conflict of interest or cause the arbitrator to be unfair or biased; and (3) in the arbitrator selection process each party has one preemptory challenge and unlimited challenges for cause.¹¹⁰

Without solid evidence of arbitrator bias, then, the courts appear willing to rely on the safeguards the NAF creates through its rules and codes of ethics to justify enforcing NAF-drafted arbitration awards.

Although courts continue to consider carefully unconscionability challenges to arbitration agreements, they do not find agreements unconscionable on the basis that NAF is the arbitral provider. The NAF data, as analyzed in this article, supports the view that requiring consumers to arbitrate using NAF arbitrators does not create a basis for finding arbitration agreements unconscionable.

arbitrator, plaintiff fails to state a claim for vacating or correcting the NAF arbitration award.

Id. at 1027.

108. 125 F. Supp. 2d 819 (S.D. Miss. 2001). In *Miller v. Equifirst Corp.*, the Southern District of West Virginia similarly held that without real evidence of arbitrator bias, the NAF rules and procedures provide "adequate mechanisms . . . to ensure that the parties will ultimately select a neutral arbitrator." 2006 U.S. Dist. LEXIS 63816, at *48-49; *see also id.* at *45 (noting unwillingness to cede to the consumer's "general antipathy to arbitration").

109. *See Coates*, 125 F. Supp. 2d at 835 ("[T]he rules governing the conduct of NAF arbitrations belie defendant's speculation that suspected bias by the NAF has any realistic potential for affecting decisions of arbitrators in NAF arbitrations."); *see also Carbajal v. H & R Block Tax Services, Inc.*, 372 F.3d 903 (7th Cir. 2004) (affirming district court's order compelling arbitration at the NAF); *Lux v. Good Guys, Inc.*, 2006 U.S. Dist. LEXIS 25167, 2006 WL 357820 *5 (C.D. Cal. 2006) (Carney, J.) ("Mr. Lux has not shown that the National Arbitration Forum ('NAF') is one-sided."); *Beneficial Nat'l Bank, U.S.A. v. Payton*, 214 F. Supp. 2d 679, 690-91 (S.D. Miss. 2001) (rejecting the consumer's argument that the NAF arbitrators are biased without any proof of bias).

110. *Miller*, 2006 U.S. Dist. LEXIS 63816, at *46 (citing Rules 20, 21, and 23 of the NAF Code of Procedure).

V. CONCLUSION

Certainly no dispute resolution process—including the court system—is perfect, and the mandatory use of consumer arbitration raises issues of concern. As mentioned above, the primary issue is the potential for “repeat player” bias. The existence of a small pool of arbitrators who may not always disclose previous work for the repeat players heightens this concern. The data does not, however, support a “repeat player” bias finding nor does it establish that arbitrators disregard legal and ethical reporting requirements. The NAF data simply cannot resolve these potentially troublesome issues.

The NAF data establishes that consumers find success in arbitration. And, even when the consumers “lose” as defined in the Public Citizen Report, the “losses” may actually be partial “wins.” In addition, the data demonstrates that consumers, as a whole, are not paying exorbitant fees and that they typically resolve their disputes in less than one year. Moreover, the courts reasonably conclude that arbitration in front of the NAF, in and of itself, does not render a consumer arbitration agreement unconscionable.

Although the NAF data contains much useful information, additional data would provide a more complete picture of consumer arbitration. First, a more detailed description of the claims at issue in each arbitration, rather than the general category of “collection” cases, would help researchers evaluate the consumer arbitration process. Second, some indication of the number and specificity of the claims would also be useful, as would an indication of whether the respondent/consumer brought counterclaims and the nature of those counterclaims. Finally, the study would be enhanced if the data specifically separated the cases ending in a default judgment from those that end with a contested hearing. With these additions, the information collected would be greatly enhanced and would shed more light on the issue of fairness in the consumer arbitration process.