

>> Tom Pahl: Well, good morning, everyone. My name is Tom Pahl. I'm an Assistant Director in the FTC's Division of Financial Practices, and I am thrilled that all of you are here today for the second of our debt-collection litigation and arbitration roundtables. We want to thank San Francisco State University for helping us today by allowing us to use their space to host this event, and we look forward to some very animated and productive discussions today. Before we get started, I'd like to go through some housekeeping and administrative details, just so everyone is aware of them before the events commence in earnest. First of all, the bathrooms, for those of you who didn't notice them, are located out in the elevator lobby and adjacent to the elevator banks. In the case of an emergency, San Francisco State has fire marshals who will come down the hallways and direct us to safety. The one thing they did ask that we not do is try to take the elevators in case of a fire or earthquake or other kind of emergency. There are light refreshments over on the countertop to my left. And please help yourself. There's coffee and some palmiers and some Nutri-Grain bars. So help yourself to light refreshments throughout the day. When we take a break for lunch, some folks have asked about places to go eat. One thing that I would note is there is an extensive food court that's attached to this building. To get there go out and take the elevators down to the "C" level, and that will connect you directly to, as I say, an extensive food court. And there's a grocery store and some other stores down there if you are interested. Now, turning to the events of the day and the workshop itself, we're gonna do -- the structure of this is there's gonna be panels up here. We're gonna go through various topics. There will be moderators who will try to keep the discussion going. What we're gonna do is at the end of each panel try to pose questions from the audience here, as well as the audience who is participating through our Website. If you're here in the audience and you have a question that you would like to have the moderator pose to the panelists, there are cards that we are making available over on the table. Write out -- and they're in your packet, as well. Write out a question. Hold the card up. Someone will collect the cards and pass them on to the moderator. I can't guarantee that we'll be able to ask all of the questions that people have. We'll do our best. But obviously, we are under pretty significant time constraints and trying to cover a lot of material. For those of you who are on the Internet, you can send questions to consumerdebtevents@ftc.gov. And those, again, will be picked up by some of our staff folks who are helping putting this event on. And they will, again, be forwarded to the moderator, and we

will ask as many of those questions as we can. For those of you who are speaking and are panelists up here, I would ask that you speak as directly as possible into the microphones. The sound system folks have said that that really is important in order to broadcast the sound, as well as for our court reporter to record it. I also would encourage you -- I know we anticipate and hope for a lively debate. Would encourage all of you, though, to try to speak one at a time. That makes the stenographer's job just that much easier. And so that's something that I would ask you to be mindful of and respectful of the other panelists. Without further ado... Oh, yes. If any of you have cellphones on, if you could turn them off or put them on vibrate, that would be much appreciated. Thank you. Without further ado, to turn to our opening speaker today. And our opening speaker is Chuck Harwood, who is the Deputy Director of the FTC's Bureau of Consumer Protection. For many years, Chuck was director of the FTC's Seattle regional office, where he was responsible for managing a number of FTC debt-collection cases. We're thrilled that Chuck is able to be here today and provide us with some opening remarks. Chuck?

>> Chuck Harwood: Thanks. Thank you, Tom. Well, good morning, and welcome to the San Francisco edition -- in fact the West Coast edition -- of the FTC's roundtable discussion entitled "Protecting Consumers in Debt-Collection Litigation and Arbitration." In fact, I'm truly pleased we were able to entice so many experts to join us today for this program. Your participation will help us better understand the issues and identify the problems and brainstorm about possible solutions to consumer-protection concerns in debt-collection litigation and arbitration. Now, along with the audience that we have in the room today, I'm also pleased that we've been joined by folks on the Internet through our Webcast. During the day, you're going to hear from a variety of folks, including some FTC folks. And I just want to add one caveat regarding the FTC folks who will be participating. While we are here primarily to collect information, we may occasionally express opinions. To the extent that we do so, please understand that those are simply our opinions and not those of the Commission or any individual Commissioner. So, this program is one of three roundtable events the FTC is hosting this year as part of our ongoing effort to address consumer-protection in debt collection. We held our first event in Chicago in early August, and the third and final event will take place in Washington, D.C., on December 4th this year. Also, we know that there are many people with interests and expertise in these areas who may not be able to participate in one of these roundtables. For these folks, we would encourage you to submit your comments, as

Tom has already said, through our online form or through other means. You have a couple different ways you can comment. One is there's a structure for commenting in your folders and on the literature table, and then also online, there's information on how to comment. And if have thoughts, you're not able to participate in one of our roundtable events, please take a moment and submit your comments through one of those means. So, these debt-collection roundtables grew out of our comprehensive study and review of consumer-debt collection. Litigation and arbitration are clearly important elements of the debt-collection process, and we want to build a more extensive record to guide policy-making in this area. The roundtable discussions are designed to help us target critical issues, understand variations in jurisdictions, and identify potential debt practices and guiding principles. We hope that our discussions will enable us to make well-informed and balanced policy recommendations as to debt-collection litigation and arbitration proceedings. Now, tomorrow, for those of you with the stamina to stick around, and I hope many of you will, we'll be discussing litigation. But for today, our topic will be debt-collection arbitration. Now, as many of you are aware, in mid-July, the Minnesota Attorney General's office sued the National Arbitration Forum, or NAF, which was by far the leading arbitration agency for consumer-debt-collection matters. The suit filed by the Minnesota AG's office alleged that NAF had engaged in consumer fraud, deceptive trade practices, and false advertising through holding itself out as an impartial dispute arbiter, despite having a complex web of affiliations with key members of the debt-collection industry. After the suit was filed, indeed within a matter of days after it was filed, NAF and the Minnesota AG's office entered into a settlement that requires NAF to in fact refrain from arbitrating consumer-debt-collection disputes. Responding to a request from the Minnesota AG's office, the American Arbitration Association also chose to refrain from arbitrating consumer-debt-collection disputes. After those two events, the Bank of America announced that it would cease using binding mandatory-arbitration clauses in its credit-card agreements. Thus at the moment, and I stress that "at the moment," there are many uncertainties surrounding the potential arbitration of consumer-debt disputes. But we believe there remains a large demand among creditors for arbitration services, and in fact, the Federal Arbitration Act favors enforcing mandatory pre-dispute arbitration clauses that creditors include in their contracts. Therefore, it seems likely that arbitration providers will appear in the future to arbitrate consumer debt-collection disputes. So how should arbitration operate in the domain of consumer-debt-collection disputes? On what principles should it operate if consumers and consumer rights are to be

protected without unduly burdening industry? Today's roundtable discussion will focus prospectively on how to construct a consumer-debt-collection arbitration system that treats consumer participants fairly. First, we'll discuss how arbitration proceedings should be initiated in a manner that makes consumers better aware of them and their potential serious consequences. As part of this, we will explore the need for improvements in consumer notification. Next, we'll examine the role of consumer choice in debt-collection arbitration, including what could be done to enhance such notice. This discussion will address what information consumers might need to make more well-informed choices about whether and when to arbitrate their disputes. We will also examine whether changes in the law or in industry practice might lead to higher consumer-participation rates or more appropriate consumer choice with regard to arbitration disputes. Then we'll have lunch. After lunch, we'll examine what procedures ought to be adopted to provide for a fair resolution of consumer-debt-collection disputes. In part, we'll examine biases or in some cases perceptions of biases in consumer-debt-collection arbitrations. What ties to exist between arbitration providers and debt collectors, for example, is a key question. What sorts of ties should be disclosed or prohibited? We'll also consider whether arbitration proceedings could be more transparent and whether arbitration results and reasoning could serve as a precedent. In connection with this inquiry, we will discuss desirability of requiring systematic reporting of data about consumer-debt-collection arbitration. Finally, we'll explore how arbitration decisions ought to be enforced or contested. In particular, we will ask whether any change in the law or in industry practice should be implemented with respect to collectors converting awards into judgments or consumers contesting awards. I trust that by the end of the day, we will have a clearer idea of how to design a fair and effective consumer-debt-collection arbitration system. Also, I should say I'm looking forward to a lively and informative discussion, and I hope we'll learn more from each other's ideas. Finally, let me thank you again to each of you in this room and online who are participating and are willing to assist the FTC in this important inquiry and help us as we move forward in this area. So with that, I will turn it over to our first panel. And what's the MO here? Oh, I turn it back over to Tom. Okay. That's not on my script. Thank you, Tom.

>> Tom Pahl: Thank you.

>> Chuck Harwood: Thanks. [Applause] Thank you. I'd like to ask all of the panelists to come up and take their seats. And if everyone could bear with us for a moment while they do that, I would appreciate it. All right, thank you. We are thrilled to have such a wonderful collection of representatives for our panels today. They represent a broad spectrum of legal experience and a broad spectrum of interest -- debt collectors, creditors, debt buyers, etc.-- people with a lot of experience in arbitration on both sides of the issue. So we're pleased to have such a fine group of people here. In the folders that you've received is a detailed biography of each of the panelists, but I'm gonna go around and in a very short form give a brief introduction to each panelist so that those of you who are in the audience will be able to connect up the names with the faces that you see before you. Beginning here, and we have seated the panelists in alphabetical order, so there's no particular rhyme or reason to where people are sitting. Our first panelist starting here on my right is Nancy Barron, who is a partner in the San Francisco law firm of Kemnitzer, Anderson, Barron, Ogilvie & Brewer, where she represents consumers in debt-collection matters. Immediately to her left is Irving Capitel, who's a senior counselor for ADR at the BBB in Chicago. Continuing around, we have Gail Hillebrand. I'm going to have to pull out Gail's biography just to see. She is the Financial Services Campaign Manager and a senior attorney at the west coast office of Consumers Union, the nonprofit publisher of "Consumer Reports" magazine. Immediately to her left is Jerry Jarzombek, who's a solo practitioner whose primary focus is on consumer law. Next to him will be David Melcer, who is a banking and consumer-finance lawyer with specialties in bankruptcy and collection. Moving around, well, the next person is Bevin Murphy, who is an FTC staff attorney who will be moderating our first panel today. Immediately to Bevin's left is Richard Naimark, who is a Senior Vice President at the American Arbitration Association and the International Center for Dispute Resolution. Continuing around to his left is Tomio Narita, who's a partner with the San Francisco law firm of Simmonds & Narita, where he defends debt-collection law firms, debt buyers, collection agencies, and creditors. Continuing around, our next panelist is Jean Sternlight, who is the Saltman Professor of Law and Director of the Saltman Center for Conflict Resolution at the University of Nevada Las Vegas Boyd School of Law. To her left is Jim Sturdevant, who is a practitioner here in San Francisco who represents plaintiffs in class actions involving consumer protection, financial fraud, and insurance fraud. Continuing around to -- after Jim, we have Christine Van Aken, who is a Deputy City Attorney in the office of the San Francisco City Attorney, Dennis Herrera, where her primary practice is the litigation of consumer-protection cases.

Immediately to her left is Jerry Yalon, who's an attorney who focuses on consumer-debt-collection issues for the law firm Mann Bracken. And last but certainly not least is Jay Welsh, who's the Executive Vice President of JAMS, which is the largest private provider of ADR services in the world. So I'd like to thank all of our panelists for being here today to share their thoughts about debt-collection arbitration. Without further ado, we can start off with our first panel, which will be moderated, as I mentioned, by Bevin Murphy, who is an attorney in the FTC's Division of Financial Practices. And our first panel today will be initiating proceedings and consumer-participation rates.

>> Bevin Murphy: Thanks, Tom. Well, we have a lot to cover and a very unfortunate short amount of time to cover it. So I guess I'll just start out by echoing again our thanks to everyone for making the trip out here and for helping us with these important issues. And because we do have a lot to talk about in a short amount of time, if I have to unfortunately cut anyone off or if I don't get to anyone's hands or questions, that's unfortunately what we're gonna have to do to get through all of our topics. So, as Tom mentioned, we're gonna start out with how proceedings are initiated, and especially what consumers understand about these processes in terms of the consequences that it has for them and how important arbitration can be to debt collection. Our approach is gonna be two-prong. We want to hear about all of you all's experiences out there in the field, in your jurisdictions, and also prospectively what can be done. To the extent there are problems, what ideas we have for solving those problems. So the general subtopics we're gonna go through are notice -- how are consumers informed about arbitration proceedings? Are they informed about arbitration proceedings? Once we get to the arbitration proceedings stage, what has to be shown? You know, what is the burden of proof to show that a consumer actually did receive notice? And again, thinking prospectively of normatively how should consumers be informed of proceedings, and how should the burden of proof work? So we are going to open up the mikes. We can take those in order, starting with notice. What is everyone's experience? How are consumers informed about arbitration proceedings? And I guess even before that, are consumers receiving notice about these proceedings? Who would like to start?

>> Jim Sturdevant: I'd be happy to start.

>> Bevin Murphy: Okay. Thank you.

>> Jim Sturdevant: Start of it. I think that the way that consumers generally find out about arbitration is they retain a lawyer, they file a lawsuit, and after a complaint is filed, there's a motion to compel arbitration that's filed by the defendant. And presumably, their lawyer communicates that to them. They don't know before that that there is an arbitration clause in the agreement. To give you an example of agreements, if you look at credit-card agreements, Senator Dodd said at a hearing in February the average length of every credit-card agreement in the United States exceeds 30 pages. If you look at the deposit side of banking, facts booklets at Wells Fargo Bank and Bank of America are near or exceed in different years 100 pages. And buried somewhere within the 100 pages is a small provision about arbitration. The same is true with employment agreements or stuffers or other kinds of retail-installment-form contracts that people have with propane suppliers, telecommunications services, long-distance providers, cellphones, cable, etc. So I don't think that, one, there's any general level of awareness by consumers about arbitration. I don't think it comes to their attention in connection with an agreement. And as I said, most of them find out about it, i.e., there is something called arbitration, in response to a lawsuit that they file.

>> Jerry Yalon: I would respectfully disagree that that's when consumers first find out about the arbitration process. Let's think about what's involved in the most typical of consumer transaction, which today is the credit card. There may be an application for a credit card that may be electronic on the Internet, that may be in writing, that may be in response to an invitation from the credit-card issuer that they'll issue a credit card if you'll just sign here. When the credit card comes, there's a written agreement that comes with it. You're asked to sign the back of the credit card. The back of the credit card generally says signing this, agrees to the terms of use of the account. When you go and use your credit card at the typical merchant, most merchants are still having you actually sign a slip for your transaction. And the slip says, "I agree to the terms of the account," or otherwise say, "I agree to pay this if it's not honored by the account." So this is a very broadly used transaction that virtually almost every household in this country now has. This is not a new thing. The fact that there's a long agreement is to meet the requirement of the law that there be disclosures. There isn't a question that's been raised that there is an improper disclosure. The question is, are people reading the agreement, and are they intending to agree to all of it? Well, in using the credit card, under the law, even under common law, using the credit card is agreeing to its terms. Where are the

terms? Are they available to the consumer? Yes. Has the consumer read it? Very possibly not. But that is a choice by the consumer. That's not a matter of it being hidden from them or there being any trickery. And I think it's important to think in terms of the fact that responsibility lies with both parties to a contract. Consumer contract perhaps, we should have a higher standard. I don't have an issue there that consumers should be protected. But we're not dealing with an issue here where something is being hidden from the consumer. Generally speaking, the credit-card companies issue an annual restatement of the terms. And I don't know if most people read those or not. Most of the time, when I get those from my credit-card issuers, I admit I usually don't. But I think that's the fact.

>> Bevin Murphy: And now, if we were gonna move beyond perhaps the initial notice that a consumer might have of arbitrations being out there and binding them, if we go to -- in fact, let's assume, although there certainly is a dispute, that consumers are not particularly aware of what arbitration is or what are its consequences. What about when an arbitration proceeding is initiated? If we assume that perhaps they aren't as aware of what arbitration is and what it means for them, what can be done in terms of the first notification they get that an arbitration proceeding has commenced against them? Ms. Van Aken?

>> Christine Van Aken: So, I can speak about what I've seen in connection with the National Arbitration Forum's processes. And we know that that's not a forum that requires personal service. There are many ways under the rules to make service, including, you know, delivery by a carrier, registered mail, UPS. And I think that there are some serious issues with that, because, you know, when you give a package to the care of UPS to deliver it, it sometimes goes to your neighbor, or somebody signs for it who answers the door. So it doesn't necessarily mean that the person to whom it was addressed received it. And that's certainly something that I've seen a lot of in confirmation proceedings, because once the creditor receives an award and wants to go to court and confirm it, then we're in the world of using service of process as required by a court. And many, many cases that I've seen, consumers do allege that they never received notice and that that's why they defaulted in the arbitration. Now, I certainly haven't investigated all of these cases individually, but it's an allegation that consumers frequently make under penalty of perjury. So that's one issue. I think another issue that arises is whether the addresses that are used are good.

And I think this particularly occurs when you have a downstream debt purchaser, and it's been a while since the debt was incurred, and since the consumer was in touch with the company with whom the consumer allegedly incurred the debt. And so, you know, I'm aware of companies that don't go back and seek information about the consumer's current whereabouts, but simply use whatever address they've been provided in the file that they purchased from the original issuer of the debt. So I think that's another issue is the currency of that information. And then we get to later on, well, what's the check on those practices? And the check, of course, is the individual arbitrator, which I think is something that we'll -- the flaws in that check are something that we'll I'm sure address later in this conversation today.

>> Bevin Murphy: Mr. Narita?

>> Tomio Narita: Yeah. I think one thing to keep in mind is that the creditors and the debt collectors have a very strong interest in making sure that the consumer gets actual notice of an arbitration proceeding. I mean, I know from my experience that, you know, one of the biggest nightmares of any case is where you go through the whole process, you give the notice that's required by the contract, you have an arbitration hearing, you get an award. You then go, and you're unable to, you know, negotiate any kind of a settlement. You go and try to confirm it, and then that's the first time that you hear from a consumer that there was no notice. So my clients certainly have a strong interest in having, you know, a methodology of showing that consumers were served. They want them served. They're not trying to collect by means of subterfuge. In fact, it's in their interest to have the consumers participate in the process and be notified of the process. But generally speaking, the way that you notify a consumer in an arbitration proceeding is set by the contract. The contract might say that you do it by registered mail with a signature. The contract might not specify, and you might use a process server. But by the time it makes it to the collection industry, we really don't have a dog in that hunt. You know, it's my client's job just to follow whatever rules apply and serve by the method that's provided for in the forum.

>> Bevin Murphy: Ms. Sternlight?

>> Jean Sternlight: I think Mr. Narita is right, obviously, that the terms of service are set in the contract. But I think that that's what we're here to talk about is whether those terms are good terms or not good terms. And to the extent as Ms. Van Aken was speaking about, that service is allowed in the arbitration context that wouldn't pass muster in the court context, I think that's a concern that we're here to talk about today. Ms. Aken's already given, you know, a good explanation of a lot of the problems that occur when service is attempted in the arbitration context, and I just want to add one more piece to that, which is I don't actually litigate anymore. I used to a long time ago. But I do spend a lot of time speaking to law students, who one would presume are actually a lot more educated than the typical member of the public, because they're going to law school. And yet I can tell you from speaking to hundreds and hundreds of law students and even law professors over the years, they don't even know what arbitration is. I mean, it's beyond just "Was a document served to them?" Even if people get served with a document that says "arbitration," they have no concept, even law students. Even law professors have no concept of what arbitration is. They don't realize that it's a binding process. They don't realize it's actually in many ways more binding than a court proceeding. So that it's understandable, I think, that many consumers, when served, if served with a piece of paper that says something about arbitration, they don't understand the seriousness of that, and they don't behave therefore as they might if they would receive a document stamped with a court's address and so on.

>> Bevin Murphy: I see some hands to my right. You, and then you.

>> Jerry Jarzombek: One of the things that I have found in my practice is when people find out they've been summoned to arbitration is when they thought they were getting something from the FedEx or the UPS guy, and now they've got an envelope, and they don't know what to do with it. And in the context of when that comes really to the forefront is during the confirmation proceeding. I had a particular situation where a client came in and said, "I never signed for this. I was never served." And when you looked at the signature that was on the service, it was clearly not hers, because it started with a "C," and her name didn't. And when I asked her if someone in her house was named Connor, she said sure. That's my 11-year-old son. And so the 11-year-old signed for it. And did mom and dad know about it? Probably did. But certainly, that wasn't service. And in the confirmation proceeding, there was an affidavit that swore that the respondent had properly been

served. Obviously, that wasn't true, because when it went back, the UPS guy didn't notice it, and it went back to the person who initiated the arbitration, and they didn't notice that that name didn't match, or perhaps they thought that "Hey, if somebody signed for it, that's good enough." But it wasn't until we got there to the confirmation attempt that we noticed that this isn't even the right person. So if there's one thing that -- starting with what notice needs to be given, it has to be a better notice than UPS or a better notice than something in the mail that would be more equivalent to service of process so people can have an idea that the documents that they have received require some type of action. Certainly, there needs to be some type of a check that the right person who purports to be the respondent in one of these cases is actually served with the documents that are intended for them.

>> Bevin Murphy: Ms. Hillebrand?

>> Gail Hillebrand: Thank you. I think there are three different issues in notice here, and I want to parse them out really briefly. The first one is the choice. The best form of notice for an arbitration is when you choose it yourself after a dispute arises, something Consumers Union has endorsed since the mid-'90s, that that's the time that both parties should make the arbitration decision rather than having it forced upon them. I've got thousands of complaints about credit-card practices in our database from real consumers, and many of them are complaining about things that are, in fact, allowed by the contracts, at least as those contracts existed before Congress' recent reforms went -- when they go into effect. Consumers believe the big print on the promises, and they don't always see all the fine print. So with respect to arbitration or other things, our empirical evidence suggests that people do not expect all of those 30 pages to undermine the deal that they've struck with their credit cards. When you get into the issue of delivery and service, it seems that if arbitration's taking the place of the court, the service ought to be as good as the court process, and let me say after the improvements that we're gonna talk about tomorrow, because there certainly are issues with service in courts, as well. There's an interesting proposal from the working group in Massachusetts on small claims. I think it's in your record of the 2007 Massachusetts working group. We'll talk about it more tomorrow. But the concept there is before you take a default, there ought to be some confirmation that the service and the address that was served were good -- an independent verification. This could deal with the issue of the old address in the data file in an efficient way,

because you'd only have to do it if there's a default. If the person shows up, they got served. They heard about it one way or another. And I think that those recommendations might have a similar usefulness in the arbitration context to say, "Don't take a default until you've taken that extra step to make sure the person was served and was served in the right place, in the right manner." And finally, I think that there's an extra problem in debt collection both in court and in arbitration which relates to the content of the notice. The judges in Chicago I think refer to it as the "who are you problem." When you receive a legal paper or an arbitration paper from a person you've never heard of and never borrowed money from, the debt buyer, without information about the original debt, it's much more likely that that paper will be ignored, regardless of how it's delivered.

>> Bevin Murphy: Mr. Welsh?

>> Jay Welsh: Yeah. I want to go back a step, because we're referring to this as arbitration. And really, what it seems to me is it's a private collection program which was designed by the industry and a provider. And the rules were designed in a way which is far different than normal arbitration rules. And I think one of the things that the Federal Trade Commission has to deal with is if there is going to be a private program to assist in the collection of debts and credit cards, let's say, then I'd want to know some information about why the public small-claims court isn't used. One reason I heard today, and I asked some people who are in the business, and they said, "Well, attorneys can't appear in small-claims court." Well, maybe in debt collection, that should be changed so that companies can in bulk file. Because we know that 98% of the time, the person bought the television and didn't pay for it. It's not an issue of whether the debt normally was valid or not. So what percentage of these awards that are reduced to judgment are collected? Is this about collection of money? And what percentage is it? Is it a large percentage or a small percentage? Or do these just go into the wastepaper basket of people who can't afford to pay the cost of the item that they bought? But you can't have a private collection program that's designed by one side and the provider, and that's what I hope you're gonna end up with, the industry is gonna end up. If indeed a private program is acceptable, then you're gonna have a program that's designed so that it's fair and just and equitable and is not just a stream of paper being stamped by somebody who somebody is calling an arbitrator. I wouldn't call them an arbitrator.

>> Bevin Murphy: Mr. Naimark?

>> Richard Naimark: Yes. I think in many respects, I certainly agree with a lot of the comments that have been made so far. In many respects, the issue of notice in these arbitration programs may be the most significant issue. Jay's correct. These are arbitrations that are not like other arbitrations. The AAA did for a short time one of these debt-collection programs and found that one of the most striking differences between these arbitrations and even other consumer arbitrations is the extremely high rate of no-show by the consumer. Well over 90% of them never show, never participate, never respond in any way. And that's something we had not experienced before. So in answer to your question about how much understanding the consumers have about the arbitration process, the real answer is we don't know.

>> Bevin Murphy: Actually, on that note, how much of that 90% do you think is because they did not receive notice versus they chose not to appear?

>> Richard Naimark: I don't know.

>> Bevin Murphy: Does anyone have a thought?

>> Jay Welsh: I would measure that against how many show up in small claims and collection proceedings, and I think it's probably about the same. But I don't know.

>> Bevin Murphy: Ms. Barron?

>> Nancy Barron: A number of studies have been done on the difference in default rates, but I think it's extremely dangerous for us to be speculating on the reasons people don't show up before we have identified what the problems with notice are. And I wanted to reiterate one of the good points that Ms. Hillebrand made, and that is that we need to have the best notice possible if an arbitration award can be confirmed in court. There is a reason that a number of panelists today have said that the first time consumers find out about arbitration is at the confirmation proceedings. That's because there's a fundamentally higher standard of notice being given then. I don't think

arbitration is going to find the credibility that this panel is seeking, if in fact arbitration is appropriate at all in these circumstances, unless at least as good notice is required in arbitration as one would find in court, and that is personal service.

>> Bevin Murphy: Mr. Capitel?

>> Irving Capitel: Costs have always been a significant issue. Who pays for it? How does it get reimbursed? Where does it come from? And obviously, personal service is a much preferred way. We at the Better Business Bureau encourage the voluntary participation of all parties that are involved with any kind of an arbitration. And there are costs involved. And some of those costs are borne by the Better Business Bureau. Some of those costs are borne by the businesses. And sometimes they're borne by the other party, the consumer. The idea is to create an attitude of fairness. And from my point of view, we have a serious cultural problem with respect to a consumer culture and what the consumers expect and how it is that the providers of money will generate the kinds of revenues that they do from a lot of these people. It's really unconscionable to the industry, to the court system, to all of the administrators of arbitration and ADR programs, that 95% of the people who are involved would not participate. And it probably won't happen for 20 years, but there's got to be some kind of a thought process as to what our culture really needs to do to allow people to have a credit card. Some people I know would refer to that as perhaps socialism. I'm not labeling any of these things. It's a matter of how we will move towards obtaining a methodology that will result in people participating in good faith. Good faith is a very, very hard thing to handle, especially when you have people who want to give out money, and you have other people with a piece of plastic in their hand who can go out and buy whatever they want to buy until somebody tells them, "Sorry, this piece of plastic is no good any longer." But the due-process fairness that is required here to both sides is absolutely necessary to be looked at. Because as far as I know, all of the courts in this country have looked at arbitration processes as voluntary between the parties. Whether they are by post-dispute or pre-dispute agreements, the voluntary nature is essential. But the banks and the credit-card companies who are seeking the participation of these other people really need to understand -- not that they don't. And I don't mean to be patronizing. But they need to understand that the most effective manner of service on especially a statistic of 95% that don't show is very significant. And if that takes personal service, then that's what needs to

be done. The people involved in the stream of commerce need to cooperate. Otherwise, the stream gets so bumpy that it causes lots of problems for lots of factions in the industry. And our whole economic culture really requires that we have a methodology of dealing with these kinds of problems. A society as complex as ours must have stability associated with it. And this is an activity that assaults the stability of the economic program, because the defaults perhaps results in non-collected debts that people really know that they owe, and somebody's gonna have to pay those debts, either in higher charges, higher fees, in terms of people doing things that might be antagonistic to other factions in the process. So the idea really needs to come as to what kind of a standard needs there to be in order to effectuate good service. That's the linchpin of this whole process. Without the good service, I don't care how well you prosecute a case. If you don't have good service, it's gonna generate problems for you. And hopefully, elimination -- as Albert Einstein once said, "A smart person can solve a problem. A genius can avoid one." So the idea is to create a set of circumstances here that will hopefully avoid these problems and encourage people to participate.

>> Bevin Murphy: Do we have any geniuses with a response? [Laughter] Mr. Narita.

>> Tomio Narita: I can't fake the genius role. But to pick up on Irv's point about costs, I think cost of service is a big issue, and probably one of the reasons that creditors are attracted to arbitration is the reduced costs. You know, it's the promise of arbitration or some people say the myth of arbitration that it's supposed to be faster and cheaper and final, right? And so cheaper is a big part of that. And, of course, if you're gonna require personal service of the consumers for every arbitration, that's gonna be more expensive. That's ultimately gonna be a cost that's gonna be tacked on top of the award, likely. And so it's gonna be, you know, passed on to the consumer ultimately in terms of "Hey, you know, we had to spend extra money to serve you with these papers, and your agreement says that we recover those." So, you know, I think everyone has some interest in keeping the cost of arbitration low. One idea that I would throw out there is most states and federal courts have a system of what's called a waiver of service of summons. And maybe something like that is already being used in arbitration forums, and maybe if not, it could be considered, where you send a notice of an arbitration claim out by registered mail or FedEx or something, and you ask the consumer to sign that they have received it, and that becomes your

service. If they don't do that, then you hire the process server with the additional costs, and that becomes something that get tacked on at the end. But it's an extra step to, again, ensure that they do get notice that this is a real proceeding and that their rights are gonna be adjudicated if they don't get in there and participate in it.

>> Bevin Murphy: Mr. Yalon?

>> Jerry Yalon: We should talk about the procedure for service and process in the court system for a moment, just to remember what we're comparing this to. There is no requirement that every lawsuit be personally served on a defendant. Substitute service in California law is delivery to the home or to the business place or to that Mail Boxes Etc. location where they have a P.O. box and mailing by regular mail an additional copy. Under the federal bankruptcy court system, which is a very large system and generates notices galore, even a summons can be served by regular mail. So we're not talking about a system in these private contracts where they've chosen something far outside the norm. And I think there is an intent to provide actual notice. I think actual notice is the best, but I don't know that personally serving, which is a very high-cost process in comparison to any other means of service -- I don't know that the number of consumer participants is substantially higher than in other forms of service if actual notice occurred.

>> Bevin Murphy: Ms. Van Aken?

>> Christine Van Aken: Just wanted to respond to that. You know, substitute service is allowed in California, and I know we're gonna be speaking tomorrow about the court system and the successes and failures of that system for debt collection. But there is some diligence that's required before you can resort to substitute service, and a declaration of diligence is required. I have never seen one of those filed in an arbitration matter. The other issue is that in many cases, what I have seen in these files that are confirmed is simply a statement that service was made. No statement of how it was made or whether it was adequate. Nothing to allow the arbitrator to independently test the adequacy of that service. Simply a signed statement by the attorney that service occurred. And, you know, in a court system, that would simply not fly, and for good reason. I mean, there's not even a statement that the attorney has personal knowledge that that's what happened. It's not

evidence. But it's permitted under arbitration systems, or has been permitted. So, you know, I think there may be issues with court service, and there are different standards, but it still seems to me that where the rubber meets the road is quite different in arbitration.

>> Bevin Murphy: Let's actually talk about that. Regardless of what form of service is being used, what sort of proof is being offered in these proceedings that the consumer was, in fact, served in some way? Mr. Jarzombek.

>> Jerry Jarzombek: We had a problem in my county with that, because so many of the times, the courts were hearing confirmations, and no one showed up. I think a 98% no-show is conservative based on that. So one of the judges at one point decided that he would no longer confirm arbitration awards by default. He was a minority position in the county courts, but it caused all the county courts in Tarrant county, Texas, to sit down and devise a way that they would then give a default judgment in the context of an arbitration confirmation. And they came out with three steps. And they said from here on -- and they wrote this letter to 14 people. 13 of them were lawyers who worked for the collection industry who confirmed arbitration awards. I was the 14th. So I wonder who poisoned the well, I guess. But the thing that they required was a certified or authenticated copy of the award, an authenticated copy of the agreement to arbitrate, and if it wasn't signed by the debtor, an explanation in an affidavit about how the debtor was notified of the agreement and the steps the debtor took to acknowledge or ratify the agreement. And the last thing was a sworn verification that the debtor had made no payments on the award. That was what the courts then adopted as what they would use to confirm an arbitration award. Now, that's way past any state rule of procedure of what you need for a default judgment. But that's what they were doing, or what procedure they adopted because of the high incident of default. And when people did come to court, they were saying, "Well, I've never seen this agreement. I don't know anything about it. I don't know how this came to pass. I wasn't notified." So when you couple the fact that the consumers often said they didn't know how they got there, why they were being arbitrated, where this stuff happened, who these people were who signed this award, any of those things, couple that with the fact that somebody didn't show, that's what led to this I guess policy that the courts adopted for defaults. What happened as a result of that -- this was in October of '07 that the courts started doing this -- the county courts at law in my county have a \$100,000 limit on jurisdiction. So

they're kind of in the middle of where you'd go to file a lawsuit. After that, many of the confirmation proceedings were being taken to the district courts, which have unlimited jurisdiction, just to get out of this requirement, because these things, so many of the times, couldn't be met. So that's what happened in my county, where the judges got to be a little more proactive, I guess, in taking a step to see that somebody really did know about what was going on before they would confirm an award against them.

>> Bevin Murphy: Ms. Sternlight.

>> Jean Sternlight: The program that Mr. Jarzombek is describing is a very interesting one, but it's also important to put this in the bigger context, as I think he did, which is this is a real minority of judges. This isn't the norm remotely in this country. And I think, you know, Jay Welsh said it very well. What's going on here is that debt collectors and credit-card companies and so on are setting up their own private collection system and writing their own rules for how to do service. And with all due respect -- I mean, Mr. Narita says, well, he thinks that the debt collectors have the incentive to do really good service. I'm not sure that's true. Because, you know, what happens is if they don't do really good service in the ways that have been described and things go to old addresses and so on, they nonetheless were getting their default judgments like crazy through NAF and will again if another industry comes in and sets up a similar program. And then they take those default judgments obtained through arbitration to courts, which by and large do nothing remotely like what Mr. Jarzombek describes. Instead, most courts simply confirm, confirm, confirm without taking any kind of close look at the type of service that was done in the arbitration context. So, you know, really what's going on is that the incentives are not appropriate. The collection companies don't necessarily have an incentive to do good service, nor do the credit-card companies who write the agreements and make the arrangements with the arbitration provider to do service. It's correct, as several people have said, that doing good service will be more expensive. But I think, you know, it's the old saying, "You get what you pay for." I mean, it's true. Yeah, you're someone's gonna have to pay more to do good service. But I think that that's worth it. We can't have a private system where people can be found to owe money that maybe they never owed, and they never heard about the claims being brought against them.

>> Bevin Murphy: Mr. Welsh.

>> Jay Welsh: I've been connected with the ADR industry for like 18 years. And when we began to see the NAF program on arbitration for collection, I couldn't understand the value proposition for companies. I couldn't understand, you've got to pay a filing fee to NAF, you've got to pay an arbitrator. Then you get an award. And then you've got to go pay a filing fee in court to confirm it. So there has to be a reason why companies are doing this. If indeed they are saving money, they're saving money at some point that I don't understand. I was talking with people before, and I asked them this question, and they said the service of process may be one area where there is a savings to justify this two-tiered system. But I think if the FTC learned more about why, then maybe certain changes could be made in the public system to permit -- I mean, look, there is an interest in companies being able to effectively collect debt. You don't want to shut down credit. And there has to be an effective way of doing that, giving consumers protections that they have in the public courts. But I think you've got to find out why companies are doing this in the first place.

>> Bevin Murphy: Mr. Sturdevant.

>> Jim Sturdevant: You know, I think that Irving Capitel hit the nail right on the head. What we need is a system of voluntariness, a system of consent which will serve to guarantee participation in the system. And that's the root problem here. There is no voluntariness. There is no knowledge. There is no consent. In 1925, when Congress passed the FAA, it basically designed the system to enable commercial parties at arm's length to resolve disputes in ongoing relationships and move on. And an example I've used time and time again is the Bay Bridge, where they were building it or retrofitting it or whatever the heck were doing to it. There's a dispute that comes up in the third month about what size of screws were to be used or whether they should be flatheads or Phillips. Neither party really cares, but they want somebody to resolve the dispute so they can keep building the bridge and maintain the relationship that the contractors and the subcontractors have. That is not the situation when we come to consumer and employment disputes. The relationship is ended, by and large. So we don't have any participation. The alleged debtor doesn't know what arbitration is. He doesn't know what the package is. It's very different than the notice that comes from a court. People know what court notices are, and they tend to respect that far more than if it comes from

company "A" or provider "B." We just don't have that. And that's necessary for the system to work. Now, the reason that companies use providers like the National Arbitration Forum is because the forum, and it's very well known publicly, solicited companies to be their clients, guaranteed them particular results, guaranteed them there would be no class action ever administered by the National Arbitration Forum. If you don't collect the money, you have the in terrorem effect in the credit-card situation of an award that you can circulate to any number -- you know, Equifax or TransUnion or whatever. There's the in terrorem effect, and people's credit rating plummets, and then they can't get a loan. They can't buy a car. They can't get a lot of things. So even if they don't collect the money, they have the in terrorem effect of ultimately getting the money from people who have money, which distinguishes them from people that don't.

>> Bevin Murphy: Ms. Hillebrand.

>> Gail Hillebrand: Thank you. I wanted to make part of the point that Mr. Sturdevant made, which is -- I think Jay Welsh put his finger on it when he said as a matter of policy issue there be a private, non-judicial system for creating judgments, essentially. That's not the theory and purpose of arbitration. Whether you agree or disagree with arbitration, the theory and purpose behind the FAA favoring it was parties could get together and do things without a lot of process and frankly without a lot of law. And some of the state arbitration -- that's even more specific about the absence of a duty of an arbitrator to follow the law. When one side doesn't show up, the idea of facilitating parties getting together makes no sense at all. I think we also need to be careful not to think there's got to be a way to turn every small debt into a judgment. If you have to go to court, you have to stop and think, is this debt worth it in terms of the filing fees, the process, etc.? And I have seen legal services files and stories and complaints where the judgment is two and three times the size of the debt. And any sensible person who was simply trying to collect would not have turned that into a judgment. You turn it into a judgment because it's good for 20 years. It's good for 10 years unless it can be renewed. So it's good for longer. You turn it into a judgment perhaps because you can get a higher price when you sell a judgment to a debt buyer than just the debt itself. And we really need to stop and think about whether that's something that should be facilitated, and I think it's not.

>> Bevin Murphy: Mr. Capitel.

>> Irving Capitel: George Washington, an individual I assume everyone is familiar, in his will -- and anybody who wants to go on George Washington's will and find it on the computer can find a copy of it -- required that any disputes that existed with respect to the distribution of his property be resolved through arbitration. And Mr. Washington died in I think 1799. And he said that the actions of the arbitrators should be as though they had been reviewed by the Supreme Court of the United States. He placed a tremendous value on eliminating the acrimony that is generated by disputes. I don't think anybody here would disagree that we have a system of commerce that should not encourage people not to participate in the enforcement of these obligations. Somehow, this entire method of operation needs to be accepted by all parties, and people cannot use it as a threat or as a bat or as a weapon. They need to use it in good faith. I use the term "good faith" a hundred times a day, because it always comes up, and there are so many places that good faith is not even considered. I've even talked about -- everybody in this land who drives an automobile has a driver's license. You can't drive a car without a driver's license, and you can't get insurance to drive a car without a driver's license. We've been talking about putting forward a concept of getting a credit-card license. It sounds laughable, I understand. But the educational system in the country has been so devoid of teaching people how to handle their personal credit, and personal credit can be dangerous. It's almost like a drug. Your personal financial health is a reflection on the character that you present to the general world. How you handle your debts and your obligations is a very, very important aspect that we have reduced to a series of numbers called a credit score. You know, what does a credit score mean? How is it determined? But we condone sending these credit-card applications out to everyone and encouraging their use, advertising their use, talking about how wonderful it is to use them. And never, as the FDA requires in drugs, do we put any kind of a warning on there that says, "Use credit responsibly." And I'm not advocating in any sense of the word that my position is in favor of the consumer or my position is in favor of the credit-card companies and the banks, because I have taken almost an oath to neutrality in what I do. I cannot function, and my organizations cannot function, unless they are in fact neutral at all times, and that's what we spend a lot of time in trying to do.

>> Bevin Murphy: Thank you. Mr. Naimark.

>> Richard Naimark: Yes. I think to a certain extent, we're circling around the issue of what constitutes proper service or notice. I think we'll hear more of the comments we heard today so far about similar problems in the court and inconsistency state to state. In fact, I don't think a perfect system exists, and I think we need to think whether this is for arbitration or for the litigation process how the process can be improved. And one modest suggestion is I think we need to think sort of in terms of the last comment of imbuing the process at least to a degree with a certain amount of education. Instead of just legal notice to people, trying to capture their attention about what's the significance of notice, what the process is, how they might access what their rights are, how they work the process, what to expect. And perhaps at various stages from the initial agreement all the way through to the point of service making sure that there's easy access to that information and attempting to draw in at least some more of the people so they participate in the process.

>> Bevin Murphy: Thank you. And actually, on that note, looking at making sure a consumer is notified, even beyond process, which we've had some good comments about that this morning, any thoughts on what exactly a consumer should receive when they are notified that a proceeding has been commenced against them? I mean, what should this notice look like to adequately inform them? Mr. Narita.

>> Tomio Narita: Yeah. I know there's been some suggestions that the notice of arbitration that they get should be more conspicuous. And I think that's fine. One thing that we have to keep in mind, though, is that the collection industry is regulated. And unless we're gonna modify the FDCPA, section 1692 f(8) prohibits a collector from saying anything on the outside of an envelope or any other debt-collection device that indicates it's about debt collection. So if you have, you know, a FedEx man or a process server waving around some brightly colored object that says, you know, "debt-collection arbitration materials enclosed," you're gonna light up the FDCPA. So if we're gonna talk about conspicuously notifying the consumer on the outside of a notice of arbitration, I think that's a great idea as long as we're also gonna talk about exempting that standardized notice or envelope from the FDCPA.

>> Bevin Murphy: Ms. Hillebrand.

>> Gail Hillebrand: I think the notice, in addition to saying, "This is arbitration. Here's what it is. Here's what you have to do and by what time," really has to give the consumer information about why they're being sued. Who was the original creditor? What was the date of the last payment or charge on the debt? Who is this person who now has it? The National Consumer Law Center recommended in their '07 comments a very specific list of things that ought to be in a litigation complaint for debt collection, and I think that same list would apply here. People have to get enough information to know "Should I show up?" You know, "Was it the television that I bought? And now I owe them money? Is it the wrong amount? Is this the creditor I have a dispute with? Is this the one where it was an identity-theft problem, and now it's been resold to another debt buyer, and we're starting over again?" And without that information about what was the original debt, who's now trying to collect it, how much was the original debt for, and how much has been added since, it's impossible for a consumer to make a sensible judgment, "Should I show up or not?"

>> Bevin Murphy: And we actually have a question from the audience regarding class-action suits and how that fits in. And I think that actually points to a broader question that's been brought up of incentives. How can we incentivize this process so that consumers will receive better notice? Does anyone have any thoughts? Mr. Sturdevant.

>> Jim Sturdevant: I wanted to add on to what Gail Hillebrand said. I think it's been pointed out that generally speaking, consumers don't know anything about arbitration. They know about small-claims court because they've watched "Judge Judy" or "Judge Carl" or whatever. They know how that generally works. And they've seen court proceedings on television. But they don't know anything about generally arbitration. And there are very significant differences between arbitration and the public justice system. So in addition to whatever the seven provisions are that Gail talked about, consumers ought to be told at the outset what the basic differences are. For example, the arbitrator isn't bound by the rules of evidence. The arbitrator doesn't have to give you any discovery. The arbitrator doesn't have to explain the award. The proceedings are private. The award is final and binding, even if the arbitrator was manifestly wrong on the facts or the law or both. You know, those are the essential differences. There may be several others. But those would

certainly provide instant information to a consumer or an employee about the sharp differences between arbitration and regular litigation. And the reason for those differences historically, as many here know, is that arbitration was supposed to be final and binding. It was supposed to reduce costs and be faster. It was designed to enable people to move on in their relationships and get over the hurdles, like the one I identified before. It really wasn't designed in 1925 to be a substitute for litigation.

>> Bevin Murphy: Mr. Melcer.

>> David Melcer: Yeah. I think, speaking, you know, as we do in the debt-collection industry as the least sophisticated consumer, I'm wondering how many of them really understand whether or not they have the rules of evidence, whether or not the judge is really bound by the law, whether or not any of these things are true. If you want to use as a comparison "Judge Judy," well, you know, Judge Judy isn't bound by the laws of evidence. Judge Judy isn't bound by any of those things. Arbitration is probably very similar to "Judge Judy," at least in my experience. As far as, you know, being notified, I think we're talking about service here. I think that you could probably design some sort of language on the outside of the envelope that would be fair-debt compliant and still make people open up the envelope -- something like "There is a claim against you, You may lose rights." Something like that. I think you can find language without saying on the outside of the envelope "We're suing you over a debt." So I think once you get it open and they realize that there's a proceeding against them, I don't see that, you know, these consumers are gonna have any difference appearing before an arbitrator or before a small-claims judge to them. And if they're not represented, it's all gonna be the same.

>> Bevin Murphy: Mr. Welsh.

>> Jay Welsh: They don't appear before either, so it really doesn't matter, does it? I mean, I talked to an arbitrator. Turned out that the 75-year-old -- which in my business is not necessarily old -- brother of a colleague of mine was doing NAF arbitrations. And I said, "What is it? What happens?" He said, "I got a box. I get a box of files, and I open them up, and I go through them." And he's a good, honest guy. And I said, "Do you ever not grant?" And he said, "Well, sometimes

it just is a little flaky. But most of the time, what I'm doing is there's a box, and I go through, and I...stamp the awards and send it back.” And that's it. Now, that is not arbitration. That's nothing. What we're dealing here with is the industry obviously wants for some reason, which you have to find out why -- they want an administrative process to get a piece of paper -- we're calling it an award, but I don't care what you call it -- to go to court and say, "Here. Give me another piece of paper.” And I'm trying to find out why they don't just go to court and get the one piece of paper. And until somebody finds out why there is some kind of savings or what the reason is, you know, we're kind of dealing around the edges.

>> Bevin Murphy: Ms. Barron.

>> Nancy Barron: I think implied in this discussion is an underlying assumption that I don't see borne out in my practice, and that is that these debts are all valid. The people that come to me have real defenses to debts, and I'll give an example in a minute. It may be that a more streamlined process, a process that doesn't give adequate notice, a process that does not actively encourage people to open an envelope avoids that messy business of defense to the debt. So I would like today for us to just set aside the notion that debtors that are sent to arbitration are all a bunch of deadbeats. Let me give you an example that happened last week. A woman was sued, not in arbitration, but she was sued, and defaulted in court on a debt. She owed something, but she didn't owe the amount that was claimed. And it involved a deficiency after her car was repossessed. So we looked at the documents and noticed that the post-repossession statutory notice was woefully defective. We sought to get the default judgment set aside, and this week, we filed a class action where she is the representative plaintiff. And we will wait and see how many tens of thousands of people got that same defective notice. Many people have a real defense to these debts that they don't know about and will never know about if they don't get proper notice, they don't open the envelope, they don't know they can see a lawyer, which is some advice that should most certainly be inside that envelope, and they don't know that they don't have to pay not only some debt but the amount that is claimed is owed. That's why the seven factors that Ms. Hillebrand mentioned the NCLC requires are very important as a part of the notice that's given in the first instance.

>> Bevin Murphy: Thank you. And with that, we're actually gonna break for 15 minutes. If everyone could return at 10:30, we'll be focusing on consumer choice. Thank you very much.