



**Consumer Attorneys report: Arbitration clauses are everywhere,
consequently causing consumer claims to disappear.**

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*by NACA's Legislative Unit
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A June 2012 survey by the National Association of Consumer Advocates (NACA) demonstrates: **pre-dispute arbitration clauses are depriving consumers of their rights; fewer cases are being brought as consumer claims are suppressed by companies' increased use of forced arbitration clauses.**

Summary

According to NACA's survey of nearly 350 consumer attorneys, it is clear that private arbitration does not compare at all well to our nation's traditional justice system. Consumers have lost the opportunity to assert their rights under many state and federal consumer protection statutes because of pre-dispute binding mandatory arbitration. Arbitration clauses are often entered into without consumer knowledge of the fact that they have signed away their rights. As a result, many consumer cases won't move forward if the underlying contract has an arbitration clause in it. In responding to the survey, many consumer lawyers note that in the last year since the Supreme Court's decision in *AT&T Mobility v. Concepcion*^[1], consumer attorneys are observing that courts summarily approve motions to compel arbitration and dismiss cases if there is an arbitration clause, even where there are clear abuses and violations of the law and without examining the merits of the case^[2].

The presence of an arbitration clause in a contract, particularly one that includes a waiver of the consumer's right to join in a class proceeding, means that consumer claims will be suppressed.

^[1] *AT & T Mobility, LLC v. Concepcion*, 563 U.S. ---, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011)

^[2] See also the recent report published jointly with Public Citizen, *Justice Denied One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident*, April, 2012.
<http://www.naca.net/sites/default/files/Justice%20Denied%20Concepcion%20Anniversary%20Report.pdf>

For consumers who don't understand what arbitration is or who do the cost benefit analysis and decline to pay arbitration fees or travel long distances to arbitrate their claim, it means that companies get a free pass as many consumer claims do not move forward as a class action or in arbitration. This survey demonstrates - through consumer lawyer experiences and stories of their experience representing or turning away consumers – that arbitration is having a claim suppressive effect and many consumer claims will never be heard. Instead of leveling the playing field, as proponents of arbitration claim the process does, consumer attorneys believe that arbitration clauses are becoming exculpatory. Many, many good claims are simply lost and never brought to justice.

Surveys of Consumer Attorneys

NACA surveyed lawyers in 46 states who regularly represent consumers in disputes against businesses. To reach consumer lawyers, NACA used a segmented membership roster of both the National Association of Consumer Advocates and the American Association of Justice. Outreach was made to attorneys who represent consumers both as individuals and in class actions, and across a wide range of consumer protection issues. Over seven hundred consumer attorneys were contacted by email with a link to the survey questionnaire. The survey was completed by almost 350 consumer lawyers.

The NACA survey included questions that called for both experiential and perceptual responses about the practice of consumer law and practitioner experience with and perception of pre-dispute arbitration clauses. Specifically, questions were asked about attorney's willingness to represent consumers when pre-dispute arbitration clauses were present, the likelihood of those claims being pursued at all, the pre-adjudication resolution potential and anticipated outcomes of these claims, and the cost and fees of pursuing a matter through the arbitration process. The Survey also asked respondents' opinions about the advantages and disadvantages of arbitral and judicial forums.

Consumer Lawyer Practice Information

The survey first examined demographics and obtained information about the consumer attorneys' practice. For most survey respondents, consumer law represented 70% to 100% of their legal practice, though there was a significant degree of variation regarding the number of cases typically handled. 52% of the respondents handled 10-20 consumer cases per year, while 22% of respondents handled 20-25 cases, 15% handled 40-50 cases, and another 11% handled 90-100 cases. When asked to indicate the proportion of all consumer disputes which are arbitrated rather than litigated, 61% of the consumer attorneys responded that they have arbitrated a consumer case although consumer arbitrations represented less than 5% of these attorneys' practices. This data reinforces our notion that very few consumer cases are actually arbitrated. This may be attributable to the fact that mandatory arbitration is a common feature of consumer contracts but many consumers, not knowing about the arbitration clause, expect to go to court.

Consumer Attorney Experience with Binding Mandatory Arbitration

The survey asked respondents about their perception of the prevalence of pre-dispute binding

mandatory arbitration clauses. Specifically, respondents were asked to identify areas in their consumer law practice where they were confronted with pre-dispute arbitration agreements. The survey responses reveal that arbitration clauses are not just present in financial service consumer contracts, they are everywhere. Specifically, pre-dispute arbitration clauses, have been found in contracts involving:

- Auto Property Damage Insurance
- debt adjusting
- phone industry (cramming, overcharging, etc.)
- medical malpractice
- legal malpractice
- credit card agreements
- pay day lending agreements
- nursing home contract
- used Car Transactions
- construction
- home Renovation/home Improvement
- precious metals and numismatic cases
- brokerage services, securities industry
- door-to-door sales of water treatment devices and other goods
- computer purchase contracts
- cable tv service contracts
- satellite tv service contracts
- home improvement retail installment contracts
- whole sale membership club contracts
- FINRA
- mobile telephone service contracts
- employment applications
- employment contracts
- auto sales and financing agreements
- debt settlement
- products (electronics)
- home solicitations / door-to-door sales
- mobile home sales contracts
- cable TV service contracts
- internet service provider
- for-profit career colleges contracts
- manufactured home contracts
- all loans and credit sales agreements
- debt consolidation agreements
- warranty (mobile home or new home construction)
- service contracts
- hospital contracts
- title lending agreements
- consumer installment loans
- contractual agreements such as yellow pages, etc.
- recreational vehicle sales contracts
- health club contracts
- every day consumer products such as computers
- every day consumer services such as satellite radio
- auto warranty
- crop insurance
- construction Contracts
- wrongful repossession cases
- employment background checks
- securities purchases
- utilities service contracts
- timeshare contracts
- internet purchase of goods and services
- stock broker/broker-dealer agreements
- tax resolution Services

Case Settlement Prior to Final Adjudication

Survey respondents were asked for an estimate of the proportion of cases that they settled prior to final adjudication, depending on whether the claim was in court or before an arbitrator. Attorneys reported that while 76% of judicially litigated consumer cases are settled prior to final

adjudication, that less than 5% of the cases subject to arbitration were settled prior to a final ruling. It is interesting to note that many consumer lawyers perception is that they would avoid cases with arbitration clauses and see no advantages of arbitration to consumers.

Consumer Lawyer Perceptions about Arbitration

Consumer attorneys were then asked about the principal advantages and disadvantages of arbitration versus the judicial system. Though a significant number (45% of survey respondents) identified some advantages to arbitration (speed, simplicity or lower cost), the majority of respondents (53%) answered that there were no advantages of arbitration. As one respondent put it: “I have seen NO advantages [to arbitration] -- most consumers when faced with arbitration costs choose to avoid the costs and conclude the case[.]”

By contrast, when asked about the disadvantages of arbitration contrasted to litigation, the overwhelming majority of consumer attorneys responded that arbitration was wholly disadvantageous to the consumer, with specific problems identified as: an uneven playing field, limited recourse for the consumer, questionable objectivity of the arbitrator and lack of transparency in the arbitration process. See chart below in Appendix I.

Consumer Lawyer experiences with Arbitration clauses

The final part of the survey asked consumer lawyers about their personal experience with cases where arbitration clauses were present. Attorneys were asked to describe cases where a consumer was denied relief because of the existence of an arbitration clause, and class action cases that provided a substantial recovery and/or injunctive relief for consumers, which would not have been attainable if an arbitration clause was present. Respondents provided over 250 stories (see below) that provide a wide variety of vivid examples of how justice can either be achieved or denied, merely based on whether or not a contract contains an arbitration clause.

Consumer attorneys were also asked about the claim suppressive effects of arbitration. Specifically, respondents were asked if they had ever turned down a meritorious consumer case (there was a clear legal claim of harm, statutory violation, or breach of contract), because of the presence of an arbitration clause.

In other words, have they observed consumer claims being suppressed?

- 84% of all consumer attorney respondents answered that they had, in fact, rejected a client with a meritorious consumer claim because of an arbitration clause.
- Of those vast majority of attorneys who turned away good cases, the median number of consumers they turned away was 10 cases, while 11% of survey respondents reported that they had turned away as many as 90-100 cases because of an arbitration clause.

Finally, the survey asked class action attorneys about their experience bringing consumer class actions. Specifically, what was the impact of arbitration clauses on their cases and the injunctive relief that can be provided to consumers by class actions.

- A full 91.4% of class action attorneys answered that relief they had obtained for consumers could not have been achieved had an arbitration clause been present.

- Additionally, many of these attorneys noted, that since the Supreme Court *Concepcion* decision, they have seen a significant decrease in the number of consumer claims that are being raised.

Survey Outcome and Conclusion

The data collected in this survey reveal a few key observations about how the corporate use of binding mandatory arbitration clauses in consumer contracts has impacted consumer's ability to seek appropriate redress when they have a claim against a company.

First, the settlement data that shows that cases in arbitration are significantly less likely to settle prior to a final decision suggests that arbitration may not be as time efficient as its proponents claim. This seems to be a question that the Consumer Financial Protection Bureau (CFPB) should further examine in its study of pre-dispute arbitration.

Second, consumer attorneys have seen a significant correlation between the increase in arbitration clauses in consumer contracts and the suppression of meritorious consumer claims. As many consumer attorneys reported they "won't even look at a case if there is an arbitration clause involved." (See consumer attorney stories below in Appendix I.). Clearly, the growing ubiquity of arbitration clauses and its impact on consumer's ability to achieve a fair measure of justice requires additional study.

Third, the stories provided and concerns expressed in this survey highlights some of NACA's key policy concerns about arbitration clauses in consumer contracts. Most significantly, it appears that arbitration clauses are succeeding in significantly suppressing both meritorious individual and consumer class action claims.¹ Unfortunately, this intentional claim suppression will only further increase as the full effect of the *Concepcion* decision takes hold in the consumer market place.

Policy Recommendations

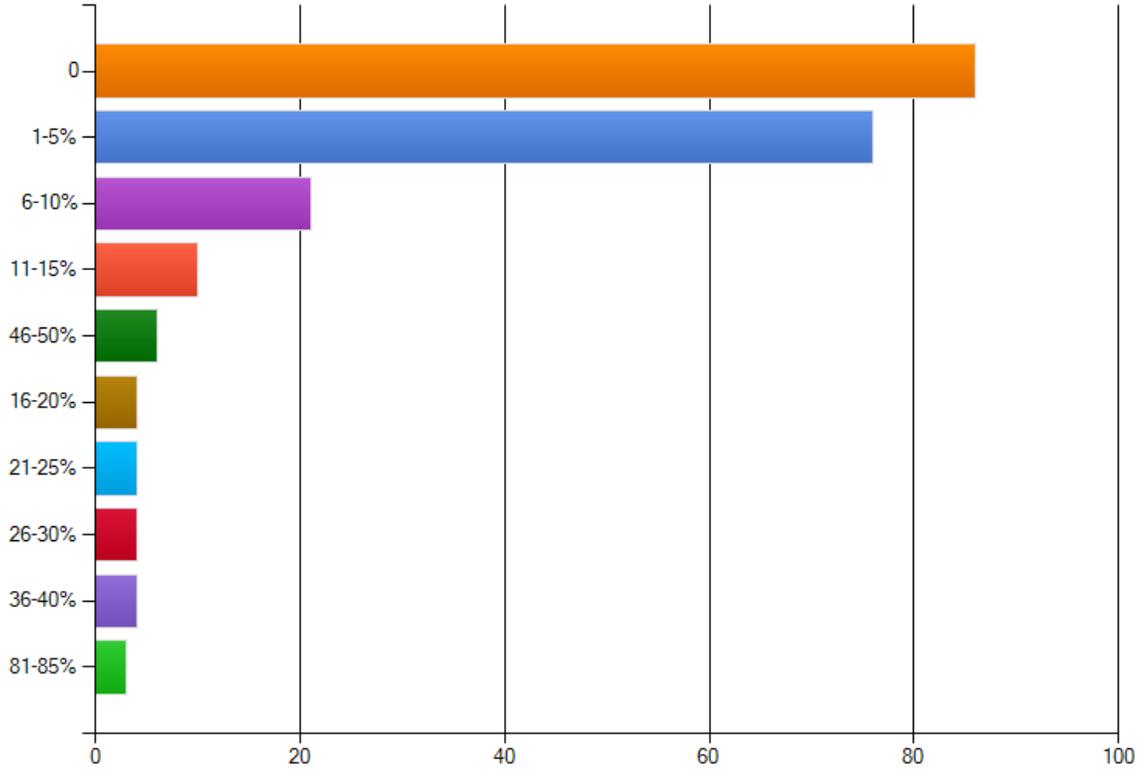
The National Association of Consumer Advocates has and will continue to call for legislation that will amend the Federal Arbitration Act so that it reflects its true legislative intent and bans the use of binding mandatory arbitration clauses in consumer to business contracts. While we will continue this legislative effort, we believe that the CFPB has a unique opportunity when it conducts its study of arbitration clauses. We hope that once the CFPB has gathered and studied all the empirical evidence available, it will act to protect consumers from the harm caused by binding mandatory arbitration in consumer financial service contracts.

¹ Thomas B. Hudson, *Arbitration Agreements Can be Helpful in Class Action Lawsuits*, The Auto Dealer Monthly (December 26, 2011) found at: <http://www.autodealermonthly.com/79/4369/ARTICLE/Arbitration-Agreements-Can-be-Helpful-in-Class-Action-Lawsuits.aspx> (noting that "[t]he biggest legal risk to the industry at the moment is still the class action lawsuit, which in the hands of a skilled plaintiffs' lawyer, can still ruin your entire day. I've been advising dealers for years that the best first line of defense against class action suits is the practice of requiring consumers to sign mandatory arbitration agreements as part of the car purchase and finance transactions they enter into. The use of arbitration agreements will not ensure victory when the class action lawyers come calling, but there is little downside to using them. And they can occasionally [save the day](#)."

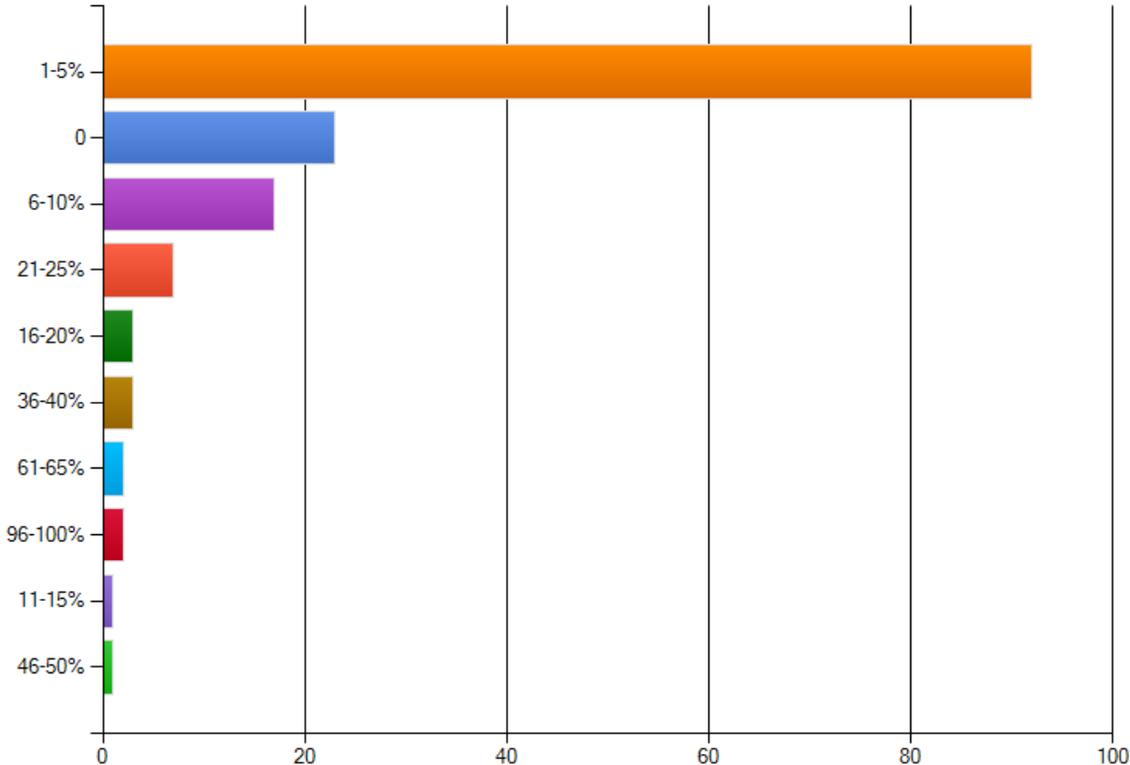
2012 NACA Binding Mandatory Arbitration Survey: APPENDIX I

Survey Data

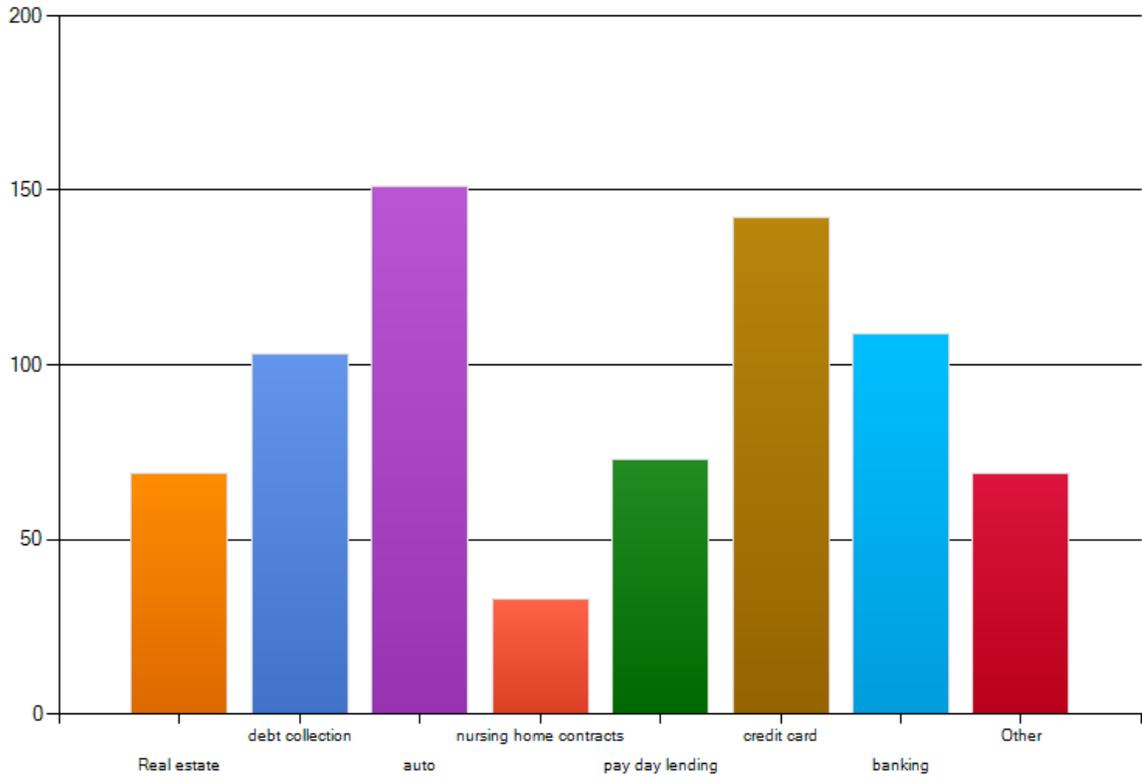
Of your consumer cases, please indicate the proportion which are arbitrated (where you either represent the consumer in arbitration or where the case ends up in arbitration)



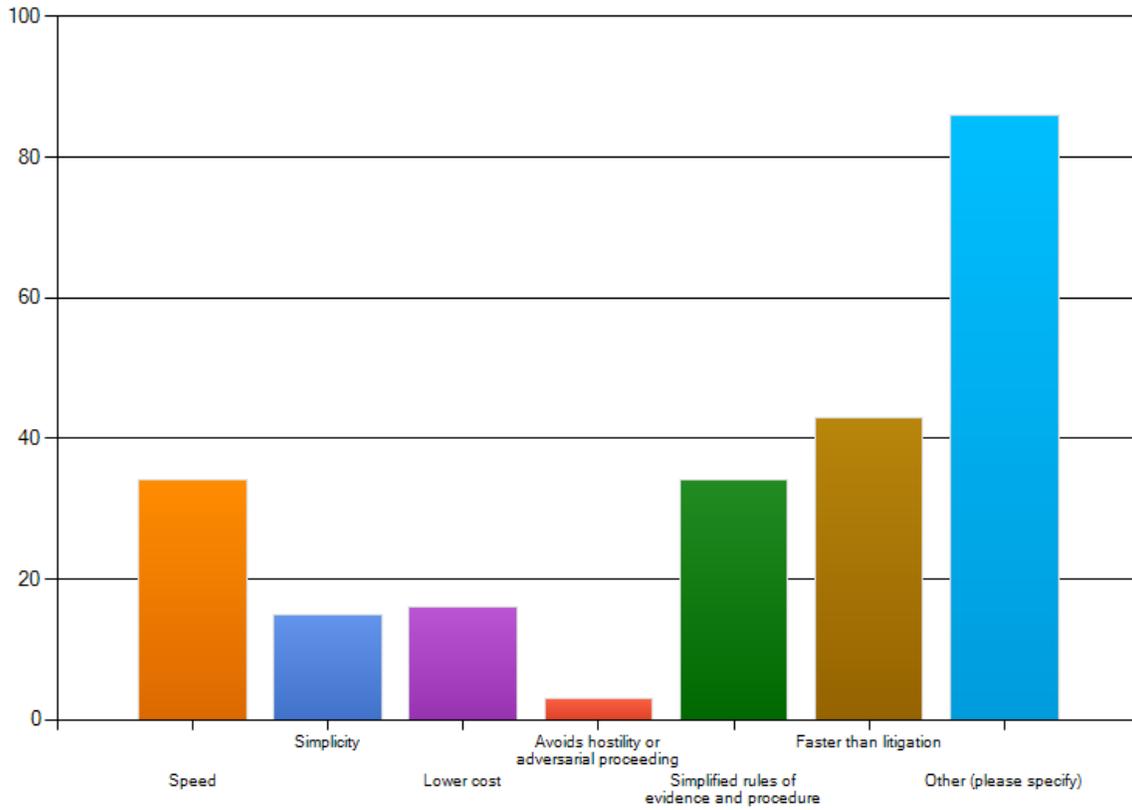
If yes to the previous question, how many times, as a percentage of your practice, have you represented a consumer in arbitration?



What are the kinds of cases / instances in which you have seen arbitration clauses? (e.g., real estate transactions, debt collection, nursing home contracts, etc)

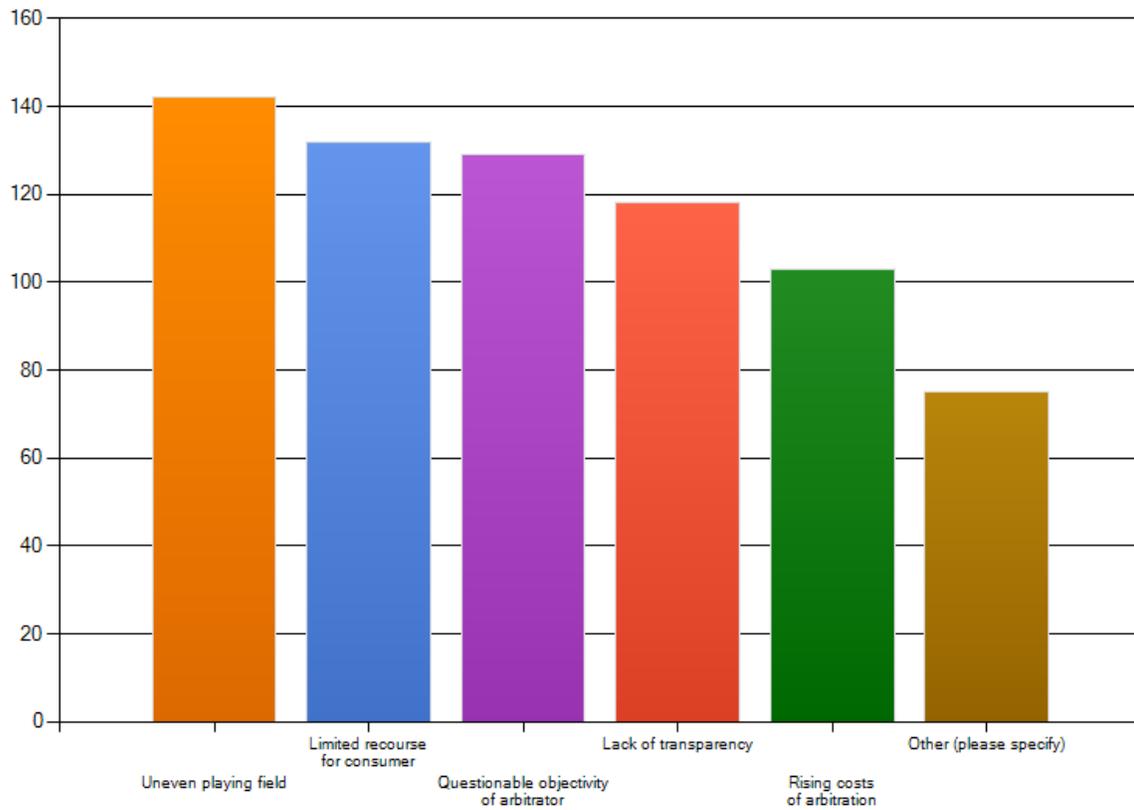


What are the principal advantages of pre-dispute binding mandatory arbitration?

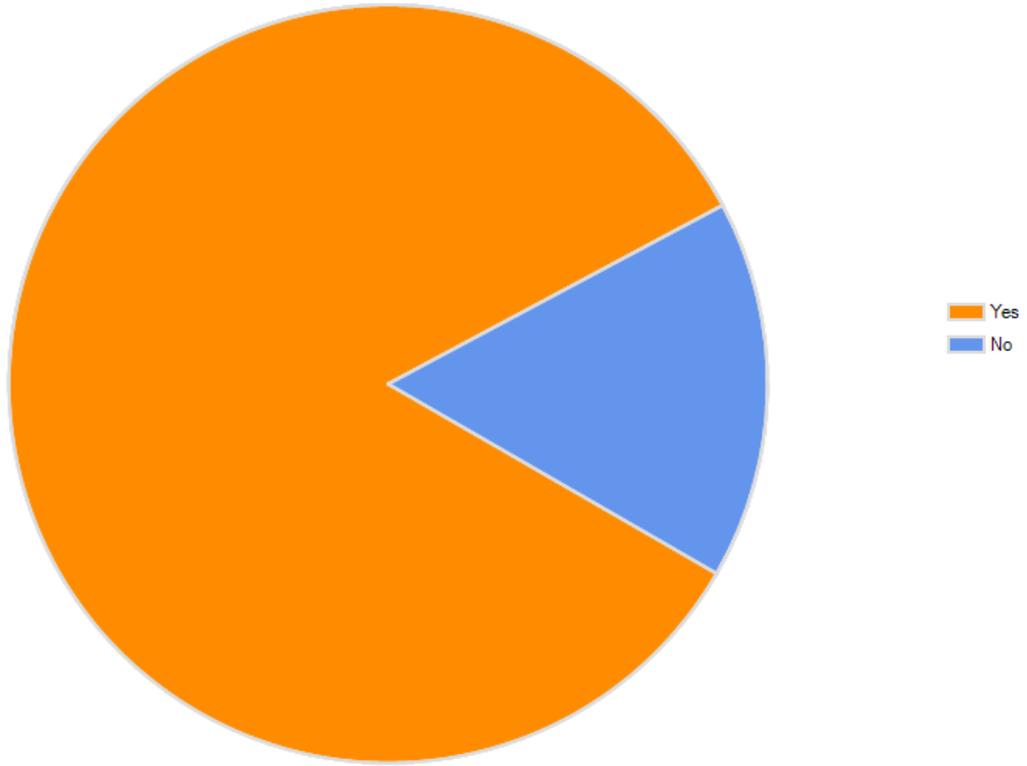


** OTHER – 52% of respondents reporting there are little to no advantages.

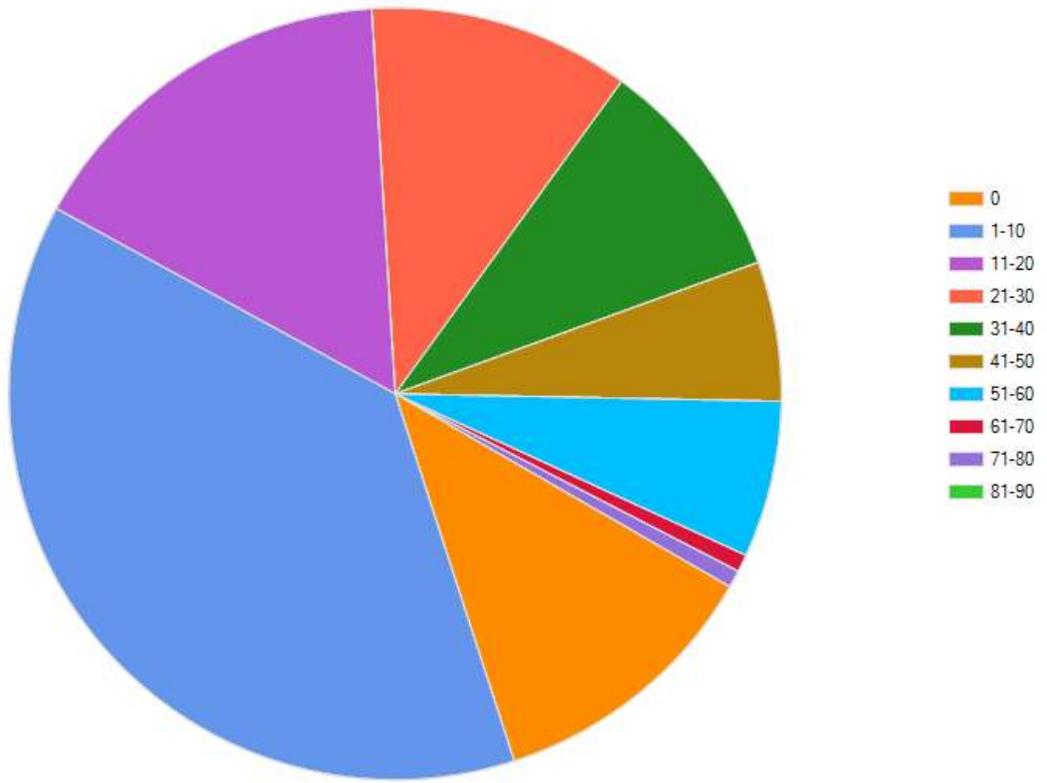
What is the principal disadvantage of pre-dispute binding mandatory arbitration?



Have you or your firm evaluated a meritorious consumer case (there was a clear legal claim of harm, statutory violation, or breach of contract), where the existence of an arbitration clause kept you from representing the consumer and pursuing the matter?



How many cases have you had to turn down that included a forced arbitration clause?



2012 NACA Binding Mandatory Arbitration Survey: APPENDIX II

Consumer claims suppressed because of an Arbitration Clause

The following case stories were submitted by survey respondents to demonstrate the cases they were not able to bring because of an arbitration clause. Survey respondents were responding to the following question:

Briefly describe a deserving case that you could not bring because of an arbitration clause. In answering this question, please be sure to include information about: 1. Nature of Case 2. Describe wrong that could not be addressed 3 Corporate Wrongdoer 4. Nature of Arbitration Clause (Scope/Implications) 5. Implications of Provision

The stories below demonstrate three patterns:

1. In some instances attorneys managed the case as far as they could – initially starting litigation and eventually being compelled / ordered to arbitrate.
2. In other instances the attorneys made an early determination that, even though the consumer had an actionable claim, the arbitration clause was an obstacle and the case was not worth bringing individually.
3. In other instances attorneys note that all cases include an arbitration clause.

Auburn, AL

As a matter of course my firm rejects every case that includes an arbitration clause now because the last five years have demonstrated that the industry is going to win these cases nearly 100% of the time. In fact, in every case I have arbitrated personally but one, the consumer has lost even when there was clear liability or admitted testimony from experts indicating liability.

Birmingham, AL

I had client with an arbitration clause that allowed Small Claims jurisdiction ONLY, and any appeal from Small Claims would be solely to BM Arbitration. Thus, borrower was severely limited in the remedy she could seek (\$3k max ceiling of Small Claims Court) and of the forum of Small Claims or BMA.

Mesa, AZ

I had a nursing home neglect case in which patient suffered malnutrition that led to infections and death. The case was forced to go to arbitration against Life Care Centers of America, Inc. The arbitration provision eliminated right to jury trial, attorney fees and right to appeal. Arbitrators are not as accustomed to being "shocked" by the evidence as a jury would be.

San Francisco, CA

We have had a court grant an order compelling our client to arbitrate on an individual basis. That meant that even though we did all the work to prove the lender violated the law and was not entitled to collect any of the deficiencies, it got to keep all it collected except our client's money.

One of my cases where arbitration was ordered is *Finance and Thrift Company, Inc. v Zavala*, Monterey County (California) Superior Court, Case No M99589. There were approximately 2,000 consumers in the class. Because Zavala's claim was sent to arbitration on an individual basis only, none of the other class members got any relief from the case.

Another case is *Cardenas v. AmeriCredit Financial Services, Inc.* US District Court for the Northern District of California, case no. 09-4978 SBA. The district court denied AmeriCredit's motion to compel arbitration, but AmeriCredit appealed and the district court stayed the action pending that appeal.

There were other cases pending against AmeriCredit and they continued in litigation. When one of the other cases got to the verge of trial, AmeriCredit asked for mediation and eventually agreed to a global settlement of all the cases, including my *Cardenas* case. That settlement has been preliminarily approved by the court in a consolidated action entitled "*In re AmeriCredit Financial Services, Inc. Litigation*," United States District Court, Southern District of California, Case No. 10-cv-1373 DMS BLM.

Under the *AmeriCredit* settlement, consumers *with* arbitration clauses will only 57% of their money back, whereas consumers without arbitration clauses will get about 90% of their money back. There are more than 35,000 in the *AmeriCredit* classes. About 50% of them had arbitration provisions in their contracts.

Paradise, CA

I turn away many otherwise meritorious employment cases (retaliatory discharge) because the arbitral forum is so unfair. I turn away meritorious nursing home abuse cases because the arbitral forum is unfair and the client is required to pay for half of the arbitration cost - a fact they learn about only after their loved one has been harmed by a facility.

Santa Clara, CA

Caveat: I am still thinking about bringing this case. Client buys car and GAP insurance. Dealer pockets money for GAP and never sends it to GAP administrator, so, she has no coverage. Car wrecks. Insurance pays off loan except final \$955.00. Wells Fargo, the assignee wants client to pay the outstanding amount regardless of the rip off and regardless of the holder language and regardless of the fact that IT is contractually liable to pay off or forgive the loan. There are three separate arbitration clauses in play that have varying levels of unfairness and conflict with each other. Class actions are banned, review is limited, panels are limited, commercial rules seem to be preferred. Taking on this very important matter actually feels like knowingly walking into a minefield.

San Diego, CA

I have [several] Telephone Consumer Protection Act (TCPA) class actions in USDC that are facing motions to compel arbitration. The case names and statuses are below. If successful, [the arbitration clause] will eliminate any chance of changing business practices in this industry as it relates to debt collection calls.

O'Brien v. American Express Company, 11-cv-1822 BTM (S.D.Cal.)

Arbitration motion filed, discovery granted as to unconscionability; Amex is seeking review by the USDC of the magistrate's order granting discovery. Hearing date is July 27, 2012.

Ramirez v. Bank of America, N.A., 11-cv-2008 LAB (S.D.Cal.)

Mortgage servicing case, no arbitration provision in the promissory note

McNamara v. RBS Citizens, N.A., 11-cv-2137 L (S.D.Cal.)

Motion to compel arbitration heard April 9, 2012; awaiting ruling

Bradley v. Discover Financial Services, 11-cv-5746 YGR (N.D.Cal.)

Motion to compel arbitration to be heard August 7, 2012

Cloud v. Real Time Group, Inc., 12-cv-1470 JAH (S.D.Cal.)

Complaint filed June 15, 2012; not yet served

Cayanan v. Citi Financial, Inc., 12-cv-1476 MMA (S.D.Cal.)

Complaint filed June 15, 2012; not yet served. Citi's GC has said that he will be filing an arbitration motion and will appeal any adverse ruling.

San Francisco, CA

I turned down at least one claim against a for-profit school because of an arbitration clause/class action waiver. The school misrepresented its placement rates. Many people enrolled on the basis of these rates, then were appalled to find that they couldn't get jobs after they graduated. Had they known the placement rates were bogus, they never would have attended. Trade school fraud is particularly pernicious; students usually have to take loans to attend them. The loans are not dischargeable in bankruptcy, and there is no statute of limitations on suits to collect them. So, when a student learns that her credential won't get her a job, she is stuck with the loan for the rest of her life. Unless, that is, she can find an attorney to sue the school. But those cases only make sense as class actions; they are discovery intensive, and the cost of pursuing a case for one person would be prohibitive.

Walnut Creek, CA

I represented a case against a buy-here pay-here car dealer, Car Hop Auto Sales and Finance, selling cars in need of numerous mechanical repairs to low income workers with bad credit who need dependable transportation to get to work, who often lose their jobs and/or car because they have no money after down payment to keep the car running. I could not get injunction to stop

dealer from misrepresenting the mechanical condition of the vehicle. The arbitration clause required arbitration for all disputes and contained a class action waiver. I could not help consumer, individually or class-wide, because arbitrator has no obligation to follow the law with respect to the consumer claim, no obligation to award attorney fees, and no assurance that I would get fair compensation for the client or my firm even if we won, with no right for judicial review of arbitrator's decision.

Washington, DC

I was approached with a clear cut case involving a bait and switch by a lender, but with an arbitration clause that banned class actions and could not be challenged. The case was not feasible because of the arbitration clause.

Tampa FL

I had a consumer claim for statutory violations under federal and state law; damages were less than \$5,000; arbitration provision prohibited class relief; and due to arbitration costs and prevailing party fee recovery permitted under statute, our firm could not recommend pursuing on an individual basis.

Tampa, FL

See, e.g., *Anderson v. Maronda Homes*, Case No. 06-1421, 13th Judicial Circuit (Tampa, FL)(consumer dispute over less than \$5,000; RISA statutory claims; class relief sought; motion to compel arbitration granted; class relief denied in arbitration based on provision being silent as to class-wide relief; subsequent appeal pending, Second District Court of Appeal, Florida, Case No. Fla. 2DCA 2D11-4203).

Fort Lauderdale, FL

I turn away about 2 or 3 cases a month solely because of arbitration.

Honolulu, HI

We represented an auto dealership selling car without having title. Due to ongoing illegal behavior, client wanted injunctive and class relief to stop the harm to others in the future. The dealership threatened to trigger arbitration clause if the case did not settle immediately after filing, so we were not able to ask the Court for injunctive relief--would not have gotten injunctive relief in arbitration. The arbitration clause said all issues were to be arbitrated, and there was no allowance for injunctive relief, punitive damages, or class relief. Given USSC's ruling on arbitration clauses and class relief, and other rulings with no injunctive relief, there was no point in going to arbitration. The threat of arbitration and no relief triggered settlement. In effect, the defendant was able to threaten limited remedies of arbitration, buy a settlement, and will probably continue the illegal practices.

Chicago, IL

Potential clients call all the time regarding billing or accounting mistakes with their credit card accounts. Virtually every credit card agreement I have seen has an arbitration provision that either bars class actions or is silent on class actions such that no class would be allowed in arbitration. Because the claims are usually small (although with compounding interest they add up) and because we would never get the discovery in arbitration to show any systematic mistake/fraud to even prevail on an individual claim, we don't take those cases. As such, credit card companies can continue to unfairly charge customers and if caught, they may just give that one consumer their money back, but keep everyone else's money.

Richmond, KY

I have a case where a securities broker cheated disabled and retired coal miners who had to move their retirement and disability funds. The broker put the coal miners in high fee, risky investments, which resulted in big commissions for the broker and large losses for the coal miners. The arbitration provision required large upfront payments by the miners, out of state arbitration proceedings, and no punitive damages. Wrongdoer's employer was Prudential Securities. The miners probably lost \$1-20 million in potential recoveries.

Boston, MA

American General Financial Services sold credit insurance products in violation of law, failed to refund unearned insurance premiums as well. Arbitration clause contained class action waiver. Without class mechanism the stakes are too small to warrant a lawyer's intervention, and the nature of the violation would not even be noticed by 99% of consumers.

Boston MA

We reviewed a home security contract with overreaching term, price, and deceptive advertising, but arbitration clause was so bullet proof it made no sense to even attempt litigation.

Towson, MD

Client was sold a car and told three days later that there was no financing and he had to bring the car back. The dealership "canceled the deal" but kept most of his down payment. We believe there were unfair and deceptive practices and Truth in Lending violations. The arbitration clause included making consumer pay some costs, a provision that loser may have to pay the winner's attorney's fees, a ban on class actions. The corporate wrongdoer was a car dealership. I could not take the case and the client was hesitant given the fee shifting provisions and costs involved in the arbitration. The dealership has the car and the client's money.

Another example of the harmful effect of an arbitration clause occurred in the case *Lane v. Antwerpen*. The Lane case was filed after winning a similar case against the same dealer in *Anthony v. Antwerpen*, CASE No. 24-C-06-004512, which resulted in a \$100,000 settlement.

The Lane case was kicked into arbitration, resulting in an award of approximately \$400.

Grand Blanc, MI

Client purchased a used vehicle from a used car dealer. The dealer failed to disclose that the vehicle had been a previously wrecked, salvaged vehicle. Pre-dispute binding arbitration clause in the Retail Installment Sale Contract required the client come up with a significant filing fee, which should have been reimbursed to client, but client could not afford initial filing fee. Additionally, the uncertainty of client being able to recoup his legal fees in an arbitration award chilled the client's desire to seek a remedy for the fraud he had been subjected to by the dealer.

Minneapolis, MN

Debit charge post-reordering case in Minnesota against large bank. Courts have determined the practice violates consumer fraud statutes, but the presence of the arbitration clause made the case too risky.

Vadnais Heights, MN

We brought an FCRA case against a credit card company and it is claiming that "any dispute" arising out of the use of the card is arbitrable. That case is being argued tomorrow 4-4-12 and I won't have the court's ruling for some time. So a federal statute implemented to protect consumers and all the rights of the legal process are tossed in favor of an arbitration, makes no sense. Arbitration is for those of equal standing: business to business etc

St. Louis, MO

A cable company was illegally charging customers. Arbitration clause with class waiver made the case impossible to pursue on behalf of class members whose damages are around \$150 each.

St. Louis, MO

I have had to turn down dozens of payday lending cases in which the APR exceeds 450%, there is no underwriting of the loan, and the process is designed to create long-term debt cycles. Although I have litigated two payday lender cases to conclusion and know that the law in Missouri supports our claims, given the new jurisprudence on arbitration clauses, I cannot pursue the class claims at this time. It is almost certain that in federal court, where most would be due to the Class Action Fairness Act (CAFA), the consumer will be forced into individual arbitration. The risk of this, coupled with the complexity of the cases, prevents us from pursuing claims that we 1) know are meritorious and 2) before the newest rulings on arbitration have successfully litigated, resulting in \$30 million in relief to consumers. The arbitration clause is truly serving as a complete immunity shield for lenders who are blatantly breaking the law and hurting some of the most vulnerable consumers around.

North Brunswick, NJ

Auto sales fraud cases, which this firm has had success litigating as state court class actions. Last week, we turned down a case in which the dealership added small overcharges to title/registration fees because the retail order contained an arbitration clause with class ban (as do almost all car retail orders do these days).

New York, NY

We don't even look at the case if there is an arbitration clause.

Tulsa, OK

I have an interesting situation brewing with two consumers that were defrauded in exactly the same way by exactly the same auto dealer. In each case, the client purchased a "new" vehicle that later proved to be used. In one case, the judge forced the client to arbitration, and she was awarded nothing due to an unjust arbitrator. That case is on appeal to our Supreme Court. *In the other case, the trial judge has refused to send the client to arbitration and I think we will get to a jury.* These cases have many, many facts in common, right down to the attorneys involved, so we will be able to objectively compare the arbitration track vs. the litigation track.

BOTH are now before the Oklahoma Supreme Court and both are at critical points.

The first is *House v. Vance Ford-Lincoln-Mercury, Inc. and Ford Motor Credit Company, LLC*. It was in Ottawa County, Oklahoma (Case No. CJ-2010-287), but bears case No. DF – 109314 in the Supreme Court. I will be submitting a Supplemental Brief in Chief requesting that the arbitrator's award be vacated because he exceeded his authority and because the award is in manifest disregard of Oklahoma law.

The other, *Hoffman v. Country Ford-Mercury*, was in Oklahoma County, CJ-2011-9643. Defendant has appealed the Judge's refusal to send the case to arbitration, Supreme Court case No. PR - 110718. They have asked that an Extraordinary Writ be issued compelling the trial court to order arbitration. Oral arguments were made 6/12 and I await a decision.

Cleveland, OH

I represented a class action counterclaim against Advance Pay of Ohio. The payday loan company is accused of violating numerous consumer protection statutes, including but not limited to, the truth in lending act, consumer sales practices act, the short term loan act and usury. The arbitration clause applied to all cases except those brought in small claims court. When a counterclaim was filed in excess of the jurisdiction of the small claims court APU sought to have the case arbitrated. In fact, even if there is an appeal of a small claims judgment, that appeal must be conducted in arbitration. There is also a class action ban and it is the contention of APU's attorneys that the arbitrator is prohibited from enjoining APU from engaging in this scheme of illegal conduct.

Lawton, OK

We decline many yo-yo cases and other auto fraud cases if they contain arbitration clauses. We no longer accept any cases with arbitration clauses because of the recent court decisions mandating arbitration clause enforcement. It just isn't worth it for us to get involved with them.

Portland, OR

Our clients were a couple that lost their jobs, because of the recession. They had to live off their credit cards, and the debt became too large. They saw debt settlement companies on the internet, and signed up for their services. The debt settlement companies charged our clients way more than is allowed by state and federal law. We brought a class action on behalf all of the consumers that had been treated this way by this debt settlement company. The debt settlement company moved to compel arbitration, and the court granted the motion based on *AT&T v. Concepcion*. These clients (and all the putative class members) were deprived of a remedy, because you cannot economically do these cases on an individual basis. The debt settlement company can continue to take advantage of those most vulnerable.

Portland, OR

Any case where there is an arbitration clause that does not allow for class actions, we no longer take.

Harrisburg, PA

Class action filed against Advance America for damages arising out of payday lending scheme declared illegal by PA Supreme Court - contracts contain arbitration clause and class action, which were avoidable under PA law until *AT&T v. Concepcion* decision - case now sent to individual arbitration by E.D. Pa. Dist. Ct. - this will make it impossible to vindicate the rights of thousands of PA citizens and allow Advance America to retain millions of dollars illegally obtained

Philadelphia, PA

I represented a meritorious claim against Greentree Financial related to a fraudulent home improvement contract. The case involved over 1,000 persons victimized by door-to-door home improvement contractors who signed people to a home improvement mortgage contract that was financed by Greentree. The home improvements were never performed. *Harris v. Greentree Financial Corporation*, 183 F.3d 173 (3d Cir.1999).

Columbia, SC

Identity theft case against Verizon Wireless; consumer returned phone within 30 day trial period; store employee reactivated and used the phone illegally. Verizon promised to rectify, but

instead turned consumer over to 3 separate collection agencies, and reported the account as a charge-off on the consumer's otherwise unblemished credit. When consumer disputed to the credit reporting agencies, Verizon failed to conduct any meaningful investigation, and simply told the agencies that it's reporting was accurate.

Dallas, TX

I had a worker's compensation retaliation claim probably worth \$25,000 to \$30,000. The Court granted the employer's Motion to Compel arbitration. The arbitrator wanted a retainer of \$8,000 per party. I could not possibly justify that expense in light of the anticipated actual value. The case settled for a mere \$7,000 instead.

Houston, TX

We had many inquiries about abusive practices from TaxMasters, a local tax resolution services firm. There were a wide range of deceptive practices that are now being litigated by the Texas Attorney General. TaxMasters has since declared bankruptcy. Our firm wished to pursue TaxMasters; however, in an "agreement" provided to the TaxMasters customer (after their credit card had already been charged over the phone), there was a strongly-worded arbitration clause. Because of that, and our perception of the current legal environment in Texas, we declined the cases for fear that it would be enforced, and our case would be removed to arbitration.

Richmond, VA

I had a fraud case, prior wrecked car, but because proof of the knowledge of the wreck by the selling dealer was unclear, decided not worth raking because it was arbitration, and did not want to invest the time into the case where we had to deal with a AAA arbitrator. Most consumer auto contracts with arbitration clauses have the AAA as the arbitrator, or NAF. Neither one is a good arbitration group since the arbitrators are not retired judges, not in this area, are not neutral nor will necessarily follow the law.

2012 NACA Binding Mandatory Arbitration: APPENDIX III

Class actions that have provided significant relief and justice to consumers that would not exist if the underlying contract contained an arbitration clause.

The following case stories are representative of the many stories submitted by survey respondents to demonstrate good class actions which provided significant recovery or injunctive relief to consumers. Survey respondents were responding to the following question:

4. Briefly describe a case (class action or individual) you handled that produced a great recovery and/or injunctive relief for your client, class members or consumers in general.

Birmingham, AL

Borrower on Payday loan was sued by Payday Lender in Small Claims Court, We filed Answer alleging illegal loans, and Counterclaims under TILA, Negligence and UDAP based upon gross violations of Payday Loan statutes. Lender did not seek to enforce its arbitration clause. Before case was adjudicated, Borrower filed a Ch 7 bankruptcy, and we removed the Counterclaim to Bankruptcy Crt, and then to USDC upon the TILA claim. Case was tried without jury and DC Judge awarded \$3,000 to the Borrower on the Negligence claim (and debt was discharged in ch 7)

Arkadelphia, AR

There were a number of cases where payday lenders tried to avoid liability by forcing customers into arbitration. We defeated arbitration in each of those instances and were then able to certify class actions and either settle the Class' claims or take the cases to verdict. In each instance, once we defeated arbitration, the payday lenders stopped their usurious practices. The first of these cases I recall is Showmethemoney Check Cashers v. Williams, 342 Ark. 112; 27 S.W.3d 361 (2000) and the most recent was Advance Am. Servicing of Ark., Inc. v. McGinnis, 375 Ark. 24; 289 S.W.3d 37 (2008). There were several others in between. We got favorable rulings from trial courts and the Arkansas Supreme Court in each of these arbitration fights. As a result of these lawsuits, and the payday lenders' inability to defeat consumers' claims by forcing arbitration, we have virtually eliminated payday lending in Arkansas.

San Diego, CA

I obtained refunds and waivers of deficiencies in the amount of over \$11,000,000 in a settlement with a credit union. The credit union's post repossession notices did not comply with California law.

The case was Selimi v. Mission Federal Credit Union and Advantage Automotive Center, San Diego County Superior Court Case No. 37-2009-00086697-CU-CO-CTL. Arben Selimi purchased a vehicle from Advantage Automotive. Advantage violated various California laws as in pertains to the purchase. In addition, Advantage did not pay off his trade in vehicle right away. Advantage sold the purchase contract with Mr. Selimi to Mission Federal Credit Union.

Shortly after the purchase, Mr. Selimi defaulted on the purchase contract and Mission Federal repossessed and sold the vehicle. In California, a finance company is required to give a buyer a notice after the repossession and before the sale of the vehicle. The notice must provide the buyer with all of the information necessary to redeem the vehicle (payoff the entire balance owed), or reinstate on the contract (pay the amount that is past due, plus collection costs). The notice sent to Mr. Selimi did not comply with California law in that it did not tell him everything he needed to do to reinstate. The notice allegedly overstated the amount necessary to pay to reinstate or redeem. In addition, the notice did not provide a physical address to send a request for extension on the time period before the vehicle would be sold.

The case was filed as a class action and the class was certified. The case then settled at mediation. Mission Federal agreed to waive deficiencies on vehicles repossessed and sold, refund payments made by individuals after their vehicles were repossessed and sold, and delete the repossession from individual's credit reports. Approximately \$11,000,000 in deficiencies for customers were waived by Mission Federal.

California's standard form retail installment sales contract includes an arbitration clause that also bans class actions. Thus, if this case was forced to arbitration Mr. Selimi would have only been able to obtain relief for himself.

Santa Clara, CA

Tracy Liu v. BMW. Ms. Liu's power steering failed while driving. She pulled over and the car caught on fire. She got out just in time. She asked BMW to buy it back but it offered her \$1,500 in goodwill money instead, stating that its warranty does not cover fires, even though it was well aware of this problem. A week after we filed the case, BMW caught with their hand in the cookie jar, offered a full buy back. This case would not have been possible if an arbitration clause was involved.

San Diego, CA

Nelson v. Pearson Ford Co., 186 Cal.App.4th 983 - court of appeal found backdating contracts violated 3 California laws, consumers entitled to rescind contracts. Pearson Ford would sell cars to customers under contracts whereby it was the creditor. When Pearson Ford could not sell the contracts to financial institutions, it would call the customer back to the dealership to sign a new contract with terms acceptable to a financial institution, and would cancel the first contract. Pearson Ford would date the second contract the same date as the first contract. This meant that buyers were being charged undisclosed finance charges for the time period between the first contract and the second contract, even though the first contract was cancelled. This happened approximately 1,500 times over a four-year period.

San Diego, CA

Husband was riding his bike during lunch hour and was hit by a car. He was in a coma for a week, in ICU for months. Family's finances were devastated and credit card companies began

calling home and cell phones. Multiple lawsuits against the family followed and they consulted an attorney "debt settlement" law firm that did nothing but take thousands of dollars of their money, draining their savings. I was referred the case and brought suit in USDC against major bank. The case settled for more than \$175,000 including debt forgiven and credit restored. Other lawsuits are pending against other banks for their harassment. Because of confidentiality agreement in the settlement, no further case details can be shared.

San Francisco, CA.

Boltz v. Buena Vista: DVD producers agreed to close caption DVD special features for the benefit of the hearing impaired. It would have been difficult or impossible to get this result in arbitration.

Boltz v. Buena Vista Home Entertainment, et al., Case No. BC 323842 (Los Angeles Superior Court). In this case, it would have been impossible to get this result if there were a class action waiver. The plaintiff was a lawyer who was partially deaf. He was a movie buff; he bought DVDs so that he could hear what the directors had to say about their films. But, he discovered that even though the package was labeled "cc", only the feature film was close captioned. The special features, which often make up the bulk of newly released DVDs, were not captioned. There was no law requiring manufacturers to caption DVDs; our leverage came from asserting the case as a class action, and telling the defendants that we would seek to recover the proportion of purchase price represented by the content of each mislabeled DVD that was not close captioned. This would have been hundreds of millions of dollars, and would have been very hard to get. We weren't interested in the money, though. We just wanted them to caption everything for the benefit of hard of hearing Americans. They eventually agreed to do so, on 85% of their annual DVD releases. It was a great result, but without the threat of a class action, it would have been impossible.

San Francisco, CA

We received a 100% recovery for class of 7,000 veterans who had tax refunds illegally seized to pay debts.

San Francisco, CA

We represent people whose cars have been repossessed and sold for less than the unpaid balance on the contract, which is called "the deficiency." California law expressly provides that the consumer does not owe the deficiency unless the lender sent a post-repossession Notice that fully complies with the California statute. Lenders routinely send Notices that do not comply with the statute and then demand payment of the deficiency from the consumer. Most consumers do not know they are not liable and many have paid thousands of dollars on these invalid deficiencies. In our consumer lawsuits, we have forced the lenders who have violated this statute to return millions of dollars they have collected from consumers who did not owe these deficiencies.

Walnut Creek, CA

We obtained 100% security deposit recoveries for 150 prior low income tenants from a landlord who routinely returned nothing, and avoided service of small claims summons.

Washington, DC

In *Wells v. Chevy Chase Bank*, there was a settlement of \$16.1 million. After fees and administrative costs, we sent checks to more than 200,000 consumers. We also got important injunctive relief, clearing the consumers' credit records.

Coral Springs, FL

We represented an elderly person convinced to purchase rare coins from Stanford Coin & Bullion. We prevailed on the motion to dismiss in federal court because the Judge ruled that the Florida Securities Act included all "investments" including the recommendation to invest in rare coins. Unfortunately, our case could not be seen to conclusion because Stanford was accused shortly thereafter of operating a massive ponzi scheme.

Chicago, IL

Catalan v GMACM (622 F.3d 676; 2011 U.S. App.) was a RESPA servicing case where the servicer wrongfully foreclosed on my client. It is a reported 7th Cir. case in which it outlines the harm that my clients suffered. I would never have brought that case if there was an arbitration provision. The case was an individual RESPA action where GMACM filed a foreclosure complaint instead of responding to plaintiffs' letter that identified loan servicing errors. RESPA required GMACM to respond and take corrective action.

The opinion describes the harms suffered by my clients in this case. Page 2 of the opinion lays out the facts of the case and sums up the genesis of the problem: "Before digging into the details of plaintiffs' maddening troubles with their mortgage..." "Plaintiffs' Problems with RBC Mortgage: In June 2003, [**6] the plaintiffs bought a home in Matteson, Illinois. They obtained a Federal Housing Administration loan by executing a mortgage and note in favor of RBC. At the outset, theirs was a 30-year fixed loan at 5.5% annual interest with a monthly payment of \$1,598 that included principal, interest, and escrow. Although the plaintiffs' first payment was not due until August 1, 2003, RBC incorrectly entered the plaintiffs' mortgage into its computer accounting system to show a first payment due date of July 1, 2003. Because of this error, when the plaintiffs made their first payment they were already behind--at least according to RBC's system. By the time the plaintiffs made their second payment, RBC had determined that their loan was in default, and it increased their monthly payment amount to \$1,787. The plaintiffs, at first unaware of the increase, and then, without receiving an explanation of the increase, continued to send their mortgage payments the original amount. RBC returned those checks uncashed. Plaintiffs' mortgage was eventually sold to GMACM. Plaintiffs wrote a detailed letter explaining all the errors associated with their mortgage but GMACM filed a foreclosure instead.

New Orleans, LA

Retired teacher brought an arbitration claim against a brokerage firm that invested all of her retirement savings in junk bonds and left her without any retirement which caused her to have to return to work as a teacher at 65 years old. She received a recovery of a substantial portion of her losses in arbitration.

Boston, MA

Sears and other major retailers induced unwitting consumers to waive rights to bankruptcy discharge by having them secretly reaffirm dischargeable debts. We obtained class relief of more than \$300 million for class of about 300,000 consumers, with recovery of approximately 175% of actual damages.

Minneapolis, MN

Class action -- Major retailer and clothing manufacturers promised a "free round trip flight" with the purchase of \$125 of branded clothing. Tens of thousands of people qualified but did not receive flights. Class representatives were able to sue in court, conduct discovery, and settle on a class-wide basis. Class members who had completed all the required paperwork were reimbursed their purchase price and given additional compensation. Costs to prosecute the action to settlement were over \$90,000. Had the arbitration clause been honored, the lawyers could not afford to conduct the necessary discovery or pay the forensic expert to necessary to interpret the qualification data. The cost of arbitrating a single claim would have, by an order of magnitude, exceeded the value of the single claim. The settlement was well supported by the class, and class counsel received thank you notes from people who thought they would never be reimbursed.

St. Louis, MO

We pursued a claim for individuals who were stripped of their retirement benefits in violation of ERISA. Recovery for some individuals was as much as \$100,000. It was life changing for many of the people we represented.

Kansas City, MO

Class claim for statutory damages under UCC Article Nine for debtors whose cars were repossessed and who were subjected to interest overcharges. The recovery was \$13,000,000 for the class, relief from \$75,000,000 in deficiency debt and cleared credit reports of class members. Several like class actions, with similar results on a smaller scale (i.e., \$2,500,000 cash, \$7,500,000 debt relief and credit reports cleared. Individual cases involving odometer fraud (\$1,000,000+) and finance company unfair and deceptive conduct in collection on auto installment contract that was void for dealer's failure to deliver title to consumer \$1,000,000+)

New Jersey.

I represented another case, *Perez v. Rent-a- Center, Inc.*, Docket No. CAM-L-21-03 (Sup. Ct. N.J.), in which a \$109 million settlement was returned to consumers. On average, \$800 was given to each of the 100,000 New Jersey consumers who paid hidden usurious interest rates. Arbitration clauses in similar contracts would make such a claim unable to be brought today.

New York

I had a case against AT&T (*In re AT&T Wireless Consumer Class Action*), Docket No. SOM-L-2070-98 (NJ), which settled for 100% on the class's damages (\$2 million) for overcharges on a rate plan. This case could not be brought today where the contract would have an arbitration and/or anti-class clause.

Akron, OH

I represented a number of consumers whose cars had been repossessed by a local finance company associated with a chain of car dealerships. We proved that the dealer priced the vehicles based on a formula of how much they could wring out of the buyer. Sale prices were 2-3 times higher than retail book value. Sale price was never discussed or disclosed. The sale presentation was focused on the buyer's bad credit rating, and how the dealer was doing the

Broadview Heights, OH.

We recently settled a case titled *Seifert v. Commonwealth Financial Systems*. Soon after this case was filed, the defendants moved to stay the case pending arbitration. The basis for this motion was an argument that the arbitration clause in a terms and conditions document published by Chase Bank, provided a right of arbitration to the debt buyer defendant. After extensive litigation, the trial court ruled that the arbitration clause did not apply. Following this ruling we conducted discovery and moved to certify. The trial court granted the motion to certify and the defendants appealed. While the appeal was pending, the parties reached a settlement agreement that provided money refunds to a number of individuals and equitable relief to a much larger number of individuals. Had the court ruled the arbitration clause was enforceable, not of the legal or equitable relief for the class would have been obtained.

Portland, OR.

I have two cases pending in Oregon and Washington states against Career Education Corporation, previously submitted to NACA. Career Education Corp. (CEC), a company that runs for-profit educational institutions, has been the subject of several lawsuits alleging that its culinary schools have provided fraudulent information to students to entice them to enroll. In general, the lawsuits have alleged that recruiters for CEC's culinary schools have misrepresented the schools' job placement rates, exaggerated the schools' prestige, and falsely suggested that the schools had selective qualifying processes. Many enrollees needed to take out tens of thousands of dollars in loans to pay for their programs. The lawsuits alleged that admissions recruiters led students to believe that upon graduation from a CEC culinary school,

they would likely become chefs and have no trouble paying off their student loans on the salaries they were likely to earn.

The lawsuit against CEC's subsidiary in Portland, Ore., alleged that admissions recruiters claimed that more than 90 percent of graduates ended up with a job upon graduation. However, CEC allegedly concealed earnings data in Oregon that showed the vast majority of these placements barely paid above minimum wage, according to the plaintiffs. CEC's practice of counting jobs that did not require CEC training as "placements" violated Oregon law, plaintiffs alleged. The lawsuit seeks refunds for the class members on the ground that students would not have enrolled in CEC's program if they knew the truth.

Portland, OR

In four different class actions, we have recovered statutory penalties against insurance companies who used credit scores, but did not disclose the use as required by the FCRA. This changed the behavior of the insurance companies.

Narbeth, PA

Debt collector NCO sent Donna Gregory a letter stating that an alleged account it was trying to collect would be submitted to "binding arbitration" if she didn't pay. NCO then initiated arbitration proceedings with the now-defunct NAF – former darling of the credit and collections industry – and attained an "award" against Ms. Gregory. But, under the Pennsylvania Rules of Civil Procedure, a creditor in a consumer transaction may not confirm any arbitration award obtained by default unless it first applies to court to compel an arbitration proceeding (or the consumer participates or waives participation in writing.). Yet, NCO unilaterally went ahead with arbitration against Ms. Gregory and over 2300 PA consumers, obtaining bogus "awards" from NAF, larded with fees and charges. In 42 instances, NCO even had these faulty awards entered as judgments in state court. Gregory sued NCO under the FDCPA, claiming that the collection of these unenforceable arbitration awards was a misleading, unfair and unconscionable collection tactic. 15 U.S.C. § 1692e, f. After two years of litigation, the parties settled on a class basis for substantial cash relief, \$6 million in credits to outstanding balances, and vacatur of nearly a half-million dollars in ill-gotten judgments. The case is Gregory v. NCO Financial Systems, Inc., et al., U.S.D.C. E.D. Pa. No. 07-CV-05254.

Philadelphia, PA

We received a \$26 million settlement, including practice changes, against a background reporting company for violating rights under Fair Credit Reporting Act.