

# Arbitration Study

Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)



Consumer Financial  
Protection Bureau

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# Section 1

Introduction and Executive Summary



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# Introduction

In Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress instructs the Consumer Financial Protection Bureau (the “Bureau”) to study “the use of agreements providing for arbitration of any future dispute . . . in connection with the offering or providing of consumer financial products or services,” and to provide a report to Congress on the same topic. This document presents the results of that study.

The advantages and disadvantages of pre-dispute arbitration provisions in connection with consumer financial products or services — whether to consumers or to companies — are fiercely contested. Consumer advocates generally see pre-dispute arbitration as unfairly restricting consumer rights and remedies. Industry representatives, by contrast, generally argue that pre-dispute arbitration represents a better, more cost-effective means of resolving disputes that serves consumers well.<sup>1</sup> With limited exceptions, however, this debate has not been informed by empirical analysis. Much of the empirical work on arbitration that has been carried out has not had a consumer financial focus.

The present study is empirical, not evaluative. Although the report covers a wide range of topics, its uniform and consistent focus is on understanding the facts surrounding the resolution of consumer financial disputes — both in arbitration and in the courts — through a careful analysis of empirical evidence. Our results reflect what we believe is the most comprehensive empirical study of consumer financial arbitration carried out to date.

The remainder of this Section 1 describes:

- What pre-dispute arbitration is;
- The Bureau’s mandate to address pre-dispute arbitration and the process the Bureau has followed in undertaking this study; and
- What we cover in the present report and the relationship of this report to the 2013 Preliminary Results.

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<sup>1</sup> See *Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date* at 4–8 (Dec. 12, 2013), [http://files.consumerfinance.gov/f/201312\\_cfpb\\_arbitration-study-preliminary-results.pdf](http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf) (hereinafter “2013 Preliminary Results”).

## 1.1 What is a pre-dispute arbitration clause?

Companies provide almost all consumer financial products and services subject to the terms of a written contract. Whenever a consumer obtains a consumer financial product such as a credit card, a checking account, or a payday loan, he or she typically receives the company's standard-form, written legal contract.

In addition to being governed by such contracts, the relationship between a consumer and a financial service provider will generally be governed by one or more federal consumer protection laws and often by state consumer protection laws. These laws create legal rights for consumers and impose duties on financial service providers. Absent an agreement to the contrary, if a dispute arises between a consumer and a company as to whether one side or the other is adhering to its contractual or statutory duties, the aggrieved party generally has the right to seek resolution of the dispute in a court of law (although some state and federal laws provide only for public, and not private enforcement).

Furthermore, the federal court system and most state court systems provide for a class action process in which, in defined circumstances, one or more plaintiffs may file suit on behalf of similarly situated individuals. If such an action is certified by the court as meeting the criteria for a class action and plaintiffs prevail or secure a settlement, members of a class — for example, customers of a company who have been affected by a particular practice — may be eligible to obtain relief without initiating their own lawsuits. Conversely, if the defendant prevails in a certified class action, members of the class may be bound by the decision and thereby precluded from initiating their own lawsuits with respect to the claims at issue in the class case.

As a general rule, the parties to a dispute can agree, after the dispute arises, to submit the dispute for resolution to a forum other than a court — for example, to submit a particular dispute that has arisen to resolution by an arbitrator.

In addition, as a general rule the parties to a contract can agree at the time of entering the contract to an alternative means of resolving disputes that arise in the future between the parties. The most common form of alternative dispute resolution provided for in contracts is

final and binding arbitration in which a privately-appointed individual — an arbitrator<sup>2</sup> — is empowered to resolve claims that arise between the parties, including both contractual disputes and disputes under state or federal law.<sup>3</sup> As discussed in detail in Section 2, contract clauses that provide for pre-dispute arbitration appear to be a common, but not a universal, feature of consumer financial contracts. These arbitration clauses are sometimes “mandatory”: Under the terms of such agreements, either side can mandate that a dispute that arises between the parties be resolved in binding arbitration.<sup>4</sup> The clauses are described as “pre-dispute” because they commit the parties to this arrangement before there is a dispute between them.

These arbitration clauses generally give each party to the contract two distinct contractual rights. First, either side can file claims against the other in arbitration and obtain a binding decision from the arbitrator. Second, if one side sues the other in court, the party that has been sued in court can invoke the arbitration clause to require that the dispute proceed, if at all, in arbitration instead.

As noted, use of pre-dispute arbitration provisions in agreements governing consumer financial products and services has become a contentious legal and policy issue. An important development in this controversy occurred in 2011, when in *AT&T Mobility LLC v. Concepcion*,<sup>5</sup> a

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<sup>2</sup> In some cases, more than one arbitrator may be involved in resolving a dispute.

<sup>3</sup> Binding arbitration is similar to litigation, in that a decision by the adjudicator is final. In contrast, other forms of dispute resolution such as mediation may not involve a final, binding decision by a third party.

<sup>4</sup> **Alternatively, the term “mandatory,” when used to describe arbitration clauses in the consumer context, may** derive from the nature of consumer contracts. When a consumer uses a consumer financial product, he or she is usually bound by the terms of a consumer contract. The terms of that contract are not generally open to negotiation by the consumer, but are instead offered on a take-it-or-leave-it basis, meaning that the consumer either accepts those terms or instead shops for another product with different standard-form terms. In legal terms, the contract is one of **adhesion, making the clause “mandatory” in contrast to the voluntary clauses that may be reached by negotiation** between commercial parties. *See, e.g.*, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 *Stan. L.Rev.* 1631, 1632 n.1 (2005). Other scholars argue that the term “mandatory arbitration” may be better reserved for arbitration that is mandated by statute or regulation. *See, e.g.*, Ian R. Macneil *et al.*, *Federal Arbitration Law* § 17.1.2.2, at 17:8–17:9 (Supp. 1999).

<sup>5</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

divided Supreme Court held that the Federal Arbitration Act of 1925 (“FAA”)<sup>6</sup> preempted state law that would have prohibited the enforcement of a consumer arbitration clause with a “no-class” provision. Prior to that decision, courts were divided on state law challenges to the enforceability of no-class provisions in arbitration clauses.

## 1.2 The Bureau’s mandate to study consumer arbitration and our process in undertaking this study

As noted at the outset, Section 1028(a) of the Dodd-Frank Act requires the Bureau to conduct a study of the use of pre-dispute arbitration agreements “in connection with the offering or providing of consumer financial products or services.”<sup>7</sup>

As a preliminary step in undertaking the study, the Bureau published a Request for Information (the “RFI”) in 2012 that sought comments on the appropriate scope, methods, and data sources

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<sup>6</sup> Chapter 1 of the FAA is codified at 9 U.S.C. §§ 1-16. It provides that an arbitration award is final and binding, with limited grounds available for judicial review. *See* 9 U.S.C. §§ 9-10. There has been an active scholarly and judicial debate over the meaning of the FAA, particularly as it applies to consumer contracts and state court proceedings.

<sup>7</sup> Section 1028, titled “Authority to Restrict Mandatory Pre-Dispute Arbitration,” reads:

- (a) STUDY AND REPORT. The Bureau shall conduct a study of, and shall provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.
- (b) FURTHER AUTHORITY. The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).
- (c) LIMITATION. The authority described in subsection (b) may not be construed to prohibit or restrict a consumer from entering into a voluntary arbitration agreement with a covered person after a dispute has arisen.



for the required study.<sup>8</sup> We received 60 comments in response to the RFI and we met with numerous commenters and other stakeholders to discuss their concerns. We refer to a number of those comments in this report.<sup>9</sup>

We published preliminary results from the study in December 2013.<sup>10</sup> In the final section of that report, we identified nine additional work streams that were underway or under consideration for inclusion in this report. Following the publication of the report, we again met with numerous stakeholders, this time to discuss their feedback regarding the 2013 Preliminary Results.

One of the areas of investigation identified in the 2013 Preliminary Results was a planned survey of consumers to address consumer awareness of arbitration clauses and consumer perceptions of and expectations about dispute resolution. Towards that end, in June 2013 we published a Federal Register notice addressing this proposed survey. We received 17 comments with respect to that survey, many of which also discussed the study as a whole. After considering the comments and conducting two focus groups to help us refine the survey instrument, we published a second Federal Register notice in May 2014, which generated an additional seven comments. We received approval from the Office of Management and Budget to proceed with the survey in September 2014. It was completed on December 31, 2014.

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<sup>8</sup> *See* Consumer Financial Protection Bureau, Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements 4 (Apr. 2012) (Docket No. CFPB-2012-0017).

<sup>9</sup> We cite to these using the name of **the commenter and the title “RFI Comment.” All such RFI Comments are available on [www.regulations.gov](http://www.regulations.gov), accessible from the Bureau’s website, [www.consumerfinance.gov](http://www.consumerfinance.gov).**

<sup>10</sup> The 2013 Preliminary Results appear in full as Appendix A of the present report. Except when specifically noted, those results are a part of the present report.

## 1.3 The scope of this report and its relationship to the 2013 Preliminary Results

The remainder of the report has nine core sections. Most of these sections have corresponding appendices presenting additional background, data and further descriptions of methodologies used.

The remaining sections are as follows:

- Section 2 presents data on the prevalence of arbitration clauses in different consumer financial product markets, including credit cards, checking accounts, general purpose reloadable prepaid accounts (**“GPR prepaid cards”**), private student loans, storefront payday loans, and mobile wireless third-party billing. It also reviews the features of these clauses. The analysis in this section is based upon a number of data sets we assembled consisting of a total of approximately 850 consumer financial agreements, of which slightly under half are credit card agreements. We explain in Section 2 how these data sets were constructed. This section recaps some material presented in Section 3 of the 2013 Preliminary Results and should be read in conjunction with that material;
- Section 3 reports on the results of a national survey of 1,007 credit card holders concerning their knowledge and understanding of arbitration and other dispute resolution mechanisms;
- Section 4 recaps the different procedural rules applicable in consumer arbitration and select courts;
- Section 5 reviews consumer disputes filed with the American Arbitration Association (“AAA”) by consumers and/or companies from January 1, 2010, through the end of 2012 for six consumer financial product markets: credit cards, checking accounts/debit cards, payday loans, prepaid cards, private student loans, and auto loans. It covers several data points such as the number of filings, the results reached in these disputes, and the time to resolution. The analysis in this section is based upon a data set consisting of 1,847 arbitration cases filed with the AAA, the organization that administers the vast majority of consumer financial arbitration cases. The AAA shared with the Bureau, pursuant to a non-disclosure agreement, its electronic case records for consumer disputes filed from 2010–2012, and we manually identified those cases pertaining to these six consumer

financial product markets. This section recaps some material presented in Section 4 of the Preliminary Results and should be read in conjunction with that material;

- Section 6 reviews individual consumer claims filed in federal court and class claims filed in federal and certain state courts from 2010 to 2012. As with the arbitration dispute analysis, this section covers data on the claims filed as well as data on how these cases are resolved. The analysis in this section is based upon a data set consisting of 562 state and federal consumer financial class actions and 3,462 individual actions in federal court filed between 2010 and 2012. We assembled this data set through a computer-assisted search methodology coupled with extensive manual review. Because of the volume of individual federal credit card cases in this data set, we constructed a one in seven random sample of those cases for purposes of our analyses;
- Section 7 repeats the small claims court analysis that we presented in the Preliminary Results. It reviews over 42,000 filings in small claims courts by consumers and companies in the credit card marketplace. Many arbitration clauses contain small claims court “carve-outs” — generally enabling either the consumer or the company to use small claims courts, rather than arbitration, for claims resolution. This section reviews available data in the states and largest counties that provide electronic access sufficient for these purposes to see how much consumers and companies use small claims court;
- Section 8 details the terms of consumer financial class settlements. The analysis in this section is based upon a data set consisting of 419 consumer financial class action settlements subject to final approval between 2008 and 2012. We assembled this data set through a computer-assisted search methodology again coupled with extensive manual review. The analysis looks at the substantive results for consumers and companies, as well as fees, timing, and claims rates. We also present in this section a case study of one multidistrict (“MDL”) proceeding involving consumer financial issues and combining class actions against approximately two dozen different financial institutions;
- Section 9 reviews data on how public enforcement actions and private class actions overlap with respect to disputes about consumer and consumer financial products. The analysis in this section is based upon a data set consisting of 1,150 consumer financial public enforcement actions identified through a search of selected websites of state and federal regulatory and enforcement agencies. Through computer-assisted searching and extensive manual review, we identified a matching private class action for 133 of these public enforcement cases. We also analyze a complementary data set consisting of 103 consumer class actions, primarily selected from our class settlement data set. For these,

we identified 33 overlapping governmental actions through computer-assisted searching and extensive manual review. We explain the methodology used to assemble these data sets in the section;

- Section 10 reviews data on the relationship between pre-dispute arbitration clauses in consumer credit card contracts and the price and availability of consumer credit card products. The analysis in this section uses the Bureau’s Consumer Credit Card Database, which contains de-identified, account-level data with respect to credit card accounts covering an estimated 85–90% of the credit card marketplace.

We append the 2013 Preliminary Results in full, as Appendix A to this report. For some material in the 2013 Preliminary Results, including our analyses of arbitration clauses and arbitration disputes, we provide updated and expanded sections in the present report. Some other material from the Preliminary Results, however, is not expanded upon in the present report and stands as presented in December 2013. Examples include Section 4.7 (“*Which consumers bring arbitrations?*”) and Section 4.8 (“*Prior litigation*”). Other sections of this report present entirely new material that was not covered at all in the Preliminary Results. Except where otherwise noted, the findings of the 2013 Preliminary Results are incorporated into the present report.

## 1.4 Executive Summary

Our report reaches the following empirical conclusions.

### 1.4.1 Clause incidence and features

- Tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses.
- In the credit card market, larger bank issuers are more likely to include arbitration clauses than smaller bank issuers and credit unions. As a result, while less than 16% of issuers include such clauses in their consumer credit card contracts, just over 50% of credit card loans outstanding are subject to them. (In 2009 and 2010, several issuers entered into private settlements of an antitrust lawsuit in which they agreed to remove the arbitration clauses from their credit card consumer contracts for a defined period. If those issuers still included such clauses, some 94% of credit card loans outstanding would now be subject to arbitration.)

- In the checking account market, larger banks tend to include arbitration clauses in their consumer checking contracts, while mid-sized and smaller banks and credit unions tend not to. We estimate that in the checking account market, which is less concentrated than the credit card market, around 8% of banks, covering 44% of insured deposits, include arbitration clauses in their checking account contracts.
- In our prepaid card, payday loan, private student loan, and mobile wireless third-party billing agreement samples, for which data are more limited than for our credit and checking account samples, arbitration clauses are generally included in the contracts we studied. In the prepaid card and payday loan markets, we found that the substantial majority of companies included such clauses in their agreements, thereby covering almost all of the applicable markets for which we had data. In the private student loan and mobile wireless markets, we found that substantially all of the large companies used arbitration clauses. However, we have no data about the contracts of the smaller companies in those markets.
- Nearly all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis. Across each product market, 85–100% of the contracts with arbitration clauses — covering close to 100% of market share subject to arbitration in the six product markets studied — include such no-class arbitration provisions. Although these terms effectively preclude all class proceedings, in court or in arbitration, some arbitration clauses also expressly waive the consumer’s ability to participate in class actions in court. Most arbitration clauses with class action prohibitions also contain an “anti-severability” provision stating that if the no-class arbitration provision were to be held unenforceable, the entire arbitration clause should be deemed to be unenforceable as well.
- Most of the arbitration clauses contained a small claims court “carve-out,” permitting either the consumer or both parties to file suit in small claims court.
- The AAA is the predominant arbitration administrator for all the consumer financial products we examined in the study. Most arbitration clauses contained provisions that have the effect of capping consumers’ upfront arbitration costs at or below the AAA’s maximum consumer fee thresholds. Similarly, most clauses contained provisions that required hearings to take place in locations close to the consumer’s place of residence, similar to the AAA’s rules regarding hearing location.

## 1.4.2 Consumer understanding and awareness

- We asked consumers what they would do in response to seeing fees on their credit card bills that they knew were incorrectly assessed. Consumers rarely consider bringing formal claims in any forum, arbitration or litigation, as a response — even after exhausting more informal procedures, such as customer service.
- Consumers report that dispute resolution plays little to no role in choosing the credit card they use most frequently.
- Consumers are generally unaware of whether their credit card contracts include arbitration clauses. Consumers with such clauses in their agreements generally either do not know whether they can sue in court or wrongly believe that they can do so.
- Consumer beliefs about credit card dispute resolution rights bear little to no relation to the dispute resolution provisions of their credit card contracts. Most consumers whose agreements contain arbitration clauses wrongly believe that they can participate in class actions.
- Consumers are generally unaware of any arbitration clause opt-out opportunities they may have been offered by their card issuer.

## 1.4.3 Arbitration incidence and outcomes

- From 2010 through 2012, an average of 616 individual AAA cases were filed per year for six product markets combined: credit card; checking account/debit cards; payday loans; prepaid cards; private student loans; and auto loans.
- Not all these arbitration filings were made by consumers. Of the 1,847 disputes filed between 2010 and 2012 concerning the six product markets, the standard AAA “claim forms” identify consumers alone as filing an average of 411 cases each year. The remaining filings were recorded as made by companies or as mutually submitted by both the consumer and the company.
- Forty percent of the arbitration filings involved a dispute over the amount of debt a consumer allegedly owed to a company, with no additional affirmative claim by either party. In another 29% of the filings, consumers disputed alleged debts, but also brought affirmative claims against companies.

- The average consumer affirmative claim amount in arbitration filings with affirmative consumer claims was around \$27,000. The median was around \$11,500. Across all six product markets, about 25 disputes a year involved affirmative consumer claims of \$1,000 or less.
- The average disputed debt amount was nearly \$16,000. The median was roughly \$11,000. Across all six product markets, about eight cases a year involved disputed debts of \$1,000 or less.
- Overall, consumers were represented by counsel in roughly 60% of the cases, though there were some variations by product. Companies almost always had counsel.
- Almost all of the arbitration proceedings involved companies with repeat experience in the forum. And when consumers had counsel, counsel was generally a repeat player in arbitration.
- Of the 1,060 arbitration cases filed in 2010 and 2011, so far as we could determine, arbitrators issued decisions in just under 33%. In approximately 25%, the record reflects that the parties reached a settlement. The remaining cases ended in an unknown manner or were technically pending but dormant as of early 2013.
- Of the 341 cases filed in 2010 and 2011 that were resolved by an arbitrator and where we were able to ascertain the outcome, consumers obtained relief regarding their affirmative claims in 32 disputes. Consumers obtained debt forbearance in 46 cases (in five of which the consumers also obtained affirmative relief). The total amount of affirmative relief awarded was \$172,433 and total debt forbearance was \$189,107.
- Of the 52 disputes filed in 2010 and 2011 that involved consumer affirmative claims of \$1,000 or less, arbitrators resolved 19, granting affirmative relief to consumers in four such disputes.
- Of the 244 cases in which companies made claims or counterclaims that were resolved by arbitrators in a manner that we were able to determine, companies obtained relief in 227 disputes. The total amount of such relief was \$2,806,662. These totals include 60 cases in which the company advanced fees for the consumer and obtained an award without participation by the consumer after notice by the AAA. Excluding those 60 cases, the total amount of relief awarded by arbitrators to companies was \$2,017,486.

- Where there was a decision on the merits by an arbitrator or where the record indicates that the case was settled, the decision generally was issued or the settlement reached within five months after the case was initiated. Where in-person hearings were held — 34% of the cases in which the arbitrator reached a decision — we estimate that consumers generally traveled an average of 15 miles to attend the hearing.
- Consumers initially paid arbitrator fees in 831 disputes. The average and median fees were \$206 and \$125, respectively. In some cases, consumers requested that their arbitrator fees be advanced by companies or had their arbitrator fees otherwise paid for by companies. Similarly, consumers' final fee assessments were modified by the arbitrator's decision in some cases.
- There were two class arbitrations filed between 2010 and 2012 relating to the six product markets described above. One was still pending on a motion to dismiss as of September 2014. The other file contains no information other than the arbitration demand following a state court decision granting the company's motion to compel arbitration.
- There were four arbitral appeals filed between 2010 and 2012 relating to those six product markets. All four were filed by consumers who were not represented by counsel. Three of the four were closed after the parties failed to pay the required administrator fees and arbitrator deposits. In the fourth, a three-arbitrator panel upheld the arbitration award after a 15-month appeal process, ruling in favor of the company.

#### **1.4.4 Class litigation incidence and outcomes**

- From 2010 to 2012, for the same six product markets covered in our arbitration analysis, we identified an average of 187 putative class cases a year — that is, cases that were filed in federal court or in selected state courts by at least one individual who sought to sue on behalf of a class. Most of these were filed in federal court. (Our state sample accounts for around a fifth of the U.S. population, so the actual number of state class filings will have been higher, but we cannot say precisely by how much.)
- Claim amounts in these class cases were generally hard to discern, but nearly half sought federal statutory damages only under statutes with class damage caps.
- About 25% of the putative class cases filed between 2010 and 2012 were resolved through individual settlements and another 35% included a withdrawal by a plaintiff or a



dismissal for failure to prosecute or serve, which may indicate that a non-class settlement was reached.

- About 12% of the class cases reached final approval of a class settlement by February 2014, which was the end of our review period for this analysis. We reviewed an additional six months of docket activity for class cases that were still open at the end of our review period and found that the percentage of cases with an approved class settlement had risen to 15%, and in another 2% of cases a settlement was pending approval. Class certification rarely occurred outside the context of class settlement. No class cases filed during this time period went to trial prior to the end of our review period.
- In 17% of the putative class cases filed in court, the company moved to compel arbitration. We do not know what percentage of these cases was covered by arbitration clauses. We did find, however, that in a subset of 40 credit card class cases involving card issuers with an arbitration clause, motions to compel arbitration were filed in approximately two-thirds of the cases.
- When motions to compel arbitration were filed in putative class cases, the court granted them in whole or in part in 49% of the cases.
- When they were not transferred to or filed in MDL proceedings, federal class cases filed in 2010 and 2011 closed in a median of 218 days and 211 days, respectively, from the date of the filing.<sup>11</sup> (Most cases filed in those two years were closed by the cutoff for our review.) Class cases transferred to or filed in MDL proceedings in 2010 and 2011 were markedly slower, at a median of 758 days and 538 days, respectively. State class cases filed in 2010 and 2011 were also somewhat slower, at a median of 407 days and 255 days, respectively.

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<sup>11</sup> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to a single district for coordinated or consolidated pretrial proceedings. 28 U.S.C. § 1407.

### 1.4.5 Individual litigation incidence and outcomes

- Our analysis of individual, non-class court cases is limited to federal court and includes only five of our product markets. (It does not include auto purchase loans, which are included in our class case analysis and in our arbitration analysis.) From 2010 to 2012, an average of just over 1,150 consumer financial cases relating to these five product markets were filed in federal court each year.<sup>12</sup>
- Consumers requested resolution by jury in almost all the individual cases filed in federal court.
- Almost all consumers were represented by counsel in federal individual cases.
- Almost half of the federal individual cases filed resulted in an identified settlement. A little over 40% involved an outcome that was consistent with settlement, but for which we cannot say with certainty that a settlement occurred.
- In about 7% of the individual federal cases, the consumer established some company liability, generally by motion. Two cases went to trial, one of which resulted in company liability.
- Companies invoked arbitration clauses in under 1% of the individual cases. Again, we do not know what percentage of the company defendants in the full set of individual cases used arbitration clauses in their consumer agreements. Focusing on 140 cases against credit card issuers where we know their consumer agreements included an arbitration clause, we found company motions to compel in eight cases (5.7%).
- Leaving out a handful of cases that transferred to MDL proceedings, federal individual cases closed in a median of 127 days from the date the complaint was filed.

### 1.4.6 Small claims court

- Most arbitration clauses that we reviewed contained small claims court carve-outs. In 2012, consumers in jurisdictions with a combined total population of around 85 million

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<sup>12</sup> We reviewed all cases in four product markets and, after identifying all cases in the credit card market, sampled those cases for our analyses.

filed fewer than 870 small claims court credit card claims — and most likely far fewer than that — against issuers representing around 80% of credit card loans outstanding.

- In small claims courts, credit card issuers were significantly more likely to sue consumers than the other way around. In these same jurisdictions, in 2012 the issuers representing about 80% of outstandings filed over 41,000 cases against individuals, substantially all of which were likely debt collection cases against consumers. (In the one county in which we were actually able to see the small claims court complaints, all but one of the cases filed against individuals were debt collection disputes.)

### 1.4.7 Class settlements

- A total of 422 federal consumer financial class settlements were approved between 2008 and 2012, resulting in an average of just under 85 approved settlements per year. The bulk of these settlements concerned debt collection, credit cards, checking accounts, and/or credit reporting. Our analyses are based on 419 of these cases, excluding three cases for which no information on fees was available and which would not have materially affected any result.
- We could identify class size or a class size estimate in around 78% of these cases. Based on these cases only, estimated class membership across all five years was 350 million. Excluding one class action involving 190 million estimated class members, the total class size for the cases where we were able to find data was 160 million.
- In the class settlements we reviewed, the annual average of the aggregate amount of the settlements was around \$540 million per year. This estimate covers, for settlements approved between 2008 and 2012, more than \$2 billion in cash relief including fees and expenses and more than \$600 million in in-kind relief. These figures represent a floor because a number of settlements also required companies to change business practices. Cases seldom provided complete or even any quantification of the value of this kind of behavioral relief.
- About 60% of settlements provided enough data for us to report the value of cash relief that, as of the last document in the case files, either had been or was scheduled to be paid to class members. Based on these cases alone, the value of cash payments was \$1.1 billion. This excludes payment of in-kind relief and, again, it excludes any valuation of behavioral relief.

- For about 55% of the settlements, we were able to estimate, as of the date of the last filing in the case, the number of class members who were guaranteed cash payment because either they had submitted a claim or they were part of a class to which payments were to be made automatically. Some 34 million class members had received or were scheduled to receive cash relief as a result of filing a claim or receiving an automatic distribution of relief.
- We were able to calculate claims rates in 105 cases. For these, the average claims rate was 21%. The median was 8%. The rates in these cases would increase to the extent that claims were submitted after last being reported in the case record. The weighted average claims rate was 4% including the one class action involving 190 million class members and was 11% without that case. These numbers exclude payments made automatically without the submission of claims. About 130 of the settlements we reviewed contained such automatic payment provisions.
- All cases we analyzed reported attorneys' fee awards. Across all settlements that reported both fees and gross cash and in-kind relief, fee rates were 21% of cash relief and 16% of cash and in-kind relief. We were able to compare fees to cash payments in 251 cases (or 60% of our data set). In these cases, of the total amount paid out in cash by defendants (both to class members and in attorneys' fees), 24% was paid in fees.
- The median time to approval of the final settlement was 560 days and the average time was 690 days.
- A little under half the settlements were preceded by substantive motions practice before settlement. Generally, the court decided these motions before settlement.

### 1.4.8 Public and private enforcement

- We looked at consumer enforcement actions filed by state and federal regulators to explore the proportion of cases where private class action lawyers sued the same defendants for similar conduct. We identified 740 enforcement actions filed between 2008 and 2012 by regulators in 20 states and four municipalities and counties, and another 410 cases that were filed by federal regulators. In 88% of these, we were unable to find an overlapping class action complaint. We also identified a set of private class actions that included all of the settlements for more than \$10 million from our class settlement data set and a random sampling of smaller settlements. To assure further robustness, we reviewed the websites of top class action firms and identified an

additional 34 class consumer financial proceedings filed in the same period. We were unable to identify an overlapping public enforcement proceeding in 66% of these 114 filings.

- When we did find overlapping activity by government entities and private class action lawyers, class action lawyers filed before the government between 62% and 71% of the time.

### **1.4.9 Price and output effects of arbitration provisions**

- A number of large credit card issuers eliminated their arbitration clauses beginning in 2010 as a result of a class action settlement in an antitrust lawsuit. Using de-identified loan-level data in the Bureau Credit Card Database, which provides monthly data with respect to interest and fees assessed on credit card accounts, we compared changes in consumer prices for at least a subset of the issuers that eliminated their arbitration clauses to changes in prices for issuers that did not change their clauses in the same period. That “difference-in-differences” analysis did not identify any statistically significant evidence of an increase in prices among those companies that dropped their arbitration clauses and thus increased their exposure to class action litigation risk.
- Using the same “difference-in-differences” methodology and looking at two measures of credit availability in the Credit Card Database, we were also unable to identify evidence that companies that eliminated arbitration clauses reduced their provision of credit to consumers relative to companies that did not change their arbitration clauses.



## Section 2

How prevalent are pre-dispute arbitration clauses and what are their main features?



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# Introduction

A central aspect of the use of pre-dispute arbitration clauses is their incidence — that is, how frequently they appear in contracts. This section provides data on the incidence and features of arbitration clauses in contracts for a number of product markets: cardholder agreements for credit cards, deposit account agreements for checking accounts, cardholder agreements for general purpose reloadable (“GPR”) prepaid cards, storefront payday loan contracts, private student loan contracts, and mobile wireless contracts governing third-party billing services.

We provide data, first, on the incidence of arbitration clauses by market. For select markets, we also provide data on how arbitration clause incidence has changed over time. Second, we report on clause length and complexity. Third, we report data on certain clause features. More particularly, we examine how common certain clause features are, what variations exist across clauses, and how these data vary across product markets.

Our 2013 Preliminary Results provided incidence data for three markets — credit cards, checking accounts, and GPR prepaid cards — using data from the end of 2012 and summer 2013.<sup>1</sup> In this report, we recap those results and, for some metrics, we update our results to include data from the end of 2013 and 2014. The report also adds results for the storefront payday lending, private student loan, and mobile wireless markets, in each case using data from 2013 and 2014.

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<sup>1</sup> The 2013 Preliminary Results are available as the first appendix to this report. The incidence section of the Preliminary Results is at pages 16 through 57.

## 2.1 Prior research

Prior to the 2013 Preliminary Results, several studies examined the use of arbitration clauses in various types of consumer financial services contracts. In 2004, Demaine and Hensler found that 69.2% of the consumer financial contracts in their sample included arbitration clauses.<sup>2</sup> Because they were seeking to determine “the frequency with which the average consumer encounters arbitration clauses,”<sup>3</sup> they included at most five contracts from a broad range of contract types in their sample, rather than investigating any particular type of consumer contract in detail.<sup>4</sup> Other studies focusing specifically on the use of arbitration clauses in credit card contracts have also relied on small samples, typically from the largest credit card issuers.<sup>5</sup> One such study, by Eisenberg, Miller, and Sherwin, found that 76.9% of the consumer contracts studied included arbitration clauses,<sup>6</sup> and that “every consumer contract with an arbitration clause also included a waiver of classwide arbitration.”<sup>7</sup>

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<sup>2</sup> Linda J. Demaine & Deborah R. Hensler, “*Volunteering*” to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer’s Experience*, 67 *Law & Contemp. Probs.* 55, 64 (2004). They included tax preparation and investment contracts, along with credit card and banking contracts, as consumer financial contracts. Limiting their results to credit card and banking contracts, 12 of 17 (70.6%) included arbitration clauses. *Id.*

<sup>3</sup> *Id.* at 57.

<sup>4</sup> Their sample included two contracts for general credit cards and five each for airline credit cards, store credit cards, and banking contracts. *See id.* at 64. Demaine and Hensler also examined a number of features of the arbitration clauses they studied, but reported only aggregate findings for all consumer contracts.

<sup>5</sup> *E.g.*, Public Citizen, *Forced Arbitration: Unfair and Everywhere 1* (Sept. 24, 2009), <http://www.citizen.org/documents/UnfairAndEverywhere.pdf> (last visited Mar. 6, 2015) (finding that eight of ten “major providers” of credit cards and five of seven major banks used arbitration clauses); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 *Harv. Negot. L. Rev.* 115, 145–46 (2010) (reporting that ten of 13 credit card contracts included arbitration clauses).

<sup>6</sup> Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 *U. Mich. J.L. Reform* 871, 883 table 2 (2008). Their sample consisted of “26 consumer agreements drafted by 21 companies,” several of which were consumer financial services companies: three commercial banks (five consumer agreements), two credit card issuers (two consumer agreements), and one financial credit company (one consumer agreement). *Id.* at 881.

<sup>7</sup> *Id.* at 884.

Rutledge and Drahozal examined the incidence of arbitration clauses in credit card contracts using a much larger sample made available under the Credit CARD Act of 2009.<sup>8</sup> They found that between 2009 and 2010, “the percentage of [credit card] issuers using arbitration clauses **declined from 17.4% ... to 15.0%,”** reflecting a net decrease of eight issuers, and that “the percentage of credit card loans subject to arbitration clauses declined from 95.1% to only 48.0%.”<sup>9</sup> This study attributed the decline to two events: (1) the National Arbitration Forum ceasing to administer consumer arbitrations following its settlement of a consumer fraud lawsuit filed by the Minnesota Attorney General; and (2) the settlement of an antitrust class action, *Ross v. Bank of America*, by four large credit card issuers, under which they agreed to remove the arbitration clauses from their credit card contracts for a three and one-half year period.<sup>10</sup> This study also examined the use of various features of credit card arbitration clauses, ranging from arbitration selection terms to class arbitration waivers.<sup>11</sup>

In November 2012, the Pew Charitable Trusts issued a study of the use of arbitration clauses in the checking account contracts used by 100 large financial institutions.<sup>12</sup> The study found that 43% of the institutions in the sample used arbitration clauses, with a “wide disparity” between the 50 largest (with 56% providing for arbitration) and the remainder of the sample (with 30% providing for arbitration).<sup>13</sup> The study also reported on various other features of the arbitration clauses, finding, for example, that “[o]f the institutions in the top 50 that have arbitration

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<sup>8</sup> Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. Rev. 1; *see also* Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. Empirical Legal Stud. 536 (2012). The relevant statutory provision is Section 204(a) of the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1746 (May 22, 2009).

<sup>9</sup> Rutledge & Drahozal, *Contract and Choice*, *supra* n.8, at 19–20.

<sup>10</sup> *Id.* at 18–19; *see also* Section 2.3.1 and Section 10.1 for more information about the *Ross* settlement.

<sup>11</sup> Rutledge & Drahozal, *Contract and Choice*, *supra* n.8, at 21–49.

<sup>12</sup> Pew Charitable Trusts, *Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution* (Nov. 2012), <http://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/banking-on-arbitration> (last visited Mar. 6, 2015); *see also* Public Citizen, *supra* n.5, at 10–11 (deposit account agreements); Pew Health Group, *Hidden Risks: The Case for Safe and Transparent Checking Accounts* 18 (Apr. 2011), (“**For 189 of these [265] accounts (representing four out of ten banks and 71 percent of all accounts), the accountholder had to waive the right to a trial before a judge and agree to have the dispute resolved before a private arbiter of the bank’s choice.**”).

<sup>13</sup> Pew Charitable Trusts, *supra* n.12, at 3–4.

clauses, 81 percent have class action bans,” while “[f]or the next 50 institutions, this number drops to 62 percent.”<sup>14</sup>

## 2.2 Data sources

The data analyzed here come from review of the provisions of consumer financial services contracts obtained by the Bureau from various sources. For each type of contract, details of the sources and samples of the contracts studied are presented in the following subsections.

## 2.3 Clause incidence

This section provides data on how frequently arbitration clauses are included in a number of types of consumer financial services contracts. In this section, we report incidence using two measures when possible.<sup>15</sup> First, we report the percentage of agreements in our sample that have an arbitration clause. In general, each company in the sample has one associated agreement, so this first measure closely proxies the rate at which companies include arbitration clauses. Second, we report the percentage of the relevant market covered by the agreements in our sample, using credit card loans outstanding, insured deposits, GPR prepaid card load volume, payday loan storefront counts, and mobile wireless subscription volume to measure market share.<sup>16</sup> Data sources for and limitations of the various market share<sup>17</sup> measurements are described in the subsections that follow and in Appendix B.<sup>18</sup>

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<sup>14</sup> *Id.* at 5. For other features studied, *see id.* at 4–6 (*e.g.*, opt-outs, carve-outs for small claims court, discovery limits, required qualifications for arbitrators, remedy limitations, and shortened statutes of limitations).

<sup>15</sup> For private student loan contracts, we do not have market share data reflecting recent changes in the market and so report only the first measure.

<sup>16</sup> By comparison, when we describe the features of arbitration clauses, we present our results as the percentage of arbitration clauses (rather than all contracts) in the samples and as the percentage of the market share subject to arbitration clauses (rather than the entire market share) in the samples.

Our overall findings are in Table 1. The data described in this summary and shown in Table 1 are the most recent available. More details on the time periods studied are provided in the subsections that follow. In summary:

- For credit card agreements, 15.8% of issuers in the sample (covering 53.0% of credit card loans outstanding) used arbitration clauses as of December 31, 2013;<sup>19</sup>
- For checking account agreements, an estimated 7.7% of financial institutions with 44.4% of insured deposits used arbitration clauses as of summer 2013;
- For GPR prepaid card agreements, just over 92% of cards studied used arbitration clauses as of summer 2014. All of the companies for which we had market share data (covering 82.9% of the dollar value loaded on cards) included arbitration clauses, so that at least 82.9% of the market was subject to arbitration clauses;<sup>20</sup>
- For storefront payday loan agreements, 83.7% of lenders covering 98.5% of storefronts in our sample used arbitration clauses in their agreements from 2013 and 2014;
- Six of the seven private student loan contracts in our sample (85.7%) from 2014 included arbitration clauses; and
- Seven of the eight largest facilities-based mobile wireless providers (87.5%), covering 99.9% of subscribers, used arbitration clauses in their 2014 customer agreements.

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<sup>17</sup> In the 2013 Preliminary Results we “refer[red] to credit card loans outstanding, insured deposits, and GPR prepaid loan volume as ‘account values.’” *Id.* at 20. Because payday loan storefronts and mobile wireless subscribers are not “account values,” we use the more general phrase “market share” here.

<sup>18</sup> The amounts of credit card loans outstanding and insured deposits come from publicly available “call reports” filed with regulators by banks and credit unions. Load data for prepaid cards and subscriber data for mobile wireless companies come from industry reports. The number of payday loan storefronts comes from state regulator web pages in California and Texas. *See* Appendix B.

<sup>19</sup> On the assumption that the number of cardholders and the volume of credit card loans outstanding are proportionate, this incidence data indicate that around 80 million consumers were subject to arbitration clauses at the end of 2013, focusing on credit cards alone. *See* 2013 Preliminary Results at 63–64.

<sup>20</sup> In Table 1, the market share subject to arbitration clauses is indicated as >82.9% because at least 82.9% of prepaid card loads in our sample are subject to arbitration clauses.

**TABLE 1:** INCIDENCE OF ARBITRATION CLAUSES IN CONSUMER FINANCIAL SERVICES CONTRACTS, 2013–2014

	Arbitration clause		No arbitration clause	
	# of contracts	% of market	# of contracts	% of market
Credit cards <sup>21</sup>	67 (15.8%)	53.0%	356 (84.2%)	47.0%
Checking accounts <sup>22</sup>	7.7%	44.4%	92.3%	55.6%
Prepaid cards	48 (92.3%)	>82.9%	4 (7.7%)	<17.1%
Storefront payday loans	83.7%	98.5%	16.3%	1.5%
Private student loans	6 (85.7%)	n/a	1 (14.3%)	n/a
Mobile wireless	7 (87.5%)	99.9%	1 (12.5%)	0.1%

Where it is available, we also provide data on how incidence has changed over time. After the Supreme Court’s 2011 decision in *AT&T Mobility LLC v. Concepcion*,<sup>23</sup> several commenters suggested that companies would inevitably include arbitration clauses with no-class-arbitration

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<sup>21</sup> Four defendants in the *Ross* antitrust litigation settled claims by agreeing not to use arbitration clauses in their credit card contracts for three and one-half years. 05-Civ. 7116 (Southern District of New York). The credit card loans outstanding of the *Ross* settlers constituted 86.4% of the outstandings not subject to arbitration clauses. If the settling defendants in *Ross* had continued to use arbitration clauses, 93.6% of credit card loans outstanding would be subject to arbitration clauses. None of the *Ross* settlers has resumed using arbitration clauses as of February 2015.

<sup>22</sup> The incidence of arbitration clauses in checking account agreements shown in this table is an extrapolation to the entire market of banks and does not include credit unions. *See* 2013 Preliminary Results at 24–26. Data on the incidence of arbitration clauses in the banks and credit unions in our sample are described in Section 2.3.2. Similarly, the incidence of arbitration clauses in storefront payday loan agreements shown in the table is an extrapolation, as explained in Section 2.3.4.

<sup>23</sup> 131 S. Ct. 1740 (2011).

provisions in all their consumer contracts.<sup>24</sup> For credit card and checking account contracts (and to a lesser degree, GPR prepaid card contracts), we examine whether the predicted change has occurred.

## 2.3.1 Credit cards

### Current incidence

The sample of credit card contracts studied consists of contracts filed by 423 issuers with the Bureau as of December 31, 2013.<sup>25</sup> Under applicable regulations, credit card issuers are required to file a copy of their consumer credit card agreements with the Bureau if they have more than 10,000 open credit card accounts.<sup>26</sup> Thus, the contracts in our sample cover almost all consumers in the credit card market. By the same token, cards issued subject to these contracts account for almost all consumer credit card transactions and almost all consumer credit card loans outstanding. The sample includes one contract per issuer.<sup>27</sup>

As shown in Figure 1, of the 423 issuers in the sample, 67 issuers (15.8%) included arbitration clauses in their credit card contracts, while 356 issuers (84.2%) did not.<sup>28</sup> Overall, for the issuers

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<sup>24</sup> *E.g.*, Ian Millhiser, *Supreme Court Nukes Consumers' Rights In Most Pro-Corporate Decision Since Citizens United*, ThinkProgress: Justice (Apr. 27, 2011), <http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers> (last visited Mar. 6, 2015); Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, SFGate.com (Nov. 7, 2010), available at <http://www.sfgate.com/opinion/article/Supreme-Court-case-could-end-class-action-suits-3246898.php> (last visited Mar. 6, 2015).

<sup>25</sup> The agreements are available at Consumer Financial Protection Bureau, Credit Card Agreement Database, <http://www.consumerfinance.gov/credit-cards/agreements/> (last visited Mar. 6, 2015).

<sup>26</sup> *See* 12 C.F.R. § 1026.58(c)(5)(i). In addition, issuers are not required to provide agreements for a private label credit card program with less than 10,000 open accounts. *See id.* § 1026.58(c)(6)(i). (A private label credit card is a credit card issued or managed by a financial institution on behalf of a merchant for use only to make purchases at that merchant — for example, a department store credit card.)

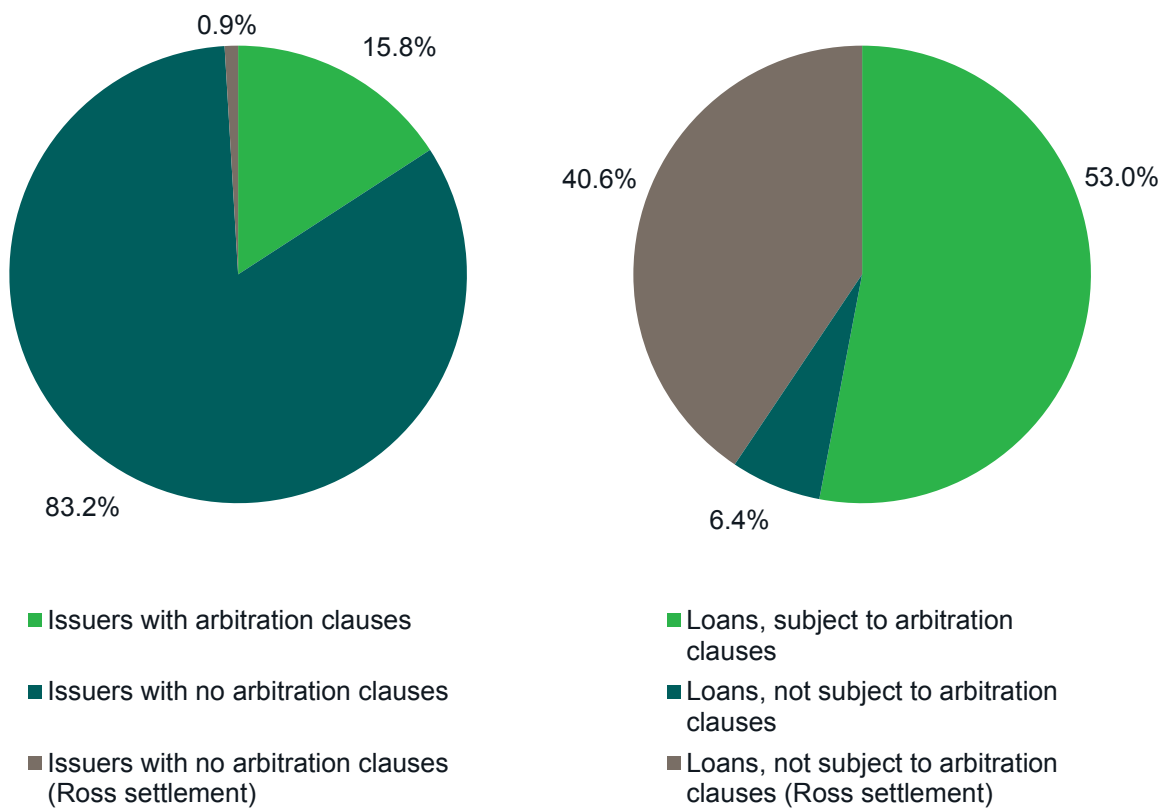
<sup>27</sup> For issuers that filed multiple contracts, the dispute resolution clauses in those contracts were almost always identical. In the rare case in which they were not identical, we used the predominant form based on the contracts filed with the Bureau. For additional description of the sample and data collection, *see* Appendix B.

<sup>28</sup> One issuer provided for arbitration only of disputes involving its credit card rewards program and another only for disputes arising out of credit insurance for credit card loans. Because the agreements did not include a generally applicable arbitration clause, they were coded as not providing for arbitration.



in the sample, 53.0% of credit card loans outstanding were subject to arbitration clauses. Large issuers, as measured by the dollar value of credit card loans outstanding, were more likely than small- to mid-sized issuers to use arbitration clauses. Fifteen of the 20 largest bank issuers (75.0%) and 30 of the 50 largest bank issuers (60.0%) used arbitration clauses, while only 24 of 57 small- to mid-sized banks (42.1%) did so. In addition, credit unions were less likely to use arbitration clauses than banks. Overall, only ten of 304 credit union issuers in the sample (3.3%) used arbitration clauses.

**FIGURE 1:** CLAUSE INCIDENCE IN CREDIT CARD CONTRACTS, AS A PERCENTAGE OF CREDIT CARD ISSUERS AND CREDIT CARD LOANS OUTSTANDING, DEC. 31, 2013



As noted in the 2013 Preliminary Results, the **Ross** settlement likely impacts these results. In late 2009, four of the ten largest issuers (Bank of America, Capital One, Chase, and HSBC) settled an antitrust class action by agreeing to remove the arbitration clauses from their credit

card contracts for three and one-half years from a date specified in the settlement agreement.<sup>29</sup> Those four issuers include the three largest credit card issuers that currently do not use arbitration clauses.<sup>30</sup> Collectively, their credit card loans outstanding constitute 86.4% of loan outstandings that are not subject to arbitration clauses. Had the settling defendants in **Ross** continued to use arbitration clauses, 93.6% of credit card loans outstanding would be subject to arbitration clauses, as shown in Figure 1. As of February 2015, none of the **Ross** issuers had resumed using arbitration clauses.<sup>31</sup>

## Changes in incidence

The data described above come from agreements filed as of year-end 2013. One year earlier, at year-end 2012, the same overall number of issuers — 67 in total — used arbitration clauses.<sup>32</sup> However, because more issuers submitted agreements to the Bureau’s credit card agreement database in 2013 than in 2012,<sup>33</sup> this tally of 67 issuers represented a lower share of issuers as of year-end 2013 (15.8%) than was the case one year earlier (67 of 393 issuers, or 17.0%). Although

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<sup>29</sup> The dates differed among the settling defendants, and ranged from January 1, 2010, to May 1, 2010. The settlement agreements also provided for the period to be extended in the event of a delay in mailing change-of-terms notices to cardholders. *See* 2013 Preliminary Results at 23 n.51.

<sup>30</sup> The other issuer, HSBC, sold a substantial portion of its credit card portfolio to Capital One in 2012. *See* Howard Mustoe, *HSBC Credit Card Sale to Capital One Yields \$2.5 Billion Premium*, Bloomberg.com (May 2, 2012), available at <http://www.bloomberg.com/news/articles/2012-05-02/hsbc-gets-31-3-billion-in-cash-for-u-s-card-and-retail-sale> (last visited Mar. 6, 2015).

<sup>31</sup> *See* Bank of America, *Find Sample Credit Card Agreements*, <https://www.bankofamerica.com/credit-cards/credit-card-agreements.go> (last visited Mar. 6, 2015); Capital One, *U.S. Consumer Credit Card Agreements*, <http://www.capitalone.com/credit-cards/lp/credit-card-agreements/> (last visited Mar. 6, 2015); Chase, *Select a Cardmember Agreement*, <https://www.chase.com/credit-cards/cardmember-agreement> (last visited Mar. 6, 2015); HSBC, *Compare Credit Cards* <https://www.us.hsbc.com/1/2/home/personal-banking/credit-cards> (last visited Mar. 6, 2015).

<sup>32</sup> 2013 Preliminary Results at 21–22.

<sup>33</sup> Of the 393 issuers studied in the Preliminary Results, 206 filed new credit card agreements with the Bureau during 2013. The remaining issuers did not file new agreements. Seven issuers were closed, merged into other institutions, sold their credit card loan portfolios, or had agreements that were otherwise unavailable during 2013, and so were removed from the sample.

the net number of issuers using arbitration clauses remained constant over the period, a handful of issuers switched to arbitration over this period, while none switched away from it.<sup>34</sup>

Although the 67 issuers using arbitration clauses represented a smaller share of total issuers at year-end 2013 than at year-end 2012, these issuers accounted for a larger share of credit card loans outstanding at year-end 2013 (53.0%) than at year-end 2012 (50.2%). This change in market share is mostly accounted for by increased loans outstanding for issuers with arbitration clauses.<sup>35</sup> The bulk of the remainder is the result of a top 20 issuer switching to arbitration during 2013.<sup>36</sup>

The slight increase in arbitration clause use between year-end 2012 and year-end 2013 continues the slight upward trend since the Supreme Court's 2011 decision in *Concepcion*.<sup>37</sup>

While the incidence of arbitration clauses in credit card contracts has increased since *Concepcion*, the increase has not been as dramatic as predicted by some commenters.<sup>38</sup>

Examining the 357 issuers that have agreements in the Bureau's database for the entire period

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<sup>34</sup> Of the 206 issuers submitting new filings in 2013, three issuers — with a combined 0.6% of credit card loans outstanding in the sample — switched to arbitration during the year. One of the three switching issuers is among the 20 largest credit card issuers as measured by total credit card loans outstanding. Another of the three issuers had more contracts with arbitration clauses than without in 2010 and 2011, then recorded more contracts without arbitration than with arbitration in 2012, but reverted to a majority of contracts containing arbitration clauses in 2013. As a result, our coding recorded a switch, but this switch reflected a marginal, not a complete, shift in the issuer's contracts away from (2011 to 2012) or toward (2012 to 2013) arbitration. An additional 37 issuers filed credit card agreements with the Bureau for the first time during 2013. Of those issuers, one, with 0.06% of the credit card loans outstanding in the sample, used an arbitration clause. These four additional issuers using arbitration clauses in 2013 were counterbalanced by the fact that four out of the seven issuers that did not file credit card agreements with the Bureau in 2013 (after having done so in 2012) used an arbitration clause. As a result, although no issuer switched away from arbitration during 2013, the net number of issuers using arbitration clauses was unchanged between year-end 2012 and year-end 2013.

<sup>35</sup> Some 84% of the increase in credit card loans outstanding subject to arbitration clauses between 2012 and 2013 resulted from increased loans outstanding by issuers with arbitration clauses.

<sup>36</sup> Although only one top 20 issuer switched to arbitration during 2013, the number of top 20 issuers using arbitration clauses increased by two between year-end 2012 and year-end 2013. The reason is that an issuer just outside the top 20 as of year-end 2012 (which used an arbitration clause) became the 20<sup>th</sup> largest issuer as of year-end 2013, replacing the 20<sup>th</sup> largest issuer as of year-end 2012 (which did not use an arbitration clause).

<sup>37</sup> 131 S. Ct. 1740 (2011).

<sup>38</sup> *See supra* text accompanying n.24.

from 2010 through 2013, the number of issuers using arbitration clauses increased from 53 as of year-end 2010, to 54 as of year-end 2011, to 55 as of year-end 2012, to 58 as of year-end 2013.<sup>39</sup> A total of seven credit card issuers in that sample have adopted arbitration clauses since *Concepcion*, while two issuers that previously used arbitration clauses stopped using them, for a net increase of five.<sup>40</sup> The dollar amount of credit card loans outstanding subject to arbitration clauses has increased somewhat more — from 47.2% of credit card loans outstanding as of year-end 2010 to 53.0% as of year-end 2013. As indicated above, almost all of the increase is due to growth in credit card loans outstanding issued by existing users of arbitration clauses.<sup>41</sup>

## 2.3.2 Checking accounts

### Current incidence

The sample of checking account contracts studied is drawn from three sources: the 100 largest banks, based on consolidated insured deposits<sup>42</sup> as of December 31, 2012; a random sample of 150 small- and mid-sized banks, based on the same measure; and the 50 largest credit unions, also based on the same measure. For reasons explained in the 2013 Preliminary Results,<sup>43</sup> the final sample consists of 103 large banks, 141 small- and mid-sized banks, and 49 credit unions. Checking account agreements from those institutions were obtained in August and September 2013 either from the Internet or in response to the Bureau’s 1022(c)(4) orders. As we explain more fully in Appendix B, our measurement of market share for checking accounts uses data from publicly available “call reports” filed with regulators by banks and credit unions. For the time period studied here, call reports did not report consumer deposit volume separately from

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<sup>39</sup> As discussed *supra* n.34, one of those three issuers had been coded as using arbitration clauses in 2010 and 2011 but not in 2012 and then again in 2013, because of changes in the frequency of agreements on file with the Bureau, not a broader shift in that issuer’s practices regarding the use of arbitration clauses.

<sup>40</sup> Three issuers switched to arbitration clauses during 2011, two during 2012, and two more during 2013. Two issuers switched away from arbitration during 2011, for a net increase of one that year.

<sup>41</sup> *See also* 2013 Preliminary Results at 54–55.

<sup>42</sup> By consolidated basis, we mean that we calculated from call reports total insured deposits for all affiliated institutions, unless an affiliate used a different dispute resolution clause. *See* Appendix B.

<sup>43</sup> *See* 2013 Preliminary Results at 24–26.

commercial deposit volume.<sup>44</sup> We used “insured deposits,”<sup>45</sup> therefore, as a proxy for consumer deposits.<sup>46</sup> Our market share results for checking accounts should be viewed accordingly.

Of the 103 largest banks, 47 (45.6%), with accounts representing 58.8% of insured deposits, used arbitration clauses.<sup>47</sup> By comparison, ten of the 141 small- and mid-sized banks (7.1%), with accounts representing 6.3% of insured deposits in that sample, used arbitration clauses, and four of the 49 credit unions (8.2%), representing 8.7% of insured deposits in that sample, used arbitration clauses. Overall, combining data from the large bank sample with data extrapolated from the small- and mid-sized bank sample, we estimate that 7.7% of banks, with accounts representing 44.4% of insured deposits, used arbitration clauses in their checking account agreements.<sup>48</sup> These results are reflected in Figure 2.

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<sup>44</sup> Beginning with the March 31, 2014, call report, institutions with \$1 billion or more in total assets are required to report the amounts of consumer deposit account products in their call report. *See* Call Report Instruction Book Update, at RC-E-16a to RC-E-16d (Mar. 2014). Our comprehensive data on checking account agreements are from 2013, at which time data on consumer deposits were not available.

<sup>45</sup> We use the term “insured deposits” to refer to the amount of deposits in accounts less than \$250,000.

<sup>46</sup> To the extent that our proxy includes commercial deposits that are not subject to arbitration clauses, our results will overstate the amount of insured deposits subject to arbitration. In general, however, we refer to the share of such deposits subject to arbitration, which should minimize the effect of using this proxy. For more information, see Appendix B.

<sup>47</sup> Three of the large banks in the sample (with 0.5% of insured deposits) used jury trial waivers but provided for arbitration in the event the jury trial waiver was unenforceable. Because arbitration was not the primary means of dispute resolution, these banks were coded as not using arbitration.

<sup>48</sup> 2013 Preliminary Results at 25–26 & n.58.

**FIGURE 2:** CLAUSE INCIDENCE IN CHECKING ACCOUNT CONTRACTS, AS A PERCENTAGE OF BANKS AND OF BANK INSURED DEPOSIT VOLUME, 2013



### Changes in incidence

Compared to credit card contracts, only limited data are available on changes in checking account contracts since *Concepcion*. We sought to examine the extent of those changes in two ways.

First, we compared the contracts used in the Pew Charitable Trusts study of checking account contracts — collected from June to August 2012 — to the contracts we collected just over a year later — from August to September 2013.<sup>49</sup> These data, which cover only a portion of the period since the 2011 *Concepcion* decision, came from a sample consisting of 88 large financial

<sup>49</sup> Pew Charitable Trusts, *supra* n.12.

institutions (banks and credit unions) as to which the sample in the Pew study overlaps with the sample used by the Bureau.<sup>50</sup>

As of summer 2012, 35 of the 88 institutions (39.8%) included arbitration clauses in their checking account contracts. As of summer 2013, one year later, 42 of 88 (47.7%) used arbitration clauses. Eight banks and one credit union switched to arbitration during that one-year period, while two banks switched away from arbitration. The eight banks switching to arbitration constituted 9.2% of all arbitration-subject insured deposits in the large bank sample. The credit union became the largest credit union using an arbitration clause, accounting for over one-third of all arbitration-subject insured deposits at credit unions in the sample as of year-end 2012.

Second, we updated the 2013 Preliminary Results by collecting checking account agreements from the Internet in August 2014 for all banks and credit unions for which we used agreements from the Internet in 2013. To avoid any additional burden on the financial institutions that provided their checking account agreements in response to the 1022(c)(4) orders in 2013, we did not require those institutions to provide updated agreements in 2014. The result is a partial view of how the agreements changed between 2013 and 2014, limited to those institutions for which the agreements were available on the Internet in both years.

Of the 57 banks from the large bank sample for which we obtained agreements from the Internet in 2013, none switched to or away from arbitration in 2014. Twenty-four of the agreements did not include an arbitration clause in both years, and two agreements were unavailable online in 2014.<sup>51</sup> The remaining 31 agreements included arbitration clauses in both years.

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<sup>50</sup> For more information on the sample, *see* 2013 Preliminary Results at 56. We were, however, able to examine the checking account contracts of the ten largest banks as of October 2010, and we found no change in their use of arbitration clauses between then and summer 2012. *See* Pew Charitable Trusts, Hidden Risks: The Case for Safe Checking Accounts (Apr. 2011), <http://www.pewtrusts.org/en/research-and-analysis/reports/2011/04/27/hidden-risks> (last visited Mar. 6, 2015); *see also* Pew Charitable Trusts, Still Risky: An Update on the Safety and Transparency of Checking Accounts (Oct. 2012), <http://www.pewtrusts.org/en/research-and-analysis/reports/2012/10/10/still-risky-an-update-on-the-safety-and-transparency-of-checking-accounts> (last visited Mar. 6, 2015).

<sup>51</sup> Neither of the two agreements that were unavailable in 2014 used arbitration clauses in 2013.

We obtained checking account agreements from the Internet in 2013 for only five of the small- and mid-sized banks. Of those five banks, two switched to arbitration in 2014. Two more did not use arbitration clauses in either year, and one agreement was not available.<sup>52</sup> We have no information on the checking account agreements in 2014 of the other small- and mid-sized banks in the sample.

Finally, we obtained checking account agreements from the Internet for 34 of the largest credit unions. One switched to arbitration and one switched away from arbitration, so the net use of arbitration clauses was unchanged. In 2014, four of the 34 credit union agreements (11.8%) used arbitration clauses, while 30 of 34 (88.2%) did not.

Overall, the limited data provide evidence of only a slight move toward arbitration in checking account contracts since the 2013 Preliminary Results, but a somewhat larger move between 2012 and 2013.

In the 2013 Preliminary Results, we noted an important caveat to this analysis. Many banks — particularly smaller banks — use standard forms acquired from a form provider rather than preparing their own customized forms.<sup>53</sup> If one or more of these form providers were to adopt an arbitration clause in their standard forms, the overall market shift to arbitration could be significant.

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<sup>52</sup> The agreement that was unavailable in 2014 did not use an arbitration clause in 2013.

<sup>53</sup> For example, at least 83 of the 141 small to mid-sized banks (58.9%) in the checking account sample used some version of a standard form prepared by a single form provider. *See* 2013 Preliminary Results at 54. As of the most recent information we have available, that standard form does not include an arbitration clause, although the form company does offer an optional freestanding arbitration clause.



### 2.3.3 GPR prepaid cards

#### Current incidence<sup>54</sup>

Our data on GPR prepaid card agreements are less complete than for the credit card and checking account contracts studied.<sup>55</sup> The sample here consists of 52 GPR prepaid cards that were listed on the Visa, MasterCard, or NerdWallet web pages listing prepaid cards as of August 2013 or that were included in several recent studies of the terms of GPR prepaid cards,<sup>56</sup> and that continued to be available in August 2014. Three companies — Green Dot, H&R Block, and

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<sup>54</sup> In November 2014, the Bureau issued a *Study of Prepaid Account Agreements* based on a sample of 325 prepaid card agreements, including 207 GPR prepaid card agreements, 25 payroll card agreements, 65 government benefit card agreements, and 28 other prepaid card agreements. *See* Consumer Financial Protection Bureau, *Study of Prepaid Account Agreements* 8 (Nov. 2014). That study used the agreements examined in the 2013 Preliminary Results as a starting point, *id.* at 5, and added additional agreements obtained by the Bureau, *id.* at 7. We use an updated version of the sample from the 2013 Preliminary Results here to maintain consistency with those results and to examine any changes in the incidence of arbitration clauses over time. Of the agreements reviewed in the Prepaid Account Study but not included in the 2013 Preliminary Results, 116 of the 152 GPR prepaid card agreements (76.3%) included arbitration clauses. (The card programs ended for an additional seven of the agreements in our original sample, and one agreement from that sample was not included in the Prepaid Account Study.) The Prepaid Account Study also examined other types of prepaid cards: Eleven of the 25 payroll card agreements studied (44.0%) included arbitration clauses; 30 of the 65 government benefit card agreements (46.2%) included arbitration clauses; and 20 of the 28 other prepaid card agreements (71.4%) included arbitration clauses.

<sup>55</sup> A GPR prepaid card is a card that “a consumer can use anywhere that accepts payment from a retail electronic payments network, such as Visa, MasterCard, American Express, or Discover” and to which the consumer can add funds after the card is issued. *See* Consumer Financial Protection Bureau, Notice of Proposed Rulemaking, 79 FR 77101 (Dec. 23, 2014) (Docket No. CFPB-2014-0031). For purposes of this report, we limit our analysis to GPR prepaid cards that consumers can purchase at retail outlets or over the Internet. We do not cover payroll cards or electronic benefit transfer cards, which also can be used over electronic payment networks and can be reloaded at least by the provider of the card, other than as noted *supra*.

<sup>56</sup> Aité Group, *The Contenders: Prepaid Debit and Payroll Cards Reach Ubiquity* 18-19 (Nov. 2012); Bankrate.com, *2013 Prepaid Debit Cards Survey*; Bretton Woods, Inc., *Analysis of Branded General Purpose Reloadable Prepaid Cards: A Comparative Cost Analysis of Prepaid Cards, Basic Checking Accounts and Check Cashing* 9 (Feb. 2012); CardHub, *Prepaid Cards Report — 2013*; Consumer Reports, *Prepaid Cards: How They Rate on Value, Convenience, Safety and Fee Accessibility and Clarity* 9 (July 2013); Pew Charitable Trusts, *Loaded with Uncertainty: Are Prepaid Cards a Smart Alternative to Checking Accounts?* 26 (Sept. 2012), <http://www.pewtrusts.org/en/research-and-analysis/reports/2012/09/06/loaded-with-uncertainty> (last visited Mar. 6, 2015).

NetSpend — dominate the market, collectively accounting for over 68% of the dollar amount loaded on cards based on the most recent available data.<sup>57</sup>

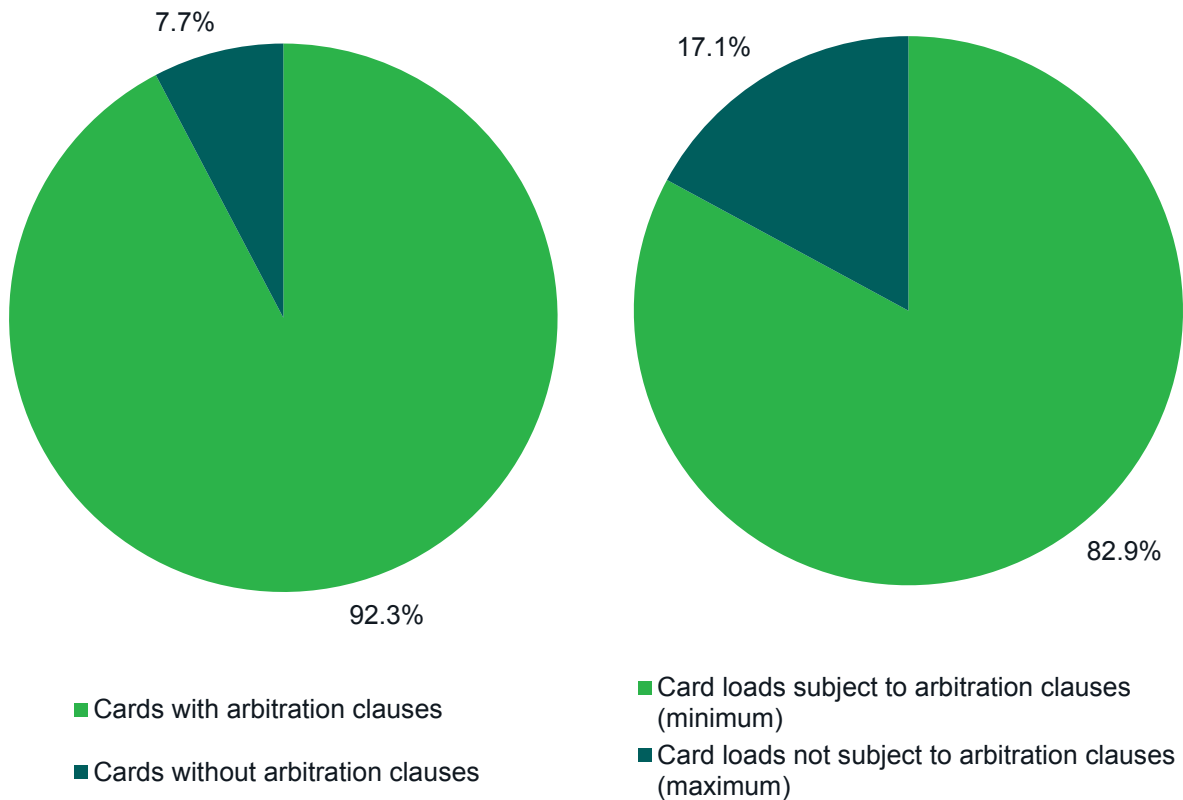
As of August 2014, 48 of the 52 GPR prepaid card agreements in the sample (92.3%) used arbitration clauses in their cardholder agreements, two used exclusive forum selection clauses, and two had no dispute resolution clause. All of the companies for which we had market share data as of November 2012 (constituting 82.9% of the dollar value loaded on cards), including the three leading companies, used arbitration clauses, so we know that at least 82.9% of card loads were subject to arbitration clauses.<sup>58</sup> These results are shown in Figure 3.

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<sup>57</sup> See Aité Group, *supra* n.56, at 19. The companies identified in the text are formally not issuers of prepaid cards; the issuers are almost always depository institutions. (GreenDot, however, now owns a bank issuer.) Companies like NetSpend (which has since been acquired by another company, TSYS) are generally referred to as “program managers.” In the GPR prepaid market, the program manager generally plays the dominant role with responsibility for most aspects of a program. Two depository institutions, Bancorp Bank and MetaBank, serve a large number of GPR program managers. There is no consistent pattern in the cardholder agreements: Some cards with the same program manager or the same issuing bank nonetheless have different cardholder agreements.

<sup>58</sup> Our market share data come from the Aité Group report cited *supra*.

**FIGURE 3:** CLAUSE INCIDENCE IN GPR PREPAID CARD CONTRACTS, AS A PERCENTAGE OF CARDS AND OF DOLLAR AMOUNT LOADED ON CARDS, 2014



### Changes in incidence

The percentage of GPR prepaid card agreements in our sample using arbitration clauses increased to 92.3% in 2014 from 81.0%, as reported in the 2013 Preliminary Results. The reasons for the increase are twofold. First, 11 card programs previously included in the sample have either ended (nine cards) or have agreements that are no longer available online (two cards). Six of these 11 programs used arbitration clauses and five did not.<sup>59</sup> Second, three cards (with no load data) that had no dispute resolution clause in their cardholder agreements as of

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<sup>59</sup> Since a substantial majority of GPR prepaid card agreements included arbitration clauses, removing an almost equal number of agreements with and without arbitration clauses from the sample resulted in a relative increase in the incidence of arbitration clauses.

August 2013 began including an arbitration clause by August 2014.<sup>60</sup> No updated market share data are available, and none of the institutions for which we had market share data made material changes to their arbitration clauses in 2014. As a result, market share data for prepaid cards in our sample remain unchanged from 2013 to 2014.

### 2.3.4 Storefront payday loans

We examine the use of arbitration clauses in 80 payday loan<sup>61</sup> contracts from storefront payday lenders in California, Florida, and Texas.<sup>62</sup> The sample of storefront payday loan contracts was drawn from the 11 largest payday lenders in the country (which we identified from the *Payday Loan Industry Report* published by Stephens, Inc. in June 2011<sup>63</sup>) as well as random samples of smaller storefront lenders licensed in California, Florida, and Texas.<sup>64</sup> We obtained the standard form contracts that each of the 11 largest lenders uses in California, Florida, and Texas if it does business in those states; in total we obtained 25 agreements from these lenders.<sup>65</sup> In addition,

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<sup>60</sup> Of the 63 GPR prepaid cards studied in the 2013 Preliminary Results, the dispute resolution clauses of 44 were unchanged a year later, three agreements had added an arbitration clause, five continued using an arbitration clause but made some revision to the clause, nine card programs had ended, and two contracts were no longer available online.

<sup>61</sup> This study's use of the terms "payday loan," "payday lender," and similar terms are solely for the purposes of the arbitration study and should not be construed to bind the Bureau in any proceeding or other undertaking involving similar products or services.

<sup>62</sup> For data on the incidence of arbitration clauses in a small, non-random sample of payday loan contracts from tribal, offshore, and other online payday lenders, *see* Appendix C.

<sup>63</sup> *See* Stephens, Inc., Payday Loan Industry Report 12 (June 6, 2011). For further discussion, *see* Appendix B.

<sup>64</sup> Lenders were sampled randomly from the set of all lenders registered in the relevant category under each state's licensing regime. The inclusion of different types of products, such as "deferred presentment" agreements, is based on those products being licensed in the respective states under the same licensing regime as payday loans. However, when a lender responded to the Bureau's 1022(c)(4) order by stating that the lender did not make payday loans, its contract was not included in the results. The maximum size of the sample, had all recipients of our 1022(c)(4) orders responded to them by providing payday loan agreements, would have been 175 — consisting of 50 contracts each from the randomly selected payday lenders licensed in California, Florida, and Texas, and 25 contracts from the 11 largest payday lenders (because not all of the largest lenders did business in all three states). Six of the Texas lenders responded that they did not make payday loans, reducing the maximum sample size to 169.

<sup>65</sup> A payday loan transaction in Texas involves multiple contracts: between the consumer and the lender; and between the consumer and a credit services organization. If there was an arbitration clause in each of the contracts, in most

we obtained 55 agreements from smaller payday lenders. To obtain these latter agreements, we randomly sampled 50 lenders in each of these three states from the set of all registered payday lenders in those states and sent 1022(c)(4) orders to those lenders seeking copies of their standard agreements.<sup>66</sup> The agreements reported on here are those from lenders who responded to the orders.<sup>67</sup>

We measured the market share of those payday lenders based on the number of licensed storefront locations indicated by the California and Texas registries; no comparable information about Florida locations is available online. Using licensed storefront locations is an imperfect measure of market share because actual lending volume may vary across locations, but it is a commonly used measure in the industry.<sup>68</sup> For more information on the sample, see Appendix B.

All of the 11 largest lenders used an arbitration clause, although some of them do not operate in all three states. Out of the 55 sampled payday lenders, 46 used arbitration clauses.<sup>69</sup>

Extrapolating to California, Florida, and Texas, 83.7% of the lenders use an arbitration clause. Lenders with more locations were somewhat more likely to use arbitration clauses: 98.5% of licensed storefronts in our sample were subject to contracts with arbitration clauses, while only 1.5% of licensed storefronts were subject to contracts that did not use arbitration clauses. We do

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cases the clauses were almost identical (except for changes to reflect the different status of the parties). When available, we coded the contract with the credit services organization. Regardless, we included only one contract in the sample.

<sup>66</sup> To contact the lenders, we used the address for the storefront location that was randomly sampled.

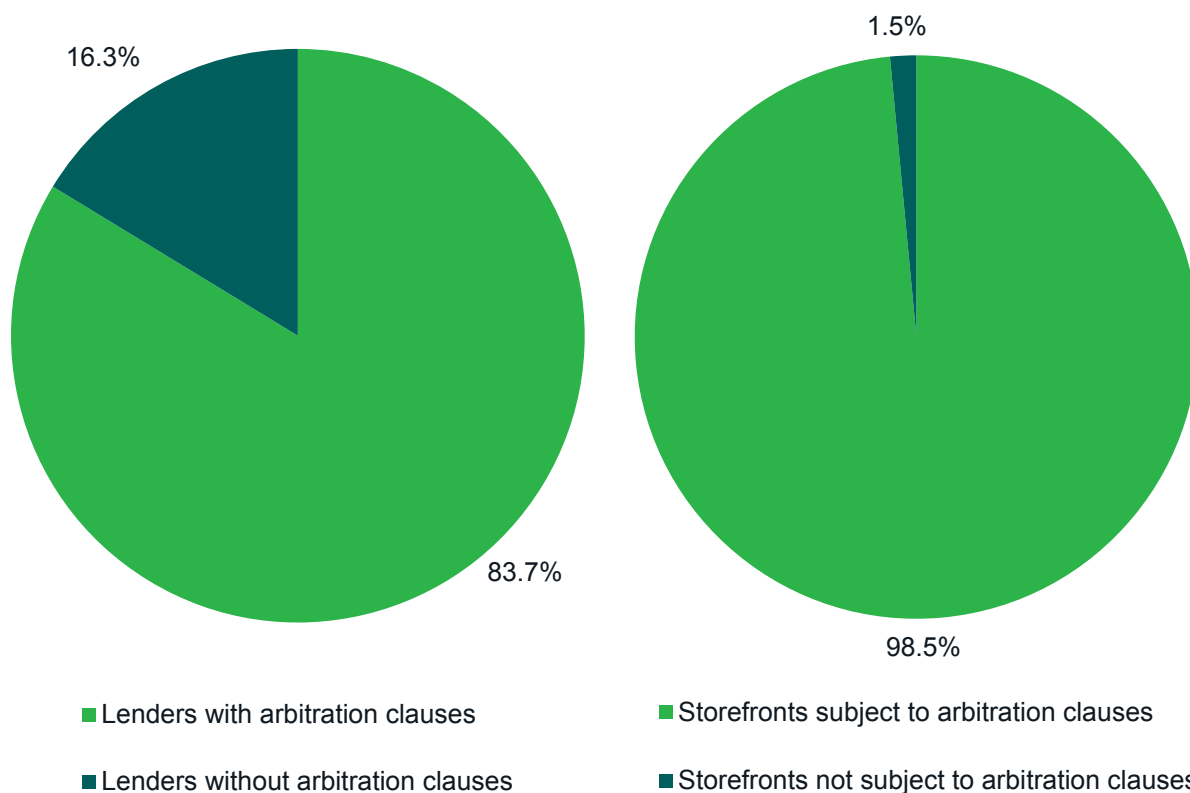
<sup>67</sup> We obtained 25 agreements from the 50 randomly selected California licensed lenders, 18 agreements from the 50 randomly selected Florida licensed lenders, and 12 agreements from the 50 randomly selected Texas licensed lenders. The response rate for payday lenders to the Bureau's 1022(c)(4) orders was much lower than the response rate for banks providing account agreements. We do not know how the contracts of the nonresponding lenders compare to the contracts of those that responded. Beyond their noncompliance, however, we have no indication that the nonresponding lenders differed systemically from the payday lenders that responded to the orders with respect to their use of arbitration clauses in their consumer contracts.

<sup>68</sup> *See, e.g.*, Stephens, Inc., *supra*.

<sup>69</sup> Of the nine storefront payday loan contracts without arbitration clauses, five were from lenders in California, three were from lenders in Florida, and one was from a lender in Texas.

not have data on changes in the incidence of arbitration clauses in storefront payday loan contracts over time.

**FIGURE 4:** CLAUSE INCIDENCE IN STOREFRONT PAYDAY LOAN CONTRACTS, AS A PERCENTAGE OF LENDERS AND OF STOREFRONTS, 2013–2014



In Figure 4 we present the extrapolated clause incidence, both as a percentage of lenders and as a percentage of storefronts (the storefront information is only available for California and Texas). Aside from this section, we do not extrapolate in the rest of the text; instead, we report the results using the 66 payday lenders (including the 11 largest). The largest 11 payday lenders might have different contracts in each of the three states. Therefore, we count the number of different contracts as opposed to the number of different payday lenders: Each of the sampled 55 creditors has one contract, and the 11 largest creditors combine for 25 contracts since most of the 11 are active in each of the three states, resulting in 80 contracts overall.

### 2.3.5 Private student loans

We look at the incidence of arbitration clauses in a small sample of private student loan contracts.<sup>70</sup> The sample consists of seven student loan contracts: one contract from each of the six largest private student lenders that were studied in a 2012 joint report by the Bureau and the U.S. Department of Education on *Private Student Loans*<sup>71</sup> and that remain in the market, plus the contract used by the approximately 250 credit unions that are affiliated with Credit Union Student Choice.<sup>72</sup> We have no data on the contracts used by other, smaller private student lenders.

Six of the seven (85.7%) contracts included an arbitration clause, as shown in Figure 5. By comparison, neither the Federal Direct Loans Master Promissory Note nor the Perkins Loan Master Promissory Note includes an arbitration clause. We do not have market share data reflecting recent changes in the market and so do not report arbitration clause incidence by market share for private student loan contracts.

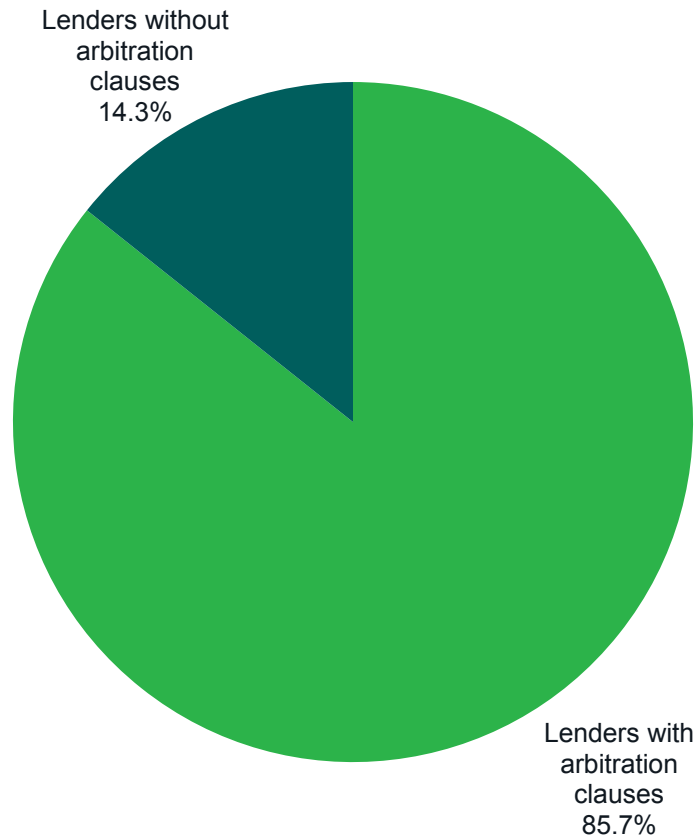
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<sup>70</sup> For an earlier study, *see* National Consumer Law Center, *Paying the Price: The High Cost of Private Student Loans and the Dangers for Student Borrowers* 22, 28 (Mar. 2008), [http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/Report\\_PrivateLoans.pdf](http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/Report_PrivateLoans.pdf) (last visited Mar. 6, 2015) (finding that 61% of contracts in sample of 28 student loans originated by six lenders between 2001 and 2006 included arbitration clauses).

<sup>71</sup> *See* U.S. Department of Education and Consumer Financial Protection Bureau, *Private Student Loans* 7 & n.3 (Aug. 29, 2012).

<sup>72</sup> For more details about the sample, *see* Appendix B.

**FIGURE 5:** CLAUSE INCIDENCE IN PRIVATE STUDENT LOAN CONTRACTS, AS A PERCENTAGE OF LENDERS, 2014



### 2.3.6 Mobile wireless third-party billing

Finally, we examine the dispute resolution provisions in contracts of the eight largest facilities-based providers of mobile wireless services in the United States.<sup>73</sup> “Facilities-based mobile wireless service providers offer mobile voice, messaging, and/or data services using their own network facilities.”<sup>74</sup> We are studying those contracts because they authorize third parties to

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<sup>73</sup> Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless 55 tbl. 13 (Mar. 21, 2013) (“FCC 16<sup>th</sup> Mobile Wireless Competition Report”). Of the 12 largest facilities-based providers identified by the FCC in its report, four have either been acquired by or sold their retail business to other companies since that report. Our sample consists of the eight remaining firms. *See* Appendix B.

<sup>74</sup> FCC 16<sup>th</sup> Mobile Wireless Competition Report, *supra* at 25.



charge consumers for services on their mobile phone bills. As explained in a recent report by the Federal Trade Commission:

*[M]ajor phone carriers permit consumers to charge payments for third-party goods and services directly to their mobile phone accounts, which is known generally as “mobile carrier billing” or just “carrier billing,” as an alternative to paying for an item with a credit or debit card, for example.<sup>75</sup>*

We did not study the contracts of smaller facilities-based providers<sup>76</sup> or other providers of mobile wireless services.

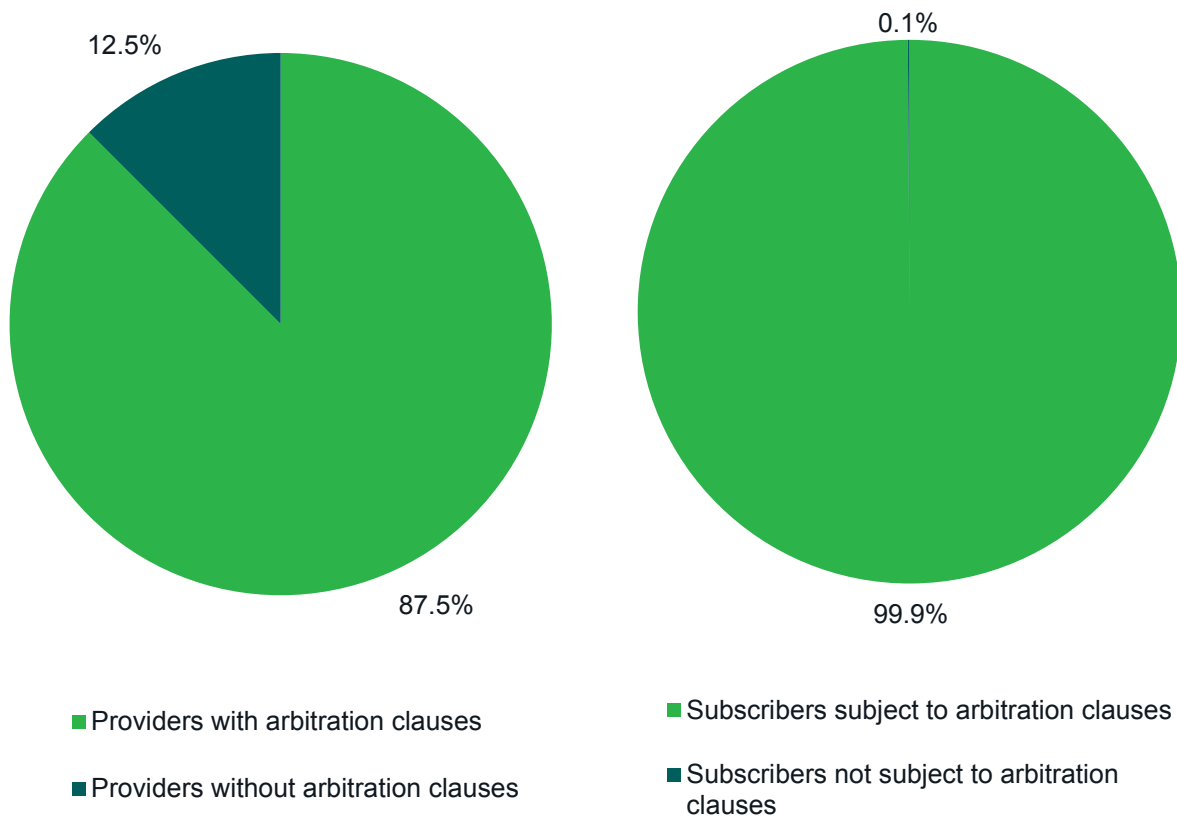
Of the eight wireless services providers in the sample, seven (87.5%) included arbitration clauses in their consumer contracts as of summer 2014. The one provider that did not use an arbitration clause was one of the smallest in the sample, so that over 99.9% of subscribers to these providers were parties to contracts that used arbitration clauses. These results are summarized in Figure 6.

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<sup>75</sup> Federal Trade Commission, Mobile Cramming: An FTC Staff Report 2 (July 2014), <http://www.ftc.gov/system/files/documents/reports/mobile-cramming-federal-trade-commission-staff-report-july-2014/140728/mobilecramming.pdf> (last visited Mar. 6, 2015).

<sup>76</sup> See FCC 16<sup>th</sup> Mobile Wireless Competition Report, *supra* at 38–39 (“estimat[ing] that there were approximately 95 smaller, facilities-based providers in the continental United States, Alaska, and Hawaii as of October 2012”).

**FIGURE 6:** CLAUSE INCIDENCE IN MOBILE WIRELESS CONTRACTS, AS A PERCENTAGE OF PROVIDERS AND OF SUBSCRIBERS, 2014



## 2.4 Clause length and complexity

In the 2013 Preliminary Results, we examined the length and complexity of arbitration clauses in credit card agreements.<sup>77</sup> The following are revised and corrected<sup>78</sup> readability data for the

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<sup>77</sup> 2013 Preliminary Results at 28–29.

<sup>78</sup> In extending our readability analysis beyond credit card arbitration clauses, we discovered an issue arising from the digital file format of the agreements we studied in the 2013 Preliminary Results. This issue affected the readability scores we reported. Correcting for the issue resulted in lower readability scores for both arbitration clauses and the rest of the credit card agreements, but did not substantially affect the relative difference in scores between the two. Thus, in the 2013 Preliminary Results, we reported that the average Flesch-Kincaid grade level for credit card arbitration clauses — with a lower grade level indicating greater readability — was 14.2, while the average Flesch-Kincaid grade level for the rest of the contract was 10.8. *See* 2013 Preliminary Results at 29. As described above,

credit card arbitration clauses in our sample. The credit card arbitration clauses averaged 1,108.8 words in length, ranging from 78 to 2,514 words. On average, the arbitration clause made up 14.1% of the words of the credit card contract, and was almost always more complex and written at a higher grade level than the rest of the contract (with an average Flesch-Kincaid grade level<sup>79</sup> of 15.6, as compared to 11.6 for the rest of the contract<sup>80</sup>). We also found that arbitration clauses from larger issuers tended to be longer (averaging 1,329.5 words) than ones from smaller issuers (averaging 1,067.3 words), but that arbitration clauses from larger issuers tended to score better on the readability metrics than ones from smaller issuers. Thus, the Flesch-Kincaid grade level was 14.7 for arbitration clauses from large issuers as compared to 15.7 for arbitration clauses from small issuers,<sup>81</sup> and one of the three largest credit card issuers used the clause with the best readability score.

We conducted the same analysis for our samples of GPR prepaid card contracts (as used in the 2013 Preliminary Results) and storefront payday loan contracts.

The word count for arbitration clauses in the GPR prepaid card contracts studied ranged from 24 words to 2,970 words, and averaged 1,082.6 words. On average, the arbitration clauses made up 14.4% of the words in the contract, and in most cases were written at a higher grade level (with an average Flesch-Kincaid grade level of 15.0, as compared to 11.8 for the rest of the contract) and had worse readability scores (with an average Flesch-Kincaid readability score of 32.9, as compared to 48.4 for the rest of the contract).

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using the corrected analysis, we found the average grade level for the arbitration clauses we studied to be 15.6, as compared to 11.6 for the rest of the contract. Thus, it remains true, as we reported in the 2013 Preliminary Results, that “[c]redit card arbitration clauses almost always were more complex and written at a higher grade level than the rest of the credit card contract,” even though the readability scores themselves are different. *Id.* at 28. The corrected numbers did change one of our qualitative descriptions of the data, however: Using the corrected methodology, one, not two, of the three largest credit card issuers used the clauses with the best readability scores. *Id.* at 29 n.72.

<sup>79</sup> As we explained in the 2013 Preliminary Results at 28 n.65, the Flesch readability score is a widely used standard in plain language analysis, calculated by taking into account total words, total sentences, and total syllables. The Flesch-Kincaid grade level translates readability to the level of education required to understand the text.

<sup>80</sup> The average Flesch readability score for credit card arbitration clauses was 31.5 and for the rest of the credit card contract was 50.2.

<sup>81</sup> The average Flesch readability score for arbitration clauses from larger issuers was 34.4, while for arbitration clauses from the remaining issuers it was 30.9.

The word count for arbitration clauses in storefront payday loan contracts ranged from 167 words to 2,860 words. The average number of words was 1,421.3. As compared to arbitration clauses in credit card and prepaid card contracts, the arbitration clauses in storefront payday loan clauses were somewhat longer. But the rest of the payday loan contract was much shorter than the rest of the credit card and prepaid card contracts, so that the arbitration clause was a much higher percentage of the payday loan contract than the credit card and prepaid card contracts (39.5% on average, as compared to 14.1% and 14.4%, respectively).<sup>82</sup>

Storefront payday loan arbitration clauses almost always were more complex and written at a higher grade level than the rest of the payday loan contract. The average Flesch-Kincaid grade level for storefront payday loan arbitration clauses was 15.4, while the average Flesch-Kincaid grade level for the remainder of the payday loan contract was 13.0. Similarly, the average Flesch readability score for payday loan arbitration clauses was 31.3, while the average Flesch readability score for the remainder of the payday loan contract was 42.7. Of the storefront payday loan contracts studied, only in seven contracts (just under 10%) were the Flesch-Kincaid grade levels lower for the arbitration clause than for the remainder of the contract.

In two contracts, however, the Flesch-Kincaid grade level was much lower for the arbitration clause than for the rest of the payday loan contract. In those contracts, the Flesch-Kincaid grade levels for the arbitration clauses were 6.8 and 7.1, while the Flesch-Kincaid grade levels for the rest of the contract were 14.9 and 14.0. Indeed, the Flesch-Kincaid grade levels for these two arbitration clauses were significantly lower than the lowest grade level for the rest of any payday loan contract in the sample (which was 9.1).

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<sup>82</sup> In Texas, the payday loan documentation often included a number of documents, including a credit services agreement between the consumer and the credit services organization, a separate credit services disclosure document, a promissory note and loan disclosure between the consumer and the lender, and sometimes other documentation. As noted *supra*, we typically analyzed the arbitration clause in the credit services agreement (although in some cases other documents also included an arbitration clause). To enhance comparability with the other payday loan contracts in the sample, we used the credit services agreements as the basis for calculating the length and readability score of the remainder of the contract.

## 2.5 Clause features

This section summarizes various features that appear in or with arbitration clauses in the contracts we studied. It examines: (1) whether the arbitration clause permitted the consumer to opt out of the clause; (2) the scope of the arbitration clause and whether the clause carved small claims cases out of the obligation to arbitrate; (3) which entity or entities were to administer the arbitration and how the arbitrator or arbitrators were to be selected; (4) the extent to which decisions on the enforceability of the arbitration clause were delegated to the arbitrator; (5) whether the clause precluded class proceedings; (6) whether the clause precluded the award of punitive or other damages; (7) whether the clause specified the time period in which a claim had to be brought; (8) whether the clause precluded disclosure of information about the arbitration or the dispute; (9) where any in-person hearing was to take place; (10) what the clause provided about payment and allocation of the cost of arbitration between the consumer and the company; (11) whether the clause provided for a minimum recovery contingent on the consumer's success in the case; (12) what the clause disclosed about various core characteristics of arbitration; and (13) the use of arbitral appeals panels.<sup>83</sup>

We describe the incidence of each feature as a percentage of the number of arbitration clauses in the sample for the type of contract. To the extent of available data, we also state the incidence as a percentage of the share of the product market subject to arbitration clauses (which we refer to as arbitration-subject market share, “% of market” in the tables).

For credit card agreements, checking account agreements, and GPR prepaid card agreements, we report data from the 2013 Preliminary Results for most features. For class and contingent minimum recovery provisions, we present updated data for these markets using the samples as described in Section 2.3. Data on the use of arbitral appeals panels in these markets are new in this report but are based on the sample of contracts studied in the 2013 Preliminary Results.<sup>84</sup>

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<sup>83</sup> Except for the use of arbitral appeals panels, all of the features are ones examined in the 2013 Preliminary Results. Some of the features described below may be inconsistent with the due process or fairness protocols applied by the AAA and JAMS in administering consumer arbitrations. *See* Section 4. We describe the features here as they appear in the arbitration clauses in the sample, without regard to the AAA's or JAMS's policies.

<sup>84</sup> This section reflects a handful of minor corrections to data in the 2013 Preliminary Results.

For the other product markets covered, we present data from the current samples described above.

## 2.5.1 Opt-outs

Some arbitration clauses permit consumers to opt out of or reject the arbitration clause within a specified time period. To exercise the opt-out right, a consumer must follow the stated procedure — which usually requires the consumer to physically mail a signed written document to the issuer (electronic submission is permitted only rarely), and which may require all authorized users on the account to sign the opt-out request — within the stated time limit.

Just over a quarter of the credit card arbitration clauses (27.3%, covering 26.0% of arbitration-subject credit card loans outstanding) and checking account arbitration clauses in our sample (26.2%, covering 38.3% of arbitration-subject insured deposits) included opt-outs. For GPR prepaid cards, 17.6% of arbitration clauses (covering 26.5% of arbitration-subject prepaid card loads) included opt-outs. A higher percentage of storefront payday loan arbitration clauses (50.7% of clauses, covering 83.6% of arbitration-subject storefronts) and private student loan arbitration clauses (83.3% of clauses) included opt-outs. But only one mobile wireless arbitration clause (14.3%, covering 14.4% of arbitration-subject subscribers) permitted the consumer to opt out.

The time allowed for opting out was generally either 30 days or 60 days, typically from when the account was opened, the loan was funded, or the application was submitted. No clause in our sample provided for an opt-out period longer than 60 days, and relatively few provided for periods (such as 45 days) between the two ends of the range. The shortest opt-out period specified was three days, in two storefront payday loan contracts. But those opt-out provisions permitted the consumer to opt out by so indicating in the signature block of the contract. The arbitration clause of one major payday lender required the consumer to submit the opt-out notice by certified mail postmarked within seven days following signing of the loan agreement.

For checking accounts, prepaid cards, and storefront payday loans, larger companies with arbitration clauses tended to be somewhat more likely than smaller ones with such clauses to permit consumers to opt out of the arbitration clause. Clauses covering some 38.3% of arbitration-subject insured deposits in the sample permitted opt-outs, as did clauses covering 26.5% of arbitration-subject prepaid card loads and 83.6% of arbitration-subject payday loan storefronts. 26.0% of arbitration-subject credit card loans and 14.4% of arbitration-subject mobile wireless subscribers were subject to clauses permitting opt-outs. These results are

summarized in Table 2. We explore the extent to which consumers actually use opt-out provisions in Section 3.4.3.

**TABLE 2:** ARBITRATION CLAUSES PERMITTING OPT-OUTS FROM ARBITRATION

	Opt out		No opt out	
	# of contracts	% of market	# of contracts	% of market
Credit cards	18 (27.3%)	26.0%	48 (72.7%)	74.0%
Checking accounts	16 (26.2%)	38.3%	45 (73.8%)	61.7%
Prepaid cards	9 (17.6%)	26.5%	42 (82.4%)	73.5%
Storefront payday loans	36 (50.7%)	83.6%	35 (49.3%)	16.4%
Private student loans	5 (83.3%)	n/a	1 (16.7%)	n/a
Mobile wireless	1 (14.3%)	14.4%	6 (85.7%)	85.6%

## 2.5.2 Scope and small claims

When providers include an arbitration clause in their consumer contracts, the scope of the clause tends to be very broad. Typically, the arbitration clause applies to all disputes arising out of or relating to the contract and the account or card, and sometimes it extends to other aspects of the parties’ relationship. As long as one party invokes the clause in litigation, any disputes within the scope of the clause will be resolved in arbitration rather than in court.<sup>85</sup>

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<sup>85</sup> The clauses varied in the parties they identified as being required to arbitrate. Some clauses by their terms only reached the named parties signing the agreement, while others expressly included the parent company, any subsidiaries and affiliates, and the company’s directors, employees, agents, assigns, successors, beneficiaries, and marketing partners.

However, most of the clauses studied “carved-out,” or excluded, certain claims or disputes from arbitration. The most common carve-out in the sample was for claims that could be or had been brought in small claims court. A small claims court carve-out is not necessary for a party to file a claim in small claims court. What the carve-out typically provides, however, is a contractual right to pursue a claim in small claims court even if the other party would prefer that the claim be resolved in arbitration.

Small claims carve-outs were most common in storefront payday loan clauses, with 93.0% of clauses in our sample (covering 99.0% of arbitration-subject storefronts) including such a provision. Just over 85% of mobile wireless arbitration clauses (covering 99.7% of arbitration-subject subscribers) and 83% of private student loan arbitration clauses also included small claims carve-outs. From 59.0% (checking) to 62.7% (prepaid card) to 66.7% (credit card) of arbitration clauses likewise included carve-outs for small claims court. Larger companies were more likely to use carve-outs than smaller companies, with from 84.7% of arbitration-subject prepaid card loads to 99.9% of arbitration-subject payday loan storefronts subject to clauses with small claims court carve-outs. Table 3 summarizes these results. We explore the extent to which consumers bring claims in small claims courts in Section 7.

**TABLE 3: ARBITRATION CLAUSES WITH SMALL CLAIMS COURT CARVE-OUTS**

	Small claims court carve out		No small claims court carve out	
	# of contracts	% of market	# of contracts	% of market
Credit cards	44 (66.7%)	99.0%	22 (33.3%)	1.0%
Checking accounts	36 (59.0%)	91.5%	25 (41.0%)	8.5%
Prepaid cards <sup>86</sup>	32 (62.7%)	84.7%–94.4%	19 (37.3%)	5.6%–15.3%

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<sup>86</sup> Two of the firms for which card load data are available used two different form cardholder agreements. When those two forms included different provisions for a particular clause feature, it was unclear how much of the card load for the firm was subject to each provision. In such cases, we present the market share data as a range rather than a single figure.



Storefront payday loans	66 (93.0%)	99.9%	5 (7.0%)	0.1%
Private student loans	5 (83.3%)	n/a	1 (16.7%)	n/a
Mobile wireless	6 (85.7%)	99.7%	1 (14.3%)	

### 2.5.3 Administrators and arbitrators

Arbitration clauses commonly specify a firm (or a choice of firms) to administer the arbitration. This administrator is not the arbitrator *per se*, although as discussed below, the administrator may select the arbitrator. The administrator generally sets out the procedural rules governing the arbitration. In some cases, the rules may be modified by the terms of the applicable arbitration clause. Administrators, however, may deem some rules not to be subject to contractual modification. Each of the two main administrators of consumer arbitrations in the United States has due process or minimum procedural fairness protocols, and their respective rules state that they will not administer arbitrations except in accordance with those core provisions.<sup>87</sup> The administrator also offers other administrative services, such as docketing or providing hearing locations.

The arbitration administrator most commonly named in the clauses we studied was the American Arbitration Association (“AAA”). Nearly half (48.5%) of credit card arbitration clauses in the sample listed the AAA as the sole option for administering arbitrations.<sup>88</sup> Some 55.7% of checking account arbitration clauses in the sample listed the AAA as the sole option,<sup>89</sup> while more than a third (37.3%) of prepaid card clauses in the sample did.<sup>90</sup> For storefront payday

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<sup>87</sup> See Section 4 (Introduction).

<sup>88</sup> Counting clauses that listed the AAA or **the National Arbitration Forum (“NAF”)** (which no longer administers consumer arbitrations), this share increases to 50.0%

<sup>89</sup> This increases to 60.7% counting clauses that list the AAA or NAF.

<sup>90</sup> This increases to 43.1% counting clauses that list the AAA or NAF.

loan arbitration clauses, 18.3% listed the AAA as the sole option;<sup>91</sup> one (16.7%) of the private student loan arbitration clauses and five (71.4%) of the mobile wireless arbitration clauses did so as well. By comparison, three credit card arbitration clauses listed JAMS as the sole option for administering arbitrations, and three listed the National Arbitration Forum (“NAF”) as the sole option, even though NAF ceased administering consumer arbitrations more than five years ago.<sup>92</sup> Of the checking account arbitration clauses in the sample, one listed JAMS and one listed NAF as the sole option. Likewise, only one prepaid card arbitration clause each listed JAMS or NAF as the sole option. One of the storefront payday loan arbitration clauses listed JAMS as sole option and three listed NAF; only one mobile wireless arbitration clause listed JAMS as the sole provider, as did one private student loan arbitration clause.

Counting clauses in which the AAA was listed as at least an option yields 83.3% of credit card arbitration clauses, 91.8% of checking account arbitration clauses, 94.1% of prepaid card arbitration clauses, 88.7% of storefront payday loan arbitration clauses, 66.7% of private student loan arbitration clauses, and 85.7% of mobile wireless arbitration clauses. The comparable numbers for JAMS are: 40.9% for credit card arbitration clauses, 34.4% for checking account arbitration clauses, 52.9% for prepaid card arbitration clauses, 59.2% for storefront payday loan arbitration clauses, 66.7% for private student loan arbitration clauses, and 14.3% for mobile wireless arbitration clauses.

By market share, the AAA’s predominance was even greater. From 84.5% of arbitration-subject mobile wireless subscribers to 100.0% of arbitration-subject prepaid card load specified the AAA as at least one possible arbitration administrator.

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<sup>91</sup> This increases to 31.0% counting clauses that list the AAA or NAF.

<sup>92</sup> Consent Judgment, *Minnesota v. National Arbitration Forum, Inc.*, No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009), available at <http://pubcit.typepad.com/files/nafconsentdecree.pdf> (last visited Mar. 6, 2015).

**TABLE 4:** SOLE ADMINISTRATOR SPECIFIED IN ARBITRATION CLAUSES

	# of contracts	% of market
<b>American Arbitration Association</b>		
Credit cards	32 (48.5%)	17.9%
Checking accounts	34 (55.7%)	44.6%
Prepaid cards <sup>93</sup>	19 (37.3%)	63.0%–72.7%
Storefront payday loans	13 (18.3%)	27.4%
Private student loans	1 (16.7%)	n/a
Mobile wireless	5 (71.4%)	49.3%
<b>JAMS</b>		
Credit cards	3 (4.5%)	0.1%
Checking accounts	1 (1.6%)	0.2%
Prepaid cards	1 (2.0%)	n/a
Storefront payday loans	1 (1.4%)	0.0%
Private student loans	1 (16.7%)	n/a
Mobile wireless	1 (14.3%)	15.5%

<sup>93</sup> See *supra* n.86.

<b>National Arbitration Forum</b>		
Credit cards	3 (4.5%)	0.1%
Checking accounts	1 (1.6%)	0.0%
Prepaid cards	1 (2.0%)	n/a
Storefront payday loans	3 (4.2%)	0.1%
Private student loans	0 (0.0%)	n/a
Mobile wireless	0 (0.0%)	0.0%
<b>Other</b>		
Credit cards <sup>94</sup>	1 (1.5%)	0.0%
Checking accounts <sup>95</sup>	1 (1.6%)	0.3%
Prepaid cards	0 (0.0%)	0.0%)
Storefront payday loans	0 (0.0%)	0.0%
Private student loans	0 (0.0%)	n/a
Mobile wireless	0 (0.0%)	0.0%

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<sup>94</sup> One clause specified Dispute Prevention and Resolution, Inc.

<sup>95</sup> One clause specified the Arbitration Service of Portland.

**TABLE 5:** ADMINISTRATOR SPECIFIED IN ARBITRATION CLAUSES, SOLE OR OTHERWISE

	# of contracts	% of market
<b>American Arbitration Association</b>		
Credit cards	55 (83.3%)	98.5%
Checking accounts	56 (91.8%)	98.9%
Prepaid cards	48 (94.1%)	100.0%
Storefront payday loans <sup>96</sup>	63 (88.7%)	85.5%
Private student loans	4 (66.7%)	n/a
Mobile wireless	6 (85.7%)	84.5%
<b>JAMS</b>		
Credit cards	27 (40.9%)	80.7%
Checking accounts	21 (34.4%)	52.0%
Prepaid cards <sup>97</sup>	27 (52.9%)	27.3%–37.0%
Storefront payday loans	42 (59.2%)	56.2%
Private student loans	4 (66.7%)	n/a
Mobile wireless	1 (14.3%)	15.5%

<sup>96</sup> One clause specified either the AAA or JAMS in one place and NAF in two others.

<sup>97</sup> See *supra* n.86.

<b>National Arbitration Forum</b>		
Credit cards	6 (9.1%)	0.6%
Checking accounts	6 (8.2%)	3.5%
Prepaid cards	5 (9.8%)	n/a
Storefront payday loans	27 38.0%	4.0%
Private student loans	0 (0.0%)	n/a
Mobile wireless	0 (0.0%)	0.0%
<b>Other</b>		
Credit cards <sup>98</sup>	1 (1.5%)	0.0%
Checking accounts <sup>99</sup>	1 (1.6%)	0.3%
Prepaid cards	0 (0.0%)	0.0%
Storefront payday loans <sup>100</sup>	1 (1.4%)	0.9%
Private student loans	0 (0.0%)	n/a
Mobile wireless <sup>101</sup>	1 (14.3%)	35.2%

<sup>98</sup> One clause specified Dispute Prevention and Resolution, Inc.

<sup>99</sup> One clause specified the Arbitration Service of Portland.

<sup>100</sup> One clause listed the Better Business Bureau as an option.

<sup>101</sup> One clause listed the Better Business Bureau as an option.

Arbitration clauses that listed more than one administrator varied in how the administrator was chosen. Some permitted the party filing the claim to select among the listed administrators. Others permitted the consumer to select the administrator, either in his or her arbitration demand or within ten to 20 days of the business's demand. Still others permitted the consumer to override the business's choice even when the business was the claimant.

In AAA consumer arbitrations, the AAA selects the arbitrator, subject to possible objections by the parties.<sup>102</sup> In JAMS streamlined arbitrations, JAMS may supply a list of arbitrators from which the parties may choose. The administrator's rules and applicable law typically require the arbitrator to disclose conflicts of interest, which may provide a basis for a party to object to the arbitrator's service.<sup>103</sup> Most of the arbitration clauses studied did not attempt to modify these default rules for arbitrator selection. A minority specified that the arbitrator be a retired judge or an experienced lawyer or a lawyer with expertise in the subject matter of the dispute.<sup>104</sup> One checking account arbitration clause for a small bank required "practical working experience in the commercial banking industry."

## 2.5.4 Delegation

The Federal Arbitration Act allocates authority between courts and arbitrators to decide challenges to the enforceability of arbitration clauses. As a general rule, only an arbitrator can decide a challenge to the legal validity of a contract that includes an arbitration clause. A court

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<sup>102</sup> *See* Section 4.5.

<sup>103</sup> *See* Section 4.5.

<sup>104</sup> The two most common formulations required either that the arbitrator be a lawyer with at least ten years' experience or a retired judge (30.3% of credit card arbitration clauses, covering 36.1% of arbitration-subject credit card loans outstanding; 18.0% of checking account arbitration clauses, covering 16.8% of arbitration-subject insured deposits; 3.9% of prepaid card arbitration clauses, covering 30.9% of arbitration-subject card loads; 11.3% of storefront payday loan arbitration clauses, covering 29.9% of arbitration-subject storefronts; and 33.3% of private student loan arbitration clauses), or that the arbitrator be a practicing lawyer where the arbitration is held and have expertise in the applicable substantive law (4.5% of credit card arbitration clauses, covering 7.4% of arbitration-subject credit card loans outstanding; 3.3% of checking account arbitration clauses, covering 26.7% of arbitration-subject insured deposits; 2.0% of prepaid card arbitration clauses; no load data; and 33.3% of private student loan arbitration clauses). No mobile wireless arbitration clauses specified qualifications for arbitrators. A number of storefront payday loan arbitration clauses did so only when the parties themselves agreed to the arbitrator, without any involvement of an administrator.

may, however, decide challenges to the enforceability of the arbitration clause itself, and can also decide whether a party assented to the contract that includes the arbitration clause.<sup>105</sup> In *Rent-A-Center West, Inc. v. Jackson*, the Supreme Court ruled that parties could delegate to the arbitrator at least some of the issues that a court otherwise could decide.<sup>106</sup> In *Rent-A-Center*, the Court held, based on the terms of the parties' agreement, that the arbitrator and not the courts should decide whether the arbitration clause was unconscionable.<sup>107</sup> The effect of including such delegation clauses in contracts is to reduce substantially the role of courts in applying unconscionability doctrine to assess the enforceability of arbitration clauses.

Although none of the arbitration clauses in the samples directly tracked the language used in *Rent-A-Center*, many of the arbitration clauses included language delegating to the arbitrator the authority to rule on the enforceability of the arbitration clause. The share ranged from 39.3% of arbitration clauses in our sample of checking account contracts (covering 51.6% of arbitration-subject insured deposits) to 63.4% of arbitration clauses in our sample of storefront payday loan contracts (covering 39.3% of the market), although none of the mobile wireless arbitration clauses studied included a delegation provision. Some of the clauses, however, did the opposite: They reserved the authority to rule on the enforceability of the arbitration clause to the court through an "anti-delegation clause." From 7.0% of arbitration clauses in the storefront payday loan contracts (covering 28.4% of arbitration-subject storefronts) to 13.6% of arbitration clauses in credit card contracts (covering 42.6% of arbitration-subject credit card loans outstanding) to 26.2% of arbitration clauses in checking account contracts (covering 22.4% of arbitration-subject insured deposits) included such a provision. These results are summarized in Table 6.

These data points understate the extent of delegation to the arbitrator for two reasons. First, an additional category of arbitration clauses delegated most enforceability issues to the arbitrator, but expressly reserved to the court the exclusive authority to decide the enforceability of any contractual limitations on class arbitration proceedings. This category appeared in from 8.2% of

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<sup>105</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (fraudulent inducement of main contract for arbitrator to decide); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (illegality of main contract for arbitrator to decide).

<sup>106</sup> 561 U.S. 63 (2010).

<sup>107</sup> *Id.* at 70–72.



arbitration clauses in checking account contracts (covering 6.5% of arbitration-subject insured deposits) to 25.8% of arbitration clauses in credit card contracts (covering 6.2% of arbitration-subject credit card loans outstanding). (We refer to these as “class exception” clauses in Table 6.) Second, most courts hold that the language on arbitrator authority typically included in arbitration rules promulgated by administrators has the same effect as a delegation clause (although delegation language in an arbitration clause of course overrides the administrator’s rule if the delegation language is inconsistent with the administrator’s rule).<sup>108</sup> Because almost all of the arbitration clauses without delegation clauses in the sample (ranging from 9.1% of the credit card arbitration clauses covering 5.3% of credit card loans outstanding to 71.4% of mobile wireless arbitration clauses covering 51.3% of subscribers) nonetheless selected one or more administrators,<sup>109</sup> those clauses have the same practical effect as a delegation clause, at least under current court decisions.

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<sup>108</sup> *See, e.g., Oracle Am., Inc. v. Myriad Group, A.G.*, 724 F.3d 1069, 1074 (9<sup>th</sup> Cir. 2013) (“Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association’s (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.”). *But see Tompkins v. 23andMe, Inc.*, 2014 WL 2903752, at \*11 (N.D. Cal. June 25, 2014) (refusing “to extend this doctrine from commercial contracts between sophisticated parties to online click-through agreements crafted for consumers”).

<sup>109</sup> Fifteen of the 16 checking account arbitration clauses without delegation clauses specified an administrator (almost always the AAA). Five of the six credit card arbitration clauses and eight of the nine prepaid card arbitration clauses without delegation clauses likewise specified an administrator (again, most commonly the AAA, either by itself or with JAMS). All of the storefront payday loan arbitration clauses without delegation clauses and all of the mobile wireless arbitration clauses without delegation clauses also specified an administrator (the AAA or a “nationally recognized provider of arbitration services” in the case of the payday loan contracts, and the AAA, either by itself or with the Better Business Bureau, in the case of the mobile wireless contracts). The lone private student loan arbitration clause without a delegation clause did not specify an administrator.

**TABLE 6:** DELEGATION PROVISIONS IN ARBITRATION CLAUSES

	# of contracts	% of market
<b>Delegation</b>		
Credit cards	34 (51.5%)	46.0%
Checking accounts	24 (39.3%)	51.6%
Prepaid cards	31 (60.8%)	42.6%
Storefront payday loans	45 (63.4%)	39.3%
Private student loans	3 (50.0%)	n/a
Mobile wireless	0 (0.0%)	0.0%
<b>Class exception</b>		
Credit cards	17 (25.8%)	6.2%
Checking accounts	5 (8.2%)	6.5%
Prepaid cards	7 (13.7%)	30.9%
Storefront payday loans	13 (18.3%)	16.6%
Private student loans	1 (16.7%)	n/a
Mobile wireless	1 (14.3%)	33.2%
<b>Anti-delegation</b>		
Credit cards	9 (13.6%)	42.6%
Checking accounts	16 (26.2%)	22.4%
Prepaid cards	4 (7.8%)	26.5%

Storefront payday loans	5 (7.0%)	28.4%
Private student loans	1 (16.7%)	n/a
Mobile wireless	1 (14.3%)	15.5%
<b>None</b>		
Credit cards	6 (9.1%)	5.3%
Checking accounts	16 (26.2%)	19.5%
Prepaid cards	9 (17.6%)	0.0%
Storefront payday loans	8 (11.3%)	15.6%
Private student loans	1 (16.7%)	n/a
Mobile wireless	5 (71.4%)	51.3%

### 2.5.5 Class action terms

Almost all of the arbitration clauses studied contained terms limiting the availability of class proceedings in arbitration. Thus, 93.9% of the credit card arbitration clauses, 88.5% of the checking account arbitration clauses, 97.9% of the prepaid card arbitration clauses, 88.7% of the storefront payday loan arbitration clauses, 100.0% of the private student loan arbitration clauses, and 85.7% of the mobile wireless arbitration clauses in our sample contained terms that expressly did not allow arbitration to proceed on a class basis.<sup>110</sup> The handful of clauses that did

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<sup>110</sup> These data are updated from the 2013 Preliminary Results to reflect the provisions in credit card contracts on file with the Bureau as of December 31, 2013, and changes in the prepaid cards studied between 2013 and 2014. By comparison, the data for checking account contracts are not updated, as we would only have been able to update a portion of the sample. *See* Section 2.3.2. Of the two small- to mid-sized banks that switched to arbitration between 2013 and 2014, both included no-class-arbitration provisions in their arbitration clauses. Likewise, the credit union that switched to arbitration also included a no-class-arbitration provision.

not include such no-class-arbitration provisions tended to be from very small institutions. Thus, in our samples, class arbitration was unavailable for 99.9% of arbitration-subject credit card loans outstanding, 97.1% of arbitration-subject insured deposits, essentially 100.0% of arbitration-subject prepaid card loads, 98.2% of arbitration-subject payday loan storefronts, and 99.7% of arbitration-subject mobile wireless subscribers. To the extent a party invokes an arbitration clause that does not allow class arbitrations, the clause precludes any dispute within its scope from proceeding as a class action, either in court or in arbitration. These results are summarized in Table 7.

Some contracts with arbitration clauses also included provisions waiving the right to participate in a class action in court, either as a named plaintiff or as a member of the class, or otherwise precluding the case from proceeding as a class action, for cases *not subject to arbitration*. Just over 30% of checking account contracts in our sample with arbitration clauses (covering 10.1% of arbitration-subject insured deposits), 13.6% of credit card contracts with arbitration clauses (covering 11.0% of arbitration-subject credit card loans outstanding), 12.5% of prepaid card contracts with arbitration clauses (no load data), 5.6% of storefront payday loan contracts with arbitration clauses (covering 1.3% of arbitration-subject storefronts), 33.3% of private student loan contracts with arbitration clauses, and 57.1% of mobile wireless contracts with arbitration clauses (covering 63.2% of arbitration-subject subscribers) included such provisions.<sup>111</sup> By comparison, two checking account contracts without arbitration clauses from the large bank sample and three from the small- to mid-sized bank sample included provisions directly waiving class actions in court. One credit card contract without an arbitration clause and no prepaid card, storefront payday loan, private student loan, or mobile wireless contracts in our sample included such class action waivers.

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<sup>111</sup> A number of these class action provisions appeared outside the arbitration clause. This was the case for 13 of the 19 checking account contracts with arbitration clauses and with class action waivers, one of nine credit card contracts with arbitration clauses and waivers, and two of four storefront payday loan contracts and private student loan contracts with arbitration clauses and waivers. The remainder appeared only within the arbitration clause. Class action provisions within the arbitration clause are generally more ambiguous. They might be interpreted as waiving class actions in cases not subject to arbitration, but might instead be interpreted only as stating the consequences of the arbitration clause — *i.e.*, that to the extent the parties' claims are subject to arbitration those claims cannot be resolved as part of a class action in court.

**TABLE 7: ARBITRATION CLAUSES WITH NO-CLASS-ARBITRATION PROVISIONS**

	No class arbitration		No provision on class arbitration	
	# of contracts	% of market	# of contracts	% of market
Credit cards	62 (93.9%)	99.9%	4 (6.1%)	0.1%
Checking accounts	54 (88.5%)	97.1%	7 (11.5%)	2.9%
Prepaid cards	47 (97.9%)	100.0%	1 (2.1%)	n/a
Storefront payday loans	63 (88.7%)	98.2%	8 (11.3%)	1.8%
Private student loans	6 (100.0%)	n/a	0 (0.0%)	n/a
Mobile wireless	6 (85.7%)	99.7%	1 (14.3%)	0.3%

Most of the arbitration clauses in the sample with provisions that address class arbitration also contained an “anti-severability provision,” stating that if the no-class-arbitration provision is held unenforceable, the entire arbitration clause is thereby rendered unenforceable as well.<sup>112</sup> Absent that provision, a court might hold a no-class-arbitration term unenforceable but the rest of the arbitration clause enforceable, meaning that the dispute might then proceed as a class arbitration. With an anti-severability provision, however, if a court holds the no-class-arbitration term unenforceable the arbitration clause would become unenforceable as well, and the case might proceed as a class action in court rather than a class arbitration. More than half (56.1%, covering 66.3% of arbitration-subject credit card loans outstanding) of credit card arbitration clauses and close to half (49.2%, covering 83.2% of arbitration-subject insured deposits) of checking account arbitration clauses included such anti-severability provisions, with their inclusion more likely by larger issuers and banks. Such provisions were also common in storefront payday loan arbitration clauses (43.7% of lenders, covering 67.1% of arbitration-

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<sup>112</sup> A severability clause generally states that if a contract provision is unenforceable, that provision will be treated as severable from the rest of the contract so that the rest of the contract remains enforceable. An anti-severability provision does the opposite — it makes one or more provisions not severable from the contract or, in this case, from the arbitration clause.

subject storefronts), private student loan arbitration clauses (66.7% of lenders), and mobile wireless arbitration clauses (42.9% of providers, covering 83.9% of arbitration-subject subscribers). By comparison, only 29.2% of prepaid card arbitration clauses (covering 26.7% of arbitration-subject prepaid loads) had an anti-severability provision.

## 2.5.6 Relief limits

The markets we studied varied widely in their inclusion of provisions to limit recovery of damages — most commonly limits on the recovery of punitive and consequential damages — in contracts with arbitration clauses. Most contracts with arbitration clauses did not include damage limitations. Just over 15% of credit card contracts with arbitration clauses in the sample, covering less than 9% of arbitration-subject credit card loans outstanding, included damage limitations. A slight majority of the damage limitations in these credit card contracts precluded the award of punitive damages, consequential damages, or both. But many were not absolute prohibitions, instead either requiring arbitrators to follow constitutional standards for the award of punitive damages<sup>113</sup> or setting out special procedures to be followed in the case of an award of punitive damages.<sup>114</sup> Damages limitations in prepaid card contracts with arbitration clauses were more frequent, and almost always precluded recovery of both punitive and consequential damages.

Damages limitations in payday loan contracts in our sample with arbitration clauses were even less common. Only six storefront payday loan contracts with arbitration clauses (8.5% of clauses, covering 17.5% of arbitration-subject storefronts) and one private student loan contract

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<sup>113</sup> Because courts usually hold that arbitration does not constitute state action, constitutional limitations on the award of punitive damages might not otherwise apply. *See, e.g., MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 872 A.2d 423 (Conn. 2005); *Mave Enters., Inc. v. Travelers Indem. Co. of Conn.*, 162 Cal. Rptr. 3d 671 (Cal. Ct. App. 2013). For an example of such a constitutional limitation, *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (holding that punitive damages award violated due process based on consideration of “the degree of reprehensibility of the [conduct], the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award, and the difference between this remedy and the civil penalties authorized or imposed in comparable cases”).

<sup>114</sup> The constitutional limit appears in three of 66 credit card arbitration clauses in our sample, covering 2.2% of arbitration-subject credit card loans outstanding. One clause, covering 4.7% of arbitration-subject credit card loans outstanding, required the arbitrator to follow specific procedures before making an award of punitive damages. The required procedures included issuing a reasoned award and conducting a post-award review of the punitive damages award, comparable to what would occur in court.

(16.7% of clauses) with an arbitration clause included any sort of damages limitation, and in each case the provision required application of constitutional standards to punitive damages awards.

By comparison, over 60% of checking account contracts with arbitration clauses in the sample, covering almost 80% of arbitration-subject insured deposits, included some damages limitation.<sup>115</sup> In most checking account contracts, the damages limitation was not in the arbitration clause but elsewhere in the contract.<sup>116</sup> Similarly, all of the mobile wireless contracts with arbitration clauses in the sample included some damage limitation outside the arbitration clause: Six of the seven contracts expressly waived recovery of consequential and punitive damages; the other waived recovery of consequential damages with no mention of punitive damages. These results are all summarized in Table 8.

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<sup>115</sup> This share does not include provisions dealing with the award of consequential damages for specific types of actions by banks, such as wrongful dishonor or errors in processing wire transfers, which are addressed specifically in the Uniform Commercial Code. UCC §§ 4-402(b), 4A-305(c).

<sup>116</sup> Provisions precluding the award of punitive damages, consequential damages, or both appeared in 52.5% of the checking account contracts with arbitration clauses (covering 69.0% of arbitration-subject insured deposits). Like the credit card contracts, some checking account contracts with arbitration clauses (8 of 61, or 13.1%; 9.2% of arbitration-subject insured deposits) made constitutional standards for the award of punitive damages applicable to arbitration. A handful of clauses purported to preclude the award of punitive damages while also authorizing the arbitrator to award punitive damages subject to constitutional standards.

**TABLE 8: DAMAGES LIMITATIONS IN CONTRACTS WITH ARBITRATION CLAUSES**

	Damages limitation		No damages limitation	
	# of contracts	% of market	# of contracts	% of market
Credit cards	10 (15.2%)	8.2%	56 (84.8%)	91.8%
Checking accounts	39 (63.9%)	77.5%	22 (36.1%)	22.5%
Prepaid cards <sup>117</sup>	14 (27.5%)	31.2%–31.5%	37 (72.5%)	68.5%–68.8%
Storefront payday loans	6 (8.5%)	17.5%	65 (91.5%)	82.5%
Private student loans	1 (16.7%)	n/a	5 (83.3%)	n/a
Mobile wireless	7 (100.0%)	100.0%	0 (0.0%)	0.0%

A review of contracts without arbitration clauses reveals a similar pattern, albeit with damages limitations somewhat less common. Just over 35% of large bank checking account contracts in our sample without arbitration clauses included either a consequential damages waiver or a consequential damages waiver together with a punitive damages waiver. For small- to mid-sized banks, 6.1% of checking account contracts without arbitration clauses included such damages limitations. A third of the prepaid card contracts without arbitration clauses included a consequential damages waiver or a punitive damages waiver or both. The only mobile wireless contract without an arbitration clause limited any damages recovery to the amount of the subscriber’s bill, without express mention of consequential damages or punitive damages. Only one of the credit card agreements without arbitration clauses, and none of the storefront payday loan contracts or private student loan contracts without arbitration clauses, limited recovery of either punitive or consequential damages.

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<sup>117</sup> See *supra* n.86.



## 2.5.7 Time limits

Few credit card, prepaid card, and payday loan contracts with arbitration clauses in our sample set time limits for consumers to file claims in arbitration. Four credit card arbitration clauses, all from small issuers, specified time limits for consumer claims, most commonly one year from when the claim arose. One of these issuers, however, required both the issuer and the consumer to give the other notice of any claim within 90 days of the claim arising.<sup>118</sup> Two prepaid card contracts with an arbitration clause set a time limit of two years from when the consumer's claim arose for the consumer to file a claim in arbitration. (One of them applied the same time limit to company claims.) Three storefront payday loan contracts with arbitration clauses (4.2% of clauses; 2.1% of arbitration-subject storefronts) specified time limits for consumer claims.<sup>119</sup> None of the private student loan contracts with arbitration clauses specified a time limit for filing a claim.

A greater number of checking account and mobile wireless contracts with arbitration clauses set time limits on consumers filing claims in arbitration, although the time limits themselves typically were not included in the arbitration clause. Around 13% of the checking account contracts with arbitration clauses had such provisions, covering 28.4% of arbitration-subject insured deposits. These generally ranged from one to two years from when the consumer's claim arose. Again, however, one bank included a 90-day notice of claim requirement for both the bank and the consumer. The time limits in the three mobile wireless contracts with arbitration clauses that included such provisions (42.9%, covering 15.8% of arbitration-subject subscribers) ranged from 180 days to two years. Table 9 summarizes data on the incidence of time limits for filing claims in arbitration clauses as well as the average and median time limits in those clauses that impose such a limit.

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<sup>118</sup> The provision added that the sending of a monthly billing statement by the issuer satisfied the issuer's notice obligations.

<sup>119</sup> Four additional clauses stated that they might impose time limits for filing claims but did not actually impose such a time limit.

**TABLE 9:** ARBITRATION CLAUSES WITH TIME LIMITS FOR FILING CLAIMS

	Arbitration clauses with time limit		Length of time limit (days)	
	# of contracts	% of market	Average	Median
Credit cards	4 (6.1%)	1.3%	296.3 days	365 days
Checking accounts	8 (13.1%)	28.4%	376.3 days	365 days
Prepaid cards	2 (3.9%)	n/a	730 days	730 days
Storefront payday loans	3 (4.2%)	2.1%	96.7 days	100 days
Private student loans	0 (0.0%)	n/a	n/a	n/a
Mobile wireless	3 (42.9%)	15.8%	546.7 days	730 days

Overall, the pattern was roughly similar for contracts without arbitration clauses, albeit time limits were less common. Of credit card contracts without arbitration clauses, 2.5% had time limits, again requiring consumers to bring claims within a year of the claim arising. For large banks in our sample, 10.7% of checking account agreements without arbitration clauses had one-year time limits for consumer claims; of the small- and mid-sized banks, 1.5% had such limits. Only one of the prepaid cards without arbitration clauses had a time limit (of one year) for bringing a claim. None of the storefront payday loan, private student loan, or mobile wireless contracts without arbitration clauses had such a time limit.

### 2.5.8 Confidentiality and nondisclosure

Unlike a judicial proceeding, arbitration as a general matter is a private process: Filings are not publicly available and hearings are not open to the public. Arbitration rules typically do not

impose express confidentiality or nondisclosure obligations on parties to the dispute, although arbitrator ethics rules do impose confidentiality obligations on arbitrators.<sup>120</sup>

As described below in Table 10, most arbitration clauses in the sample were silent on confidentiality and did not impose any nondisclosure obligation on the parties. Only two credit card arbitration clauses (3.0% of clauses, covering 7.3% of arbitration-subject credit card loans outstanding) precluded the parties from making disclosures about the arbitration proceeding, including its existence and outcome. Only one prepaid card arbitration clause (2.0% of clauses; no load data) included such a nondisclosure provision. Two private student loan arbitration clauses (33.3%) and seven checking account arbitration clauses (11.5%, covering 28.0% of arbitration-subject insured deposits) included nondisclosure provisions. (One provision in a credit union checking account arbitration clause barred disclosures about the dispute and the arbitration proceeding, while the rest precluded disclosures only about the arbitration proceeding.) Four storefront payday loan arbitration clauses (5.6% of clauses, covering 5.9% of storefronts) stated that “[a]ll disputes shall be resolved confidentially by binding arbitration,” but the clause did not separately impose any nondisclosure obligation so it is unclear what, if any, legal effect this language would have. None of the other storefront payday loan arbitration clauses, and none of the mobile wireless arbitration clauses, included a confidentiality provision.

**TABLE 10: ARBITRATION CLAUSES WITH CONFIDENTIALITY PROVISIONS**

	Confidentiality provision		No confidentiality provision	
	# of contracts	% of market	# of contracts	% of market
Credit cards	2 (3.0%)	7.3%	64 (97.0%)	92.7%
Checking accounts	7 (11.5%)	28.0%	54 (88.5%)	72.0%
Prepaid cards	1 (2.0%)	n/a	50 (98.0%)	100.0%

<sup>120</sup> American Bar Association & American Arbitration Association, Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(B) (Mar. 1, 2004) (“The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.”).

Private student loans	2 (33.3%)	n/a	4 (66.7%)	n/a
Mobile wireless	0 (0.0%)	0.0%	7 (100.0%)	100.0%

### 2.5.9 Hearing location

The arbitration clauses in the samples generally addressed the location at which any in-person hearing was required to take place. All but five prepaid card arbitration clauses (covering almost all arbitration-subject load volume in our sample) and all but nine credit card arbitration clauses (covering 92.6% of arbitration-subject credit card loans outstanding) addressed the issue. Similarly, all but five storefront payday loan arbitration clauses, all but one private student loan arbitration clauses, and all mobile wireless arbitration clauses addressed the issue. This feature was less common in checking account arbitration clauses, but even there, 68.9% of the clauses in the sample addressed the hearing location.

The clauses specified a range of locations, as summarized in Table 11. The most common such requirement in the credit card, checking account, and prepaid card arbitration clauses was that the hearing would be held in the federal judicial district of the consumer’s residence. A common variation was that the hearing would be held in the same city as the U.S. District Court closest to the consumer. Other clauses (most common in the mobile wireless arbitration clauses) specified the consumer’s county or state as the site of the hearing. Between 3.9% and 33.3% of the clauses in the samples (but none of the mobile wireless clauses) provided that any arbitration hearing would be at a location “reasonably convenient” for the customer.<sup>121</sup> In Section 5.7.2, we analyze the actual travel distance for the in-person AAA hearings for which we have case data.

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<sup>121</sup> Some clauses which specified that the arbitration hearing would take place near the consumer’s residence were coded as providing for locations reasonably convenient for the consumer. In addition to those included in Table 11, several clauses provided for the hearing to be held at a reasonably convenient location either for both parties (one credit card arbitration clause, covering 0.3% of arbitration-subject credit card loans outstanding; one checking account arbitration clause, covering 2.8% of arbitration-subject insured deposits; and three prepaid card arbitration clauses, with no load data) or without specifying for whom the location was to be convenient (two (3.0%) credit card arbitration clauses, covering 7.8% of arbitration-subject credit card loans outstanding).

**TABLE 11: HEARING LOCATIONS SPECIFIED IN ARBITRATION CLAUSES**

	# of contracts	% of market
<b>Federal judicial district of consumer's residence (including city in which U.S. District Court is located)</b>		
Credit cards	34 (51.5%)	81.2%
Checking accounts	14 (23.0%)	38.1%
Prepaid cards	33 (64.7%)	73.3%
Storefront payday loans	10 (14.1%)	7.3%
Private student loans	2 (33.3%)	n/a
Mobile wireless	0 (0.0%)	0.0%
<b>Consumer's state or county</b>		
Credit cards	1 (1.5%)	0.0%
Checking accounts	4 (6.6%)	8.2%
Prepaid cards	4 (7.8%)	n/a
Storefront payday loans	8 (11.6%)	27.5%
Private student loans	0 (0.0%)	n/a
Mobile wireless	6 (85.7%)	99.7%
<b>Reasonably convenient location for consumer</b>		
Credit cards	9 (13.6%)	2.5%
Checking accounts	12 (19.7%)	11.4%
Prepaid cards	2 (3.9%)	26.5%

Storefront payday loans	11 (15.5%)	30.8%
Private student loans	2 (33.3%)	n/a
Mobile wireless	0 (0.0%)	0.0%
<b>Specific location</b>		
Credit cards	5 (7.6%)	0.1%
Checking accounts	4 (6.6%)	0.9%
Prepaid cards	3 (5.9%)	n/a
Storefront payday loans	1 (1.4%)	0.0%
Private student loans	1 (16.7%)	n/a
Mobile wireless	1 (14.3%)	0.3%
<b>None</b>		
Credit cards	9 (13.6%)	7.4%
Checking accounts	19 (31.1%)	36.9%
Prepaid cards	5 (9.8%)	0.3%
Storefront payday loans	5 (7.0%)	0.7%
Private student loans	1 (16.7%)	n/a
Mobile wireless	0 (0.0%)	0.0%

The storefront payday loan arbitration clauses commonly provided a variety of possible locations, often without specifying who decides among the alternatives.<sup>122</sup> Eight storefront payday loan clauses (11.3%, covering 7.9% of arbitration-subject storefronts) provided that the hearing would take place either in the county in which the consumer resides or where the original transaction took place. Twenty-six storefront payday loan clauses (36.6%, covering 25.3% of arbitration-subject storefronts) provided that the hearing would take place in the county of the consumer’s residence, where the original transaction took place, or where ordered by the arbitrator.

A handful of arbitration clauses across the different product markets — typically associated with small companies — identified specific cities or states in which any in-person hearings were to be held.<sup>123</sup> If the company does all of its business locally, such a clause might differ little from a clause specifying that any hearing take place in the county of the consumer’s residence. But if the company does business nationally (or internationally), the hearing location may be some distance from the consumer’s residence.

A number of contracts without arbitration clauses also specified hearing locations by using choice-of-court clauses that mandated an exclusive forum for any court case. But these contracts did so less frequently than contracts with arbitration clauses. Of the large banks using checking account agreements without arbitration clauses in our sample, 21.4% specified the location of any court proceeding (most commonly, the state where the account was located); 4.6% of checking account agreements without arbitration clauses for small- and mid-sized banks specified the location of any court proceeding (most commonly the city where the contract was signed or a specific state and federal court). Only 3.7% of the credit card contracts without arbitration clauses specified a city in which the court hearing should take place,<sup>124</sup> while 33.3%

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<sup>122</sup> When the consumer was expressly given the choice, the clause was categorized among the options listed in Table 11.

<sup>123</sup> Of the arbitration clauses in our sample, five credit card clauses (or 7.6%, covering 0.1% of arbitration-subject credit card loans outstanding), four checking account clauses (or 6.6%, covering 0.9% of arbitration-subject insured deposits), three prepaid card clauses (or 5.9%, with no load data), one storefront payday loan clause (or 1.4%, covering 0.0% of arbitration-subject storefronts), one private student loan clause (or 16.7%), and one mobile wireless clause (or 14.3%, covering 0.3% of arbitration-subject subscribers) included such a provision.

<sup>124</sup> An additional 2.1% of the clauses provided that any hearing would take place in the county in which the credit union was located.

of prepaid card contracts without arbitration clauses did so. None of the payday loan, private student loan, or mobile wireless contracts without arbitration clauses specified the location of any court hearing.

## 2.5.10 Costs

In court systems, the government pays the salaries of judges and much of the cost of administering cases, although the filing fees required when initiating a case may defray a part of these costs. In arbitration, by contrast, all the costs of arbitrating the dispute must be paid for privately. The rules adopted by the AAA and JAMS set fees to be paid by claimants and respondents at the time a claim or counterclaim is filed (and sometimes at later points in the process, such as for a hearing).<sup>125</sup> The fees covered by the arbitration rules include both fees to be paid to the administrator and fees to be paid to the arbitrator. (The parties also may incur attorneys' fees if they choose to be represented by counsel in the arbitration proceeding.) For part of the period studied here, the arbitration rules also permitted the arbitrator to reallocate the administrative and arbitrator fees between the parties in the arbitral award — by requiring a company to reimburse the consumer for arbitration fees the consumer paid or by requiring the consumer to reimburse the company for arbitration fees that the company advanced pursuant to the terms of the contract or paid outright. More recent versions of the AAA's rules preclude such reallocations.

The terms of an arbitration clause may address how these different costs will be allocated between the parties. An arbitration clause might simply ratify or incorporate the default rules of the administrator. But some contractual allocation of costs — beyond the default rules of the administrator — was the norm in the clauses we studied. Only seven credit card clauses (10.6%, all from small issuers and covering a negligible market share), 14 checking account arbitration clauses (23.0%, covering 2.5% of arbitration-subject insured deposits), five prepaid card arbitration clauses (9.8%, all from cards for which load data are not available), one private student loan arbitration clause (16.7%), and six storefront payday loan arbitration clauses (8.5%, covering 1.0% of arbitration-subject storefronts) in our sample did not contain provisions altering the default arbitration cost provisions in the administrator's governing rules. All of the mobile wireless arbitration clauses included some such provision or provisions.

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<sup>125</sup> For a more detailed description of the fee structure, *see* the following subsections as well as Section 4.3.



The arbitration clauses we studied contained three different types of cost provisions: first, provisions addressing the initial payment of arbitration fees; second, provisions addressing the reallocation of arbitration fees in the award; and third, provisions addressing the award of attorneys' fees.

Many of the contracts, and in particular the checking account contracts, included general provisions on the allocation of costs and expenses arising out of disputes that were *not* specific to arbitration costs — and, indeed, were commonly included in contracts without arbitration clauses as well. Although such provisions might interact with provisions specifically addressing arbitration costs, this report does *not* address such provisions or their interactions with other provisions because they are not specific to arbitration clauses.

## Provisions addressing the initial payment of arbitration fees

In consumer arbitration, administrative and arbitrator fees are first assessed to the parties at filing. We refer to this as the “initial fee” allocation. Under the consumer arbitration rules of the AAA and JAMS, the business pays a higher initial fee than the consumer.<sup>126</sup> (We discuss the AAA's allocation in more detail in Section 4.3.) In addition, the administrator's rules may bar the parties from contractually allocating a greater share of fees to the consumer. The AAA's rules, for example, do not permit it to administer a case in which the consumer is required by the applicable arbitration clause to pay more at filing than the maximum amounts stated in the AAA's consumer fee schedule.<sup>127</sup>

Some credit card arbitration clauses provided that the issuer would pay at least some of the initial fees otherwise allocated to the consumer under the governing rules. This was true for 22 clauses (33.3%) representing 46.4% of arbitration-subject credit card loans outstanding. These

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<sup>126</sup> *See, e.g.*, American Arbitration Association, Supplementary Procedures for Consumer-Related Disputes, Rule C-8 (“Costs of Arbitration”) (Rules Effective Sept. 15, 2005; Fees Effective Mar. 1, 2013); American Arbitration Association, Consumer Arbitration Rules (“Costs of Arbitration”) (rules and costs effective Sept. 1, 2014) (“In cases before a single arbitrator, a nonrefundable filing fee capped in the amount of \$200 is payable in full by the consumer when a case is filed, unless the parties' agreement provides that the consumer pay less. A partially refundable fee in the amount of \$1,500 is payable in full by the business, unless the parties' agreement provides that the business pay more.”); JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness ¶ 7 (effective July 15, 2009).

<sup>127</sup> *See* Section 4.3.

clauses provided that the issuer would pay the fees either unconditionally, for good cause, or only if the administrator did not waive the fees, with the amount of the payment varying and sometimes limited to amounts in excess of court fees. A slightly smaller proportion of the credit card arbitration clauses (15 clauses, or 22.7%, covering 43.2% of arbitration-subject outstandings) stated that the issuer would advance at least some portion of the consumer’s arbitration fees under specified circumstances, leaving open the possibility that the consumer might have to repay those fees later. Finally, 11 clauses used by small issuers (16.7% of clauses, covering a negligible share of outstandings) indicated that the issuer would consider paying or advancing the consumer’s arbitration fees, either on request or if the administrator did not waive the fees. These results, as well as similar information about clauses relating to other product markets, are summarized in Table 12.

**TABLE 12: ARBITRATION CLAUSE PROVISIONS ADDRESSING THE INITIAL PAYMENT OF ARBITRATION FEES**

	# of contracts	% of market
<b>Company will pay some or all fees</b>		
Credit cards	22 (33.3%)	46.4%
Checking accounts	27 (44.3%)	43.7%
Prepaid cards <sup>128</sup>	18 (35.3%)	32.0%–41.8%
Storefront payday loans	18 (25.4%)	39.7%
Private student loans	2 (33.3%)	n/a
Mobile wireless	6 (85.7%)	99.7%

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<sup>128</sup> See *supra* n.86.

<b>Company will advance some or all fees</b>		
Credit cards	15 (22.7%)	43.2%
Checking accounts	8 (13.1%)	16.0%
Prepaid cards	7 (13.7%)	31.2%
Storefront payday loans	39 (54.9%)	29.4%
Private student loans	1 (16.7%)	n/a
Mobile wireless	0 (0.0%)	0.0%
<b>Company will consider advancing or paying some or all fees</b>		
Credit cards	11 (16.7%)	0.2%
Checking accounts	2 (3.3%)	0.4%
Prepaid cards <sup>129</sup>	17 (33.3%)	27.0%-36.8%
Storefront payday loans	7 (9.9%)	29.9%
Private student loans	1 (16.7%)	n/a
Mobile wireless	0 (0.0%)	0.0%

Similarly, 44.3% of checking account arbitration clauses in our sample (43.7% of arbitration-subject insured deposits) provided that the institution would pay or reimburse some portion of the consumer's share of the initial arbitration fees. Again, the prerequisites and amounts varied, with some contracts requiring good cause or that the administrator not waive the fees, and some

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<sup>129</sup> See *supra* n.86.

only paying the amount in excess of court filing fees. A smaller number (eight clauses, or 13.1%, covering 16.0% of arbitration-subject insured deposits) provided that the institution would advance the arbitration fees under the specified circumstances. Two clauses (3.3%; 0.4% of arbitration-subject insured deposits) stated that the institution would consider paying the fees.

Prepaid card arbitration clauses in our sample most commonly provided that the institution would consider advancing the consumer's share of arbitration fees (17 clauses, or 33.3%, covering between 27% and 36.8% of card loads); would advance the consumer's arbitration fees (seven clauses, or 13.7%, covering 31.2% of card loads); or would simply pay the consumer's arbitration fees, either in their entirety (14 clauses, or 27.5%, covering between 5.6% and 15.3% of card loads), to the extent the fees exceed filing fees in court (one clause, 2.0%; no data on loads), up to \$500 (one clause, 2.0%; no data on loads), or for claims under \$50,000 to \$75,000 (two clauses, or 3.9%, covering 26.5% of card loads).

The payday loan contracts in our sample most commonly provided that the lender would advance the fees of arbitration, with 54.9% of storefront payday loan arbitration clauses (covering 29.4% of arbitration-subject storefronts). A number of storefront payday loan arbitration clauses (25.4% of clauses, covering 39.7% of arbitration-subject storefronts) provided that the lender would pay some portion of the consumer's arbitration fees. Fewer clauses provided that the lender would consider advancing or paying arbitration fees: 9.9% of storefront payday loan arbitration clauses (but covering 29.9% of arbitration-subject storefronts) included such a provision.

Of the private student loan arbitration clauses studied, two provided that the lender would pay the consumer's arbitration fees (33.3%), one provided that the lender would advance the fees (16.7%), and one provided that the lender would consider paying the fees (16.7%). Finally, the six mobile wireless arbitration clauses addressing the issue all provided that the wireless service provider would pay some portion of the consumer's arbitration fees (85.7% of clauses, covering 99.7% of arbitration-subject subscribers).

## **Provisions addressing the reallocation of arbitration fees in the award**

The rules of arbitration administrators may permit the arbitrator to reallocate arbitration fees from one party to the other. As we explain further in Section 4.3, prior to March 1, 2013, the

default AAA rules allowed for such reallocation. (From that date, however, the AAA rules restrict reallocation.<sup>130</sup>) The JAMS Streamlined Arbitration Rules also allow for such reallocation, and the JAMS Minimum Standards of Procedural Fairness for consumer arbitrations do not appear to restrict the practice, except for cases in which California law so requires.<sup>131</sup> Understanding the results in this section thus requires consideration both of the JAMS rules and the AAA rules in force from 2010 through 2012, as a baseline for analysis, and the change made to the AAA rules in 2013, which may not be reflected in the arbitration clauses.

Arbitration clauses took noticeably different approaches to the allocation of arbitration fees in the arbitrator's award.<sup>132</sup> First, a number of credit card arbitration clauses (23 clauses, or 34.8%, covering 21.8% of arbitration-subject credit card loans outstanding) expressly permitted the arbitrator to shift the payment of arbitration fees from the issuer to the consumer (*i.e.*, to require the consumer to pay some portion of the issuer's arbitration fees), as the default JAMS rule permitted and the default AAA rule used to permit.<sup>133</sup> Second, a smaller number (ten clauses, or 15.2%; 21.3% of arbitration-subject credit card loans outstanding) expressly precluded such shifting of arbitration fees from the issuer to the consumer. Third, 63.6% of credit card arbitration clauses (42 of 66 clauses; 73.4% of arbitration-subject credit card loans outstanding), including all but one of the clauses in the first category, permitted the consumer to recover arbitration fees from the issuer. Seven of these clauses (covering 4.4% of arbitration-subject credit card loans outstanding) were also included in the second category because they

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<sup>130</sup> The consumer arbitration fee schedule adopted by the AAA effective March 1, 2013, provides that “[a]rbitrator compensation . . . and administrative fees (which include Filing and Hearing Fees) are not subject to reallocation by the arbitrator(s) except pursuant to applicable law or upon the arbitrator’s determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.” American Arbitration Association, Supplementary Procedures for Consumer-Related Disputes, Rule C-8; *see also* American Arbitration Association, Consumer Arbitration Rules (“Costs of Arbitration”).

<sup>131</sup> JAMS Streamlined Arbitration Rules & Procedures, Rule 19(e) (effective July 15, 2009); JAMS Streamlined Arbitration Rules & Procedures, Rule 19(e) (effective July 1, 2014); JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness) ¶ 8, (effective July 15, 2009) (“In California, the arbitration provision may not require the consumer to pay the fees and costs incurred by the opposing party if the consumer does not prevail.”).

<sup>132</sup> Many clauses clearly covered both the administrator’s fees and the arbitrator’s fees, but a number were ambiguous about whether they covered both types of fees or only the administrator’s fees.

<sup>133</sup> Only one such clause (for a small issuer) required that a losing consumer pay the issuer’s arbitration costs. The rest permitted the arbitrator to so decide but did not require the arbitrator to do so.

precluded cost-shifting to the consumer; the rest did not. Thus, while the majority of the credit card arbitration clauses in the sample allowed the arbitrator to shift fees from the consumer to the company, only a much smaller percentage of clauses offered the consumer any contractual protection against the possibility of an adverse reallocation of costs at the award stage.

Checking account arbitration clauses contained similar provisions. Almost 25% of the clauses in our sample (15 of 61, covering 17.3% of arbitration-subject insured deposits) expressly permitted the arbitrator to shift arbitration costs to the consumer. Just over 13% of the clauses (8 of 61, covering 8.3% of arbitration-subject insured deposits) precluded cost-shifting back to the consumer. Finally, 39.3% of clauses (24 of 61, covering 45.2% of arbitration-subject insured deposits), including all the clauses in the first category, expressly permitted the consumer to recover arbitration fees from the institution. But only one such clause (covering 0.4% of arbitration-subject insured deposits) and also included in the second category precluded the arbitrator from shifting costs to the consumer.

The pattern also was similar for prepaid cards. Nine prepaid card arbitration clauses (17.6%; no data on card loads) permitted fees to be shifted to consumers, while three clauses (5.9%; 26.5% of arbitration-subject prepaid card loads) precluded such fee shifting. Many more clauses (30 clauses, or 58.8%; 57.9%–67.7% of arbitration-subject prepaid card loads), including all but one of the clauses in the first category, permitted prevailing consumers to recover their arbitration fees, although without precluding cost-shifting back to the consumer.

More of the storefront payday loan arbitration clauses than the other arbitration clauses in our sample permitted shifting the lender's arbitration fees to the consumer (49.3% of clauses, covering 22.3% of arbitration-subject storefronts). But close to two-thirds of those clauses capped the amount of the costs that could be shifted to the consumer at whatever costs courts could impose on the losing party in litigation. Similarly, a higher percentage of payday loan arbitration clauses than other clauses studied permitted shifting the consumer's fees to the lender, typically when the consumer prevailed (50.7% of storefront clauses, covering 22.3% of arbitration-subject storefronts) and barred shifting the lender's fees to the consumer (18.3% of storefront clauses, covering 29.1% of arbitration-subject storefronts).

One private student loan arbitration clause (16.7%) permitted costs to be shifted from the lender to the consumer, and one (16.7%) permitted costs to be shifted from the consumer to the lender. The remaining clauses (66.7%) did not address the issue.

The majority of mobile wireless arbitration clauses (57.1% of clauses, covering 49.3% of arbitration-subject subscribers) permitted shifting the consumer's arbitration fees to the provider, at least when the consumer recovered more than his or her demand or the provider's last settlement offer. One wireless arbitration clause permitted shifting the company's fees to the consumer (covering 0.3% of arbitration-subject subscribers), while another (covering 33.2% of arbitration-subject subscribers) expressly permitted such cost-shifting only when the consumer's claim was frivolous, implicitly precluding it in other cases. All these results are summarized in Table 13.<sup>134</sup>

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<sup>134</sup> Minor coding corrections have been made to the agreements summarized in this table since the 2013 Preliminary Results. *See also infra* n.139.

**TABLE 13:** ARBITRATION CLAUSE PROVISIONS ADDRESSING REALLOCATION OF ARBITRATION FEES IN THE AWARD

	# of contracts	% of market
<b>Permits shifting company fees to consumer</b>		
Credit cards	23 (34.8%)	21.8%
Checking accounts	15 (24.6%)	17.3%
Prepaid cards	9 (17.6%)	n/a
Storefront payday loans	35 (49.3%)	22.3%
Private student loans	1 (16.7%)	n/a
Mobile wireless	1 (14.3%)	0.3%
<b>Bars shifting company fees to consumer</b>		
Credit cards	10 (15.2%)	21.3%
Checking accounts	8 (13.1%)	8.3%
Prepaid cards	3 (5.9%)	26.5%
Storefront payday loans	13 (18.3%)	29.1%
Private student loans	0 (0.0%)	n/a
Mobile wireless	1 (14.3%)	33.2%
<b>Permits shifting consumer fees to company</b>		
Credit cards	42 (63.6%)	73.4%
Checking accounts	24 (39.3%)	45.2%



Prepaid cards <sup>135</sup>	30 (58.8%)	57.9%-67.7%
Storefront payday loans	35 (50.7%)	22.3%
Private student loans	1 (16.7%)	n/a
Mobile wireless	4 (57.1%)	49.3%

## Provisions addressing the award of attorneys' fees

A significant share of credit card arbitration clauses directed that the parties bear their own attorneys' fees either without qualification or unless the law or contract requires otherwise (27 clauses, or 40.9%; 46.9% of arbitration-subject credit card loans outstanding). This was also true for a smaller share of checking account arbitration clauses (12 clauses, or 19.7%; but 39.8% of arbitration-subject insured deposits), prepaid card arbitration clauses (four clauses, or 7.8%; no load data), storefront payday loan arbitration clauses (eight clauses, or 11.3%; 6.4% of arbitration-subject storefronts), private student loan arbitration clauses (two clauses, or 33.3%), and mobile wireless arbitration clauses (two clauses, or 28.6%; 15.5% of arbitration-subject subscribers) in our sample. One prepaid card (which covers 26.5% of arbitration-subject card loads in our sample) waived any right of the company to recover attorneys' fees from the consumer, as did several checking account agreements, one storefront payday loan contract, and one private student loan contract.

Significant shares of arbitration clauses across almost all markets, however, did not address attorneys' fees. This was true for 18 credit card clauses (27.3%, covering 21.4% of arbitration-subject credit card loans outstanding), 22 checking account clauses (36.1%, covering 27.2% of arbitration-subject insured deposits), 35 prepaid clauses (68.6%, covering 73.3% of arbitration-subject card loads), 14 storefront payday loan clauses (19.7%, covering 15.5% of arbitration-subject storefronts), and one private student loan clause (16.7%).<sup>136</sup> When the arbitration clause

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<sup>135</sup> See *supra* n.86.

<sup>136</sup> All of the mobile wireless arbitration clauses had some provision addressing the award of **attorneys' fees**.

does not address the issue, the arbitrator may award attorneys' fees when permitted elsewhere in the agreement or by applicable law.<sup>137</sup>

Five credit card arbitration clauses (7.6%, from small issuers representing a negligible market share) directed or permitted the arbitrator to award attorneys' fees to the prevailing party, which presumably would have permitted the issuer to recover its attorneys' fees from the consumer when it prevailed, and also would have permitted a prevailing consumer to recover his or her attorneys' fees from the issuer. Five prepaid arbitration clauses (9.8%; no load data) permitted an award to a prevailing party, either the consumer or the company. Three checking account clauses (4.9%; 1.0% of arbitration-subject insured deposits) permitted an award to the prevailing party, consumer or company. Two storefront payday loan arbitration clauses (2.8%, covering 0.7% of arbitration-subject storefronts), and one mobile wireless arbitration clause (14.3%, covering 0.3% of arbitration-subject subscribers) likewise permitted an award of attorneys' fees to the prevailing party.

A number of the clauses permitted or directed the award of attorneys' fees to a prevailing consumer.<sup>138</sup> Five credit card clauses (7.6%, covering 10.2% of arbitration-subject credit card loans outstanding) directed the issuer to pay the consumer's attorneys' fees if the consumer prevails. Other credit card clauses expressly authorized (but did not require) the arbitrator to award attorneys' fees to consumers, either if the consumer prevailed (one clause, or 1.5%; 15.1% of arbitration-subject credit card loans outstanding), if the amount awarded was greater than the issuer's last settlement offer (one clause, or 1.5%; 0.0% of arbitration-subject credit card loans outstanding), or if the arbitrator so determined (one clause, or 1.5%; 0.2% of arbitration-subject credit card loans outstanding).

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<sup>137</sup> American Arbitration Association, Consumer Arbitration Rules, Rule R-44(a) (effective Sept. 1, 2014) ("The arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of **attorneys' fees** and costs, in accordance with the law(s) that applies to the case."); American Arbitration Association, Commercial Arbitration Rules, Rule R-43(d)(ii) (effective June 1, 2009); JAMS Streamlined Arbitration Rules, Rule 19(f).

<sup>138</sup> In the 2013 Preliminary Results, we reported data on clauses providing for the award of **attorneys' fees** to the prevailing party separately from data on clauses providing for the award of **attorneys' fees** to prevailing consumers. In Table 14, we report data on clauses providing for awards to prevailing parties separately, but also include those clauses as clauses permitting the award of **attorneys' fees** to prevailing consumers, which they do.

Eleven checking account clauses (18.0% of clauses; 18.1% of arbitration-subject insured deposits) provided that the arbitrator would award, and another two clauses (3.3% of clauses; 2.4% of arbitration-subject insured deposits) provided that the arbitrator may award attorneys' fees to a prevailing consumer. An additional three checking account clauses directed (4.9%; 2.5% of arbitration-subject insured deposits), and another permitted (1.6%; 0.5% of arbitration-subject insured deposits), the arbitrator to award the consumer attorneys' fees if the award exceeded the institution's last written settlement offer, while another directed the award of double attorneys' fees under those circumstances (1.6%; 0.2% of arbitration-subject insured deposits). Six prepaid clauses (no load data), including the five clauses permitting awards to a prevailing party, permitted the arbitrator to award attorneys' fees to a prevailing consumer.

Eighteen storefront payday loan arbitration clauses (25.4%, covering 51.8% of arbitration-subject storefronts) required the arbitrator to award attorneys' fees to a prevailing consumer, with one clause limited to individual arbitrations, one clause capped at \$2,000 in attorneys' fees, and three clauses providing for an award of attorneys' fees if the consumer recovered more than the lender's last settlement offer. Three private student loan arbitration clauses (50.0%) provided for the award of attorneys' fees to prevailing consumers: one provided that the lender would pay attorneys' fees, one provided that the arbitrator would award attorneys' fees, and one provided that the arbitrator may award such fees. And five mobile wireless arbitration clauses (71.4%, covering 84.5% of arbitration-subject subscribers) provided for the arbitrator to award prevailing consumers their attorneys' fees, with one clause providing for recovery when the award exceeded the consumer's demand, one when the award exceeded the company's last settlement offer, and one providing for the award of double attorneys' fees when the award exceeded the company's last settlement offer.

**TABLE 14:** ARBITRATION CLAUSE PROVISIONS ADDRESSING THE AWARD OF ATTORNEYS' FEES IN THE AWARD

	# of contracts	% of market
<b>Parties bear own attorneys' fees</b>		
Credit cards	27 (40.9%)	46.9
Checking accounts	12 (19.7%)	39.8%
Prepaid cards	4 (7.8%)	n/a
Storefront payday loans	8 (11.3%)	6.4%
Private student loans	2 (33.3%)	n/a
Mobile wireless	2 (28.6%)	15.5%
<b>Attorneys' fees awardable to prevailing party</b>		
Credit cards	5 (7.6%)	0.0%
Checking accounts	3 (4.9%)	1.0%
Prepaid cards	5 (9.8%)	n/a
Storefront payday loans	2 (2.8%)	0.7%
Private student loans	0 (0.0%)	n/a
Mobile wireless	1 (14.3%)	0.3%
<b>Attorneys' fees awardable to prevailing consumer</b>		
Credit cards	13 (19.7%)	25.6%
Checking accounts	21 (34.4%)	24.7%

Prepaid cards	6 (11.8%)	n/a
Storefront payday loans	18 (25.4%)	51.8%
Private student loans	3 (50.0%)	n/a
Mobile wireless	5 (71.4%)	84.5

### 2.5.11 Contingent minimum recovery provisions

The AT&T Mobility arbitration clause at issue in *Concepcion* provided that a customer would receive a minimum recovery of \$10,000 if the arbitrator awarded the customer more than the amount of the last written settlement offer made by AT&T.<sup>139</sup> Such contingent minimum recovery provisions were uncommon in the arbitration clauses we studied, although they appeared more often in the storefront payday loan arbitration clauses and mobile wireless arbitration clauses than in the other arbitration clauses studied. We did not identify any such terms in contracts without arbitration clauses.

Only five of the credit card arbitration clauses studied — covering 18.5% of arbitration-subject credit card loans outstanding in the sample — included such a provision, with the contingent amount ranging from \$5,100 to \$7,500.<sup>140</sup> One large issuer adopted such a provision during 2013. By comparison, ten arbitration clauses (16.4%) in the checking account sample — representing 10.5% of the arbitration-subject insured deposits in the sample — included such a provision. For these ten checking account contracts, the contingent minimum recoveries generally ranged from \$2,500 to \$10,000. And 17 arbitration clauses in the storefront payday loan sample — representing 43.0% of storefronts in the sample — included a contingent

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<sup>139</sup> See *Concepcion*, 131 S. Ct. at 1744 & n.3.

<sup>140</sup> These data are updated to reflect the provisions in credit card contracts on file with the Bureau as of December 31, 2013. By comparison, the data for checking account contracts are not updated, although we were able to update a portion of the sample. See Section 2.3.2. Of the two small to mid-sized banks that switched to arbitration between 2013 and 2014, one provided for a contingent minimum recovery. The credit union that switched to arbitration did not use such a provision.

minimum recovery provision. The amounts of the contingent minimum recoveries ranged from \$500 to \$10,000, with \$5,100 the most common. One clause provided for a minimum recovery of 110% of the amount awarded. Three of the private student loan arbitration clauses (50.0%) included contingent minimum recovery provisions (one clause had a minimum recovery of \$3,000 and two clauses had \$7,500). Two of the mobile wireless arbitration clauses (28.6%, covering 68.4% of subscribers; minimum recovery of \$5,000 for one clause and \$10,000 for the other) used contingent minimum recovery provisions. None of the arbitration clauses in the prepaid card contracts in the sample included a contingent minimum recovery provision.<sup>141</sup> These results are summarized in Table 15.

**TABLE 15: ARBITRATION CLAUSES WITH CONTINGENT MINIMUM RECOVERY PROVISIONS**

	Contingent minimum recovery provision		No contingent minimum recovery provision	
	# of contracts	% of market	# of contracts	% of market
Credit cards	5 (7.6%)	18.5%	61 (92.4%)	81.5%
Checking accounts	10 (16.4%)	10.5%	51 (83.6%)	89.5%
Prepaid cards	0 (0.0%)	0.0%	51 (100.0%)	100.0%
Storefront payday loans	17 (23.9%)	43.0%	54 (76.1%)	57.0%
Private student loans	3 (50.0%)	n/a	3 (50.0%)	n/a
Mobile wireless	2 (28.6%)	68.4%	5 (71.4%)	31.6%

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<sup>141</sup> Most of the provisions that we identified made the minimum recovery contingent on the arbitrator awarding the consumer the relief sought, or greater relief, after the business refused to provide such relief. A smaller share used a different contingency: Whether the arbitrator awarded relief equal to or in excess of the value of the company's last settlement offer.

## 2.5.12 Disclosures

Most of the arbitration clauses studied described differences between arbitration and litigation in court. They typically highlighted some combination of four differences. First, no jury trial is available in arbitration. Second, when parties have agreed to arbitrate, they cannot participate in class actions in court.<sup>142</sup> Third, discovery typically is more limited in arbitration than in court litigation. Fourth, appeal rights are more limited in arbitration than in court.<sup>143</sup> Often, this descriptive language was capitalized or in boldfaced type.<sup>144</sup>

The frequency of disclosures is summarized in Table 16. Of the credit card arbitration clauses studied, 49.3% (covering 40.8% of arbitration-subject credit card loans outstanding) identified all four procedural differences; 4.5% of issuers (all very small, covering 0.1% of arbitration-subject credit card loans outstanding) identified none. Almost every credit card arbitration clause indicated that the consumer would not have a right to a jury trial (92.5% of issuers, covering 99.7% of arbitration-subject credit card loans outstanding), and slightly more (94.0% of issuers, covering 99.9% of arbitration-subject credit card loans outstanding) stated that for claims subject to arbitration the consumer could not be a party to a class action in court.

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<sup>142</sup> The disclosure provisions discussed here are not the same as the no-class-arbitration provisions examined earlier. **See** Section 2.5.5. The disclosure provisions explain to the consumer that by agreeing to arbitration, the consumer will not be able to participate in a class action in court. The no-class-arbitration provisions provide that any arbitration proceeding will be conducted on an individual basis and not a class basis. Most contracts included both, but a few contracts with no-class-arbitration provisions did not make the type of disclosure considered here.

<sup>143</sup> **See** Section 4.12.

<sup>144</sup> For example, of the credit card arbitration clauses in the sample, 26 (38.8%, covering 54.1% of arbitration-subject credit card loans outstanding) disclosed some difference between arbitration and litigation in bold type and all capital letters; 20 (29.9%, covering 33.5% of arbitration-subject credit card loans outstanding) did so in all capital letters; and ten (14.9%, covering 1.9% of arbitration-subject credit card loans outstanding) did so in bold type. Only four such clauses (6.0%, covering 0.1% of arbitration-subject credit card loans outstanding) did so in regular type. In addition, 21 of the 67 credit card arbitration clauses in the sample (31.3%, covering 23.3% of arbitration-subject credit card loans outstanding) provided some notice of the arbitration clause in one of the first three paragraphs of the contract.

By comparison, of the payday loan arbitration clauses in the sample, 32 (45.1%, covering 47.5% of arbitration-subject storefronts) disclosed some difference between arbitration and litigation in bold type and all capital letters; 23 (32.4%, covering 14.0% of arbitration-subject storefronts) did so in all capital letters; and five (7.0%, covering 8.0% of arbitration-subject storefronts) did so in bold type. In addition, 17 of the 71 payday loan arbitration clauses in the sample (23.9%, covering 35.1% of arbitration-subject storefronts) provided some notice of the arbitration clause in one of the first three paragraphs of the contract.

**TABLE 16:** DISCLOSURE OF DIFFERENCES BETWEEN ARBITRATION AND LITIGATION IN ARBITRATION CLAUSES

	# of contracts	% of market
<b>No jury trial</b>		
Credit cards	62 (92.5%)	99.7%
Checking accounts	46 (75.4%)	98.1%
Prepaid cards	47 (92.2%)	100.0%
Storefront payday loans	67 (94.4%)	85.6%
Private student loans	6 (100.0%)	n/a
Mobile wireless	6 (85.7%)	99.7%
<b>No class actions in court</b>		
Credit cards	63 (94.0%)	99.9%
Checking accounts	37 (60.7%)	67.5%
Prepaid cards	45 (88.2%)	100.0%
Storefront payday loans	62 (87.3%)	97.9%
Private student loans	6 (100.0%)	n/a
Mobile wireless	3 (42.9%)	48.8%
<b>Disclosure of all four differences</b>		
Credit cards	33 (49.3%)	40.8%
Checking accounts	17 (27.9%)	19.0%



Prepaid cards <sup>145</sup>	21 (41.2%)	27.0%–36.8%
Storefront payday loans	44 (62.0%)	71.9%
Private student loans	4 (66.7%)	n/a
Mobile wireless	2 (28.6%)	48.7%
<b>No disclosure of differences</b>		
Credit cards	3 (4.5%)	0.1%
Checking accounts	15 (24.6%)	1.9%
Prepaid cards	4 (7.8%)	n/a
Storefront payday loans	1 (1.4%)	0.0%
Private student loans	0 (0.0%)	n/a
Mobile wireless	1 (14.3%)	0.3%

The checking account arbitration clauses studied contained fewer disclosures. Only 27.9% of clauses (covering 19.0% of arbitration-subject insured deposits) identified all four procedural differences, while 24.6% of clauses (although again covering smaller institutions) identified none. The disclosures in the mobile wireless arbitration clauses were similar, with only 28.6% of clauses (covering 48.7% of arbitration-subject subscribers) identifying all four differences and 14.3% (covering 0.3% of arbitration-subject subscribers) identifying none. The most common difference disclosed in the checking account and mobile wireless arbitration clauses was the lack of a jury trial (75.4% of checking account clauses, covering 98.1% of arbitration-subject insured deposits; 85.7% of mobile wireless clauses, covering 99.7% of arbitration-subject subscribers). A sizable percentage (60.7% of checking account clauses, covering 67.5% of arbitration-subject

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<sup>145</sup> See *supra* n.86.

insured deposits; 42.9% of mobile wireless clauses, covering 48.8% of arbitration-subject subscribers) stated that for claims subject to arbitration, the consumer could not be part of a class action in court.

The disclosures in the prepaid card and storefront payday loan arbitration clauses were more like those in credit card clauses, with from 41.2% to 62.0% of arbitration clauses (covering from 27.0% to 71.9% of arbitration-subject market shares) disclosing all four procedural differences and only from 1.4% to 7.8% of arbitration clauses (with minimal market share or no data) disclosing none. Almost all (92.2% to 94.4% of clauses; 85.6% to 100.0% of arbitration-subject market share) stated that no jury trial was available and a comparable percentage (87.3% to 88.2% of clauses; 97.9% to 100.0% of arbitration-subject market share) noted the inability to participate in a class action in court. Finally, of the private student loan arbitration clauses, 66.7% identified all four differences, and 100% stated that no jury trial was available in arbitration and that a consumer could not be part of a class action in court.

### 2.5.13 Arbitral appeals process

As a general matter, parties can challenge arbitration awards in court only on the limited grounds specified in arbitration statutes.<sup>146</sup> Those grounds typically provide for little or no appeal on the merits of the award.<sup>147</sup> But the parties' arbitration clause can establish an arbitral appeals process under which a new arbitrator or panel of arbitrators reviews the original award. The 2013 Preliminary Results did not present data on the use of such provisions. This section does, using the same agreements studied in the 2013 Preliminary Results.

A minority of arbitration clauses in most of the samples studied, ranging from 28.6% of mobile wireless clauses to 40.9% of credit card clauses (but 66.7% of private student loan clauses), provided for an arbitral appeals process.<sup>148</sup> In almost every case, the appeals panel was to consist

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<sup>146</sup> *See* 9 U.S.C. § 9. The Supreme Court has held that parties cannot expand the grounds for vacating arbitration awards in federal court by contract. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008); *see also* Section 4.12.

<sup>147</sup> *See* Section 4.12.

<sup>148</sup> 41.2% of prepaid card arbitration clauses, 29.5% of checking account arbitration clauses, and 29.6% of storefront payday loan arbitration clauses provided for an arbitral appeals process.

of three arbitrators.<sup>149</sup> For most markets, larger companies tended to be more likely to provide for arbitral appeals: clauses covering 76.7% of arbitration-subject credit card loans outstanding, 44.8% of arbitration-subject payday loan storefronts, 43.3% of arbitration-subject insured deposits, and 35.3% of arbitration-subject mobile wireless subscribers provided for an arbitral appeals process. The one exception was prepaid cards, as to which clauses covering from 27.0% to 36.8% of the dollar value of arbitration-subject prepaid card loads provided for arbitral appeals.

Of those arbitration clauses that established an arbitral appeals process, most provided that any party could appeal, as shown in Table 17. A slightly smaller number of clauses specified a monetary threshold before an appeal was permitted. Of the clauses specifying a monetary threshold, most based the threshold on the amount of the claim or the amount in dispute.<sup>150</sup> Under such a clause, for example, a claimant that recovered nothing on a claim above the threshold amount, or a respondent that had an amount awarded against it that was above the threshold amount, could appeal.<sup>151</sup> A still smaller number (mostly from very small businesses) based the threshold on the amount of the award.<sup>152</sup> Under such a clause, for example, a

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<sup>149</sup> The only exceptions were the four storefront payday loan clauses discussed below, which permitted the appealing party the choice between a sole arbitrator and a three-arbitrator panel on appeal, and one mobile wireless arbitration clause, which did not specify the number of arbitrators on appeal.

<sup>150</sup> For credit card arbitration clauses, the threshold for appeal ranged from a claim amount of \$25,000 (one clause) to \$50,000 (three clauses) to \$100,000 (six clauses). For checking account arbitration clauses, the threshold for appeal ranged from a claim amount of \$10,000 (one clause) to \$25,000 (one clause) to \$50,000 (seven clauses) to \$100,000 (two clauses). In addition, one checking account arbitration clause contained a hybrid clause, permitting an appeal if the amount of the award was \$0 or the amount of the claim exceeded \$100,000. One prepaid card arbitration clause permitted appeals when the claim amount exceeded \$100,000. One storefront payday loan arbitration clause permitted appeals when the amount of the claim exceeded \$10,000; seven clauses permitted appeals when the amount exceeded \$50,000. Two private student loan clauses permitted appeals when the claim exceeded \$50,000, while one permitted appeals when the claim exceeded \$100,000.

<sup>151</sup> Indeed, the claimant could appeal in any case in which it recovered less than the full amount claimed and the respondent could appeal in any case in which any amount was awarded against it, as long as the amount of the claim was above the threshold.

<sup>152</sup> For credit card arbitration clauses, the threshold for appeal ranged from an award amount of \$100,000 (four clauses) to \$200,000 (one clause) to \$250,000 (one clause). For checking account arbitration clauses, the threshold for appeal ranged from an award amount of \$100,000 (one clause) to \$200,000 (one clause) to \$250,000 (one clause). One prepaid card arbitration clause permitted appeals when the award amount exceeded \$250,000; one storefront payday loan arbitration clause permitted appeals when the award amount exceeded \$30,000.

respondent that had an amount awarded against it that was above the threshold amount could appeal, but a claimant that recovered nothing (or some amount less than the appeals threshold) on a claim above the threshold amount could not. Such a clause may result in a one-sided right to appeal available to respondents more often than claimants. To the extent that consumers are more likely than businesses to bring higher-dollar claims<sup>153</sup> — that is, consumers are more likely to be claimants and businesses are more likely to be respondents in cases in which they may be able to appeal — business may be able to appeal more often than consumers. If the consumer wins, the business can appeal (if the amount of the award exceeds the threshold), but if the business wins, the consumer cannot appeal (even though the amount of the claim was above the threshold) because the amount of the award does not exceed the threshold.

Many arbitration clauses that specified an arbitral appeals process also addressed to some extent the allocation of the costs of any appeal. The most common approach was for the costs to be allocated the same way as the costs of the original arbitration proceeding. Less commonly, the clause directed that the appealing party would pay all the costs, although some clauses provided that the company would consider a request by the consumer to cover those costs. Four storefront payday loan arbitration clauses provided that the lender would pay the costs of an appeal to a single arbitrator, but that if the consumer wanted a three-arbitrator appeals panel the consumer would need to pay the additional cost.

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<sup>153</sup> **See** Section 5.5.2 (finding average consumer claim amount in AAA consumer arbitrations ranged from \$18,287 to \$55,948 while average disputed debt amount ranged from \$3,523 to \$23,986 and average company claim amount ranged from \$1,468 to \$16,669, excluding the four disputes relating to checking accounts).

**TABLE 17:** ARBITRATION APPEALS PROCESS IN ARBITRATION CLAUSES

	# of contracts	% of market
<b>Any party</b>		
Credit cards	11 (16.7%)	58.1%
Checking accounts	3 (4.9%)	25.9%
Prepaid cards <sup>154</sup>	19 (37.3%)	27.0%–36.8%
Storefront payday loans	12 (16.9%)	13.7%
Private student loans	1 (16.7%)	n/a
Mobile wireless	2 (28.6%)	35.3%
<b>Claim amount threshold</b>		
Credit cards	10 (15.2%)	18.3%
Checking accounts	12 (19.7%)	14.1%
Prepaid cards	1 (2.0%)	n/a
Storefront payday loans	8 (11.3%)	30.8%
Private student loans	3 (50.0%)	n/a
Mobile wireless	0 (0.0%)	0.0%
<b>Award amount threshold</b>		

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<sup>154</sup> See *supra* n.86.

Credit cards	6 (9.1%)	0.4%
Checking accounts	3 (4.9%)	3.4%
Prepaid cards	1 (2.0%)	n/a
Storefront payday loans	1 (1.4%)	0.2%
Private student loans	0 (0.0%)	n/a
Mobile wireless	0 (0.0%)	0.0%
<b>None</b>		
Credit cards	39 (59.1%)	23.3%
Checking accounts	43 (70.5%)	56.7%
Prepaid cards <sup>155</sup>	30 (58.8%)	63.2%–73.0%
Storefront payday loans	50 (70.4%)	55.2%
Private student loans	2 (33.3%)	n/a
Mobile wireless	5 (71.4%)	64.7%

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<sup>155</sup> See *supra* n.86.

# Section 3

What do consumers understand about dispute resolution systems?



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# Introduction

As part of this study, we sought and obtained approval from the Office of Management and Budget (“OMB”) to conduct a national telephone survey of credit card holders to examine a number of questions with respect to their attitudes towards and understanding of dispute resolution mechanisms.<sup>1</sup>

Our survey explored (1) the role of dispute resolution clauses in consumer decisions to acquire credit cards and (2) consumers’ default assumptions (meaning consumers’ awareness, understanding, or knowledge without supplementation from external sources) regarding their dispute resolution rights vis-à-vis their credit card issuers. In studying default assumptions, we also studied consumers’ awareness of their ability to opt out of pre-dispute arbitration clauses (where applicable).

We chose to focus our survey on credit cards, as opposed to other consumer financial products and services, because credit cards offer strong market penetration with consumers across the nation. Further, by limiting the survey to credit cards, we were able to verify the accuracy of many of the respondents’ default assumptions about their dispute resolution rights by examining the actual credit card agreements to which the consumers are currently subject.<sup>2</sup>

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<sup>1</sup> The OMB Control Number for our survey is 3170-0046. In the interest of simplicity, we use the first person plural to describe how the information collection was conducted. In actuality, ICF International, our contractor, performed the survey and also assisted significantly in its design. ICF International, for instance, determined what the call sample would be, identified who would receive pre-notification letters, contacted respondents, and collected data from those discussions. The Bureau never gathered survey answers from individual respondents. Instead, the Bureau received only de-identified survey results. More information about the allocation of responsibilities between the Bureau and ICF International is available in our submission to OMB, *available at* [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201411-3170-002](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201411-3170-002) (last visited Mar. 6, 2015). The survey is covered under the Bureau’s system of records notice CFPB.021 Consumer Education and Engagement Records, *available at* <https://www.federalregister.gov/articles/2012/10/03/2012-24311/privacy-act-of-1974-as-amended#h-8> (last visited Mar. 6, 2015) and the Bureau’s Consumer Experience Privacy Impact Assessment, *available at* [http://files.consumerfinance.gov/f/201406\\_cfpb\\_consumer-experience-research\\_pia.pdf](http://files.consumerfinance.gov/f/201406_cfpb_consumer-experience-research_pia.pdf) (last visited Mar. 6, 2015).

<sup>2</sup> The Credit CARD Act of 2009 and Dodd-Frank Act require major credit card issuers to file their agreements with the Bureau. *See, e.g.*, 2013 Preliminary Results at 132–133; Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1746, § 204(a) (May 22, 2009); *see* 15 C.F.R. § 226.58(c)(5) (*de minimis* exception).

## 3.1 Summary of analysis and results

Consumers are very unlikely to consider bringing formal claims against their card issuers. When presented with a hypothetical situation in which the consumer has been charged fees by their credit card issuers that they know to be wrongly assessed and has exhausted efforts to obtain relief from the credit card company, only 1.4% of respondents state that they would seek legal advice — another 0.7% state that they would consider legal proceedings, without mentioning an attorney. That is almost the same proportion of consumers that state they would simply accept responsibility for the improperly assessed fee (1.7%).<sup>3</sup> A majority of respondents said that they would cancel their cards (57.2%).

Perhaps not surprisingly then, dispute resolution mechanisms play a limited role in consumers' decision to obtain a particular credit card.

- When asked an open-ended question regarding all the features that factored into their decision to get the credit card that they use most often for personal use, no consumers volunteered an answer that even implicitly referenced dispute resolution procedures; and
- When presented with a list of nine features of credit cards (*e.g.*, interest rates, customer service, rewards) and asked to identify those features that factored into their decision, consumers identified dispute resolution procedures as being relevant less often than any of the other eight options.

As for consumers' knowledge of and default assumptions regarding arbitration clauses:

- A majority (54.4%) of respondents whose credit card agreements include pre-dispute arbitration clauses stated that they did not know if they could sue their issuers in court.
- Over a third (38.6%) of respondents whose agreements include pre-dispute arbitration clauses believed they could sue in court. Allowing for possible ambiguities in the

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<sup>3</sup> In reviewing the findings of our survey, it can be helpful to keep in mind that given the size of our largest sample set discussed in these findings (the 1,007 respondents that completed the survey) our findings are, at standard (95%) confidence levels, accurate within 3.1%. Therefore, a finding of, for example, 5% is not statistically different from a finding of 8% (at standard confidence levels). This margin of error increases for smaller sample sizes.

responses in light of limitations contained in the arbitration clauses (*e.g.*, consumers' ability to bring claims in small claims courts or opt out of their arbitration clauses), at a minimum almost 80% of those respondents are mistaken.

- Only one consumer whose current credit card contract permitted him to opt out of the pre-dispute arbitration clause in his credit card contracts recalled being offered such an opportunity.<sup>4</sup>
- Less than 7% of consumers whose credit card agreements included pre-dispute arbitration clauses stated that they could not sue their credit card issuers in court.
  - Even this 7% share may not, in fact, have knowledge of the clause. A statistically similar proportion of consumers *without* a clause in their agreement reported that they could not sue their issuers in court. (7.7% compared to 6.8%.)
  - To the same effect, consumers whose credit card agreements included pre-dispute arbitration clauses were about as likely to believe that their agreement had such a clause as were consumers without such clauses in their agreements. (The exact numbers were 18.4% for those with clauses and 21.1% for those without.)
- When we asked consumers if they could participate in class action lawsuits against their credit card bank, more than half of those whose agreements had pre-dispute arbitration clauses thought that they could participate (56.7%).

## 3.2 Prior research

Prior consumer surveys have explored issues relevant to consumer arbitration, but in specific and limited focus areas.

For example, studies have asked consumers, after they participate in arbitration proceedings, about their experiences with the forum.<sup>5</sup> We opted not to explore consumer satisfaction with

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<sup>4</sup> To help safeguard respondent privacy, we use male pronouns to describe all respondents.

arbitration (or litigation) proceedings, however, given the difficulty in finding consumers who have had personal experience with each forum.<sup>6</sup>

Other studies have explored whether consumers understand their contracts generally. Such research, however, has generally not focused on arbitration clauses and is not necessarily translatable to arbitration clauses, which are frequently formatted differently than the rest of consumer contracts (*e.g.*, featuring different typeface, font size, bold, or underlining)<sup>7</sup> and written at higher reading levels (meaning that they are more difficult to understand).<sup>8</sup>

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<sup>5</sup> See, *e.g.*, *Arbitration: Simpler, Cheaper, and Faster than Litigation*, Harris Litigation Survey, conducted for U.S. Chamber Institute for Legal Reform (Apr. 2005), available at <http://www.adrforum.com/rcontrol/documents/researchstudiesandstatistics/2005harrispoll.pdf> (last visited Mar. 6, 2015) (the survey was not limited to pre-dispute arbitration proceedings, as only 19% of survey respondents had entered arbitration proceedings because they were required by contract); *Outcomes in Arbitration: An Empirical Study of Respondent Lending Cases*, Ernst & Young (2004) (studying outcomes in 226 arbitration proceedings by the National Arbitration Forum in lending-related respondent-initiated cases). Cf., Gary Tidwell, Kevin Foster & Michael Hummel, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations 3* (1999) cited in Michael Perino, *Report to the Securities Exchange Commission Regarding Arbitrator Conflict Disclosure Requirements in NASD and NYSE Securities Arbitrations* (2002), available at <http://www.sec.gov/pdf/arbconflict.pdf> (last visited Mar. 6, 2015) (describing NASD arbitration proceedings).

<sup>6</sup> As described in Section 5.5.1, in the years 2010, 2011, and 2012, fewer than 400 consumers a year were involved with arbitration disputes before the American Arbitration Association relating to credit cards. See also U.S. Chamber of Commerce, Aug. 6, 2013, OMB Comment Letter, pp. 10, 16 (“[v]anishingly few respondents will have sufficient background information to assess the comparative merits of arbitration and litigation, because it is highly unlikely that more than a very few individual respondents will have had the experience of pursuing similar disputes in each forum. . . . And the number of respondents with experience concerning *both* arbitration *and* litigation is likely to be extremely small — indeed, it is likely to be zero.”) (emphasis in original).

<sup>7</sup> We discuss the prevalence of credit card arbitration agreements that use bold or capitalized text in highlighting their dispute resolution provisions in Section 2.5.12. See, *e.g.*, *Murea v. Pulte Group, Inc.*, 2014-Ohio-398 (Ct. App. Ohio Feb. 6, 2014) (“The arbitration provisions in both agreements were clearly marked in capital letters. The arbitration clause in the purchase agreement was conspicuously written in bold print, and the signature line of the agreement expressly warned Murea to ‘make sure that all provisions are read and understood before signing.’”); *Forest Hill Nursing Ctr., Inc. v. McFarlan*, 995 So. 2d 775, 785 (Miss. Ct. App. 2008) (noting bold, all capital letters); Lorene Park, *Be Loud, Clear, and Fair in Arbitration Provisions or be Prepared to Litigate*, Released Aug. 7, 2012, available at <http://www.employmentlawdaily.com/index.php/2012/08/07/be-loud-clear-and-fair-in-arbitration-provisions-or-be-prepared-to-litigate> (last visited Mar. 6, 2015) (advising employers to feature arbitration agreements in a separate document, or at least in its own paragraph set off with spacing, and to “[u]se a 12-point font or larger; and use a bold, underlined, and capitalized heading that includes the words ‘**Arbitration Agreement**.’”) (emphasis in original); see also 2013 Preliminary Results at 52.

<sup>8</sup> See Section 2.4.

The subset of awareness studies that have focused on arbitration clauses generally have not focused on consumer financial products and services.<sup>9</sup> And many of these studies were too limited in size or geographic diversity to draw conclusions about the country as a whole.<sup>10</sup>

The closest study that we identified before we submitted our materials to OMB was a September 2011 report by the Mercator Advisory Group. Mercator surveyed credit card holders to determine what factors led them to acquire or use credit cards.<sup>11</sup> The study, however, did not discuss how dispute resolution clauses, such as pre-dispute arbitration clauses, played into consumers' choices.

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<sup>9</sup> See, e.g., Yannis Bakos *et al.*, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts*, 43 J. Legal Stud. 1 (Jan. 1, 2014) (studying online browsing habits of 45,091 households relating to online software merchants); The Employee Rights Advocacy Institute for Law & Policy and Public Citizen, *National Study of Public Attitudes on Forced Arbitration: Findings from a Survey of 800 Likely 2010 Voters Nationwide*. (Apr. 2009), available at <http://www.citizen.org/documents/lake-research-national-study-of-public-attitudes-forced-arbitration.pdf> (last visited Mar. 6, 2015) (focusing on contracts with employers or agreements for goods and services); Roper ASW, *2003 Legal Dispute Study: Institute for Advanced Dispute Resolution* (2003) (focusing on only voluntary arbitration proceedings) cited in Public Citizen, *The Arbitration Debate Trap*, at 20–22 (2008), available at [http://www.citizen.org/documents/ArbitrationDebateTrap\(Final\).pdf](http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf) (last visited Mar. 6, 2015).

<sup>10</sup> See, e.g., Amy Schmitz, *Access to Respondent Remedies in the Squeaky Wheel System*, 39 Pepperdine L. Rev. 279–366 (2012) (describing panel of 306 Colorado respondents); Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DePaul Bus. & Com. L.J. 199 (2010) (surveying 147 respondents); Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Respondent Realities*, 5 N.Y.U. J.L. & Bus. 617, 619–23 (2000) (surveying 91 students fulfilling a course requirement; 106 approached in a public location; and 101 law students). *But see* The Pew Charitable Trusts, *Banking on Arbitration: Big Banks, Respondents, and Checking Account Dispute Resolution*. (Nov. 26, 2012), available at [http://www.pewtrusts.org/~media/Assets/2012/11/27/Pew\\_arbitration\\_report.pdf](http://www.pewtrusts.org/~media/Assets/2012/11/27/Pew_arbitration_report.pdf) (last visited Mar. 6, 2015) (referencing a lack of respondent awareness regarding dispute resolution clauses, but stopping short of discussing questions or data relating to such a finding); Joshua M. Frank, Center for Responsible Lending, *Stacked Deck: A Statistical Analysis of Forced Arbitration* (2009), available at [http://www.responsiblelending.org/credit-cards/research-analysis/stacked\\_deck.pdf](http://www.responsiblelending.org/credit-cards/research-analysis/stacked_deck.pdf) (last visited Mar. 6, 2015) (study of respondents that financed cars from dealerships, but whose sample size for the arbitration awareness questions was only 268 respondents).

<sup>11</sup> Mercator Advisory Group *U.S. Credit Cardholders: Waiting for a Rebound*, Customer Monitor Survey Series, Insight Summary Report Vol. 3, Report 1 (Sept. 2011). Mercator fielded an Internet-based respondent survey of approximately 1,000 adults, in which they asked respondents to identify reasons for selecting or using their credit cards. “Dispute resolution provisions/rights” was not included in Mercator’s fourteen reported measures. “Some Other Reason,” which would likely subsume such concerns with several other reasons, was consistently one of the largest categories of responses.

As we began our telephone survey, however, researchers at St. John’s School of Law released a paper summarizing a web-based survey of 668 consumers sourced primarily from an online research panel maintained by Qualtrics. That survey touched upon many comprehension and awareness issues that we planned to explore.<sup>12</sup>

Beginning with comprehension issues, the St. John’s researchers showed respondents a seven-page credit card contract, which featured a pre-dispute arbitration clause in bold, all-capitalized font.<sup>13</sup> The St. John’s researchers then asked respondents a series of questions about the contract, followed by additional questions about arbitration more generally.<sup>14</sup> When asked open-ended questions about what terms of the contract they had just been shown, about 3% of the respondents mentioned an arbitration clause (or dispute resolution issues).<sup>15</sup> When asked a closed-ended question about whether the contract included an agreement to arbitrate disputes, nearly half of respondents (43%) stated that the contract included an agreement to arbitrate disputes.<sup>16</sup> Yet, when asked about a hypothetical billing dispute with their credit card provider, only 14% of respondents indicated that the contract could prevent them from resolving claims in court.<sup>17</sup> Likewise, less than 20% of respondents recognized that the contract could impact their

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<sup>12</sup> Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis, and Yuxiang Liu, “Whimsy Little Contracts” With Unexpected Consequences: An Empirical Analysis of Respondent Understanding of Arbitration Agreements (Oct. 29, 2014), *available at* <http://ssrn.com/abstract=2516432> (last visited Mar. 6, 2015).

<sup>13</sup> The St. John’s sample arbitration clause informed respondents that they waived the right to sue in court, participate in a class action, have a jury trial, and appeal the arbitrator’s decision. *Id.* at 33. The sample clause did not include an opt-out provision, which is commonly found in arbitration clauses in consumer financial contracts. *See* Section 2.5.1.

<sup>14</sup> *Id.* at 29–30, 32–33.

<sup>15</sup> *Id.* at 45.

<sup>16</sup> *Id.* at 49.

<sup>17</sup> The question asked: Suppose after you paid your credit card bill you realized the credit card overcharged you. The credit card company, however, believes it has not overcharged you and refuses to give you your money back. The dispute is too large to be decided by a small claims court. Under the terms of the contract you just saw, if the amount of the dispute was large enough, would you have a right to have a court decide the dispute even if the credit card company didn’t want a court to decide the dispute? *Id.* at 49–50.

right to a jury trial<sup>18</sup>; and approximately 13% understood that the contract they had just been shown prohibited them from participating in a class action lawsuit.<sup>19</sup>

The researchers also tested whether respondents were aware that they were already subject to pre-dispute arbitration clauses. They asked respondents if they had entered contracts with a set list of companies, which included companies that the researchers had previously confirmed used arbitration clauses.<sup>20</sup> The St. John’s researchers found that 87% of respondents who said that they had never entered a consumer contract with an arbitration clause had indeed entered into at least one consumer contract that included a pre-dispute arbitration clause.<sup>21</sup> That rate did not meaningfully differ for respondents who did not claim to know if they had entered a consumer contract with an arbitration clause (where 89% had at least one account that included a pre-dispute arbitration clause).

Finally, the St. John’s researchers asked if respondents looked to see if contracts included pre-dispute arbitration clauses before entering them.<sup>22</sup> 37% of respondents said that they did.<sup>23</sup> Yet of the respondents that specifically stated that they looked to see if their contracts included arbitration clauses (and went on to say that they had never entered into a contract with an arbitration clause), 85% had, in fact, entered at least one contract with an arbitration clause.<sup>24</sup>

Because the sample for the St. John’s study was selected from an online panel supplemented by respondents identified by the researchers, the sample — while demographically representative of the United States population — is “not truly random,” as the researchers said in their paper.

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<sup>18</sup> *Id.* at 53.

<sup>19</sup> *Id.* at 54.

<sup>20</sup> The researchers used PayPal, Skype, Verizon Wireless, AT&T Mobility, and Sprint. *Id.* at 59.

<sup>21</sup> *Id.* at 59–60.

<sup>22</sup> Specifically, the survey asked “Before entering into a contract, do you look to see if the contract says you have to arbitrate any disputes and can’t sue the company?” *Id.* at 61.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* Again, the 85% figure was not statistically different from the percentage of respondents who said that they did not look to see if contracts contained arbitration clauses and who had entered at least one agreement that included an arbitration provision (87%).

## 3.3 Data

In June 2013, we published a Federal Register Notice notifying the public of our intent to conduct the survey and starting a 60-day public comment period (Vol. 78, No. 110, Page 34352). We held two focus group panels in February 2014 to help assess the comprehensibility of the draft survey instrument and also met with commenters and reviewed their comment letters.<sup>25</sup> Based on this input, we submitted a revised proposal to OMB in May 2014 and received approval in September 2014 to proceed with the telephone survey.<sup>26</sup> Data collection began on October 22, 2014, and concluded December 31, 2014.

We describe our collection methodology in detail in Appendix E. Our contractor ultimately completed surveys with 1,007 respondents that owned credit cards. (We gathered demographic information, for statistical weighting purposes, from another 557 respondents that stated that they did not own credit cards.<sup>27</sup>) Our overall response rate was 23.8%.<sup>28</sup>

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<sup>25</sup> The two focus group panels, held in Bethesda, Maryland, explored credit card holders' general familiarity with issues raised by the proposed survey and the vocabulary used by respondents when they discuss those issues. The focus group panels were diverse with respect to race, age, ethnicity, and education.

Further details regarding the initial questionnaire, commenters' feedback, and the focus groups are available in our submissions to OMB, which, along with comment letters submitted in response to our proposal, are available at [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201411-3170-002](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201411-3170-002) (last visited Mar. 6, 2015).

<sup>26</sup> The survey questions are attached as Appendix D. Focusing solely on the question text read to respondents (not including demographic questions), the initial questionnaire had a Flesch readability score of approximately 68 and an eighth grade reading level. In contrast, the final draft had about one-third fewer words, with a Flesch readability score of approximately 78 and a sixth grade reading level (meaning that the revised version was easier to understand when read to respondents).

<sup>27</sup> As discussed further below, we ceased collecting demographic information from non-cardholders after 557 such respondents. For additional non-cardholders, we weighted their demographic information using a statistical sample from the 557. Because percentages in this section reflect demographic weighting, they will frequently differ from calculations based solely on the number of respondents involved.

<sup>28</sup> We provide additional detail about our response rate calculation, which used the American Association of Public Opinion Research Response Rate 4 formula, in Appendix E.



Of the 1,007 respondents who completed the survey and stated that they had credit cards for personal use,<sup>29</sup> 53.5% were reached via landlines and 46.5% via cellphones. Respondents participated from across the United States. While almost 100% of the surveys were conducted in English, 11.8% of respondents described themselves as Hispanic or Latino. Our respondent population was 46.6% male and 53.0% female, with 0.4% not reporting gender information.<sup>30</sup>

Based on the size of our sample, our survey results are representative of the national population, with a +/- 3.1% sampling error. Other sources of error may also affect the accuracy of the survey estimates. The sampling error is larger when dealing with sample sets of fewer than the 1,007 respondents. We have noted, throughout this discussion, when we deal with smaller sample sets.

## 3.4 Results

Our discussion of the survey results proceeds in two basic segments.

First, we describe our findings about what consumers consider when they decided to obtain the credit card they now use most frequently. We asked consumers about this twice. We began with an “open-ended” question that essentially asked the consumer to explain his thinking in his own words. We did that to mitigate the effects of “priming” consumers — inadvertently leading consumers to specific answers by the form or order of our questions. We followed the open-ended question, however, with a “closed-ended” series of questions, randomly varying the order

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<sup>29</sup> When discussing the 1,007 respondents that completed the survey and stated that they had credit cards for personal use, our percentages reflect totals that were weighted as follows. We first weighted the overall survey population (all 1,575 respondents – 1,007 respondents with credit cards that completed the survey; 11 respondents with credit cards that did not complete the survey; and 557 respondents that did not have credit cards) by assigning each of the 1,575 respondents specific weights so that the overall set was demographically representative of the United States. Then, we extracted the 1,007 respondents that reported that they had credit cards for personal use and adjusted each record’s weight such that the sum of the weights was equal to the sample size of 1,007. Throughout the survey results, we frequently report tabulations based on smaller sample sizes, due to consumers not responding to certain questions or the structure of the survey questionnaire. (Certain questions were only posed to subsets of consumers who provided specific answers to prior questions.) We include additional information about our methodology, including our demographic weighting of data, in Appendices E and F.

<sup>30</sup> Additional demographic information about the respondent population is available in Appendix F.

in which the questions were presented. In so doing, we listed specific features of credit cards and asked whether the consumer considered them when comparison shopping. Closed-ended questions may show higher levels of incidence than open-ended questions, because of the issues such as the previously mentioned possibility of priming. But closed-ended questions have the benefit of being relatively easy to report in an objective manner, whereas answers to open-ended questions must be manually reviewed and categorized before analysis and reporting.

Second, we describe our findings with respect to consumers' default assumptions about their dispute resolution rights. We again used a set of open-ended questions followed by closed-ended questions. We intentionally did not use the words "arbitration" or "class action litigation" in the open-ended questions, out of concern for priming issues.<sup>31</sup> After gathering that data, however, we moved to a series of closed-ended questions, where we specifically asked consumers about their awareness of pre-dispute arbitration and class action litigation. In so doing, we asked consumers about their perceived rights relating to each type of dispute resolution.

### 3.4.1 The role of dispute resolution clauses in card acquisition decisions

We began by asking respondents if they comparison shopped before acquiring the credit card they used most frequently for personal use. Approximately 6.9% of the respondents we spoke with were not involved in the decision to acquire the credit card. We then explored the factors that influenced the remaining 929 respondents to acquire that specific card.<sup>32</sup> We began with the open-ended question:

*"What features, if any, were factors in your decision to get this card?"*

We probed to obtain complete answers by asking "*Are there any other features that were factors in your decision to get this card?*" and repeated the question until the respondent answered in the negative.

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<sup>31</sup> Before we began the inquiry, though, we first asked respondents if they would even consider bringing a formal action against their credit card issuer. We did this by asking respondents a series of questions about how they would respond in a hypothetical dispute with their credit card company.

<sup>32</sup> 33.0% of the 929 respondents stated that they did not consider multiple cards before acquiring their card.

We grouped respondents' answers into ten different categories:

- Interest rate (*e.g.*, “*low percentage rate,*” “*I didn’t want to pay 20-some percent for interest rate*”);
- Customer service (*e.g.*, “*good service and happy,*” “*something I had for the last 70 years; always very reliable and honest*”);
- Rewards (*e.g.*, “*you can earn cash back,*” “*this card was a you promise card, which meant I could earn money for . . . college*”);
- Credit limit (*e.g.*, “*unlimited charge,*” “*por el limite de crédito*”);
- Dispute resolution;
- Fees (*e.g.*, “*no annual fees,*” “*no foreign transaction fees, for international travel*”);
- Reputation of the card or issuer (*e.g.*, “*I guess the familiar name,*” “*from a bank I trust*”);
- Card acceptance by merchants (*e.g.*, “*you could travel with card,*” “*where you shop*”);
- Convenience in applying (*e.g.*, “*came through our credit union,*” “*it was the first one available to me, it’s hard to get credit after a bankruptcy*”)<sup>33</sup>; and
- Other (*e.g.*, “*because I needed one,*” “*card for emergencies*”).

In some cases, one response could be coded in more than one category. For example, one respondent explained that he chose his card because of “APR after grace period, percentage back on rewards.” Accordingly, the answer was coded twice: once for “interest rate” and once for “rewards.”

We then asked respondents a list of closed-ended questions, specifically asking if each of the aforementioned features was a factor in their decision to get the card they use most frequently.

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<sup>33</sup> The overwhelming majority of open-ended responses relating to convenience in applying arose from consumers that described choosing their credit cards based on pre-existing banking relationships (6.7% vs. 1.5%). Arguably, these responses could have been categorized as relating to the reputation of the issuer.

We randomized the order of the features across respondents to help mitigate priming issues. We compare respondents' responses to the open-ended and closed-ended queries in Figure 1 below.

The first bar of each pair, the bar which represents the responses to the open-ended question, represents 929 responses (the weights account for 8.3% of respondents, who were either unable or unwilling to provide an answer, as well as 17.4% that provided "other" reasons that we did not code in one of the aforementioned categories). The dark segment to the left of each top bar represents respondents who affirmatively identified a particular feature in response to the open-ended question. The lighter segment of each such bar, on the right end of the graph, represents respondents who did not mention that feature in response to the open-ended question.<sup>34</sup>

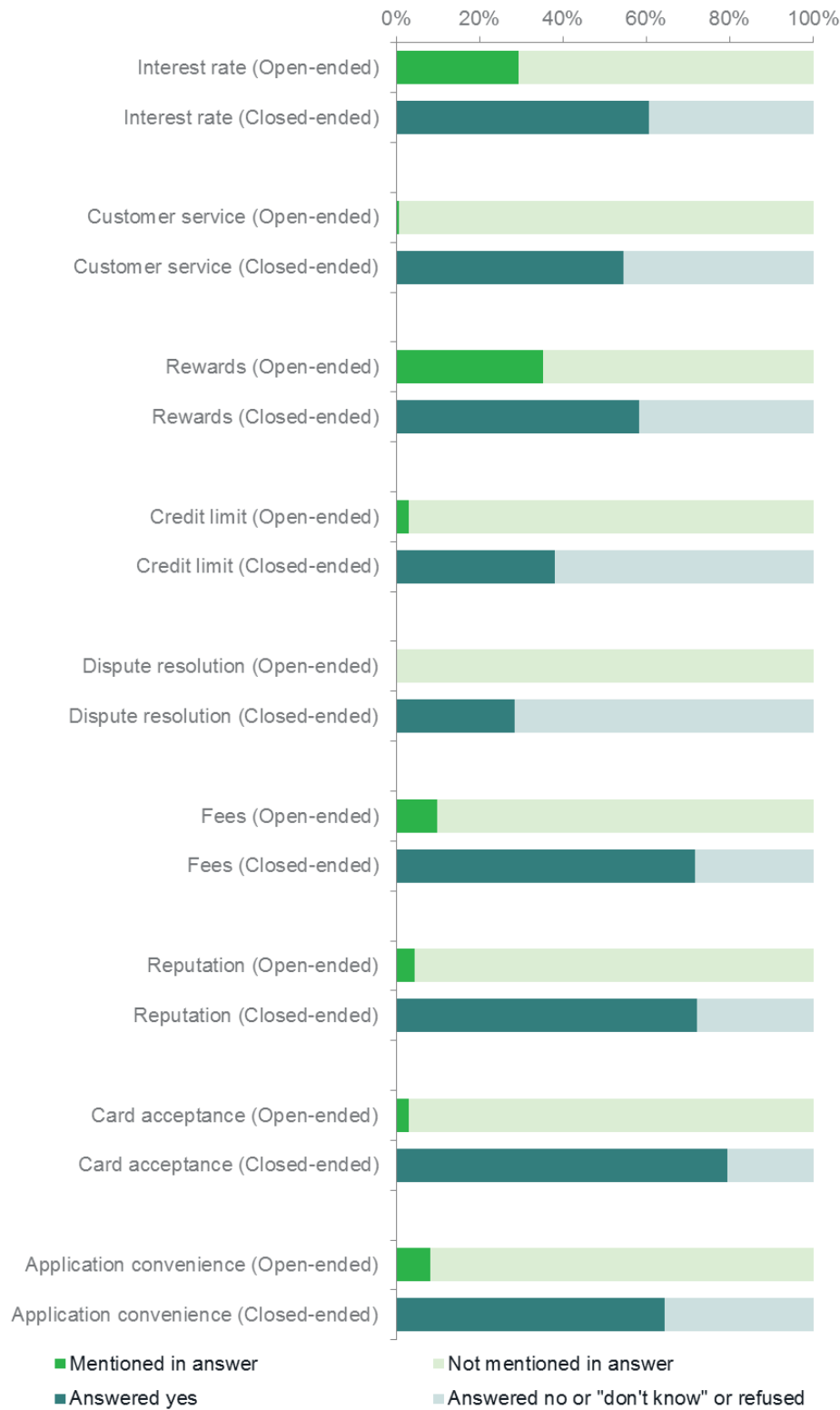
The second bar of each pair, the closed-ended bars, again represents 929 responses. Like the open-ended question bars, the darker segments to the left reflect respondents who stated that a given feature was a factor in their credit card acquisition decision. The lighter segment of each closed-ended bar represents respondents that specifically stated that the particular feature was not a factor in their card acquisition decision, as well as respondents that did not know if the factor played a part in their decision or who refused to answer the question (as opposed to failing to mention the feature).<sup>35</sup>

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<sup>34</sup> 3.2% of respondents responded by stating that they did not know why they chose their credit card; another 17.4% provided a different answer than our coding categories.

<sup>35</sup> When asked about dispute resolution, 6.6% of consumers stated that they did not know whether the issue was part of their decision-making processes. The next highest percentage of respondents reporting that they did not know if a feature was a factor in their decision-making process was 2.5% (relating to customer service). We provide greater detail about these distributions in Appendix G.

**FIGURE 1: FEATURES THAT FACTORED INTO RESPONDENTS' DECISION TO ACQUIRE THE CREDIT CARDS THEY USE MOST FREQUENTLY FOR PERSONAL USE**



When we asked respondents in an open-ended format about the factors that drove their decision to acquire their credit card, they identified rewards (35.2%) and interest rates (29.2%) most frequently, followed by fees (9.8%) and application convenience (8.2%). No respondent mentioned dispute resolution.

As for the closed-ended queries, the acceptance of credit cards by merchants, issuer reputation, and fees were the three most numerous responses (79.8%, 73.5%, and 72.2%, respectively). Where rewards and interest rates were the two most frequently-cited features in response to the open-ended questions, they were sixth and fifth out of nine responses to the closed-ended questions, respectively. Dispute resolution, described as “[t]he method for resolving disputes with the bank when customer service won’t fix a problem,” was again the least cited respondent concern in the closed-ended questions (identified by 31.0% of respondents).<sup>36</sup> This contrast to the open-ended queries (where no respondent mentioned dispute resolution) may be in part due to acquiescence response bias.<sup>37</sup>

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<sup>36</sup> In order to put the factors identified by respondents into better context, we read each respondent back a list of the features that he had identified as playing a role in his decision to acquire a credit card. We then asked the respondent to identify each such factor as being “very important,” “important,” or “not very important.” This exercise, however, did not reveal a meaningful distinction across the different product features, as respondents frequently asserted that all of their concerns were “very important.”

<sup>37</sup> Acquiescence response bias is “the tendency for survey respondents to agree with statements regardless of their content” and is particularly problematic with “agree-disagree” questions. Paul J. Lavrakas, *Encyclopedia of Survey Research Methods* (2008), available at <http://www.srmo.sagepub.com/view/encyclopedia-of-survey-research-methods/n3.xml> (last visited Mar. 6, 2015).

### 3.4.2 Willingness to invoke dispute resolution and default assumptions about dispute resolution rights

After exploring respondents' card acquisition decisions, we then asked a series of questions that probed respondents' default assumptions about their dispute resolution rights regarding the credit card they use most frequently.<sup>38</sup>

#### Respondents' willingness to sue credit card issuers or file claims against them in arbitration

We began our inquiry of default assumptions by exploring whether respondents would even consider starting a formal dispute resolution proceeding (*e.g.*, litigation, arbitration, or small claims court case) against their credit card issuer after exhausting their informal dispute resolution processes, such as calling 1-800 customer service hotlines.

Accordingly, we asked all 1,007 respondent credit card holders to consider the following scenario:

*I am going to describe a situation to you, and then ask how you would respond to that situation. Imagine that you looked at your credit card statement and noticed that your credit card company had been charging you a fee for a service relating to your account that you are sure you did not sign up for. They may have been charging you this fee for a while now. You called the customer service line, but the credit card company refused to do anything about the fees.<sup>39</sup>*

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<sup>38</sup> Although our card acquisition data omitted respondents that did not participate in the acquisition of their primary credit card, data relating to such respondents are included in our discussion of default assumptions.

<sup>39</sup> Given the length of the proposed scenario, we asked each respondent "Do you understand the situation" before moving to our query. Only seven respondents asked for the scenario to be repeated, after which they responded that they understood the situation.

We then asked the respondent an open-ended question:

*What would you do next in this situation?*

After the respondent stopped listing his answers, the survey administrators were instructed to ask *“Would you do anything else?”* and then continue probing until no other actions were stated.

We coded answers for any indication that respondents would either (1) seek legal counsel (*e.g.*, *“I would send a certify [sic] letter to them and a lawyer,” “probably call lawyer and have him handle it”*) or (2) initiate formal dispute resolution proceedings on their own (*e.g.*, *“I would probably sue them,” “I would cancel the card and ask for arbitration”*). In addition to those two categories, respondents’ responses generally fell into six categories, which were not necessarily mutually exclusive in the case of compound answers:

- Continuing the discussion with the customer service line, via phone or letter (*e.g.*, *“keep pursuing the situation,” “call customer service”*);
- Escalating the complaint to a manager/going to the bank in-person (*e.g.*, *“write a letter to CEO,” “go to someone higher up”*);
- Cancelling the card and/or changing to a new credit card (*e.g.*, *“probably close my account . . . , “leave the company immediately and go to another company”*);
- Obtaining more information about the proceedings or seeking assistance from non-lawyers (*e.g.*, *“I would have my husband call,” “call my daughter and have her take care of it”*);
- Accepting responsibility for the fee or otherwise take no action (*e.g.*, *“I’d just take care of it and continue using the card,” “do nothing cause don’t know where to go”*); and
- Referring the matter to a consumer protection organization or government agency (*e.g.*, *“call the state attorney,” “contact federal trade commission and any [sic] FDIC”*).



Respondents' most common response to the situation was to cancel the card (57.2%).<sup>40</sup> While 9.9% of respondents stated that they would refer the issue to a government agency, only 1.4% of respondents stated that they would seek legal advice or sue using an attorney. Similarly, only 0.7% of respondents mentioned initiating legal proceedings without mention of an attorney. As a basis of comparison, 1.7% of consumers stated that they would either accept responsibility for the fee or otherwise take no action.

### 3.4.3 Respondents' default assumptions regarding the ability to seek relief in court

To explore their default assumptions, we asked respondents another hypothetical question. Directing respondents' attention to the bank or credit union to which the respondent makes payment on the credit card used most often for personal use, we asked, "If the bank were to act in a way that you believed violated the law, would you have the right to sue this bank in court, meaning that you are asking for a judge or jury to decide your claim?" Overall 41.6% answered this question in the affirmative, 6.2% in the negative, and 51.7% did not know.

One benefit of focusing the survey on credit card products is that, by identifying respondents' credit card issuers, we were able to determine whether the issuer's most recent credit card agreement (which likely governs the respondents' current relationship with the issuer) contains a pre-dispute arbitration clause.

570 of the respondents (56.6%) that completed the survey identified their credit card issuers clearly enough that we were able to determine whether the issuer incorporated a pre-dispute arbitration clause in its current consumer agreement.<sup>41</sup> 46.7% of those respondents identified issuers that we later determined use pre-dispute arbitration clauses in their 2013 agreements. The remaining 53.3% of the respondents identified issuers that we later determined do not use pre-dispute arbitration clauses. This breakdown is roughly consistent with our findings about the prevalence of credit card arbitration clauses in the agreements that we sampled in Section

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<sup>40</sup> Nine hundred and eighty-two respondents provided at least one response to the situation.

<sup>41</sup> The other respondents either did not answer the question or provided a response that we were unable to trace back to an issuer, for example "Visa," "Mastercard," or "Credit union."

2.3.1, where we find that 53.0% of credit card loans outstanding *did* use arbitration clauses in their credit card contracts.

As shown below in Table 1, we found that when we asked respondents if they could sue their credit card issuers in court, respondents’ default assumptions about their dispute resolution rights were similar, regardless of whether their card was in fact subject to a pre-dispute arbitration clause.

**TABLE 1:** “CAN YOU SUE YOUR CREDIT CARD ISSUER IN COURT?”<sup>42</sup>

	Don't know	Yes	No
All 570 respondents for whom we can determine whether their agreements use pre-dispute arbitration clauses	50.9%	41.3%	7.3%
Agreement includes pre-dispute arbitration clause (280 respondents)	54.4%	38.6%	6.8%
Agreement does not include pre-dispute arbitration clause (290 respondents)	47.8%	43.7%	7.7%

In each subcategory, the percentage of respondents who expressed that they did not know if they could sue their credit card issuer in court was statistically similar, given the size of our sample — 47.8% compared to 54.4%.

Likewise, the percentage of respondents who answered that they could sue was similar. 43.7% of respondents whose agreements did not include arbitration provisions responded that they could sue their issuers in court. 38.6% of respondents whose agreements *did* include arbitration provisions also responded that they could sue. The two figures were within 5.1% of each other.

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<sup>42</sup> Totals may not add to 100% because consumers could decline to answer the question.

Similarly, for respondents who answered “no,” that they could not sue their credit card issuers in court, the relevant percentages differed by just 0.9%.

## Were the respondents who answered that they could sue their issuers in court correct?

In order to assess whether the respondents who answered that they could sue despite being covered by a pre-dispute arbitration clause were correct, we asked three additional questions.

First, all respondents who indicated that they believed they could sue in court were asked whether they could sue “in small claims court, in ‘regular court’ or either?” We identified 16 respondents who indicated that they could sue in small claims court and whose agreement contained an arbitration provision. Given the prevalence of “small claims carve-outs” (*see* Section 2.5.2), we treated all 16 respondents as having correctly assessed their ability to sue.

Second, we asked the respondents who indicated that they could sue in court whether “the bank could require that someone outside of court decide the case even if you wanted to stay in court and have a judge or jury decide the case?” Twenty respondents covered by pre-dispute arbitration clauses answered that question in the affirmative. We asked those 20 respondents a follow-up question: “Why could the bank require you to have someone outside of court decide the case?” Seven respondents’ answers referenced their contract with the issuer or even arbitration specifically.<sup>43</sup> We treated those respondents as having correctly assessed their ability to sue.

Finally, we asked all respondents who indicated that their agreement contained an arbitration clause whether they were given an opportunity to opt out of that clause. Three stated that they had. But, when subsequently asked if they did opt out of arbitration requirements, each of the

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<sup>43</sup> For example, respondents stated “if that’s the agreement,” “**may be in the contract . . .**,” and “because they create **their terms . . .**” In contrast, we did not treat respondents as having correctly assessed their ability to sue if they provided an answer that was unrelated to their contractual agreement, for example: “I don’t know I’m not sure” or “Fairness”.

three stated that they did not opt out. (When we checked the terms of the relevant credit card agreements, none of the three arbitration clauses featured opt-out provisions, as of 2013.)<sup>44</sup>

With these caveats in mind and after accounting for demographic weighting, when a respondent's credit card agreement included a pre-dispute arbitration clause, and a respondent answered that he could sue in court (the 38.6% figure in Table 1), he was wrong at least 79.8% of the time.

## Respondents' specific awareness of pre-dispute arbitration clauses

Finally, where our prior questions — including the questions about the right to sue — avoided the use of the words “arbitration” and “class action litigation,” we ended the survey by explicitly asking respondents if they had ever heard of arbitration as a way of resolving disputes and whether they understood what it meant to participate in an arbitration proceeding. Some 78.1% of our 1,007 respondents stated that they recognized arbitration as a way of resolving disputes. Of those who did, when asked what it meant to participate in arbitration, only 21.4% referenced a third party that *decided* the dispute (as opposed to helping the parties negotiate an outcome).<sup>45</sup>

We asked the 816 respondents that had responded in the affirmative:

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<sup>44</sup> One other individual had a contractual agreement whose current version contained an opt-out provision and recalled being offered an opportunity to opt out. He did not opt out. He had not been included in the group of three, **because he had been “filtered out” at the prior query:** He indicated that the bank could, indeed, require that someone outside the court decide his case. Eighteen other people recalled being offered an opportunity to opt out, but — for the respondents whose credit card agreements we could identify — none of their 2013 agreements actually contained opt-out provisions. In fact, four of the agreements did not even contain pre-dispute arbitration provisions. (This, of course, does not preclude the possibility that earlier versions of their agreements did actually contain arbitration provisions and opt-out clauses.) Our opt-out query (Question 14.2) was a nested question, that was asked of (1) people who indicated that they had heard of arbitration as a way of resolving disputes (Question 13) and (2) believed that their account agreement included an arbitration requirement (Question 14).

<sup>45</sup> 11.8% stated that they did not know or refused to answer the question.

*Think again of the credit card that you use most frequently. Does your account agreement for this credit card include any requirements related to arbitration? Would you say yes, no, or I don't know?*

Of these 816 respondents, we were able to determine, for 463 respondents, whether the agreement relating to their primary credit card included a pre-dispute arbitration clause. Consumers' answers did not materially vary regardless of whether their credit card agreements included arbitration clauses or not.

As shown below in Table 2, of the 230 respondents who both had agreements including arbitration clauses and also recognized arbitration as a way of resolving disputes, over three-fourths stated that they did not know whether their card issuers used pre-dispute arbitration clauses (78.8%).

18.4% of the 230 correctly stated that their agreements included arbitration clauses. Conversely, of the 233 consumers whose agreements did not have arbitration clauses (but who recognized arbitration as a way of resolving disputes), more than one in five (21.1%) erroneously stated that their agreements included an arbitration clause.

Only 2.1% of the 233 respondents answered correctly that their cards were not subject to pre-dispute arbitration clauses.<sup>46</sup>

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<sup>46</sup> We looked to see if the consumers that correctly identified whether the credit card contracts had pre-dispute arbitration clauses benefited from prior experience in arbitration (or the experience of a spouse, close friends, or family). We found that people whose contracts included arbitration provisions stated that they had arbitration provisions in their contracts when they self-reported that family or friends had previously participated in arbitration proceedings 28.1% of the time; when they did not report such familiarity in their social circles, they stated that they had such clauses 17.4% of the time.

We found that people whose contracts did **not** include arbitration provisions stated that their contracts did have such requirements when they self-reported that family or friends had previous arbitration experience 20.2% of the time. When they do not report having family or friends with such experience, they stated that they have arbitration clauses 25.2% of the time.

**TABLE 2:** “DOES YOUR ACCOUNT AGREEMENT FOR THIS CREDIT CARD INCLUDE ANY REQUIREMENTS RELATED TO ARBITRATION?”<sup>47</sup>

	Don't know	Yes	No
All respondents who recognized arbitration as a form of dispute resolution (816 respondents)	75.9%	20.1%	3.9%
Subset of those respondents, whose agreements require pre-dispute arbitration (230 respondents)	78.8%	18.4%	2.8%
Does not require pre-dispute arbitration (233 respondents)	76.8%	21.1%	2.1%

## Respondents' awareness regarding participation in class action litigation

We also asked respondents if they had ever heard of class action lawsuits — 83.2% of respondents said that they had.<sup>48</sup>

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<sup>47</sup> Totals may not add to 100% because consumers could decline to answer the question.

The 175 respondents that described arbitration as relating to a **third party “decider” of claims** (as opposed to a mediator), were, across the board, about as likely to state that their credit card agreement included an arbitration-related requirement regardless of whether or not they had an arbitration provision or not.

In that regard, they responded in the affirmative 29.0% of the time (1.0% did not think they had such agreements; and 70.0% **responded** “I don’t know”).

Of those 175 respondents, 52 used credit cards that we identified as using arbitration provisions. Those 52 consumers correctly identified their card agreements as having pre-dispute arbitration requirements 25.9% of the time (0.9% stated that they did not have such agreements; 73.2% **responded** “I don’t know”).

In contrast, when we focused on the 50 of the 175 respondents that used credit cards that did **not** use arbitration provisions, 28.9% responded that their credit card agreements did have pre-dispute arbitration provisions; 0.6% stated that they did not; and 70.5% did not know.

<sup>48</sup> We later asked the 859 respondents, “*What does it mean to participate in class action lawsuits?*” Some 102 respondents stated that they did not know; another five refused to answer the question. Of the remaining 752, 505 responded in a way that mentioned a group of other plaintiffs — for example, bringing or joining a lawsuit or participating in a settlement.

Of those 859 respondents, we asked:

*Do you have the right to participate in class action lawsuits against the bank to whom you make your credit card payments? Would you say yes, no, or I don't know.*

This time we were able to determine whether their primary credit card agreement included pre-dispute arbitration clauses for 489 of the 859 respondents. Again, consumers' answers did not materially vary regardless of whether their credit card agreements included arbitration clauses or not.

As shown below in Table 3, more than half (56.7%) of those respondents whose agreements also included pre-dispute arbitration clauses stated that they had the right to participate in class action proceedings against their issuer.<sup>49</sup> Since arbitration clauses generally extinguish the consumer's ability to participate in class lawsuits in court, the consumers in the first subgroup (*i.e.*, those who were covered by an arbitration clause and believed they could participate in class litigation) were largely mistaken.

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<sup>49</sup> While four recalled being offered an opportunity to opt out of an arbitration provision, all four stated that they did not opt out. (Three of the four respondents' credit card agreements did not feature opt-out provisions, as of 2013.)

**TABLE 3:** “CAN YOU PARTICIPATE IN A CLASS ACTION LAWSUIT?”<sup>50</sup>

	Don't know	Yes	No
All respondents who provided a description of class action participation (859 respondents) <sup>51</sup>	38.0%	60.7%	1.3%
Subset of those respondents, whose agreements require pre-dispute arbitration (243 respondents)	41.3%	56.7%	1.8%
Subset of those respondents, whose agreements did not require pre-dispute arbitration (246 respondents)	36.5%	63.3%	0.2%

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<sup>50</sup> Totals may not add to 100% because consumers could decline to answer the question.

<sup>51</sup> The 505 respondents that provided descriptive definitions of class action disputes, referenced in n.48, had a greater probability of assuming that they could join a class action (68.2%, compared to 30.7% who did not know and 1.1% who thought that they could not).

Of those 505 respondents, 144 respondents' credit card issuers used pre-dispute arbitration provisions. The percentage of respondents who thought that they could join a class action was comparable to the populations described in Table 3 (62.9%, compared to 34.8% who did not know and 2.3% who thought they could not). Another 153 respondents' credit card issuers did *not* use pre-dispute arbitration provisions. (71.2% of those respondents thought they could join a class action; 28.6% did not know; and 0.2% did not believe they could join a class action.)



# Section 4

How do arbitration procedures currently differ from procedures in court?



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# Introduction

This section provides a general comparison of some of the procedures that apply to dispute resolution in court and in arbitration, as they currently exist. It describes the procedures in court litigation as reflected in the current Federal Rules of Civil Procedure<sup>1</sup> and in Philadelphia Municipal Court Rules of Civil Practice (as an example of a small claims court process).<sup>2</sup> It then compares those procedures to arbitration procedures as set out in the current rules governing consumer arbitrations administered by the two leading arbitration administrators in the United States, the American Arbitration Association (“AAA”) and JAMS, Inc. (“JAMS”).<sup>3</sup> As discussed later, our review of arbitration agreements and our comparison of AAA data with public reports from JAMS indicate that most consumer financial arbitration disputes are administered by AAA, although of course that might change in the future.

## What specific sets of rules are we comparing?

Consumer financial arbitration agreements typically specify an arbitration administrator (or administrators, if the agreement provides a choice).<sup>4</sup> By specifying the arbitration administrator,

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<sup>1</sup> A number of state rules of civil procedure are modeled on the Federal Rules. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1367–69 (1986).

<sup>2</sup> Philadelphia Municipal Court hears civil cases in which the amount claimed “does not exceed \$12,000.” 42 Pa. Cons. Stat. Ann. § 1123(a)(4) (West). Caps on claim amounts in small claims courts vary across the country. *See* Nat’l Ctr. for State Courts, State Court Structure Charts, [http://www.courtstatistics.org/other-pages/state\\_court\\_structure\\_charts.aspx](http://www.courtstatistics.org/other-pages/state_court_structure_charts.aspx) (last visited Mar. 6, 2015). Small claims court procedures likewise vary across the country, and we make no claim that the Philadelphia Municipal Court rules necessarily are representative. We use them because we report detailed case data from that court in our discussion of the use of small claims courts by consumers and covered persons, described in Section 7. For general but dated descriptions of procedures in small claims courts, *see, e.g.*, John C. Ruhnka & Steven Weller, *Small Claims Courts: A National Examination 2-3* (Nat’l Ctr. for State Courts 1978); Josephine Y. King, *Small Claims Practice in the United States*, 52 St. John’s L. Rev. 42 (1977).

<sup>3</sup> A third arbitration administrator, the National Arbitration Forum, ceased administering consumer arbitrations as part of a settlement of a consumer fraud action brought against it by the Minnesota Attorney General. Consent Judgment, *Minnesota v. National Arbitration Forum, Inc.*, No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009), *available at* <http://pubcit.typepad.com/files/nafconsentdecree.pdf> (last visited Mar. 6, 2015). Other smaller administrators are occasionally specified in consumer financial services arbitration clauses. *See* Section 2.5.3, Table 5.

<sup>4</sup> *See* Section 2.5.3.

the agreement establishes a set of default rules that will apply in a subsequent arbitration dispute. An arbitration agreement can specify changes to those default rules — but any such changes generally must meet minimum standards of procedural fairness or the parties run the risk that an administrator would refuse to accept the dispute.<sup>5</sup> In that regard, both the AAA and JAMS have adopted due process protocols that set out minimum standards of procedural fairness to be followed in the consumer arbitrations they administer.<sup>6</sup> The protocols contain similar (although not identical) standards, addressing issues such as the independence and impartiality of arbitrators, the costs of the arbitration process, the location of the hearing, and the extent of discovery.<sup>7</sup>

The description of the arbitration process that follows is based on the default process described in the AAA and JAMS rules. For most of the time period studied in this report, consumer arbitrations before the AAA were governed by the AAA’s Supplementary Procedures for Consumer-Related Disputes, which supplemented the AAA’s Commercial Dispute Resolution Procedures in consumer cases.<sup>8</sup> Effective September 1, 2014, the AAA promulgated new, all-

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<sup>5</sup> American Arbitration Association, Consumer Arbitration Rules, Rule R-1(d) (effective Sept. 1, 2014) (“AAA Consumer Rules”) (“The AAA will accept cases after the AAA reviews the parties’ arbitration agreement and if the AAA determines the agreement substantially and materially complies with the due process standards of these Rules and the *Consumer Due Process Protocol*.”); JAMS, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness, preamble (effective July 15, 2009) (“JAMS Minimum Standards”) (“JAMS will administer arbitrations pursuant to mandatory pre-dispute arbitration clauses between companies and consumers only if the contract arbitration clause and specified arbitration rules comply with the following minimum standards of fairness.”).

<sup>6</sup> Nat’l Consumer Disputes Advisory Comm., Consumer Due Process Protocol (Apr. 17, 1998) (“AAA Consumer Due Process Protocol”); JAMS Minimum Standards; *see also* Nat’l Task Force on the Arbitration of Consumer Debt Collection Disputes, Consumer Debt Collection Due Process Protocol (Oct. 2010).

<sup>7</sup> *See* Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 Tenn. L. Rev. 289, 305–06 (2012) (“describ[ing] key features the protocols have in common and highlight[ing] some important differences”).

<sup>8</sup> American Arbitration Association, Supplementary Procedures for Consumer-Related Disputes (effective Sept. 15, 2005) (“AAA Supplementary Consumer Procedures”); American Arbitration Association, Commercial Arbitration Rules (effective Oct. 1, 2013) (“AAA Commercial Rules”).

The Supplementary Consumer Procedures applied:

*Whenever the [AAA] or its rules are used in an agreement between a consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and*

inclusive Consumer Arbitration Rules.<sup>9</sup> Several features of the new AAA Consumer Rules will be noted in the discussion that follows.<sup>10</sup>

The JAMS rules most likely to be used in administering consumer arbitrations are the JAMS Streamlined Arbitration Rules and Procedures.<sup>11</sup> The JAMS Streamlined Rules “govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties have agreed to use these Rules or, in the absence of such agreement, no disputed claim or counterclaim exceeds \$250,000.”<sup>12</sup>

Court procedures also follow default rules that can be changed by parties’ contracts in certain circumstances. For example, the contract may state that the parties waive the availability of a jury trial.<sup>13</sup> Like the description of the arbitration process that follows, the description of court litigation also is based on the default procedures.

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*conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use.*

AAA Supplementary Consumer Procedures, Rule C-1(a). The Rules further specified that “[t]he AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator.” *Id.*

<sup>9</sup> See AAA Consumer Rules; *see id.* Rule R-1 (defining when rules apply).

<sup>10</sup> The AAA has in place a moratorium on consumer debt collection arbitrations, under which it refuses to administer arbitrations under “consumer debt collection programs or bulk filings and individual case filings in which the company is the filing party and the consumer has not agreed to arbitrate at the time of the dispute, and the case involves a credit card bill, a telecom bill or a consumer finance matter.” Am. Arb. Ass’n, Notice on Consumer Debt Collection Arbitrations, [https://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTAGE2017016&RevisionSelectionMethod=LatestReleased](https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2017016&RevisionSelectionMethod=LatestReleased) (last visited Mar. 6, 2015). The AAA will administer debt collection arbitrations on the basis of a post-dispute submission agreement, in response to a court order, or if filed by the consumer. *Id.*

<sup>11</sup> JAMS, JAMS Streamlined Arbitration Rules & Procedures (effective July 15, 2009) (“JAMS Streamlined Arbitration Rules”). Effective July 1, 2014, JAMS has promulgated new Streamlined Rules. *See* JAMS, JAMS Streamlined Arbitration Rules & Procedures.

<sup>12</sup> JAMS Streamlined Arbitration Rules, Rule 1(a).

<sup>13</sup> Given that disputes would be in court, rather than arbitration, the enforceability of such procedural provisions is not governed by the Federal Arbitration Act, but rather by other law. While Section 2 of this report does not comprehensively catalogue the incidence of provisions in consumer financial services contracts that purport to alter

As a practical matter, the adoption of a pre-dispute arbitration clause often does not preclude parties from proceeding in small claims court. A number of arbitration clauses, as well as the AAA and JAMS due process protocols, preserve to the parties the right to have any dispute resolved in small claims court provided, of course, the dispute meets the definition of “small claims” in the applicable court.<sup>14</sup> Accordingly, our comparison of small claims court rules to arbitration rules should not be read to suggest that an arbitration clause necessarily precludes the parties from going to small claims court. Instead, the comparison is simply to provide a frame of reference for understanding how procedures in court and in arbitration are alike, or are different.

Our rules comparison is subject to a number of limitations. Because we focus on the JAMS and AAA consumer arbitration rules, we have not considered rules of other smaller arbitration administrators.<sup>15</sup> In addition, our rules comparison represents a snapshot based on the current rules in the different fora. The processes by which rules change, however, are obviously different for arbitration administrators and for each court system. Generally, arbitration administrators develop rule changes internally, with changes becoming effective after a notice period.<sup>16</sup> Federal court rules are developed and revised through a more public process, governed by the Rules Enabling Act.<sup>17</sup> State court rules are developed under similar public processes.<sup>18</sup> Given the

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court procedures by contract, it does provide data on some such provisions. *See also* David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. Ill. L. Rev. 389, 419–20, 429 (2014) (“There are literally only a handful of contracts, and cases, in which parties expect the court to impose their own private procedural rules.”).

<sup>14</sup> *See* Sections 2.5.2 and Section 7.

<sup>15</sup> *See, e.g.*, 2013 Preliminary Results at 34 n.85.

<sup>16</sup> While an arbitration administrator’s rulemaking process is internal, it is often consultative, with the administrator consulting various experts and interest groups in the process of developing and revising its rules. *See, e.g.*, Drahozal & Zyontz, *supra*, at 301–04. Of course, in its internal processes, an arbitration administrator also may respond to changes in the law, including court decisions and statutes. *See, e.g.*, American Arbitration Association, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003) (“AAA Class Arbitration Rules”) (adopted after U.S. Supreme Court’s decision in *Green Tree Fin’l Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion)); AAA Consumer Rules, “Costs of Arbitration,” at n.\* (incorporating Cal. Civ. Proc. Code § 1284.3 provision on fee waivers into AAA rules).

<sup>17</sup> Under the Rules Enabling Act, the Supreme Court and all courts established by Congress have the authority to prescribe rules of practice consistent with Acts of Congress, and rules of practice and procedure prescribed by the Supreme Court. 28 U.S.C. § 2071 *et seq.* The Supreme Court has delegated oversight of the rulemaking process to committees of the Judicial Conference of the United States. *See How the Rulemaking Process Works*,

different procedures for their development and revision, procedural rules in the different fora may change in different ways over time.<sup>19</sup>

Moreover, our rules comparison does not account for any differences in how rules might be applied across different fora. Because arbitration administrators have their own procedural rules, there is no requirement that arbitrators apply procedural precedent established by courts. Individual arbitrators may choose to be guided by court precedent (looking to procedurally similar rules), but there is no legal requirement to that effect. Furthermore, decisions interpreting procedural rules in arbitration typically are not publicly available, whereas decisions in court typically are publicly available and can therefore be used as precedence for subsequent interpretation of court rules.<sup>20</sup>

## 4.1 General comparison of arbitration rules and court rules

Arbitration is commonly described as a less complex and less formal process than court litigation.<sup>21</sup> One possible, though obviously incomplete, way to measure that complexity is simply to count the number and length of the rules governing the process. More and lengthier

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www.uscourts.gov, <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works.aspx> (last visited Mar. 6, 2015). Those committees publish contemplated amendments for comment from the bench, bar, and general public, and possible transmission to a separate Standing Committee, which, in turn, recommends any changes to the Supreme Court. If the Supreme Court concurs in the recommendation, it promulgates the revised rules. *Id.*

<sup>18</sup> For example, in Pennsylvania, rules and revisions are published for public comment before being submitted to or adopted by the Supreme Court, which has general rulemaking authority for Pennsylvania courts. *See* 42 Pa. Cons. Stat. Ann. § 1722; *see also* Pa.R.J.A. No. 103.

<sup>19</sup> It is possible, for example, that another existing or future arbitration administrator may adopt rules that vary from those of JAMS or the AAA or vary from, or lack an analog in, litigation procedural rules.

<sup>20</sup> While some non-precedential court orders or opinions may be “unpublished,” and thus not available for citation, courts typically do publish opinions of general precedential value that may be relied upon in interpreting their rules.

<sup>21</sup> *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (describing “informality” as “the principal advantage of arbitration”); *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008) (stating that “[a] prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results’”) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985)).

rules may indicate a more complex dispute resolution process; fewer and shorter rules may indicate a simpler dispute resolution process. An alternative interpretation is that more and lengthier rules indicate a process in which the decisionmaker has less discretion, while fewer and shorter rules indicate a process in which the decisionmaker has more discretion.

The new AAA Consumer Arbitration Rules comprise 55 rules, with an additional four rules covering document-only arbitrations.<sup>22</sup> The AAA Consumer Arbitration Rules are 10,560 words in length. The AAA's Supplementary Consumer Procedures were much shorter (only eight rules) but were not a complete set of arbitration rules. They supplemented the AAA's Commercial Arbitration Rules for consumer-related disputes. The JAMS Streamlined Arbitration Rules consist of 28 rules that are 7,236 words in length. In some respects, of course, the applicable arbitration clause functions as an additional source of controlling rules, adding an average of from two dozen to nearly 3,000 words, depending on the type of contract.<sup>23</sup> By comparison, the Federal Rules of Civil Procedure consist of 93 rules and 42,148 words. Excluding Federal Rule 23 (dealing with class actions) because the AAA Consumer Rules do not address class arbitrations leaves 92 rules and 40,191 words. Note that this total does not include either the Federal Rules of Evidence (arbitration typically is not subject to evidence rules) or local federal court rules.

The Philadelphia Municipal Court Rules are much more like the arbitration rules than are the Federal Rules of Civil Procedure. The Philadelphia Municipal Court Rules comprise 38 rules (a number of which deal with specific types of cases like landlord-tenant disputes) and total 9,649 words.

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<sup>22</sup> *See* AAA Supplementary Consumer Procedures, Rule C-1(a).

<sup>23</sup> *See* Section 2.4.



## 4.2 Filing a claim

To begin a case in court, a party files a complaint setting forth, among other things, “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>24</sup> A plaintiff (the party filing the complaint) in federal court must “plead facts sufficient to show that her claim has substantive plausibility.”<sup>25</sup> In addition, the plaintiff generally must pay a filing fee (see below) and serve the complaint on the opposing party (the defendant).<sup>26</sup> The defendant then has the opportunity to file an answer and assert counterclaims.<sup>27</sup> If the defendant fails to answer, the clerk of the court will enter the defendant’s default, and either the clerk or the court (depending on the circumstances) can enter a default judgment against the defendant.<sup>28</sup>

To begin a case in arbitration before the AAA, the claimant (the party asserting a claim) files a “demand” for arbitration.<sup>29</sup> Under the AAA Consumer Rules, the demand must:

- Briefly explain the dispute;
- List the names and addresses of the consumer and the business, and, if known, the names of any representatives of the consumer and the business;
- Specify the amount of money in dispute if applicable;
- Identify the requested location for the hearing if an in-person hearing is requested; and

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<sup>24</sup> Fed. R. Civ. P. Rule 8(a)(2); *see also* Phil. Co. M.C.R. Civ. P. No. 106(a), 109(a)(3) (2012) (“A brief, concise statement of the relevant and admissible facts, occurrences and transactions upon which the claim is based and damages sustained, including relevant times, dates and places.”)

<sup>25</sup> *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This standard “do[es] not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.” *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 346 (Nov. 10, 2014) (*per curiam*).

<sup>26</sup> Fed. R. Civ. P. 4; Phil. Co. M.C.R. Civ. P. No. 111 (2012).

<sup>27</sup> Fed. R. Civ. P. 7; Phil. Co. M.C.R. Civ. P. No. 114 (“Notice of Defense”), 115 (counterclaims) (2012).

<sup>28</sup> Fed. R. Civ. P. 55(a) & (b); Phil. Co. M.C.R. Civ. P. No. 120(b) (2012).

<sup>29</sup> AAA Consumer Rules, Rule R-2(a)(1); AAA Supplementary Consumer Procedures, Rule C-2(a). For the procedures governing the commencement of a JAMS arbitration, *see* JAMS Streamlined Arbitration Rules, Rule 5.

- State what the claimant wants.<sup>30</sup>

With the demand, the claimant must submit a copy of the pre-dispute arbitration agreement,<sup>31</sup> or else both parties must agree post-dispute to submit their claim to arbitration.<sup>32</sup> Non-parties to the arbitration agreement can only be added to the proceeding when bound to arbitrate under theories such as agency, assumption, veil piercing, and estoppel.<sup>33</sup>

The claimant also must pay a filing fee and notify the opposing party (the respondent). The respondent has the opportunity to file an answer and assert counterclaims.<sup>34</sup> If the respondent does not file an answer, the claimant's allegations are deemed denied by the respondent.<sup>35</sup> The arbitration may proceed even if a party does not participate, although the participating party must pay the non-participating party's applicable fees for the dispute to proceed in arbitration. The AAA Consumer Rules provide that "[a]n award cannot be made only because of the default of a party" and that the arbitrator shall require the participating party "to submit the evidence needed by the arbitrator to make an award."<sup>36</sup>

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<sup>30</sup> AAA Consumer Rules, Rule R-2(a)(1); AAA Supplementary Consumer Procedures, Rule C-2(a); JAMS Streamlined Arbitration Rules, Rule 7 (requiring claimant to submit to JAMS and the other parties a "notice of its claim and remedies sought").

<sup>31</sup> AAA Consumer Rules, Rule R-2(a)(2); AAA Supplementary Consumer Procedures, Rule C-2(a); JAMS Streamlined Arbitration Rules, Rule 5(a)(i).

<sup>32</sup> AAA Consumer Rules, Rule R-3; AAA Supplementary Consumer Procedures, Rule C-3; JAMS Streamlined Arbitration Rules, Rule 5(a)(ii). The AAA Consumer Rules state that parties must enter into a submission agreement "[i]f the consumer and business do not have an arbitration agreement or their arbitration agreement does not name the AAA." AAA Consumer Rules, Rule R-3. In addition, the AAA's debt collection moratorium provides that the AAA will administer a debt collection arbitration if filed pursuant to a submission agreement.

<sup>33</sup> *See, e.g.*, Thomson-CSF, S.A. v. Am. Arb. Ass'n, 64 F.3d 773 (2d Cir. 1995).

<sup>34</sup> AAA Consumer Rules, Rule R-2(c) & (d); AAA Supplementary Consumer Procedures, Rule C-2(c); JAMS Streamlined Arbitration Rules, Rule 7(c).

<sup>35</sup> AAA Consumer Rules, Rule R-2(e); AAA Supplementary Consumer Procedures, Rule C-2(d); JAMS Streamlined Arbitration Rules, Rule 7(e).

<sup>36</sup> AAA Consumer Rules, Rule R-39; AAA Commercial Rules, Rule R-31; JAMS Streamlined Arbitration Rules, Rule 5(c).

## 4.3 Fees

The fee for filing a case in federal court is \$350 plus a \$50 administrative fee, paid by the party filing suit, regardless of the amount being sought.<sup>37</sup> The fee for a small claims filing in Philadelphia Municipal Court ranges from \$63 to \$112.<sup>38</sup> Filing fees in other courts vary.<sup>39</sup> An indigent plaintiff can seek to have the court waive the required filing fees.<sup>40</sup> Courts typically do not charge fees for hearings. They may, however, require the losing party to pay court costs (not including attorneys' fees) after the case is resolved.<sup>41</sup>

The fees in arbitration — which comprise both fees paid to the administrator and fees paid to the arbitrator — vary depending on the governing arbitration rules.<sup>42</sup> Under the AAA consumer fee schedule in force prior to March 1, 2013, the consumer paid \$125 for claims under \$10,000 and \$375 for claims between \$10,000 and \$75,000.<sup>43</sup> The consumer's payment was a deposit to cover the consumer's share of the arbitrator's fee; none of the payment was for administrative

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<sup>37</sup> 28 U.S.C. § 1914(a) (1948), District Court Miscellaneous Fee Schedule, effective Dec. 1, 2014, *available at* <http://www.uscourts.gov/FormsAndFees/Fees/DistrictCourtMiscellaneousFeeSchedule.aspx> (last visited Mar. 6, 2015).

<sup>38</sup> First Judicial District of Pennsylvania, Office of Judicial Records Fee Schedule: Municipal Court (effective Aug. 8, 2014), <http://www.courts.phila.gov/pdf/mcfees.pdf> (last visited Mar. 6, 2015).

<sup>39</sup> Nat'l Ctr. for State Courts, Civil Filing Fees in State Trial Courts, April 2012, <http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Civil%20Filing%20Fees%20April%202012.ashx> (last visited Mar. 6, 2015) (noting that filing fees in some states vary depending on the amount of the claim and that some states charge fees to defendants for filing answers).

<sup>40</sup> 28 U.S.C. § 1915(a).

<sup>41</sup> Fed. R. Civ. P. Rule 54(d)(1) (“Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorneys’ fees — should be allowed to the prevailing party.”); Phil. M.C.R. Civ. P. No. 130; *see also* 28 U.S.C. § 1920 (listing items that “any court of the United States may tax as costs”).

<sup>42</sup> In addition, arbitration clauses in consumer financial services contracts often include detailed provisions addressing the allocation of arbitration costs. *See* Sections 2.5.10 and 5.7.5 (discussing contractual provisions regarding fee allocations and the reallocation of fees in AAA arbitrator awards, respectively).

<sup>43</sup> *See* AAA Supplementary Consumer Procedures, Rule C-8 & “Fees and Deposits to be Paid by the Consumer” (fee schedule effective Jan. 1, 2010).

fees.<sup>44</sup> The company paid all administrative fees and the remaining deposit for arbitrator fees.<sup>45</sup> For claims over \$75,000, the fees were governed by the fee schedule in the AAA’s Commercial Arbitration Rules.<sup>46</sup> The arbitrator had discretion to reallocate administrative or arbitrator fees in the award, as he or she deemed appropriate.<sup>47</sup> (We review data in Section 5.7.5 with respect to the frequency with which arbitrators did so in consumer financial arbitration cases over a two-year period for which we have data.)

Under the AAA consumer fee schedule effective March 1, 2013, and currently in force, the consumer pays a \$200 administrative fee, regardless of the amount of the claim and regardless of the party that filed the claim.<sup>48</sup> The company pays the remaining fees.<sup>49</sup> The arbitrator can only reallocate the arbitration fees in the award if required by applicable law or if the claim “was filed for purposes of harassment or is patently frivolous.”<sup>50</sup>

Under either AAA fee schedule, the consumer can apply for a hardship waiver of otherwise applicable administrative fees.<sup>51</sup>

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<sup>44</sup> The consumer could request an arbitrator willing to serve *pro bono*, although the rules did not guarantee that one would be provided. *Id.*

<sup>45</sup> For a more detailed description of the fees paid by the company, *see* the 2013 Preliminary Results at 111–14; *see also* AAA Consumer Rules, “Introduction,” at 7 (“Arbitrators are paid for the time they spend resolving disputes. The business makes deposits as outlined in the fee schedule in the Costs of Arbitration section of these Rules. Unused deposits are refunded at the end of the case.”).

<sup>46</sup> AAA Commercial Rules, Rules R-53, R-55, & “Administrative Fee Schedules.”

<sup>47</sup> *Id.* Rule R-47(b).

<sup>48</sup> AAA Consumer Rules, “Costs of Arbitration (including AAA Administrative Fees).”

<sup>49</sup> Again, for more details on the fees paid by the company, *see* the 2013 Preliminary Results at 110 n.270.

<sup>50</sup> AAA Consumer Rules, “Costs of Arbitration (including AAA Administrative Fees).”

<sup>51</sup> *See* AAA Supplementary Consumer Procedures, Rule C-8 & “Fees and Deposits to be Paid by the Consumer”; AAA Consumer Rules, Rule R-4; *see also* American Arbitration Association, Administrative Fee Waivers and Pro Bono Arbitrators (“AAA, Administrative Fee Waivers”), [https://www.adr.org/aaa/ShowPDF%3Bjsessionid%3DR295PCqYD5MkNKhQqm9H7jhSMwYh2NnsYFSbG6yrMhgmGVB299Ic!1082660915%3Fdoc%3DADRSTG\\_004098](https://www.adr.org/aaa/ShowPDF%3Bjsessionid%3DR295PCqYD5MkNKhQqm9H7jhSMwYh2NnsYFSbG6yrMhgmGVB299Ic!1082660915%3Fdoc%3DADRSTG_004098) (last visited Mar. 6, 2015) (“[P]arties are eligible for consideration for a waiver or deferral of the administration fee if their annual gross income falls below 200% of the federal poverty guidelines.”); Cal. Civ. Proc. Code § 1284.3(b)

Finally, JAMS charges a “case management fee” of \$400 per party each day for up to three days of hearings.<sup>52</sup> In addition, the arbitrator or arbitrators set their own fees. Under the JAMS Minimum Standards, however, “when a consumer initiates arbitration against the company, the only fee required to be paid by the consumer is \$250, which is approximately equivalent to current Court filing fees.”<sup>53</sup> The company pays all other arbitration fees, including both administrative and arbitrator fees. When the company initiates the arbitration against a consumer, the company pays all the arbitration fees; the consumer pays no fees.

Under the usual “American rule,”<sup>54</sup> parties in court bear their own attorneys’ fees, unless a statute or contract provision provides otherwise or a party is shown to have acted in bad faith.<sup>55</sup> The AAA Consumer Arbitration Rules, like the AAA Supplementary Consumer Procedures, provide that “[t]he arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, including awards of attorney’s fees and costs, in accordance with the law(s) that applies to the case.”<sup>56</sup>

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(California requirement of arbitration fee waiver “**for an indigent consumer**” for administrative fees; the statute defines “**indigent consumer**” as “a person having a gross monthly income that is less than 300 percent of the federal poverty guidelines.”).

Because the AAA did not assess an administrative fee to the consumer under its fee schedule in force prior to March 1, 2013 (the fee assessed to the consumer covered the consumer’s share of the arbitrator’s compensation), it is not clear under what circumstances a waiver of administrative fees would have been necessary. (The AAA did state that it would attempt to appoint an arbitrator to serve without charge in cases in which it granted a fee waiver or if the consumer so requested. *See* AAA, Administrative Fee Waivers, *supra*.) Under the AAA fee schedule in force after March 1, 2013, the consumer pays an administrative fee but no arbitrator fees.

<sup>52</sup> JAMS Streamlined Arbitration Rules p.5.

<sup>53</sup> JAMS Minimum Standards, Standard 7.

<sup>54</sup> *See, e.g.*, Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1175 (2013) (“Under the bedrock principle known as the ‘American Rule,’ [e]ach litigant pays his own **attorneys’** fees, win or lose, unless a statute or contract provides otherwise.”) (internal quotations omitted).

<sup>55</sup> We discuss the incidence of arbitration clauses addressing the award of **attorneys’** fees in Section 2.5.10. Note, however, that the discussion does not address contractual provisions regarding the allocation of costs and expenses that were not specific to arbitration costs (which were commonly included in contracts both with and without arbitration clauses).

<sup>56</sup> AAA Consumer Rules, Rule R-44(a); AAA Supplementary Consumer Procedures, Rule C-7(c) (“The arbitrator may grant any remedy, relief or outcome that the parties could have received in court.”); AAA Commercial Rules, Rule

## 4.4 Representation

In most courts, individuals can either represent themselves or hire a lawyer as their representative.<sup>57</sup> The lawyer must be either a member of the bar of the court or be admitted to practice before the court for purposes of the case (*pro hac vice*).<sup>58</sup> Corporations are generally required to be represented by counsel in federal court, as well as most state courts.<sup>59</sup>

Arbitration rules are more flexible than many courts about the identity of any party representative. The AAA Consumer Rules, for example, permit a party to be represented “by

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47(d)(ii) (“The award of the arbitrator(s) may include: . . . an award of attorneys’ fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.”); JAMS Streamlined Arbitration Rules, Rule 19(f) (“The Award of the Arbitrator may allocate attorneys’ fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties’ Agreement or allowed by applicable law.”).

On page 114 of the 2013 Preliminary Results, we stated that “[u]nless the contract or applicable law required otherwise, the arbitrator might also reallocate attorneys’ fees” without specifying that any such reallocation would generally be limited to situations where fee shifting was specifically allowed pursuant to applicable law, agreement of the parties, or a finding that one of the parties acted in bad faith. *But see* 2013 Preliminary Results at 49 (“When the arbitration clause does not address the issue, the arbitrator may award attorney’s fees when permitted by the agreement or applicable law.”)

<sup>57</sup> The Philadelphia County Municipal Court Rules permit “[a]n individual or sole proprietorship” to be “represented by himself or herself, by an attorney at law, or by an authorized representative.” Phil. Co. M.C.R. Civ. P. No.131(a). An “authorized representative” is defined to mean “**an individual who is** an agent of a party, [who] has personal knowledge of the subject matter of litigation, and files a written authorization with the Court prior to the commencement of trial.” *Id.* No. 102. However, not all small claims courts permit parties to be represented by an attorney. *See, e.g.*, Ark. Sup. Ct. Admin. Order 18, at ¶ 4(a) (“No attorney-at-law or person other than the plaintiff and defendant shall take part in the filing, prosecution, or defense of litigation in the small claims division.”).

<sup>58</sup> *See* Erin O’Hara O’Connor & Peter B. Rutledge, *Arbitration, the Law Market, and the Law of Lawyering*, 38 Int’l Rev. L. & Econ. 87, 94 (2014).

<sup>59</sup> *See, e.g., Amteco, Inc. v. BWAY Corp.*, 241 F. Supp. 2d 1028, 1030 (E.D. Mo. 2003); *Biomed Comm, Inc. v. Washington Dep’t of Health Board of Pharm.*, 193 P.3d 1093, 1096–97 (Wash. App. 2008) (noting state common law rule requiring corporations to be represented by attorneys in court proceedings); *Eckles v. Atlanta Tech. Grp., Inc.*, 485 S.E.2d 22, 25 (Ga. 1997) (“Thus, notwithstanding that a corporation is a “person” for the purpose of receiving due process and equal protection from the state, it has been held that a corporation is not a “person” for the purpose of exercising a constitutional right to legal self-representation, since it cannot represent itself and can only be represented by its agents.”); *Richter v. Higdon Homes, Inc.*, 544 So. 2d 300 (Fla. Ct. App. 1989); N.Y. CPLR § 321(a).

counsel or other authorized representative, unless such choice is prohibited by applicable law.”<sup>60</sup> Some states forbid non-attorneys to represent parties in arbitration.<sup>61</sup> (We discuss in Section 5.5.3, below, the extent to which consumers were represented by an attorney in consumer financial arbitration cases. We also discuss in Sections 6.5 and 6.5.2, below, the extent to which consumers were represented by an attorney in consumer finance litigation.)

## 4.5 Selecting the decisionmaker

With limited exceptions, court rules do not permit parties to reject the judge assigned to hear their case. The plaintiff typically chooses the court in which the suit is filed, subject to limitations on court jurisdiction over the parties<sup>62</sup> and the defendant’s ability to remove certain cases from state court to federal court.<sup>63</sup> A judge from the court then typically is assigned randomly to the case.

Judges are elected or appointed government employees who are required to disqualify themselves, either on their own initiative or on motion of one of the parties, “in any proceeding in which his [or her] impartiality might reasonably be questioned.”<sup>64</sup> Parties in court may have the right to a jury trial, either by statute or under the U.S. Constitution (in federal court) or a

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<sup>60</sup> AAA Consumer Rules, Rule R-25; AAA Commercial Rules, Rule R-26; JAMS Streamlined Arbitration Rules, Rule 9(a).

<sup>61</sup> *See, e.g., The Florida Bar re Advisory Opinion on Nonlawyer Representation in Sec. Arbitration*, 696 So. 2d 1178, 1184 (Fla. 1997) (*per curiam*) (“enjoin[ing] nonlawyers from representing investors in securities arbitration proceedings for compensation”).

<sup>62</sup> *See, e.g.,* 28 U.S.C. §§ 1331 & 1332; *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945) (due process limitation on personal jurisdiction); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (general and specific jurisdiction).

<sup>63</sup> 28 U.S.C. § 1441 *et seq.*

<sup>64</sup> *Id.* § 455(a), (b) (listing specific circumstances in which disqualification is required). *See generally* Charles Gardner Geyh, *Judicial Disqualification: An Analysis of Federal Law* (Federal Judicial Center 2d ed. 2010).

state constitution (in state court).<sup>65</sup> In general, the right to a jury trial applies to any consumer financial case in which the consumer is seeking money damages.

In arbitration, if the parties agree on the individual they want to serve as arbitrator, they can choose that person to decide their dispute. If the parties cannot agree on the arbitrator, the arbitrator is selected following the procedure specified in their contract or in the governing arbitration rules. In AAA consumer arbitrations, the default process of arbitrator selection is for the AAA to choose the arbitrator from its National Roster of Arbitrators.<sup>66</sup> Under the JAMS Streamlined Arbitration Rules, the default process is a “list procedure,” whereby JAMS provides a list of at least three prospective arbitrators to the parties. Each party may strike one name and rank the others, and “[t]he remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator.”<sup>67</sup>

Arbitration rules require the arbitrator to be independent and impartial<sup>68</sup> and to disclose potential conflicts of interest.<sup>69</sup> The rules set out a procedure by which a party can seek to have the arbitrator disqualified from service.<sup>70</sup> The Federal Arbitration Act provides for a court to vacate an arbitration award when “there was evident partiality or corruption in the arbitrators,”

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<sup>65</sup> *See, e.g.*, U.S. Const., amend. VII.

<sup>66</sup> *See* AAA Supplementary Consumer Procedures, Rule C-4; AAA Consumer Rules, Rules R-15 & R-16.

<sup>67</sup> JAMS Streamlined Arbitration Rules, Rule 12 (c) & (d).

<sup>68</sup> AAA Consumer Rules, Rule R-19 (“Any arbitrator shall be impartial and independent”); AAA Commercial Rules, Rule R-18(a) (same); JAMS Streamlined Arbitration Rules, Rule 12(a) (“neutral arbitrator”).

<sup>69</sup> AAA Consumer Rules, Rule R-18(a) (requiring prospective arbitrator to “provide information to the AAA of any circumstances likely to raise justifiable doubt as to whether the arbitrator can remain impartial or independent”); AAA Commercial Rules, Rule R-17(a) (requiring prospective arbitrator to “disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator’s impartiality or independence”); JAMS Streamlined Arbitration Rules, Rule 12(i) (describing obligation of arbitrator to make required disclosures of potential conflicts of interest).

<sup>70</sup> AAA Consumer Rules, Rule R-19; AAA Commercial Rules, Rule R-18; JAMS Streamlined Arbitration Rules, Rule 12(j). We discuss the frequency of such arbitrator challenges (and parties’ success in bringing such challenges) in Section 5.7.4.



which has been construed to include the arbitrator’s failure to disclose conflicts of interest.<sup>71</sup> No jury trial is available in arbitration.

## 4.6 Discovery

The Federal Rules of Civil Procedure provide a variety of means by which a party can discover evidence in the possession of the opposing party or a third party. Parties have an obligation to make certain mandatory disclosures early in the case, and then can request documents from other parties in the dispute, compel discovery from third parties, take depositions, seek admissions, and so forth.<sup>72</sup> Under the Federal Rules,

*Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.*<sup>73</sup>

Unlike federal court, however, “[p]retrial discovery is not available in the Philadelphia Municipal Court.”<sup>74</sup>

By comparison, “[l]imited discovery rights are the hallmark of arbitration.”<sup>75</sup> Arbitration rules on discovery (often called the “exchange of information”) ordinarily do not track the detailed

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<sup>71</sup> 9 U.S.C. § 10(a)(2). Courts are divided over whether the standards of impartiality for arbitrators under the FAA are more or less stringent than the standards of impartiality for judges. *Compare Commonwealth Coatings Corp. v. Continental Casualty Corp.*, 393 U.S. 145, 149 (1968) (“[W]e should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges . . .”) *with Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7<sup>th</sup> Cir. 1983) (“[P]eople who arbitrate do so because they prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter.”).

<sup>72</sup> Fed. R. Civ. P. 26–37.

<sup>73</sup> *Id.* 26(b).

<sup>74</sup> Phil. Co. M.C.R. Civ. P. No. 129.

discovery provisions nor the broad scope of discovery under the Federal Rules of Civil Procedure, and generally envision less discovery than would be available in court. Thus, arbitration rules on discovery give the arbitrator authority to manage discovery “with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party’s opportunity to fairly present its claims and defenses.”<sup>76</sup>

Arbitration rules on discovery do not allow for broad discovery from third parties, which were not parties to the underlying agreement to arbitrate disputes. Section 7 of the FAA, however, grants arbitrators the power to subpoena witnesses to appear before them (and bring documents).<sup>77</sup> The circuits currently are split on whether Section 7 authorizes subpoenas for discovery purposes *before* the hearing.<sup>78</sup>

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<sup>75</sup> *Brown v. CMH Mfg., Inc.*, 2014 WL 4298332, at \*8 (S.D. W. Va. Aug. 29, 2014) (internal quotations omitted).

<sup>76</sup> AAA Commercial Rules, Rule R-22; *see also* AAA Consumer Rules, Rule R-22(a)(1) (“Keeping in mind that arbitration must remain a fast and economical process, the arbitrator may direct . . . specific documents and other information to be shared between the consumer and the business.”); *id.* Rule R-22(c) (“No other exchange of information beyond what is provided for in section (a) above is contemplated under these Rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process.”); JAMS Streamlined Arbitration Rules, Rule 13(a) (directing that parties to “cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information . . . relevant to the dispute or claim,” and giving the arbitrator authority to determine whether additional discovery is necessary “based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness”).

<sup>77</sup> 9 U.S.C. § 7.

<sup>78</sup> *Alliance Healthcare Servs., Inc. v. Argonaut Private Equity, LLC*, 804 F. Supp. 2d 808, 810–11 (N.D. Ill. 2011) (“The Sixth and Eighth Circuits have held that the power to compel pre-hearing discovery from a third party is implicit in the power of an arbitrator to compel production of documents from a third party for a hearing. The Second and Third Circuits have ruled to the contrary. The Fourth Circuit has read Section 7 of the FAA in more or less the same way as the Third, though it has suggested that an arbitration panel may subpoena a non-party for prehearing discovery upon a showing of a ‘special need.’”); *see Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 413–14 (3d Cir. 2004) (Chertoff, J., concurring) (“Under section 7 of the Federal Arbitration Act, arbitrators have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings. This gives the arbitration panel the effective ability to require delivery of documents from a third-party in advance, notwithstanding the limitations of section 7 of the FAA. In many instances, of course, the inconvenience of making such a personal appearance may well prompt the witness to deliver the documents and waive presence.”).

## 4.7 Dispositive motions

The Federal Rules of Civil Procedure provide for a variety of motions by which a party can seek to dispose of the case, either in whole or in part. A party may move to dismiss a claim on various jurisdictional grounds,<sup>79</sup> as legally insufficient even if the facts as alleged are true,<sup>80</sup> and on the ground that “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”<sup>81</sup> By comparison, the Philadelphia Municipal Court Rules provide for motions to “be made orally or in writing at the time of trial” rather than throughout the course of the case.<sup>82</sup>

Arbitration rules typically do not expressly authorize dispositive motions,<sup>83</sup> and few cases in the consumer arbitrations we reviewed in the AAA Case Data were resolved on the basis of such motions.<sup>84</sup> The new AAA Consumer Rules expressly authorize the filing of a dispositive motion “if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.”<sup>85</sup>

## 4.8 Class proceedings

Federal Rule of Civil Procedure 23 permits a named plaintiff to bring an action on behalf of a class of plaintiffs when two sets of requirements are met. First, the named plaintiff must show that:

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<sup>79</sup> Fed. R. Civ. P. 12(b)(1)–(3).

<sup>80</sup> *Id.* 12(b)(6) (motion to dismiss for failure to state a claim on which relief can be granted).

<sup>81</sup> *Id.* 56(a) (motion for summary judgment).

<sup>82</sup> Phil. Co. M.C.R. Civ. P. No. 117(a).

<sup>83</sup> *See, e.g.*, AAA Supplementary Consumer Procedures; JAMS Streamlined Arbitration Rules. Courts have held, however, that arbitrators have the implied authority to grant such motions under appropriate circumstances. *See, e.g., Schlessinger v. Rosenfeld, Meyer & Susman*, 47 Cal. Rptr. 2d 650, 658 (Cal. Ct. App. 1995).

<sup>84</sup> *See* Section 5.7.1.

<sup>85</sup> AAA Consumer Rules, Rule R-33; AAA Commercial Rules, Rule R-33.

- The class is so numerous that joinder of all members is impracticable;
- There are questions of law or fact common to the class;
- The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- The representative parties will fairly and adequately protect the interests of the class.<sup>86</sup>

Second, the class action must fall within one or more of the three categories set out in Rule 23(b): cases in which (1) individual actions “would create a risk of” inconsistent adjudications or adjudications dispositive of the rights of non-parties; (2) “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole;” or (3) common questions predominate and “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.”<sup>87</sup>

If the court certifies a class action under Rule 23(b)(1) or (2), “the court may direct appropriate notice to the class.”<sup>88</sup> If the court certifies a class action under Rule 23(b)(3), “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”<sup>89</sup> The notice to members of a Rule 23(b)(3) class action must inform them of their right to opt out of the class.<sup>90</sup> The case will then proceed to a trial on the merits, with any class members who have not opted out being bound by the judgment.<sup>91</sup> (In Section 4.8.2 of the 2013 Preliminary Results we

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<sup>86</sup> Fed. R. Civ. P. 23(a).

<sup>87</sup> *Id.* 23(b).

<sup>88</sup> *Id.* 23(c)(2)(A).

<sup>89</sup> *Id.* 23(c)(2)(B).

<sup>90</sup> *Id.* 23(c)(2)(B)(v). Members of classes under Rule 23(b)(1) and (b)(2) have no corresponding right to opt out of the class.

<sup>91</sup> Of course, most class actions settle before going to trial. *See* Section 6.6.1 and Federal Rule 23(e)(2) provides that if the settlement “would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.”

reported on the opt-out rates for a set of consumer financial class actions that were resolved during the time period under study here and where there was an applicable arbitration agreement in place that consumers who opted out could invoke.)

We are not aware of a class action procedure for small claims court. Both the AAA and JAMS have adopted rules, derived from Federal Rule 23, for administering arbitrations on a class basis.<sup>92</sup> The rules set out a three-step process. First, the arbitrator determines whether the arbitration clause authorizes class arbitration.<sup>93</sup> Second, if the arbitration clause authorizes class arbitration, the arbitrator determines whether a class should be certified, applying similar standards to those set out in Federal Rule 23.<sup>94</sup> Third, assuming a class is certified (and does not settle), the arbitrator proceeds to resolve the case on the merits, resulting in a binding arbitration award.<sup>95</sup> The AAA Class Arbitration Rules provide for a “preliminary filing fee of \$3,350” to be paid by the party bringing a class arbitration.<sup>96</sup> If the case proceeds beyond the first phase, that party shall pay a “supplemental fee . . . calculated based on the amount claimed in the class arbitration and in accordance with the fee schedule in the AAA’s Commercial

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<sup>92</sup> AAA Class Arbitration Rules; JAMS, JAMS Class Action Procedures (effective May 1, 2009) (“JAMS Class Action Procedures”).

<sup>93</sup> AAA Class Arbitration Rules, Rule 3; JAMS Class Action Procedures, Rule 2. Both the AAA and JAMS indicate that they will not administer a class action case arising out of an arbitration clause with a no-class-arbitration provision unless ordered to do so by a court. *See* American Arbitration Association, AAA Policy on Class Arbitrations (effective July 14, 2005) (“The Association is not currently accepting for administration demands for class arbitration where the underlying agreement prohibits class claims, consolidation or joinder, unless an order of a court directs the parties to the underlying dispute to submit any aspect of their dispute involving class claims, consolidation, joinder or the enforceability of such provisions, to an arbitrator or to the Association.”); JAMS Class Action Procedures, Rule 1(a) (“JAMS will not administer a demand for class action arbitration when the underlying agreement contains a class preclusion clause, or its equivalent, unless a court orders the matter or claim to arbitration as a class action.”).

<sup>94</sup> AAA Class Arbitration Rules, Rule 4; JAMS Class Action Procedures, Rule 3. Because the arbitrators are interpreting arbitration rules rather than the Federal Rules of Civil Procedure, their interpretations may differ from those applied in court, even though the arbitration rules were originally derived from the Federal Rules.

<sup>95</sup> AAA Class Arbitration Rules, Rule 7; JAMS Class Action Procedures, Rule 5.

<sup>96</sup> AAA Class Arbitration Rules, Rule 11(a). The JAMS Class Action Procedures do not address the fee for filing a class arbitration.

Arbitration Rules.”<sup>97</sup> Consumer financial arbitration agreements typically preclude the filing of class arbitrations and few consumer finance arbitration disputes are filed as class actions.<sup>98</sup>

## 4.9 Privacy and confidentiality

Court litigation (including small claims court) is a public process, with proceedings conducted in public court rooms and the record generally available for public review.<sup>99</sup> Parties can seek confidentiality orders to protect sensitive information,<sup>100</sup> but “[o]nce filed with the court, . . . ‘[d]ocuments that affect the disposition of federal litigation are presumptively open to public view.’”<sup>101</sup>

By comparison, arbitration is a private although not a confidential process.<sup>102</sup> Arbitration hearings are closed to the public,<sup>103</sup> and awards in consumer arbitrations typically are not published.<sup>104</sup> The new AAA Consumer Rules, however, contemplate the possibility that redacted arbitration awards will be made public, as is the case with AAA employment arbitration

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<sup>97</sup> AAA Class Arbitration Rules, Rule 11(a).

<sup>98</sup> *See* Sections 2.5.5 and 5.9 (discussing the prevalence of contract provisions addressing class proceedings and studying AAA class filings relating to consumer financial products and services, respectively).

<sup>99</sup> For precise and limited privacy protections for electronic filings in court, *see* Fed. R. Civ. P. 5.2.

<sup>100</sup> Fed. R. Civ. P. 5.2(e), 26(c).

<sup>101</sup> *City of Greenville, Ill. v. Syngenta Crop Prot., LLC*, 764 F.3d 695, 697 (7th Cir. 2014) (quoting *In re Specht*, 622 F.3d 697, 701 (7th Cir.2010)).

<sup>102</sup> *See, e.g.*, Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. Kan. L. Rev. 1211, 1211 (2006) (“Arbitration is private but not confidential . . . . Arbitration is private in that it is a closed process, but it is not confidential because information revealed during the process may become public.”).

<sup>103</sup> AAA Consumer Rules, Rule R-30; AAA Commercial Rules, Rule R-25; JAMS Streamlined Arbitration Rules, Rule 21(c).

<sup>104</sup> Schmitz, *supra*, at 1216.

awards.<sup>105</sup> No similar possibility exists under JAMS rules. Basic information about AAA class arbitrations, including a copy of the demand and any awards, is made available on the AAA web site.<sup>106</sup> In addition, the laws of several states, most notably California, require arbitration administrators to disclose basic data about consumer arbitrations that take place in the state.<sup>107</sup>

## 4.10 Hearings

If a case in court does not settle or get resolved on a dispositive motion, it will proceed to trial in the court in which the case was filed. A court trial may be before either a jury or a judge (the factfinder),<sup>108</sup> and evidence will be admitted only when permitted by the governing rules of evidence.<sup>109</sup> The factfinder resolves any disputed factual questions; the judge resolves any legal issues in accordance with binding precedent and governing statutes and regulations. No jury trial is available in Philadelphia Municipal Court,<sup>110</sup> but rules of evidence do apply in trials

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<sup>105</sup> AAA Consumer Rules, Rule R-43(c) (“The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published, unless a party agrees in writing to have its name included in the award”). AAA consumer arbitration awards are not available as of yet. By comparison, AAA employment arbitration awards, in redacted form, are available on Westlaw, Lexis, and Bloomberg Law.

<sup>106</sup> American Arbitration Association, Class Arbitration Docket, [https://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket?\\_afLoop=52301804617634&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D52301804617634%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D5j59ongkc\\_4](https://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket?_afLoop=52301804617634&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D52301804617634%26_afWindowMode%3D0%26_adf.ctrl-state%3D5j59ongkc_4) (last visited Mar. 6, 2015); *see also* AAA Class Arbitration Rules, Rule 9(b).

<sup>107</sup> Cal. Civ. Proc. Code § 1281.96 (amended effective Jan. 1, 2015); D.C. Code §§ 16-4430; Md. Code, Com. L. §§ 14-3901 to -3905.

<sup>108</sup> *See, e.g.*, Fed. R. Civ. P. 39.

<sup>109</sup> *See, e.g.*, Fed. R. Evid.

<sup>110</sup> 42 Pa. Cons. Stat. Ann. § 1123(a)(4) (West) (“In cases under this paragraph the defendant shall have no right of trial by jury in the municipal court, but shall have the right to appeal for trial de novo, including the right of trial by jury, to the court of common pleas, in accordance with local rules of court established by the administrative judge of the trial division.”).

before the judge.<sup>111</sup> Few cases in court actually make it to trial. The vast majority of cases either settle or are otherwise resolved before trial.<sup>112</sup>

An arbitration can be resolved either on the basis of the parties' submission of documents, by a telephone hearing, or by an in-person hearing. For a case in which no claim exceeds \$10,000, a documents-only arbitration was the default under the AAA Supplementary Procedures, although any party could request or the arbitrator could order a hearing.<sup>113</sup> For cases with a claim of over \$10,000, "the arbitrator [would] conduct a hearing unless the parties agree not to have one."<sup>114</sup> Under the JAMS Streamlined Rules, the default is an in-person hearing, although the hearing may be conducted by telephone if the parties agree or the arbitrator directs.<sup>115</sup> Alternatively, the parties may agree to waive an oral hearing and, instead, have the dispute determined on written submissions and other evidence.<sup>116</sup> Parties may, and often do, settle arbitration disputes.<sup>117</sup>

Court rules of evidence do not necessarily apply in arbitration in the absence of an agreement by the parties.<sup>118</sup>

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<sup>111</sup> Phil. Co. M.C.R. Civ. P. No.121(a).

<sup>112</sup> *See* Sections 6.6.1 and 6.6.2; *see, e.g.*, Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. Pa. L. Rev. 1793, 1814 (2014) ("In 2012, of one hundred civil cases filed in federal district court, 1.2 began trial.").

<sup>113</sup> AAA Supplementary Procedures, Rule C-5. Under the new AAA Consumer Rules, \$25,000 is the threshold below which the default is a documents-only arbitration. AAA Consumer Rules, Rule R-29.

<sup>114</sup> AAA Supplementary Procedures, Rule C-6. For data on the proportion of arbitration proceedings that are resolved without a hearing *see* Section 5.7.1.

<sup>115</sup> JAMS Streamlined Arbitration Rules, Rule 17(g).

<sup>116</sup> *Id.* Rule 18.

<sup>117</sup> *See* Sections 5.6.2 and 5.6.3.

<sup>118</sup> AAA Consumer Rules, Rule R-34(a); AAA Commercial Rules, Rule R-34(a); JAMS Streamlined Arbitration Rules, Rule 17(d) ("Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator may be guided [in the weight to be given to evidence] by principles contained in the Federal Rules of Evidence or other rules of evidence."); *see also* AAA Consumer Rules, Rule R-34(c) ("The arbitrator shall consider applicable principles of legal privilege, such as those that involve the confidentiality of communications between a lawyer and a client.").



The AAA’s Consumer Due Process Protocol and the JAMS Minimum Standards both require that any in-person hearing be conducted at a location convenient for the consumer.<sup>119</sup> The AAA Consumer Arbitration Rules provide that “[t]he arbitrator may grant any remedy, relief, or outcome that the parties could have received in court, . . . in accordance with the law(s) that applies to the case.”<sup>120</sup>

## 4.11 Judgment/award

The outcome of a case in court is reflected in a judgment, which the prevailing party can enforce through various means of post-judgment relief.<sup>121</sup> The outcome of a case in arbitration is reflected in an award,<sup>122</sup> which, once turned into a court judgment, can be enforced the same as any other court judgment.<sup>123</sup> The process for turning an arbitration award in a court judgment (confirming the award) is an expedited one; unless the award is set aside on one of the limited statutory grounds, it must be confirmed by the court.<sup>124</sup> Like the arbitration agreement, the award can only be enforced against parties named in the award or otherwise bound to arbitrate.

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<sup>119</sup> AAA Consumer Due Process Protocol, Principle 7; JAMS Minimum Standards 5.

<sup>120</sup> AAA Consumer Rules, Rule R-44(a); AAA Consumer Due Process Protocol, Principle 15(2) (“In making the award, the arbitrator should apply any identified, pertinent contract terms, statutes and legal precedents.”).

<sup>121</sup> Fed. R. Civ. P. 69 & 70; Phil. Co. M.C.R. Civ. P. No. 126.

<sup>122</sup> AAA Consumer Rules, R-43(b) (“The award shall provide the concise written reasons for the decision unless the parties all agree otherwise.”); AAA Supplementary Consumer Procedures, Rule C-7(c) (“In the award, the arbitrator should apply any identified pertinent contract terms, statutes, and legal precedents.”); JAMS Streamlined Arbitration Rules, Rule 19(g) (“Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.”).

<sup>123</sup> 9 U.S.C. § 13 (“The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action . . .”).

<sup>124</sup> *Id.* § 9.

## 4.12 Appeals

Parties in court can appeal a judgment against them to an appellate court.<sup>125</sup> The extent of review by the appellate court varies depending on the type of issue raised on appeal. Appellate courts typically review legal issues *de novo*, showing no deference to the lower court. But in reviewing factual issues, appellate courts typically defer to the fact finder and reverse findings of fact only if clearly erroneous or under similarly deferential standards.<sup>126</sup>

By comparison, parties can challenge arbitration awards in *court* only on the more limited grounds set out in the governing arbitration statute.<sup>127</sup> The statutory grounds for setting aside arbitration awards focus on the fairness of the arbitration process and on whether the arbitrator exceeded his or her authority, and provide at most very limited review of the merits of the arbitrator's decision.<sup>128</sup>

In addition, the parties' arbitration agreement can establish an arbitration appeals panel to hear an appeal on grounds specified in the agreement.<sup>129</sup> JAMS has issued optional rules to govern

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<sup>125</sup> Appeals from the Philadelphia Municipal Court go to the Philadelphia Court of Common Pleas. Phil. M.C.R. Civ. P. No. 124(a).

<sup>126</sup> *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion'."); Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

<sup>127</sup> *See, e.g.*, 9 U.S.C. § 10. The U.S. Supreme Court has held that the Federal Arbitration Act does not permit the parties in their arbitration agreement to expand the grounds for challenging awards in court. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008). *But see Cable Connection v. DirecTV, Inc.*, 190 P.3d 586, 599 (Cal. 2008) (refusing to follow *Hall Street* as matter of state law in state court); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 101 (Tex. 2011) (same).

<sup>128</sup> The circuits currently are split on whether a court can set aside an arbitration award for manifest disregard of the law, which ordinarily requires that "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrator[ ] refused to heed that legal principle." *See, e.g., Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 481 & n.7 (4<sup>th</sup> Cir. 2012) (internal quotations omitted).

<sup>129</sup> As discussed in Section 2.5.13, parties' arbitration agreements may also impose limitations on the types of decisions that could be appealed (*e.g.*, monetary thresholds based on the size of the parties' claims or awards) or specify the allocation of the costs of any appeal.

arbitral appeals.<sup>130</sup> Effective November 1, 2014, the AAA also has issued optional appeals rules, but the rules do not apply to disputes arising out of arbitration clauses in consumer contracts.<sup>131</sup>

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<sup>130</sup> JAMS, JAMS Optional Arbitration Appeal Procedure. The JAMS rules do not address the administrative fee for an appeal, but do specify that “[t]he Appeal Panel will consist of three neutral arbitrators,” *see* ¶ A, who presumably would need to be compensated.

<sup>131</sup> American Arbitration Association, AAA Optional Appellate Arbitration Rules, Rule A-1 n.\* (effective Nov. 1, 2014). For discussion of AAA arbitral appeals in consumer arbitrations, including the fees assessed, *see* Section 5.8.



# Section 5

What types of claims are brought in arbitration and how are they resolved?



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# Introduction

In the 2013 Preliminary Results, we provided initial findings from our review of 1,245 credit card, checking, payday loan, and general purpose reloadable (“GPR”) prepaid card consumer disputes filed with the American Arbitration Association (“AAA”) from the start of 2010 to the end of 2012.<sup>1</sup> Our review in the Preliminary Results was focused on claim frequency and typology — a tally of the number of claims brought before the AAA and a classification of what types of claims were brought. In this section, we expand on our prior analysis by adding two new product markets: private student loans and auto purchase loans. We refer to this analysis under the general heading of “Arbitration Frequency.”<sup>2</sup>

In addition, for all six product markets within the scope of this review, we explore whether and how arbitration disputes are resolved. We refer to this analysis under the general heading of “Arbitration Outcomes.” This second analysis focuses on the *form* and the *substance* of the outcomes reached in these consumer arbitration disputes. Under form, we cover whether cases are resolved on the merits, settle, or end in other, less clear outcomes. Under substance, we look at how consumers and companies fare in the relatively small share of consumer financial disputes that arbitrators resolve on the merits, these being the only arbitration disputes for which such information is available. The final part of our outcome analysis covers several additional metrics, such as how long disputes take to resolve, how often parties recover attorneys’ fees, and how arbitration fees are allocated between the parties.<sup>3</sup>

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<sup>1</sup> As with the 2013 Preliminary Results, this discussion focuses on arbitration filings (deficient or otherwise), as opposed to the number of such filings that are subsequently “perfected” and proceed to arbitration. 2013 Preliminary Results at 13 n.24.

<sup>2</sup> As previously noted, the 2013 Preliminary Results are included as Appendix A and those findings, except where specifically modified, are part of this report.

<sup>3</sup> We provide details about our methodology in Appendix H. For definitions of the various types of fees associated with arbitration proceedings, *see* Section 4.3.



## 5.1 Analysis scope and limitations

In general, our analysis of arbitration frequency is able to show the number and type of consumer financial disputes that consumers file in arbitration. As a result, we have a reasonably complete picture of the claims that consumers are willing to file in arbitration where arbitration is an available option.<sup>4</sup> This analysis, however, is subject to certain limitations. As explained below, our data are derived entirely from case filings with the AAA. Although we are confident that the AAA handles the vast majority of consumer financial arbitration cases,<sup>5</sup> there also are consumer financial arbitrations administered by JAMS, Inc. (“JAMS”)<sup>6</sup> and it is possible that the types of claims in those cases differ from the claims we observe in the AAA Data.<sup>7</sup> Furthermore, as described in Section 2, some companies do not include pre-dispute arbitration provisions in their consumer financial contracts. Similarly, certain types of disputes may not be covered by pre-dispute arbitration clauses. In our discussion of litigation disputes, for instance, we find that nearly 50% of class complaints and nearly 90% of individual complaints in federal

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<sup>4</sup> Not all disputes between consumers and companies are filed in arbitration or court, however. As discussed in Section 3.4.2, consumers may not pursue formal relief against companies — even when they know they have been wrongly assessed fees. Informal disputes may be resolved via customer service processes (discussed in Section 8) or dropped by consumers after they were initiated.

<sup>5</sup> JAMS has reported that it handles “at most” a few hundred consumer cases every year, an unknown percentage of which are consumer financial cases. *See* Jean Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 S.W. U. L. Rev. 87, 99 n.68 (2012) (citing Jay Welsh, JAMS Executive Vice President and General Counsel); *see, e.g.*, ABA, CBA, & FSR RFI Comment at 3. As discussed in Section 2.5.3, above, the AAA is specified as at least one potential choice of contractually-specified arbitration administrators in 98.5% of the credit card market we studied; 98.9% of the checking account market we studied; 100% of the GPR prepaid card market we studied; 85.5% of the storefront payday loan market we studied; and 66.7% of the private student loan agreements we reviewed. The AAA is specified as the *sole* choice in 17.9% of the credit card market we studied; 44.6% of the checking account market we studied; 63.0–72.7% of the GPR prepaid card market that we studied; 27.4% of the payday loan market we studied; and one of the private student loan agreements we reviewed. With that said, as discussed in Section 6.7.1, when we reviewed the court records of class cases in which parties moved to compel arbitration, we found five records indicating a subsequent filing with the AAA and four indicating a filing in JAMS.

<sup>6</sup> JAMS is an arbitration administrator formerly known as Judicial Arbitration and Mediation Services.

<sup>7</sup> As in the 2013 Preliminary Results, throughout this section we use “AAA Data” to denote the electronic case records provided voluntarily by the AAA to the Bureau for all AAA-administered consumer arbitration filings since 2010. We also use “AAA Case Data” to refer to the subset of AAA Data pertaining only to credit card, checking account, GPR prepaid card, payday loan, auto loan, and private student loan disputes for 2010, 2011, and 2012.

court involved FDCPA<sup>8</sup> claims — yet less than 10% of arbitration disputes involved the same claims.<sup>9</sup> Thus, the number and types of case filings in arbitration will reflect, in part, the frequency with which pre-dispute arbitration clauses exist and the scope of the disputes to which they apply.

For a number of reasons, our analysis of arbitration outcomes is subject to additional limitations.

First, the available outcome metrics are imperfect. Some researchers have examined consumer and company “win rates.” But what constitutes a “win”? If a consumer recovers a single dollar in a \$100 dispute, is that a win? What about \$50? Some studies account for this issue by providing “recovery rates” (such as “companies win X cents for every dollar claimed”), and we use both approaches in our analysis. The use of recovery rate data, however, is complicated by its dependence on claim amount data, which may reflect posturing or tactical decisions by the parties or, at the very least, incomplete information.

Second, whatever metric is used to assess win rates can be computed only for the subset of disputes that arbitrators resolve on the merits.<sup>10</sup>

For the most part, these “arbitration awards” are the data that have been available to researchers.<sup>11</sup> But arbitrators do not resolve the vast majority of consumer financial disputes

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<sup>8</sup> Fair Debt Collection Practices Act, 15 U.S.C. § 1692.

<sup>9</sup> As discussed more thoroughly in Section 6.7, the extent to which debt collectors can invoke arbitration provisions in consumers’ underlying credit contracts is often unclear and dependent on the specific language of the relevant contract. *See, e.g.*, Richard M. Alderman, *The Fair Debt Collection Practices Act Meets Arbitration: Non-Parties and Arbitration*, 24 Loy. Consumer L. Rev. 586 (2012).

<sup>10</sup> To our knowledge, prior researchers have not had access to the electronic case files for all consumer financial disputes filed with the AAA. In some cases, they may have had access to data about perfected filings, even if those disputes did not end in awards. For the most part, however, they have been limited to awards data or data other than actual case files. We believe, therefore, that, outside of the AAA itself, we have had the fullest information on the proportion of filings that yield substantive decisions.

<sup>11</sup> Scholarship and legal practice generally refer to arbitrator decisions on the merits as “arbitrator awards,” even if the arbitrator, in a specific case, awards nothing. To try to avoid confusion, in this discussion we generally refer to disputes reaching an “arbitration decision on the merits” when an arbitrator comes to a decision on parties’ claims, whether they be affirmative claims or disputes of alleged debt. When a decision on the merits involves any amount

filed with the AAA, as disputes are frequently settled or reach other procedural outcomes. ***Because our ability to review substantive outcomes is generally limited to arbitration decisions on the merits, the substantive outcomes of most consumer financial arbitration disputes are unknown and largely unknowable to reviewers.*** (As discussed in Section 6.1, this is even more true for cases brought in state and federal courts.)

If the parties settle their arbitration dispute, for example, only in very rare circumstances are the terms of settlement available. In fact, for most arbitration disputes reviewers cannot even determine the *type* of outcome reached (*e.g.*, whether an incomplete file indicates that the parties settled their dispute, on the one hand, or that the dispute is still in progress, but relatively dormant, on the other). In a clear majority of consumer financial arbitration disputes, whether considered as an overall group of disputes or segmented in some way (such as by product market, claim type, or claim amount), the most that a reviewer can offer is a very general assessment about the form of the outcome: For example, that the dispute *could* have resulted in a settlement (but might not have), or that the dispute was unlikely to have been resolved by settlement (but might have been). It is even more difficult to determine the substantive terms of any outcome for the parties involved.

Third, the minority of disputes that reach an arbitrator decision on the merits are not a random subset of disputes that are filed, because parties may make different settlement decisions for different types of claims. Parties settle claims strategically. For example, if the parties settle all strong consumer (or company) claims filed, that will affect the types of disputes on which arbitrators rule. Consumers (or companies) may appear to do poorly — or to bring only weak claims — but that may result from settlement decisions as well as (or more than) from the arbitration process itself. (In addition to potentially affecting the form and substance of outcomes, these kinds of selection bias may also affect procedural variables such as the time disputes take to resolve, or the likelihood of recovering attorneys’ fees.)

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of monetary relief regarding consumers’ affirmative claims, we describe the decisions as “arbitrators providing affirmative relief.” Accordingly, “providing monetary relief” should not be construed as providing 100% relief on consumers’ affirmative claims.

When a decision on the merits of a dispute involves some amount of debt relief regarding a dispute over an alleged consumer debt, we describe the decisions as “providing debt relief” or “providing debt forbearance.” Again, “providing debt forbearance” should not be construed as providing 100% relief on a disputed debt.

These considerations make it quite challenging to attempt to answer even the simple question of how well do consumers (or companies) fare in arbitration. Another element of selection bias (that is, a type of non-random distribution among categories in our real-world data set) further complicates comparative judgments: The claims consumers bring in arbitration differ, at least in part, from the claims that companies bring. Companies or consumers may seem to do better or worse than each other with respect to the arbitration claims that they each bring, but that variance may arise from differences in the types of claims each type of party elects to bring in arbitration or litigation, rather than the differences between the arbitration or litigation mechanisms themselves. For example, if consumers chose to bring only strong claims in arbitration and companies were less selective, the average consumer claim may appear to do better than the average company claim, but that could result from the choices made by the parties rather than from the arbitration process itself. (The reverse situation could also be possible.)

As will be seen, these concerns about selection bias also apply to disputes filed in litigation. These various considerations warrant caution in drawing conclusions as to how well consumers or companies fare in arbitration as compared to litigation.<sup>12</sup> As the frequency analysis shows, in significant respects, the disputes that are filed in arbitration differ from the disputes that are filed in litigation. To a greater or lesser degree of certainty, these differences result from decisions that the parties make about arbitration and litigation, such as the company's decision to have an arbitration clause, the consumer's willingness to initiate either arbitration or litigation, the company's or consumer's decision to invoke the arbitration clause in a given litigation, and the parties' decision to settle or litigate. Disputes, in short, are not randomly assigned to the two different fora. They exist in one forum or the other because of purposeful decisions by one or both parties. And the known outcomes — principally the cases resolved through an arbitrator's or court's decision — likewise reach that form of outcome, at least in part because of purposeful decisions by one or both parties.

In addition, claim amounts will be subject to the same limitations noted above, and may be subject to others as well.

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<sup>12</sup> In addition to the considerations discussed in the text, we also note that our data with respect to arbitration outcomes come from filings across six product markets in 2010 and 2011. Our data with respect to litigation outcomes come from filings across five product markets from 2010 through 2012.

## 5.2 Summary of analysis and results

Sections 5.3 and 5.4, respectively, identify prior research and describe our data sources.

Under the general heading of arbitration frequency, Section 5.5 presents data about the number and type of consumer financial disputes reflected in the AAA Case Data. These sections also cover claim amounts and rates at which parties are represented by attorneys. Please note that these sections do not repeat many of the results presented in the 2013 Preliminary Results, such as our finding that a high proportion of the disputes filed in arbitration are debt collection disputes. Instead, we recap only those prior frequency results that are necessary to put the findings about our two new markets into context. Unless we offer a specific update or clarification, therefore, all of our prior findings from the 2013 Preliminary Results are incorporated into this report by reference.

Under the general heading of arbitration outcomes, Section 5.6 presents available data about what happens in these consumer financial disputes. In particular, this section focuses on the form and outcome of consumer financial disputes filed with the AAA, segmented by claim type, claim amount, and representation. Our analysis encompasses data about the form of the outcomes reached, such as an arbitration decision on the merits or whether a settlement was or may have been reached. For the minority of disputes for which it is possible, our analysis also presents data about the substance of these outcomes.

Section 5.7 presents data on a number of additional procedural variables, such as the amount of time disputes take to resolve, what type of hearing was involved (if any), the travel distances to hearings, and whether there was an appeal of the arbitral decision on the merits using the arbitral forum's appeal process.

Finally, Section 5.8 covers consumer financial class arbitrations.

We summarize our findings below.

## 5.2.1 Frequency results

We tallied the number of disputes filed with the AAA regarding consumer financial products and services. Focusing on six distinct product markets, we were able to identify 1,847 filings for the period from the beginning of 2010 to the end of 2012. This includes 613 disputes that were filed either by a company or jointly by a company and a consumer.<sup>13</sup>

Overall, the data show that:

- Some disputes involved only disputed debts and did not include an affirmative consumer claim that was formally distinct from the dispute about the alleged debt (39.9%); others only involved affirmative consumer claims and no formal debt dispute (30.6%); and some disputes involved both (29.2%).<sup>14</sup> In total, over two-thirds of these disputes (69.1%) involved some dispute over the amount of debt a consumer allegedly owed and almost two-thirds (59.8%) involved an affirmative consumer claim.<sup>15</sup>

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<sup>13</sup> Each dispute was accompanied by a form that included three checkboxes, indicating whether the disputes were filed by the consumer, the company, or by both (“mutually submitted”). As discussed more thoroughly below, however, we did not attempt to verify whether these claim form representations were accurate and there were some instances in which the course of the proceedings seemed inconsistent with the statement on the claims form. **See** Section 5.6.7 and Appendix H.

<sup>14</sup> Six disputes (0.3%) involved neither a disputed debt amount nor a consumer pre-disposition claim amount.

<sup>15</sup> Arguably almost all claims involving consumer financial products and services have the potential to relate to or modify a debt owed or allegedly owed by a consumer. For example, if a consumer brought a claim that a debt collector’s allegedly harassing and abusive practices created an entitlement to special damages under the Fair Debt Collection Practices Act, a recovery would ordinarily offset any debt the consumer allegedly owed the collector. Particularly because consumers frequently cited numerous causes of action when seeking a single claim amount, this complicated our drawing a distinction between “disputed debt” claims and “affirmative consumer claims.” Our default assumption is that any claim brought under a federal or state statute represents an affirmative consumer claim, unless the claim form or associated documentation represents that the consumer is not seeking affirmative monetary relief. (For example, if the consumer responds “No” to the AAA Claim Form question: “Do you believe there is any money owing to you? If yes, how much?”) More generally, if a claim would offset any disputed debt, rather than going directly to the legal validity of the claimed debt, we considered it an affirmative claim even in the overlapping presence of a debt dispute. With breach of contract claims, we reversed our default assumption. For these claims, we assumed that the claims went directly to the validity of the alleged debt, unless there was some contrary indication in the record that these were offset-type claims instead.

Note that our definition of a dispute over a debt here is different than the definition of a “debt collection” filing in the 2013 Preliminary Results. There, we categorized cases as being “debt collection” filings if a case involved a

- Although claim amounts varied by product, in disputes involving consumer affirmative claims, the average affirmative claim amount was approximately \$27,000 and the median affirmative claim amount was \$11,500.
- Across all six product markets, about 25 disputes a year involved consumer affirmative claims of \$1,000 or less.
- In debt disputes, the average disputed debt amount was approximately \$15,700 and the median was approximately \$11,000.
- Consumers had counsel in over 60% of disputes. The rate of representation, however, varied widely by the consumer product or service at issue. In payday and student loan disputes, consumers had counsel in as many as 95% of all disputes filed.
- Companies were almost always represented by attorneys.
- The participants in the arbitration proceedings were predominantly experienced players. In over 80% of the disputes, the company had participated in at least three other disputes relating to the same product markets in a three-year period. Roughly 50% of disputes featured consumer attorneys who also handled another arbitration dispute in that product market in the same time frame.<sup>16</sup>

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substantive debt dispute and the arbitration record showed that there was a prior court proceeding in which the consumer invoked arbitration. All such cases would fall within the category of filings involving a debt dispute set forth in this text, but we also include cases in which either the consumer affirmatively sought relief from a debt or in which the company sought to compel the consumer to pay a debt without regard to whether there was a prior judicial proceeding.

<sup>16</sup> In the most extreme example, one firm represented over 97% of all consumers with counsel in student loan disputes. Similarly, one law firm represented over 68% of consumers with counsel in payday loan disputes.

## 5.2.2 Outcome results<sup>17</sup>

### Forms, processes, and costs of resolution

Overall, we found that:

- As with other systems of dispute resolution, only a minority of consumer financial arbitrations reached the point where there was a decision on the merits of the parties' claims. Specifically, arbitrators resolved less than a third (32.2%) of the consumer financial arbitration disputes on the merits.
- In 23.2% of disputes, the record shows that the parties settled.
- In a little more than a third of the disputes (34.2%), the available AAA case record ends in a manner that is consistent with settlement, but we cannot definitively say that settlement occurred. We refer to these as disputes that may have or could have settled, but we stress that we do not — and cannot — know whether there was a settlement in any of these cases. Note that parties are not required to tell the AAA that they have settled a dispute.
- In the remaining 10.5% of disputes, the available AAA case record ends in a manner that is *prima facie* in tension with settlement. We cannot eliminate the possibility that settlement occurred in these disputes, but the way in which the record ends is not one that would logically proceed from settlement. (For example, the AAA may have refused to administer the dispute because it determined that the arbitration clause at issue was inconsistent with the AAA's due process standards.<sup>18</sup>) We refer to these as disputes that are unlikely to have settled, even as we recognize that it remains possible that they did end in settlements.

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<sup>17</sup> Our outcome results use 2010 and 2011 filings because we did not have complete electronic case records for a significant share of 2012 filings. We considered including 2012 disputes for which we did have complete records, but resolved against doing so in case our results would have been skewed by the resulting focus on disputes that were faster to resolution.

<sup>18</sup> AAA Consumer Due Process Protocol, [https://adr.org/aaa/ShowPDF?doc=ADRSTG\\_005014](https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014) (last visited Mar. 6, 2015).



- Where there was a decision on the merits by an arbitrator, the decision generally was issued within five to eight months after the case was filed. Where the record definitively indicates that a case was settled, the median time to settlement was 155 days of initiation.<sup>19</sup>
- Of the 341 cases that were resolved by an arbitrator, in-person hearings were held by an arbitrator in 34.0% of the cases, telephonic hearings were held in 8.2% of the cases, and the remaining cases were decided only on consideration of paper filings. Where there was an in-person hearing, we estimate the distance consumers had to travel at an average and median of 30 and 15 miles, respectively.
- Consumers were initially charged and paid arbitrator fees in 831 disputes out of the 1,060 disputes filed in 2010 and 2011. The average and median fees, conditional upon the consumer having made a payment, were \$206 and \$125, respectively. In some cases consumers requested that their arbitrator fees be advanced by companies or had those arbitrator fees otherwise paid for by companies. Similarly, consumers' final fee assessments were modified by arbitrator decision in some cases.
- There were 146 cases in which arbitrators reached a decision on the merits of the parties' claims and the consumers were represented by counsel. Of these, consumers were awarded attorneys' fees in 14.4% of the disputes — a comparable rate as compared to companies, who were awarded attorneys' fees (to be paid by the consumer) in 14.1% of disputes in which arbitrators reached a decision on the merits of the parties' claims.
- There were four arbitration appeals, all of them filed by unrepresented consumers. None resulted in reversal of the original award.

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<sup>19</sup> These time estimates do not include the time taken in prior litigation, if any.

## Substantive outcomes

Because of the limitations discussed above, our substantive outcome data are limited to the less than one third of disputes (341 in total) in which arbitrators reached a decision on the merits of the parties' claims.<sup>20</sup> With respect to these disputes, the data show:

- There were 161 disputes filed in 2010 or 2011 involving the six product markets in which an arbitrator rendered a decision with respect to a consumer's affirmative claim. In three we could not determine the results. Of the remaining 158 cases, arbitrators provided some kind of relief in favor of consumers' affirmative claims in 32 disputes (20.3%). The average and median awards in those 32 disputes were around \$5,400 and \$2,700, respectively. The average and median claim amounts for these 32 disputes were approximately \$19,750 and \$13,000, which means that when consumers were provided relief on their claims, consumers won an average of 57 cents for every dollar they claimed.<sup>21</sup> Taking into consideration all 158 disputes in which we know how arbitrators resolved consumer claims, consumers won an average of 12 cents for every dollar they claimed.
- Of the 52 disputes filed in 2010 or 2011 that involved consumer affirmative claims of \$1,000 or less, arbitrators resolved 19, granting affirmative relief to consumers in four such disputes.<sup>22</sup>
- Consumers obtained some debt forbearance in 46 filings relating to the six product markets we studied in disputes filed in 2010 and 2011. Those 46 filings constituted 19.2% of the disputes in which an arbitrator could have provided some form of debt forbearance (a decision on the merits about a consumer's dispute regarding an alleged

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<sup>20</sup> There are almost no consumer financial arbitrations for which we know the terms of settlement. (As will be seen, litigation is different in this respect because the terms of class litigation settlements are known.) As a result, we limit our substantive outcomes analysis to disputes in which arbitrators issued awards regarding the parties' claims.

<sup>21</sup> There are two ways to calculate recovery ratios: (1) calculating the recovery ratio for each case (by dividing any award in that case by the claim amount in that case) and then taking the average of all recovery ratios or (2) summing all awards in the sample set and then dividing that by the sum of all claim amounts in the sample set. We used the former calculation method, as a number of large claim amounts would have resulted in consistently lower recovery ratios for almost all of the average recovery ratios reported.

<sup>22</sup> As described in Section 5.6, our analysis of arbitration outcomes is limited to disputes filed in 2010 and 2011.

debt).<sup>23</sup> In the 46 disputes in which we could determine the details of an arbitrator award relating to some form of debt forbearance, the average and median forbearance awards were approximately \$4,100 and \$2,600, respectively. The average and median disputed debt amounts in these 46 disputes were approximately \$11,750 and \$7,250, meaning that in those 46 disputes, consumers were successful in disputing an average of 51 cents of each dollar of debt. Counting disputes in which arbitrators provided relief on consumers' affirmative claims in debt disputes but did not provide debt forbearance, consumers successfully disputed ten cents for each dollar allegedly owed. Consumers fared slightly better, both in terms of the rate at which they obtained forbearance and the amount of forbearance, when there also was an affirmative consumer claim.

- As for companies, we could determine the terms of arbitrator awards relating to company claims in 244 of the 421 disputes involving company claims filed in 2010 and 2011. (This includes cases filed by companies as well as cases in which companies asserted counterclaims in consumer-initiated disputes.) Arbitrators provided companies some type of relief in 227, or 93.0%, of those disputes. In those 227 disputes, the average and median awards were approximately \$12,500 and \$9,500, respectively. In the 227 disputes in which companies were provided some type of relief on their claims, companies won 98 cents for every dollar claimed. In all disputes in which companies asserted claims, including disputes where claims were rejected by an arbitrator, companies won 91 cents for every dollar they claimed.
- In 60 of the 227 disputes involving company awards, companies paid filing fees for consumers who failed to pay their initial fees, resulting in “*ex parte*” awards to the companies. In each of the 60 cases, the arbitrator awards specifically stated that the consumer failed to submit documents after notice from the AAA or otherwise failed to participate to the end of the proceedings. Company payment of absent consumer's fees allowed each proceeding to continue to a resolution against the non-participating consumer. The 60 awards constitute 17.6% of the total number of disputes resolved by arbitrators in the AAA Case Data for the product markets we studied — 26.4% of awards to companies. All of these 60 disputes involved debts allegedly owed by the consumer.

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<sup>23</sup> These 46 filings are 19.2% of the 239 disputes where an arbitrator could have provided some form of debt forbearance and we know what the amount of debt in dispute was, as well as what the arbitrator's ruling was.

Excluding one dispute for which we were unable to determine the amount of debt in dispute, the average disputed debt was approximately \$13,500; the median, \$11,000. Excluding these 60 cases, arbitrators provided companies some type of relief in 90.8% of the cases in which they rendered decisions on company claims.

- We found no major differences in outcome for different types of claims brought by consumers against companies (*e.g.*, different federal statutory claims as compared to different state statutory claims). We also found no major differences among different sizes of consumer claims or disputed debts.
- Consumers who used attorneys were less likely to have their filings resolved by an arbitrator decision on the merits and more likely to have them resolved by settlement (or at least in a way consistent with settlement) than consumers who did not use attorneys. When cases were resolved by an arbitration decision on the merits of the dispute, consumers with attorneys were, in certain circumstances, more likely to be awarded relief on their claims.

## 5.3 Prior research

A number of empirical studies have examined employment and securities arbitration.<sup>24</sup> With the exception of the 2013 Preliminary Results, very few have focused on consumer arbitration, particularly as it relates to consumer financial products and services.<sup>25</sup>

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<sup>24</sup> See, *e.g.*, 2013 Preliminary Results at 60–62; Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Stud. 1 (2011); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 Employee Rts. & Employment Pol’y J. 405, 418 (2007); Lisa B. Bingham & Shimon Sarraf, *Evidence that Self-Regulation Makes a Difference*, in *Alternative Dispute Resolution in the Employment Arena: Proceedings of the New York University 53rd Annual Conference on Labor* 303, 320–28 (Samuel Estreicher & David Sherwyn eds. 2004); Michael Delikat & Morris Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Claimants Better Vindicate Their Rights in Litigation?*, 6 A.B.A. Litig. Sec. Conflict Mgmt. 1, 10 (2003); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 Disp. Resol. J. 44, 48 (Nov. 2003–Jan. 2004); Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. Disp. Resol. 777, 806 (2003).

Drahozal and Zyontz reviewed 301 AAA consumer disputes covering a nine-month period in 2007, but their data were largely limited to disputes actually resolved by arbitrators.<sup>26</sup> Also, while their data set comprised AAA consumer disputes, they did not segment the data in a manner that differentiated disputes about consumer financial products and services from consumer disputes generally.<sup>27</sup> A number of summary reviews published by the AAA covered all administered AAA consumer arbitrations from 2006 and a sample from 2007, but similarly did not provide detail regarding disputes relating to consumer financial products and services.<sup>28</sup>

Other reviews of consumer arbitrations have focused on data relating to a different arbitration administrator whose caseload was largely credit card debt collection disputes, the National Arbitration Forum (“NAF”).<sup>29</sup> In 2009, the NAF agreed to cease administering consumer

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<sup>25</sup> See, e.g., 2013 Preliminary Results at 60–62; see also Peter B. Rutledge, *Whither Arbitration?*, 6 Geo. J.L. & Pub. Pol’y 549 (2008) (summarizing prior empirical work).

<sup>26</sup> See Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Res. 843, 845 (2010). This study was part of a broader research project supported by the Searle Civil Justice Institute, which was then associated with Northwestern University School of Law. Drahozal and Zyontz used the same AAA data for a follow-on study that compared debt collection claims by companies in AAA consumer arbitrations with debt collection claims in federal court and in state court proceedings in certain Virginia and Oklahoma jurisdictions. See Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 Hastings Bus. L. J. 77 (2011) (“Creditor Claims”).

<sup>27</sup> AAA rules classify a dispute as a “consumer case” when it meets three requirements: (1) the dispute arose out of a standardized, systematic application of arbitration clauses by a business with its consumers; (2) the terms and conditions of the purchase of “standardized, consumable goods or services” were at least primarily non-negotiable; and (3) the product or service was for personal or household use. See The AAA Consumer-Related Disputes Supplementary Procedures, 4 (effective Sept. 15, 2005, fees effective March 1, 2013 [https://encrypted.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC1QFjAA&url=https%3A%2F%2Fwww.adr.org%2Fcs%2Ffdcplg%3F1dcService%3DGET\\_FILE%26dDocName%3DADRSTAGE2009997%26RevisionSelectionMethod%3DLatestReleased&ei=F\\_d1VIKXC5DGsQSaOoK4DA&usg=AFQjCNHGRwLZ0AwEK9aOR\\_GpsqlqBzw1g&sig2=fdY2tMrF2p\\_HFJvXhUnXsA&bvm=bv.80642063,d.cWc&cad=rja](https://encrypted.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CC1QFjAA&url=https%3A%2F%2Fwww.adr.org%2Fcs%2Ffdcplg%3F1dcService%3DGET_FILE%26dDocName%3DADRSTAGE2009997%26RevisionSelectionMethod%3DLatestReleased&ei=F_d1VIKXC5DGsQSaOoK4DA&usg=AFQjCNHGRwLZ0AwEK9aOR_GpsqlqBzw1g&sig2=fdY2tMrF2p_HFJvXhUnXsA&bvm=bv.80642063,d.cWc&cad=rja) (last visited Mar. 6, 2015)).

<sup>28</sup> See Statement of the AAA Before the Constitution Subcomm. of the Senate Comm. on the Judiciary (2007) and Analysis of the AAA’s Consumer Arbitration Caseload (2007), <http://www.judiciary.senate.gov/imo/media/doc/Naimark%20Testimony%20121207.pdf> (last visited Mar. 6, 2015).

<sup>29</sup> See, e.g., Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007), <http://www.citizen.org/documents/ArbitrationTrap.pdf> (last visited Mar. 6, 2015); Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, Metro. Corp. Counsel (July 2006), <http://www.metrocorpcounsel.com/articles/6988/same-result-court-more-efficiently-comparing-arbitration-and-court-litigation-outcomes> (last visited Mar. 6, 2015) (covering NAF cases from 2003 and 2004); Ernst &

arbitrations. This agreement was made in settlement of a consumer fraud lawsuit filed by the Minnesota Attorney General.

## 5.4 Data

As described in the 2013 Preliminary Results, our analysis of arbitration disputes uses electronic AAA case records for consumer disputes filed in the years 2010, 2011, and 2012.<sup>30</sup> The AAA voluntarily provided these records to the Bureau pursuant to a non-disclosure agreement.<sup>31</sup> For the most part, our analysis looks at disputes governed by the then-applicable AAA Supplementary Procedures for Consumer-Related Disputes (“AAA Supplementary Procedures”).<sup>32</sup> The AAA Supplementary Procedures were recently replaced by a new set of stand-alone rules for consumer disputes, beginning September 1, 2014.<sup>33</sup>

Our analysis focuses on consumer disputes about the following consumer financial products and services<sup>34</sup>:

- Credit cards;
- Checking accounts and/or debit cards;

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Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2004), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf> (last visited Mar. 6, 2015).

<sup>30</sup> The AAA began using electronic case records for its consumer arbitrations in 2010.

<sup>31</sup> Our use of the AAA Case Data is covered by the Bureau’s Market Analysis of Administrative Data under Research Authorities Privacy Impact Assessment, as well as the Bureau’s Market and Consumer Research Records Systems of Records Notice (CFPB.022).

<sup>32</sup> Class arbitration and arbitration appeals, however, were and remain governed by a different set of AAA rules.

<sup>33</sup> American Arbitration Association, Consumer Arbitration Rules (effective Sept. 1, 2014), <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased> (last visited Mar. 6, 2015). We discuss the new Consumer Arbitration Rules in Section 4.

<sup>34</sup> We did not study arbitration disputes relating to residential mortgages or home equity loans, as the Dodd-Frank Act prohibited the use of “arbitration or any other nonjudicial procedure” for resolving disputes arising from residential mortgage loans or extensions of credit under an open-end consumer credit plan secured by the principal dwelling of the consumer. 15 U.S.C. § 1639c.

- Payday and similar loans;<sup>35</sup>
- GPR prepaid cards;
- Private student loans; and
- Auto purchase loans.<sup>36</sup>

We have not extended the analysis to records of arbitration proceedings before other administrators, such as JAMS. As discussed in Section 2.3.3 and in the 2013 Preliminary Results, the AAA is the predominant administrator of consumer financial arbitrations.

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<sup>35</sup> As explained in greater detail in n.153 of the 2013 Preliminary Results, we included in the category of “payday loans” cases in which consumers alleged that credit service organizations (“CSOs”) originated any loans other than auto-title loans. In updating our findings from 2013, we have added other, similar cases to the “payday loan” category. For example, media reports have documented a trend of former payday lenders offering installment loans, so we have updated our results to include disputes regarding high-interest installment loans. *See, e.g.*, Carter Dougherty, *Payday Lenders Evading Rules Pivot to Installment Loans*, Bloomberg (May 29, 2013), <http://www.bloomberg.com/news/2013-05-29/payday-lenders-evading-rules-pivot-to-installment-loans.html> (last visited Mar. 6, 2015). We use the resulting classification of “payday loans” only for the limited purposes of this report. Our intent was to include as much potentially relevant AAA case data in our analysis as possible. The classification is not related to any other Bureau initiative, current or future, that may address similar loans.

<sup>36</sup> Our count of auto purchase loans does not include disputes relating to automobile title loans. We also excluded disputes against auto dealers unless: (1) it was clear that the auto dealer was also the issuer of the consumer’s auto purchase loan (errring on the side of overstating the number of disputes that focused on the automobile loans, as opposed to the automobiles being purchased); or (2) the consumer brought a claim relating to an auto purchase loan and only named the auto dealer as a respondent (suggesting that either the auto dealer was the lender or that the consumer potentially named the auto dealer in error, believing that the auto dealer was the lender); or (3) the consumer also named the lender as a defendant. We did not include in our case count claims against car dealers relating to “spot financing” or similar disputes that do not involve an actual auto purchase loan, as opposed to a representation that such financing would be forthcoming. We also did not include disputes about motorcycles or motorhomes. We use this classification of “auto purchase loans” only for the limited purposes of this report. It is not related to any other Bureau initiative, current or future, that may address similar loans.

## 5.5 Frequency: Types of claims asserted

### 5.5.1 Overall

For 2010 through 2012, we identified 1,847 AAA consumer arbitration disputes involving credit cards, checking accounts, payday loans, GPR prepaid cards, auto purchase loans, or private student loans.<sup>37</sup> The distribution of disputes by filing date and product market is summarized below in Table 1.

Of the cases reported in Table 1, 438 disputes were designated by the claimant as having been filed by companies. Another 175 were designated as having been mutually filed by consumers and companies. The remaining 1,234 disputes were designated as having been filed by consumers.<sup>38</sup>

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<sup>37</sup> This total excludes two disputes asserted as purported consumer class arbitrations. It also does not count arbitration appeals as separate disputes. We discuss class arbitration in Section 5.9 and arbitration appeals in Section 5.8.

<sup>38</sup> As previously noted, we did not attempt to verify whether the representation on the claim forms as to the party filing the case was accurate. In a number of cases that were designated as having been filed by a consumer, the record indicates that the consumer failed to prosecute the action and that the company actually paid the fees and obtained a quasi-default judgment. In other cases, we noted that a law firm representing consumers filed a number of student loan disputes but indicated on the checkbox that the action was being filed by the company. We thus cannot state with assurance what percentage of the arbitration disputes were, in fact, filed by consumers.



**TABLE 1: NUMBER OF AAA CONSUMER ARBITRATION DISPUTES BY PRODUCT, DISPUTES FILED 2010–2012**

Product type	Total	Filed in 2010	Filed in 2011	Filed in 2012
Credit cards <sup>39</sup>	1,026	302	368	356
Checking accounts/debit cards	72	21	29	22
Payday loans	166	108	28	30
GPR prepaid cards	4	0	1	3
Private student loans	286	35	7	244
Auto purchase loans	293	74	87	132
All product markets combined	1,847	540	520	787

## 5.5.2 Claim amounts

### Measuring affirmative consumer claim amounts

In the 2013 Preliminary Results, we reported on the “claim form amount” to measure the size of consumer affirmative claims. That was the amount indicated by the party filing an arbitration claim when completing the standard one-page AAA consumer arbitration “claim form” that accompanies the filing of every arbitration dispute.<sup>40</sup> The filing part(ies) are required to

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<sup>39</sup> In updating and revising the four markets we addressed in the 2013 Preliminary Results, we have lowered our credit card dispute count by seven. This represents, in part, identification of case files relating to the same dispute. Also, we had included additional disputes based on the parties’ claim filings, but, on further review of specific loan documents, the disputes did not in fact appear to relate to credit cards. Similar review of case files led to a net increase of one in the checking dispute count. We also increased our payday loan dispute count by 29 disputes over the three-year period, primarily because of the scope changes described in Section 5.4.

<sup>40</sup> The claim form asks the submitting party to “briefly explain the dispute.” It then asks: “Do you believe there is any money owing to you? If yes, how much?” In recording the claim form amount we used the number listed by the claimant on the AAA claim form, modifying that figure only by any documents attached to the claim forms that were referenced by the claimant in completing the form.

complete this form for the matter to proceed. The benefit of the claim form amount was its standard form and its presence in nearly every arbitration dispute. (Consumers did not, however, assert claims in every dispute.)

As an arbitration proceeding progressed, however, parties occasionally revised, clarified, or otherwise changed the amount that they sought, at least as compared to the claim form amount. The parties may have revised their claim amounts upwards or downwards as the matter proceeded, perhaps because of discovery. They may have corrected or clarified entries on the claim form. Or, they may have used the initial claim form amount only as a placeholder, subsequently tailoring their requests for relief more precisely.<sup>41</sup>

We noted in the 2013 Preliminary Results that we were recording, but at that time could not report on, another measure of claim amount: The last discernible statement of the parties' respective claim amounts prior to the resolution or other closure of the dispute.<sup>42</sup> We refer to this measure as the "pre-disposition claim amount."

There are material differences between the claim form amount and the pre-disposition claim amount. For example, 1,185 disputes had non-zero initial claim amounts. In 364 of those disputes, where consumers had revised non-zero pre-disposition claim amounts, the average and median initial claim form amounts were \$25,728 and \$13,111, respectively; the average and median pre-disposition claim amounts were \$21,498 and \$12,000, respectively.<sup>43</sup>

Table 2, below, illustrates the relationship between consumer claim form amounts and consumer pre-disposition claim amounts across the six product markets. Its entries differ from the above calculation, because the average and median claim amounts reflected in Table 2

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<sup>41</sup> Until March 2013, claim amounts had a direct impact on fee levels for consumers and companies in AAA consumer arbitrations. After March 2013, that is no longer the case. As discussed further in Sections 4.3 and 5.7.5, under the pre-March 2013 fee schedules, claimants generally paid \$125 for claims under \$10,000 and \$375 for claims between \$10,000 and \$75,000. As illustrated in Figure 14 of the 2013 Preliminary Results, we saw large clusters of claim form amounts of \$10,000 and \$42,500 claims. (As described in the Preliminary Results, we reported claims expressed as a range as the midpoint between the high and low range. Thus, a claim described as a range of \$10,000 to \$75,000 was recorded as a claim for \$42,500.)

<sup>42</sup> 2013 Preliminary Results at 78.

<sup>43</sup> These calculations exclude two initial claim form amounts of over \$1 million, as well as two pre-disposition claim form amounts of over \$1 million (three cases total, one of which fell into both categories).

include all claims — including claim amounts that were not revised over the course of the proceedings.

**TABLE 2: AVERAGE AND MEDIAN CONSUMER CLAIM FORM AND PRE-DISPOSITION CLAIM AMOUNTS, BY PRODUCT, DISPUTES FILED 2010–2012<sup>44</sup>**

Product type	Filings with consumer claim form amounts	Average initial claim form amount <sup>45</sup>	Median initial claim form amount	Filings with consumer pre disposition claims <sup>46</sup>	Average pre disposition claim amount	Median pre disposition claim amount
Credit cards	458	\$17,381	\$10,000	535	\$21,581	\$10,000

<sup>44</sup> Our tally of claim amounts includes 155 disputes in which the consumer asserted affirmative claims, but did not quantify the claim amount throughout the proceedings (*i.e.*, there was no pre-disposition claim amount). Those 155 disputes, however, were excluded from our calculation of average and median claim amounts. We similarly include in our tally affirmative consumer claims of \$1 million or over, of which there are six claim form amounts and six pre-disposition claim amounts. (Five overlap. One in each set is not in the other.) (For more information about these high-value disputes, *see* Appendix I.) Those six claims are excluded from our average/median calculations. We also exclude another 743 disputes in which the consumer made no affirmative claims (from both our tally and average/median calculations).

<sup>45</sup> In limited instances consumers responded “no” to the claim form’s inquiry: “Do you believe there is any money owed to you?” yet still provided a dollar amount in the following field, which asks “If so, how much?” If the amount specified by the consumer matched the disputed debt amount stated elsewhere (for example, in a company’s counterclaim), we assumed that the consumer was referencing the disputed debt on the AAA Claim Form and designated a \$0 pre-disposition claim amount. In such cases, the disputed debt amount would capture the sum identified by the consumer. This occurred relatively frequently in cases relating to credit cards and private student loans.

<sup>46</sup> The number of pre-disposition claims is larger than the number of initial claim form amounts in some cases because, among other reasons, consumers frequently did not fully complete the AAA claim form at the beginning of the proceeding or raised their claims as counterclaims. In other disputes, claimants identified a specific initial claim amount (sometimes erroneously listing the disputed debt amount or only statutory damages), later to add affirmative claims of unspecified amounts.

Checking accounts/ debit cards	63	\$45,089	\$14,424	69	\$55,948	\$15,028
Payday loans	153	\$33,159	\$42,500	163	\$22,359	\$10,080
GPR prepaid cards	4	\$20,111	\$2,000	4	\$20,111	\$2,000
Private student loans	279	\$38,849	\$42,500	66	\$18,287	\$13,750
Auto purchase loans	228	\$35,062	\$25,000	267	\$33,676	\$25,000
All product markets combined <sup>47</sup>	1,185	\$29,308	\$17,008	1,104	\$26,924	\$11,500

As illustrated in the table, while the median pre-disposition claim amount was \$11,500, high-dollar claims raised the average pre-disposition claim amount to nearly \$27,000, even after excluding claims of \$1 million or more. This difference is most noticeable in the 69 disputes relating to checking accounts and debit cards, where the average claim amount was nearly \$56,000, while the median claim amount was just over \$15,000.<sup>48</sup>

Across all six product markets there were 74 disputes with pre-disposition consumer claim amounts of \$1,000 or less. These broke out as follows: 34 credit card disputes, seven checking account or debit card disputes, 24 payday loan disputes, One private student loan dispute, and

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<sup>47</sup> Across all product markets, the initial claim amount for the tenth percentile was \$3,000; the ninetieth, \$50,000. Regarding the pre-disposition claim amount, the tenth percentile was \$1,918; the ninetieth, \$54,210.

<sup>48</sup> The tenth percentile claim amount relating to checking accounts and debit cards was \$1,100; the ninetieth, \$170,299.

eight auto loan disputes. This results in an annual average of approximately 25 disputes per year of \$1,000 or under.<sup>49</sup>

For the rest of the report, unless we specifically reference “initial claim amounts,” when we refer to “claim amounts” or “affirmative claim amounts,” we are referring to pre-disposition claim amounts.<sup>50</sup>

## Disputed debt amounts

Consistent with our prior practice, if a filing revealed a dispute over a debt alleged to be owed by the consumer (regardless of whether the filing was submitted by a consumer, company, or mutually), we separately recorded the disputed debt amount where that information was available. The disputed debt amount reported in the 2013 Preliminary Results was determined based upon a review of the entire case file and thus we use the same metric here as in that report.

Some 69.1% of the disputes involved such debt disputes. Disputed debt amounts could arise in a number of circumstances. For example, they might result from a consumer’s request for declaratory relief that the consumer did not owe an alleged debt (so that a grant of relief on the affirmative claim would have the effect of negating the consumer’s alleged debt to the company). Or the disputed debt amount could have been reflected in a consumer’s defense of a company’s claim in a company-filed dispute or of a company’s counterclaim in a consumer-initiated dispute.<sup>51</sup>

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<sup>49</sup> In the 2013 Preliminary Results, we found 19 filings a year that involved initial claim form amounts of \$1,224 or less relating to credit card disputes, checking account or debit card disputes, payday loan disputes, and GPR prepaid card disputes.

<sup>50</sup> As described in the 2013 Preliminary Results, we ultimately did not record punitive damage claims. We found such claims to be so rarely quantified that we did not believe they could be analyzed in any meaningful manner. Accordingly, where punitive damage claims were separately quantified, we did not include those amounts in our claim form amounts or pre-disposition claim amounts. For similar reasons, our claim amounts also do not include requests for attorneys’ fees. Our claim amounts do, however, include requests for statutory damages.

<sup>51</sup> In our methodology, a case in which a consumer filed a claim for declaratory relief that he did not owe \$500 and the company filed a counterclaim seeking \$500 from the consumer would have an identical disputed debt amount as a case in which the consumer filed a claim for declaratory relief that he did not owe \$500, which the company

The disputed debt amount encompasses, where available, all components of the alleged debt — principal, loan interest, fees, and other financing costs. (However, we did not include pre-award or post-award interest.) We recorded only the amount of debt that was in dispute. For example, if a company alleged that a consumer owed a debt of \$12,000, but the consumer asserted that the debt was only \$9,000, we would record a disputed debt amount of \$3,000 and a company claim of \$12,000.<sup>52</sup>

The average and median disputed debt amounts for arbitration disputes relating to each product market are shown below in Table 3. In 82 filings, a consumer disputed a debt but we were unable to determine the amount of the disputed debt. We included those disputes in our debt dispute counts, but excluded them from any calculations that deal with the actual size of the debts being disputed, such as calculations of averages, medians, and recovery ratios.

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simply defended without filing the formal counterclaim. Similarly, a case where a consumer brought no claims against the company, but only defended a company’s claim that he owed it \$500, would have the same disputed debt amount of \$500.

In each of these scenarios, we would record nothing for the consumer’s pre-disposition claim amount because his claim focused solely on disputing alleged debts, as opposed to seeking affirmative relief. We would have recorded a company claim, however, in all but the second scenario. If the consumer also brought affirmative claims — such as seeking statutory damages for harassing debt collection activity, which is actionable under the Fair Debt Collection Practices Act — those would have been separately recorded as affirmative claims.

<sup>52</sup> These scenarios were rare.

**TABLE 3: AVERAGE AND MEDIAN DISPUTED DEBT AMOUNTS, DISPUTES FILED 2010–2012<sup>53</sup>**

Product type	Number of filings with disputed debts	Average disputed debt amount	Median disputed debt amount
Credit cards	899	\$13,103	\$8,124
Checking accounts/debit cards	3	\$3,523	\$4,101
Payday loans <sup>54</sup>	14	\$12,406	\$4,334
Private student loans	280	\$23,986	\$25,725
Auto purchase loans	80	\$14,393	\$12,119
All six product markets <sup>55</sup>	1,276	\$15,705	\$10,996

Unlike affirmative consumer claim amounts, the amount of debt disputed was more evenly distributed across disputes, so that the average disputed debt amount of \$15,705 was closer to the median disputed debt amount of \$10,996. As might be expected, filings involving private student loans and auto purchase loans featured larger disputed debt amounts than credit cards, checking accounts, or payday loans.

As the table above shows, credit card and student loan filings accounted for the overwhelming majority of debt disputes. Appendix J includes additional information about debt disputes in these two product markets.

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<sup>53</sup> None of the four GPR prepaid card disputes in the AAA Case Data involved disputed debts.

<sup>54</sup> A large proportion of the payday loan-related disputes were filed by a single repeat plaintiff's counsel (what we later describe as a "heavy repeat player"), whose pleadings did not dispute alleged consumer debts relating to the use of payday lenders' services. Frequently the repeat player sought recovery of the total amount paid by the consumer as a form of statutory relief under state law rather than a disputed debt.

<sup>55</sup> The tenth and ninetieth percentile disputed debt amounts were \$2,548 and \$27,268, respectively.

## Company claims against consumers

Companies brought claims against consumers in 35.7% of disputes overall.<sup>56</sup> Further details are in Table 4 below. Almost all of the disputes involving company claims also involved disputed debts.<sup>57</sup> With rare exceptions, the company claim amounts were identical to the disputed debt amounts in those filings. There were only 11 instances in which the company claim amount differed from the disputed debt amount, generally reflecting consumers who conceded owing some portion of debts companies sought to collect. The average and median company claim amounts in Table 4 differ from the average and median disputed debt amounts in Table 3, because a consumer may dispute an alleged debt without there being a formal company claim filed. For example, the consumer may file for declaratory relief that they do not owe \$5,000 in alleged debt, and the company may not submit a formal counterclaim for the same \$5,000.

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<sup>56</sup> Under the AAA rules that were applicable during the period under study, a company could unilaterally file a debt collection dispute against a consumer in arbitration only if a preceding debt collection litigation had been dismissed or stayed in favor of arbitration. Companies could file disputes mutually with consumers; they could also file counterclaims in dispute filed by consumers against them. The 35.7% includes one claim in which a company asserted a claim against a consumer, but did not detail the amount of the claim. That case is included in the “Number of filings with company claims” column of Table 4, but is excluded from the average and median claim amount calculations. For the rest of this report, the case is likewise excluded from discussions involving the dollar amount of company claims (as opposed to the number of company claims).

<sup>57</sup> The majority of the filings featuring company claims against consumers that did not also involve disputed debts involved a single consumer attorney “heavy repeat player” regarding payday loans, who framed the amount of the payday loan as an affirmative claim only, rather than a disputed debt. Other disputes involved relatively unique factual scenarios that did not involve loans (*e.g.*, a dispute in which a bank sought recovery for funds a consumer withdrew from his checking account). It is also possible, in theory, that some cases might have been missing relevant documents from the case files.



**TABLE 4:** COMPANY CLAIM AMOUNTS ALL PRODUCT MARKETS, DISPUTES FILED 2010–2012<sup>58</sup>

Product type	Number of filings with company claims	Average company claim amount	Median company claim amount
Credit cards	557	\$16,669	\$10,678
Checking accounts/debit cards	4	\$75,292	\$15,441
Payday loans	34	\$1,468	\$684
Private student loans	8	\$13,868	\$9,906
Auto purchase loans	56	\$14,088	\$12,119
All product markets combined <sup>59</sup>	659	\$16,011	\$10,236

### 5.5.3 Representation

In the 2013 Preliminary Results, we reported the rates at which consumers and companies were represented by counsel in arbitration disputes about credit cards, checking accounts, and payday loans. We found that nearly 53% of consumers in these arbitration disputes had counsel. Companies typically participated in these consumer arbitrations with an attorney.<sup>60</sup>

Table 5 updates these findings. It shows consumer and company representation rates in the AAA Case Data for all six product markets. As shown in Table 5, consumer representation rates were comparatively higher in disputes relating to our new product markets — private student loans and auto loans — than in disputes about the product markets covered by the 2013 Preliminary

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<sup>58</sup> None of the four GPR prepaid card disputes in the AAA Case Data involved company claims.

<sup>59</sup> The tenth and ninetieth percentile company claim amounts were \$2,394 and \$27,366, respectively.

<sup>60</sup> 2013 Preliminary Results at 70–73.

Results. (Consumer representation rates in these new markets were more comparable, however, to the rates identified in the Preliminary Results for payday loan disputes, in which 19 out of every 20 consumers were represented.<sup>61</sup>) The overall representation rate across all six product markets increased to 63.2%. Company representation rates for the new product markets were similar to the rates we identified for the other product markets.<sup>62</sup>

**TABLE 5: REPRESENTATION RATES FOR CONSUMERS AND COMPANIES, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2012**

Product type	Number of filings	% of cases consumers represented by counsel	% of cases companies represented by counsel
Credit cards	1,026	46.5%	94.2%
Checking accounts/debit cards	72	55.6%	84.7%
Payday loans	166	94.6%	94.0%
GPR prepaid cards	4	25.0%	75.0%
Private student loans	286	95.1%	89.2%
Auto purchase loans	293	75.4%	81.2%
All product markets combined	1,847	63.2%	90.9%

<sup>61</sup> One possible explanation for the higher consumer representation rates is that student and auto loan disputes involved higher stakes. Another possible explanation, discussed more thoroughly in Section 5.6.12, is the number of consumers represented by “repeat counsel” in the different product markets. As discussed below, the payday loan disputes also featured a high concentration of repeat counsel — one law firm, in particular.

<sup>62</sup> As we noted in the 2013 Preliminary Results, the data may understate company representation rates. We assumed that companies were unrepresented unless we could reliably identify outside or in-house counsel. But while it was straightforward from the AAA Case Data to identify the presence of an *outside* attorney acting for the consumer or company, it was much harder to tell whether an internal company representative was acting as a lawyer. Further, at least some jurisdictions require that companies be represented by counsel. *See, e.g., Nisha, LLC v. TriBuilt Const. Group, LLC*, 388 S.W.3d 444 (Ark. 2012).

Table 6, below, focuses on representation rates in disputes with affirmative consumer claims. It segments disputes with affirmative claims into those with debt disputes and those without debt disputes. We frequently repeat this distinction through our analysis, because of the possibility that the affirmative claims consumers bring may qualitatively differ depending on whether the consumer also disputes an alleged debt in the same arbitration proceeding.<sup>63</sup> Appendix J compares affirmative claim amounts across these two categories. As the appendix shows, affirmative claim amounts do vary for arbitration filings with and without debt disputes, but not in a manner that appears consistent across product markets.

In credit card disputes, representation rates are much higher for consumers when consumers dispute alleged debts as well as bring affirmative claims (70.2%), as compared to when consumers solely bring affirmative claims (31.7%).

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<sup>63</sup> For example, as later shown, in disputes that arbitrators resolve on the merits, consumers are more likely to be awarded some relief on affirmative claims when these claims are **not** brought in conjunction with disputes about alleged debt.

**TABLE 6:** REPRESENTATION RATES FOR CONSUMERS' AFFIRMATIVE CLAIMS, DISPUTES FILED 2010–2012<sup>64</sup>

Product type	Number of affirmative claim only disputes	Representation rate in affirmative claim only disputes	Number of disputes with affirmative claims and debt disputes	Representation in cases with affirmative claims and disputed debts
Credit cards	123	31.7%	412	70.2%
Checking accounts/debit cards	68	54.4%	1	100.0%
Payday loans	151	96.0%	12	91.7%
GPR prepaid cards	4	25.0%	0	n/a
Private student loans	6	50.0%	60	95.0%
Auto purchase loans	213	76.5%	54	79.6%
All product markets	565	68.7%	539	74.4%

A significant number of consumers were represented by counsel who also represented consumers in other AAA consumer financial disputes filed in 2010–2012. For example, one attorney represented 68.2% of the payday loan consumers who were represented by counsel. A

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<sup>64</sup> There were 737 filings where the consumer only disputed alleged debts, without bringing affirmative claims at all. From these cases, the representation rate for the 487 credit card disputes was 30.6%; for the 220 private student loan disputes, 96.4%; and for the 26 auto purchase loan disputes, 57.7%. There were only two checking account/debit card disputes, one of which involved consumer counsel. There were also only two payday loan disputes where the consumer only disputed alleged debts, none of which involved consumer counsel.

There were another six cases in which consumers neither brought affirmative claims nor disputed alleged debts. Four of those cases related to credit cards; no consumers were represented by attorneys in any of them. In the other two cases, involving checking accounts and payday loans, the consumers were represented by attorneys.

single law firm represented 97.4% of the private student loan consumers who had counsel. We discuss such “repeat players,” particularly “heavy repeat players,” further in Section 5.6.12.

## 5.6 Outcomes: How claims were resolved

In studying how arbitration filings were resolved, more than half of the 2012-filed disputes were still in progress or were otherwise incomplete as of the date of our collection of data from the AAA in early 2013. As a result, we report on outcomes only on cases filed in 2010 or 2011, which yields a set of 1,060 arbitration filings.<sup>65</sup> In all but 60 of these there is either a final disposition reflected in the record or (in 13 cases) a stay with a mention of bankruptcy. In the remaining 60 cases the file simply stopped mid-dispute. (We treat these cases as “disputes consistent with settlement.”)

We begin by categorizing case outcomes into four mutually exclusive groups:

- Disputes that arbitrators resolved on the merits (32.2% of the filings);
- Disputes that we know settled (23.2% of the filings);
- Disputes consistent with settlement (34.2% of the filings); and
- Disputes inconsistent with settlement (*i.e.*, their outcomes were unlikely to result from settlements) (10.5% of the filings).

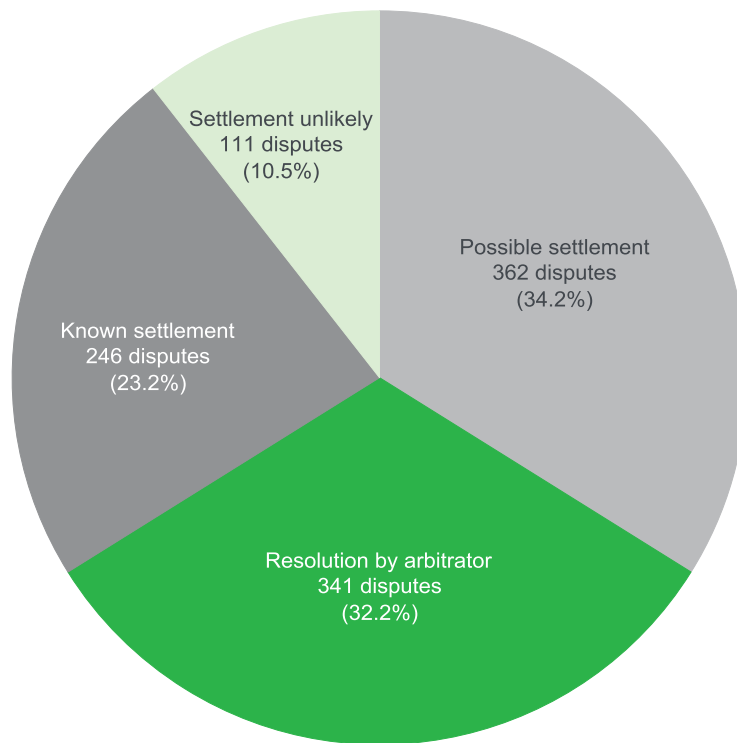
Of these four groups, we only can know the substantive outcome of the parties’ claims in the first category: The disputes that arbitrators resolved on the merits.<sup>66</sup> Figure 1 below illustrates these shares graphically.

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<sup>65</sup> We did, however, review documents entered into the record in 2012 in disputes that were filed in 2010 and 2011.

<sup>66</sup> We know substantive settlement terms in fewer than 2.5% of the 246 disputes that we know settled. Because this is such a small share, we generally limit our substantive outcomes analysis to arbitrator-resolved disputes. Also, in six disputes, we know that the parties’ claims were the subject of an arbitrator award, but do not know the terms of the award.

**FIGURE 1:** RESOLUTIONS BY ARBITRATOR, AS A PROPORTION OF OVERALL CASE FILINGS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2011



### 5.6.1 Arbitrator decisions on the merits of the parties' claims

Arbitrators decided the merits of parties' claims in 341 disputes. These decisions were issued after in-person hearings, telephone hearings, or the arbitrators' reviewing written submissions by the parties, including dispositive motions. We describe these disputes in greater detail in Sections 5.6.6 and 5.6.7.

## 5.6.2 Known settlements

Under the then applicable (and the current) AAA rules, parties were not required to inform the AAA of settlements.<sup>67</sup> Even so, the record in 246 disputes showed that the parties settled the dispute. Settlement terms, however, were unavailable in all but six of these disputes.<sup>68</sup>

## 5.6.3 Disputes that may have settled

Another 362 disputes ended in a form that was consistent with settlement between the parties but without an express indication of settlement. These disputes were as follows:

- Disputes that the AAA closed because a consumer or company failed to pay its initial filing fees (116 filings);<sup>69</sup>
- Disputes where the claimant withdrew the filing (86 filings);<sup>70</sup>

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<sup>67</sup> The AAA Supplementary Procedures for Consumer-Related Disputes create limited incentives for the parties to notify the AAA of a settlement or withdrawal. The parties, however, were not obligated to do so. They similarly were not obligated to distinguish settlements from withdrawals when they did provide notice to the AAA.

In that regard, under the AAA Supplementary Procedures for Consumer-Related Disputes, if a case was settled or withdrawn within 30 calendar days, 50% of the filing fee was refunded to the business. Similarly, parties in cases held as inactive for one year were assessed an annual abeyance fee of \$300.

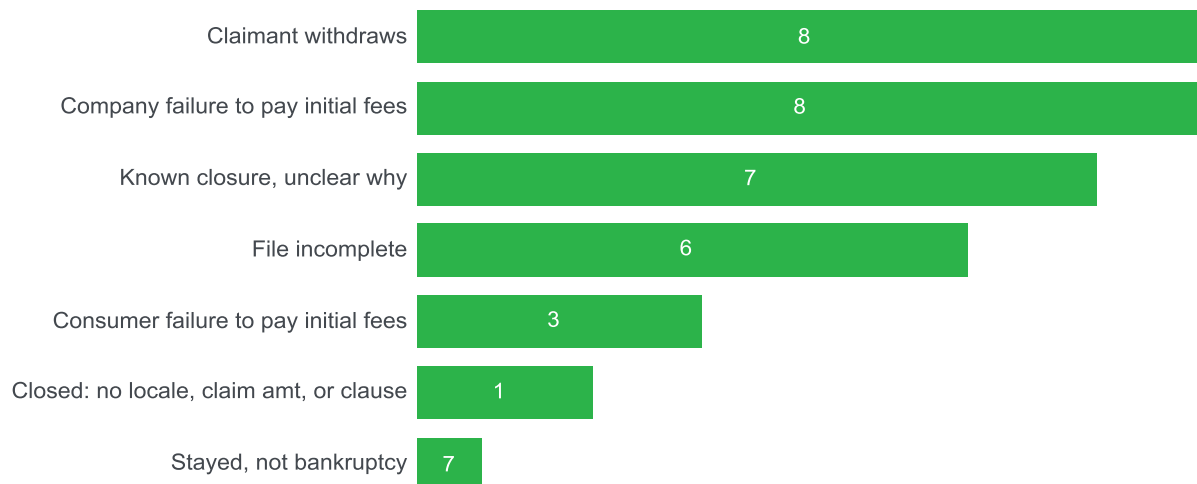
<sup>68</sup> The six disputes where we know the terms of the parties' settlements all concerned credit cards. The average and median consumer affirmative claim amounts were \$7,150 and \$0. The average and median disputed debt amounts were \$19,766 and \$23,783. One settlement provided for some monetary payment to the consumer; the payment was less than \$1,000. Three settlements involved some amount of debt forbearance. For these three disputes, the average and median forbearance amounts were \$6,968 and \$4,900.

<sup>69</sup> The AAA closed 85 cases because a company did not pay initial filing fees. The company's conduct may have a number of causes. Settlement may have occurred post-filing, but prior to payment of initial fees. Consumers may have filed against a company even though the contract did not provide for AAA arbitration. But companies could also choose not to pay initial fees for other reasons. For example, if a company brought about the administrative closure of an arbitration proceeding by failing to pay the initial filing fee, it is not clear whether a state or federal court would subsequently hear the parties' dispute or whether the consumer would even be willing to press it in another forum. Note that before closing a dispute for the company's failure to pay an initial fee, the AAA typically sends a warning letter that explains that the AAA may decline to administer any other consumer disputes involving the business if the company does not pay the filing fee. The letter generally requests that the business remove the AAA name from its arbitration clause, as well.

- Disputes that the AAA closed, but where we were unable to determine the cause of the closure (74 filings);
- Disputes in which the file simply stopped, seemingly mid-dispute (60 filings);
- Disputes that included correspondence from the AAA specifying that it was closing the proceedings because claimants failed to meet other filing requirements, such as failure to identify the locale of the hearing, specify the claim amount sought, or provide the underlying arbitration clause relevant to the action (19 filings); and
- Disputes that were stayed without mention of bankruptcy proceedings (seven filings).<sup>71</sup>

Figure 2, below, illustrates these shares (which are mutually exclusive and collectively exhaustive).

**FIGURE 2: DISPUTES THAT MAY HAVE SETTLED, BY CLOSURE TYPE, DISPUTES FILED 2010–2011**



<sup>70</sup> Thirty-nine of the 86 claimant withdrawals (45.4%) relate to filings by a single law firm. The 39 withdrawals constitute 47.6% of the firm’s AAA cases. The average percentage of claimant withdrawals for the set of cases involving other law firms is 4.3%.

<sup>71</sup> If the dispute was stayed because of a bankruptcy, we included it under the category of cases that likely did not settle.



## 5.6.4 Disputes that likely did not settle

Our final set of disputes involved administrative closures that were unlikely to reflect a settlement of the AAA proceedings by the parties.<sup>72</sup> These were various types within this general category:

- Disputes that the AAA declined to administer because the company had previously failed to comply with prior requests to adhere to the AAA’s due process standards (55 filings);
- Disputes that conflicted with the AAA’s moratorium on debt collection arbitrations (24 filings);<sup>73</sup>
- Disputes that were administratively closed due to a pending bankruptcy (13 filings);
- Disputes closed because of a conflicting arbitration proceeding or litigation (11 filings); and
- Disputes closed for other reasons that were likely unrelated to a settlement between the parties (8 filings).<sup>74</sup>

Figure 3 below, illustrates these shares (which are again, mutually exclusive and collectively exhaustive).

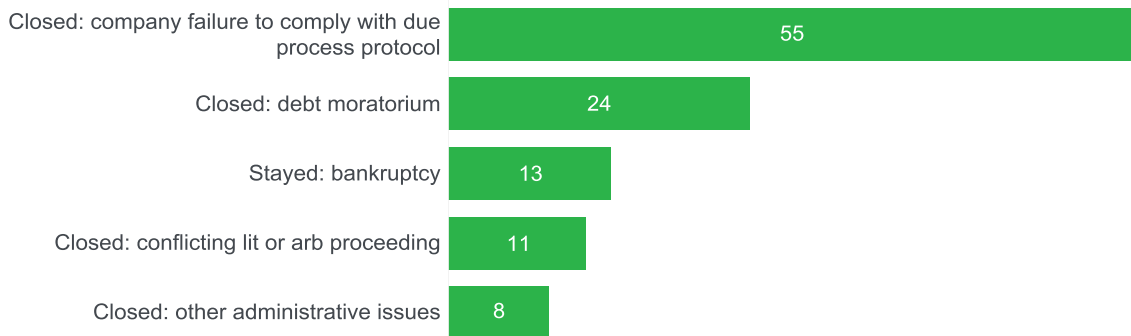
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<sup>72</sup> The closures do not preclude the possibility that the parties separately settled their underlying dispute. The form of closure, however, was unlikely to be the result of any such settlement. These forms were not of the kind one would expect to proceed from settlement inasmuch as they were not outcomes that the parties could have readily engineered in light of settlement.

<sup>73</sup> In July 2009, the AAA announced a moratorium on the administration of any additional debt collection arbitrations. It cited due process and fairness concerns. *See Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts*, Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight, 111th Cong. (July 22, 2009) (testimony of Richard W. Naimark on behalf of the American Arbitration Association); *see also* Consumer Debt Collection Due Process Protocol Statement of Principles, American Arbitration Association, [https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG\\_003865&revision=latestreleased](https://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003865&revision=latestreleased) (last visited Mar. 6, 2015). The AAA subsequently decided to entertain debt collection arbitrations only where the company had attempted a collection action in court and the consumer had invoked an arbitration clause.

<sup>74</sup> Examples include cases in which an arbitrator determined that no arbitration agreement existed between the parties; a closure when the consumer filed the same demand form twice; and situations where the claimant died over the course of the proceedings.

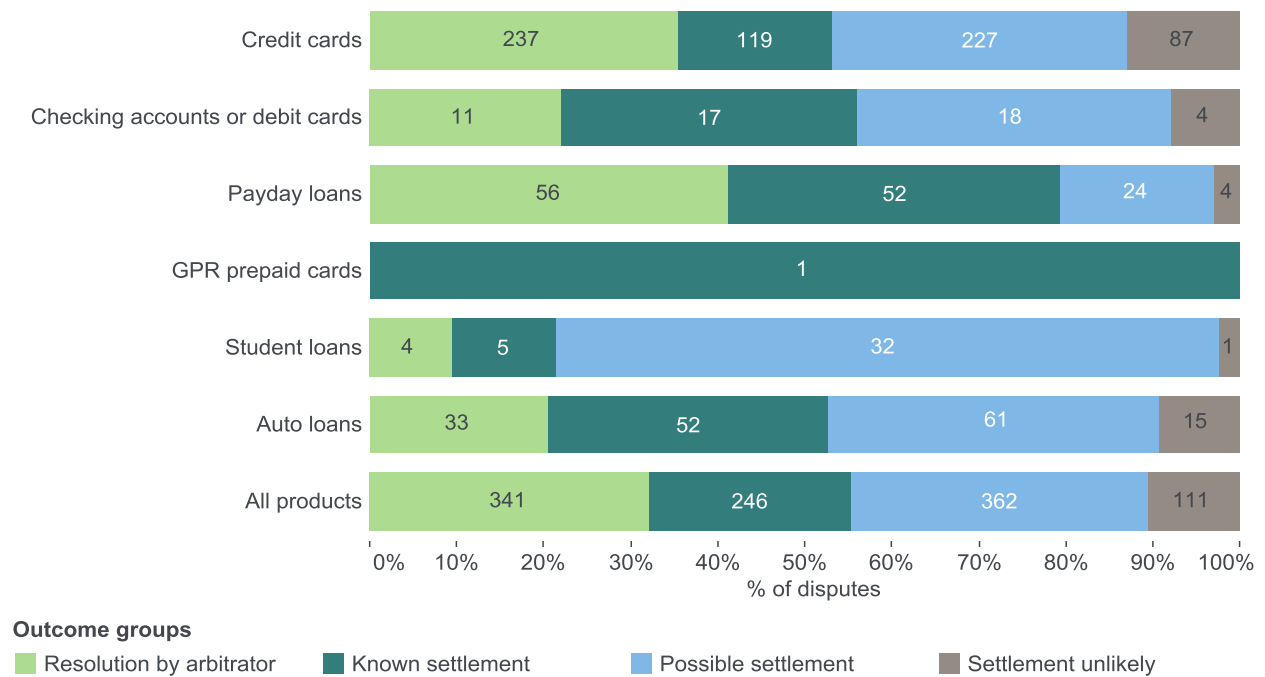
**FIGURE 3:** OUTCOMES THAT WERE UNLIKELY TO BE THE RESULTS OF SETTLEMENTS, DISPUTES FILED 2010–2011



### 5.6.5 Outcome form by product type

Figure 4 below summarizes how the four different categories of outcomes discussed above were distributed across the six different product markets we studied. It is a normalized segmented bar chart, so each bar represents all the cases in the applicable set and sums to 100%. Normalizing the bars allows us to compare the relative distribution of outcome forms for each product market. For example, the chart shows that nearly 90% of private student loan filings were or may have been resolved by settlement, whereas less than 60% of payday loan disputes were or may have been. For context, we have included the absolute counts within each bar segment.

**FIGURE 4:** DISTRIBUTION OF OUTCOME FORMS, BY PRODUCT MARKET, DISPUTES FILED 2010–2011



### 5.6.6 Substantive outcomes in arbitrator-resolved disputes

As discussed above, arbitrators made a determination regarding the merits of the parties’ claims in 341 of the 1,060 consumer financial disputes filed in 2010 and 2011 — fewer than a third of all filed disputes. With limited exception, these are the only disputes in which the substantive outcome of the parties’ claims can be determined from the record.<sup>75</sup>

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<sup>75</sup> As noted above, a handful of the known settlements — or less than 1% of all disputes filed — were for identifiable terms.

## Arbitrator decisions on the merits of disputes involving affirmative consumer claims<sup>76</sup>

Of the 1,060 disputes filed in 2010–2011, some 668 involved affirmative claims by consumers. This total can be split into two sets: (1) those in which consumers did not also dispute alleged debts; and (2) those in which consumers also disputed such debts.

There were 379 disputes in the first set — disputes where consumers brought affirmative claims, but did not dispute any alleged debts. Substantive outcomes for these disputes are as follows:

- Arbitrators reached a decision on the merits of the parties' claims in 92 of the 379 disputes. Arbitrators provided relief to consumers in 25, or 27.2%, of the disputes in which arbitrators reached a determination on the merits of the parties' claims. In these 25 disputes, the average and median award amounts were \$5,505 and \$2,578, respectively. The average and median claim amounts for these 25 disputes were \$21,194 and \$13,212.<sup>77</sup> In the 25 disputes in which consumers were provided some form of relief on their affirmative claims, consumers won an average of 47 cents for every dollar they claimed.<sup>78</sup>

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<sup>76</sup> We did not systematically record data regarding requests or grants of injunctive relief. Awards of injunctive relief, however, were exceptionally rare. We are unaware of any dispute in which an arbitrator provided injunctive relief that could theoretically affect any consumer aside from the claimant.

<sup>77</sup> These calculations exclude one dispute involving an undefined claim amount.

These figures, overall, do not include four awards of punitive damages to consumers (there were no punitive damage awards to companies). Two of the punitive damage awards to consumers related to payday loan-related disputes (punitive damage awards of \$2,000 and \$4,000) and two related to auto purchase loan-related disputes (punitive damage awards of \$1,000 and \$76,000).

These figures also exclude arbitrator awards relating to AAA-related fees or awards of attorneys' fees, which are discussed in Sections 5.7.5 and 5.7.6, respectively.

<sup>78</sup> The average and median *initial* claim form amounts for these 25 disputes were \$26,706 and \$21,000, which leads to a recovery ratio of \$0.31 for every dollar claimed on AAA claim forms. One dispute involved an initial claim form amount of \$0, which is excluded from these calculations regarding initial claim form amounts.

- However, taking into consideration all 92 disputes in which we know the substance of the arbitrator’s award, consumers won an average 13 cents for every dollar they claimed.<sup>79</sup>

There were 289 disputes in the second set — disputes where consumers brought affirmative claims and also disputed debts they were alleged to owe. Substantive outcomes for these disputes are as follows:

- Arbitrators reached a decision on the merits of the parties’ claims in 69 disputes, but we were unable to determine the terms of the arbitrator’s award in three cases. In the remaining 66 disputes involving arbitrator awards, arbitrators provided relief to consumers on their affirmative claims in seven, or 10.6%, of these disputes. In these seven disputes, the average and median grants of relief on consumers’ affirmative claims were \$4,972 and \$3,000, respectively.<sup>80</sup> The average and median claim amounts for these seven disputes were \$14,880 and \$12,919. In these seven cases, consumers won an average of 90 cents for every dollar they claimed.<sup>81</sup>
- Taking into consideration all 66 disputes where we know the substance of the arbitrator’s award, consumers won an average of ten cents for every dollar they claimed.<sup>82</sup>

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<sup>79</sup> These calculations exclude one dispute involving an undefined claim amount and one dispute involving a claim amount over \$1 million.

The average and median *initial* claim form amounts for these 92 disputes were \$41,446 and \$42,500, which leads to an average recovery ratio of nine cents for every dollar claimed on AAA claim forms, after taking into consideration disputes in which an arbitrator rejected consumers’ claims entirely. The calculations relating to initial claim form amounts exclude an initial claim form amount of \$100 million and five claim form amounts of \$0.

<sup>80</sup> As above, these figures also exclude arbitrator awards relating to AAA-related fees or awards of attorneys’ fees, which are discussed in Sections 5.7.5 and 5.7.6, respectively.

<sup>81</sup> The average and median *initial* claim form amounts for these seven disputes were \$15,664 and \$10,000, which leads to a recovery ratio of 58 cents for every dollar claimed on AAA claim forms. This calculation excludes one initial claim form amount of \$0.

<sup>82</sup> These calculations exclude four disputes with unknown claim amounts.

The average and median *initial* claim form amounts for these 66 disputes were \$20,342 and \$10,000, which leads

- In one of these 66 disputes, we were unable to determine the amount of debt in dispute. Accordingly, we could not determine whether the consumer was provided any debt forbearance. In the remaining 65 disputes, however, we know arbitrators provided debt relief to consumers in 22 disputes, or 33.8% of the disputes. In the 22 disputes in which the arbitrator provided some form of debt forbearance, the average and median grants of debt forbearance were \$5,211 and \$3,093, respectively. The average and median disputed debt amounts in these 22 disputes were \$8,273 and \$6,126, meaning that in these 22 disputes, consumers won an average debt forbearance of 69 cents of each dollar of alleged debt.
- Taking into consideration all 65 debt disputes for which we knew both the disputed debt amount and the arbitrator award, consumers won an average debt forbearance of 24 cents of each dollar of alleged debt.

For completeness, the substantive outcomes for the affirmative claims in all 668 disputes that involved consumer affirmative claims are as follows:

- Arbitrators provided some kind of relief to consumers on their affirmative claims in 32 of 158 disputes in which consumers brought claims and we could determine the amount of the award (20.3%). In these 32 disputes, the average and median grants of relief on consumers' affirmative claims were \$5,389 and \$2,682, respectively. The average and median claim amounts for these 32 disputes were \$19,768 and \$12,919, respectively, which means that in the 32 disputes that consumers were provided relief, consumers won an average of 57 cents for every dollar they claimed.<sup>83</sup>
- In the 32 disputes filed in 2010 and 2011 in which arbitrators provided relief to consumers regarding their affirmative claims, consumers won a total of \$172,433.

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to an average recovery ratio of six cents for every dollar claimed on AAA claim forms, after taking into consideration disputes in which an arbitrator rejected the consumers' claims entirely. These calculations relating to initial claim form amounts exclude four disputes featuring \$0 initial claim form amounts.

<sup>83</sup> One of the 32 disputes included a claim with an undefined amount. That claim is consequently omitted from the calculation of the average, median calculations, and recovery ratio.

The average and median *initial* claim form amounts for these 32 disputes were \$24,497 and \$16,500, which leads to a recovery ratio of 36 cents for every dollar claimed on AAA claim forms. Two disputes featured \$0 initial claim form amounts and have been excluded from the average, median, and ratio calculation.

- Taking into consideration all 158 disputes for which we know the substance of the arbitrator’s award, consumers won an average of 12 cents for every dollar they claimed.<sup>84</sup>

## Arbitrator decisions on the merits of disputes involving disputed debts

Outside of consumer affirmative claims, there were 386 disputes in which consumers disputed debts they were alleged to owe, but brought no affirmative claims.

- Arbitrators reached a decision on the merits of the parties’ claims in 180 such disputes. We were unable to determine the terms of the arbitrator’s award in three of those 180 disputes; in another three, we were unable to determine the amount of debt in dispute. Of the remaining 174 disputes, arbitrators provided consumers some form of debt forbearance in 24 filings, or 13.8% of the disputes. In the 24 disputes in which the arbitrator provided debt forbearance, the average and median grants of debt forbearance were \$3,103 and \$2,212, respectively. The average and median disputed debt amounts in these 24 disputes were \$14,919 and \$11,262, meaning that in those 24 disputes, consumers were successful in disputing an average of 35 cents of each dollar of debt.
- Taking into consideration all 174 disputes in which arbitrators provided consumers debt relief, consumers were successful in disputing five cents of each dollar of debt allegedly involved.

For completeness, the substantive outcomes for the debt disputes in all 675 arbitration filings that involved disputes over alleged consumer debts are as follows:

- Arbitrators reached a decision on the merits of the parties’ claims in 249 such disputes. We were unable to determine the terms of the arbitrator’s award in six of those 249 disputes; in another four we were unable to determine the amount of debt in dispute. Of

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<sup>84</sup> Five of the 158 disputes involved unidentified claim amounts. Another one involved a claim of \$100 million. All six disputes have been excluded from the average, median, and ratio calculations.

The average and median *initial* claim form amounts for these 158 disputes were \$32,605 and \$20,000, which leads to an average recovery ratio of 7 cents for every dollar claimed on AAA claim forms, after taking into consideration disputes in which an arbitrator rejected consumers’ claims entirely. Nine disputes involving initial claim form amounts of \$0 have been excluded from these calculations. Additionally, one dispute with an initial claim of \$100 million has been excluded from these calculations.

the remaining 239 disputes, arbitrators provided consumers debt forbearance in 46 filings, or 19.2% of the disputes. In the 46 disputes in which the arbitrator provided debt relief, the average and median grants of debt forbearance were \$4,111 and \$2,599, respectively. The average and median disputed debt amounts in these 46 disputes were \$11,741 and \$7,198, meaning that in those 46 disputes, consumers were successful in disputing an average of 51 cents of each dollar of debt.

- In the 46 disputes filed in 2010 and 2011 in which arbitrators provided some form of debt forbearance to consumers, consumers won a total of \$189,107 in debt forbearance.
- Taking into consideration all 239 debt disputes for which we knew both the disputed debt amount and the arbitrator award, consumers were successful in disputing ten cents of each dollar of debt allegedly involved.

We also provide award information for each separate product market in Appendix K.

### **5.6.7 Arbitrator decisions on the merits of company claims**

Consumers were not the only parties to bring claims in the AAA disputes — companies also asserted claims or counterclaims against consumers. As described in Section 5.5.2, almost all of the disputes involving company claims overlapped with disputes involving disputed debts.

There were 421 disputes involving company claims or counterclaims filed in 2010 and 2011.

- Of those 421 disputes, arbitrators reached a decision on the merits of the parties' claims in 250 disputes. We were unable to determine the terms of the arbitrator's award in six of these 250 disputes. In 227 disputes, or 93.0% of the 244 disputes where we could determine the terms of the award, arbitrators provided companies relief regarding their claims. In 60 of these cases, companies paid filing fees for consumers who failed to pay



their initial fees, resulting in what appears to be decisions similar to default judgments.<sup>85</sup> In the remaining 184 disputes involving company claims, arbitrators provided companies relief in 167 or 96.8%.

- In the 227 disputes filed in 2010 and 2011 in which arbitrators provided some form of affirmative recovery to companies, companies won a total of \$2,806,662. The average and median grants of relief on companies' claims were \$12,364 and \$9,390, respectively. Companies' average and median claim amounts were \$12,616 and \$9,654, respectively, meaning that in the 227 disputes in which companies were provided relief, companies won 98 cents for every dollar claimed.<sup>86</sup> Excluding the 60 quasi-default cases, companies won a total of \$2,017,486. Excluding those 60 cases, the average and median grants of relief on companies' claims were \$12,081 and \$9,339, respectively. Companies' average

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<sup>85</sup> In each of the 60 cases, the arbitrator awards specifically stated that the consumer failed to submit documents after notice from the AAA or otherwise failed to participate to the end of the proceedings. Company payment of absent consumer's fees allowed each proceeding to continue to an award against the non-participating consumer. The 60 awards constitute 17.3% of the total number of disputes resolved by arbitrators in the AAA Case Data for the product markets we studied. All of these 60 disputes involved debts allegedly owed by the consumer. In one of these 60 disputes, we were unable to determine the amount of debt in dispute; in the other 59 disputes, the average disputed debt was \$13,542; the median, \$10,880. Although none of these cases appear to have been disputed, seven companies received less than their full claim amounts.

Although the arbitrator awards specified that the consumers did not submit documents in the proceedings, it is notable that in 48 disputes the consumer purportedly participated in the filing of the dispute. In that regard, 42 disputes involved claim forms indicating that the consumer filed the dispute and six involved claim forms indicating that both parties filed the dispute mutually. As described in Appendix H, we did not attempt to verify whether these claim form representations were accurate. We do note that of the 42 claim forms indicating that the consumer filed the dispute, consumers were represented by lawyers in 16.7% of the disputes — almost a quarter of the overall consumer representation rate in our data. For the 12 claim forms indicating that the company filed the dispute, consumers were represented by lawyers in 16.7% of the disputes; consumers were not represented by lawyers in any of the six disputes in which the claim forms indicate that the parties filed mutually.

In other disputes, it appears that companies may have paid consumers' initial fees for the arbitrator, but it is unclear whether or not consumers participated in those disputes.

<sup>86</sup> One of the 227 disputes involved an undefined company claim and is consequently excluded from the average, median, and ratio calculations.

The average and median *initial* claim form amounts for the company's claims in these 227 disputes were \$13,195 and \$10,259, which leads to a recovery ratio of \$1.00 for every dollar claimed on AAA claim forms. Fifteen initial claim form amounts of \$0 have been excluded from these calculations.

and median claim amounts were \$12,289 and \$9,359, respectively, meaning that if the 60 quasi-default cases are excluded, companies won 99 cents for every dollar claimed.

- Taking into consideration disputes in which companies' claims were rejected by the arbitrator, companies won 91 cents for every dollar they claimed.<sup>87</sup> Further excluding the 60 quasi-default decisions, companies won 89 cents for every dollar they claimed.

### 5.6.8 Outcome form and substance by consumer claim type

Within each of our six product markets, we coded the consumer claims involved by type — such as contract law claims, federal statutory claims, state statutory claims, unfair and deceptive acts and practices claims, fraud claims, and tort claims.<sup>88</sup> If a filing involved claims under a federal statute, we also recorded the specific statute involved.<sup>89</sup> Note that a dispute may raise more than one claim type, but no single dispute was counted twice in any specific claim type category. Thus, a filing that raises two FDCPA claims and one Fair Credit Reporting Act (“FCRA”) claim will show up once in the general federal statutory pool: once in the FDCPA pool and once in the FCRA pool. Accordingly, the dispute counts shown for the different claim types do not sum to the total number of disputes.

#### Outcome form by consumer claim type

Figure 5 is a normalized segmented bar graph showing the distribution of outcome forms, by claim type, across all product markets combined for disputes filed in 2010 and 2011. For example, for all filings in which consumers asserted federal statutory claims, the first segmented bar shows the percentage of disputes where: (1) the arbitrator reached a decision on the merits;

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<sup>87</sup> One dispute involving unidentified company claims has been excluded from the average, median, and ratio calculations.

The average and median *initial* claim form amounts for the company's claims in these 244 disputes were \$12,836 and \$9,945, which leads to a recovery ratio of 95 cents for every dollar claimed on AAA claim forms. Twenty-two disputes involving \$0 initial claim amounts have been excluded from these calculations.

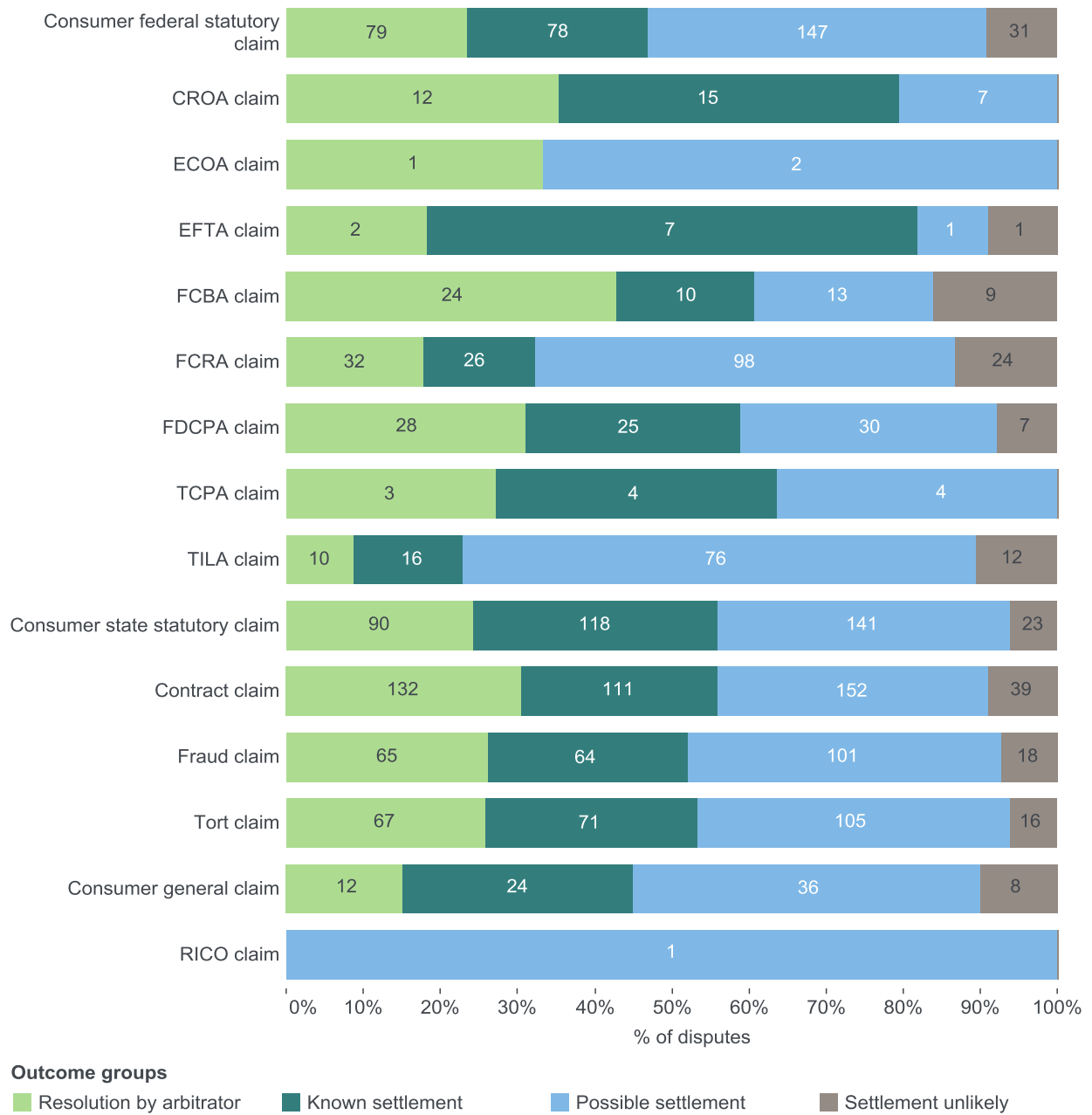
<sup>88</sup> As with the 2013 Preliminary Results, we do not double-count common law fraud under tort as well. “Tort,” as used here, excludes fraud claims.

<sup>89</sup> For full citations of the federal statutes we recorded consumer claims under, *see* Appendix H.

(2) the parties settled the dispute; (3) the dispute may have settled; or (4) the dispute was unlikely to have settled.

As with the similar graphs used in Section 5.6.5, each bar generally represents a different absolute number of disputes. By normalizing the bars, however, we can compare the relative outcome shares for each claim type. For each segment showing an outcome and claim type, the chart also includes the total number of disputes in that segment. The graphs show, among other things, that more than half of the disputes involving consumer federal statutory claims involve claims under FCRA (180 disputes). That is about 50% more than the next most frequently-occurring federal consumer claim, the Truth in Lending Act (“TILA”) (114 disputes), and twice as much as FDCPA claims (90 disputes). Of the three types of claims, disputes involving TILA claims appear to be least likely to proceed to a decision by an arbitrator on the merits of the dispute. The high proportion of “possible settlement” outcomes involving each type of claim make it difficult to draw any correlations between claim type and settlement.

**FIGURE 5: OUTCOME FORM BY CLAIM TYPE, DISPUTES FILED 2010–2011**



## Substantive outcome by consumer claim type

This section analyzes substantive outcomes in the disputes that arbitrators actually resolved.

Again, we show our results using normalized segmented bar graphs. This time, however, the charts show only the disputes that arbitrators resolved on the merits. In that regard, Figure 6 shows substantive outcomes by claim type for the 158 disputes that arbitrators resolved and that involved affirmative claims where we were able to determine the arbitrator’s decision.<sup>90</sup> In three additional disputes, we know that there was an arbitrator decision but were unable to determine what that decision was.

In the chart, the shaded portion of each bar represents the proportion of disputes raising that claim type in which an arbitrator provided relief to the consumer.<sup>91</sup> (This shaded area includes all disputes in which the consumer achieved some monetary relief, no matter how low the amount.<sup>92</sup>) The lighter portion of each bar, to the right, represents the proportion of filings where the arbitrator issued no monetary relief to the consumer at all.

Figure 6 illustrates that disputes involving federal statutory claims — particularly the three most commonly-asserted federal statutory claims under FCRA, TILA, and the FDCPA — rarely result in an arbitrator’s providing relief to consumers.

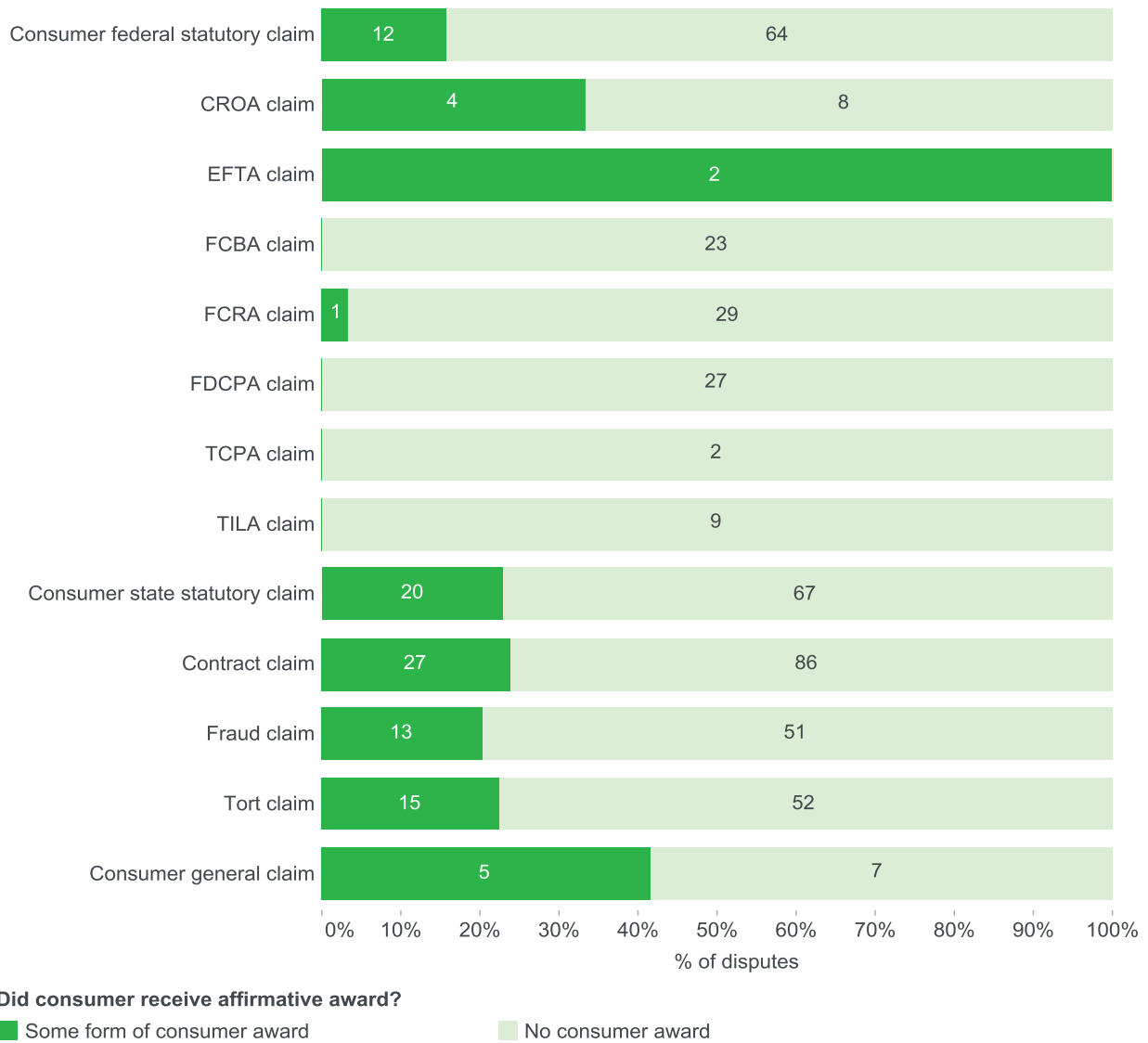
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<sup>90</sup> Figure 6 only covers substantive outcomes on the affirmative claims in these disputes and does not contain any information about debt forbearance. Note that we interpreted arbitrator silence on the respective merits of the affirmative and debt disputes as a rejection of each party’s claims. Consider, for instance, a scenario in which: The company alleges that the consumer owed \$5,000 in credit card debt; the consumer disputed the alleged \$5,000 debt and also brought affirmative claims of \$70,000; and the arbitrator determined that the parties owed each other nothing. Unless the arbitrator award specified otherwise, we viewed this arbitrator silence as a rejection of each parties’ claim, meaning that the consumer “won” \$5,000 in debt forbearance, but nothing on his affirmative claims. Accordingly, the dispute would not be included in the count of awards on consumer affirmative claims.

<sup>91</sup> Because arbitration awards rarely provided by-claim recovery amounts, we did not differentiate outcomes directly by claim type, but by disputes raising each claim type. As a result, the figures will overcount consumer “success” because an arbitrator award in one dispute will be reflected as awards relating to multiple claim types.

<sup>92</sup> The lowest award to a consumer, when there was one, was \$35 for Figure 6.

**FIGURE 6: SUBSTANTIVE OUTCOME BY CLAIM TYPE FOR AFFIRMATIVE CLAIMS IN ARBITRATOR-RESOLVED DISPUTES, DISPUTES FILED 2010–2011**



### 5.6.9 Outcome form and substance by affirmative claim size

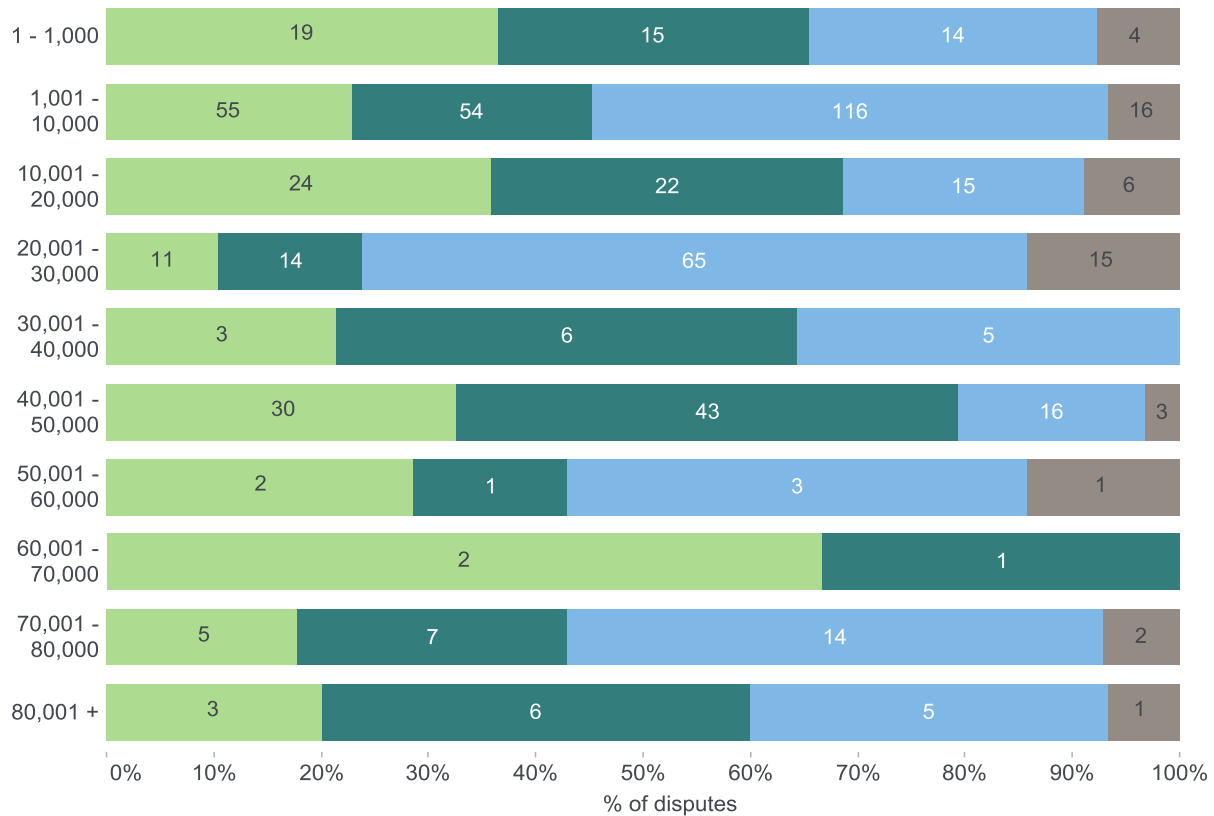
Figures 7 and 8 below show how disputes were resolved, focusing now on the size of the consumers' affirmative claims. All the figures are normalized segmented bar charts. In Figure 7, each bar represents a different affirmative claim amount range, and each segment shows the outcome forms for that range. In Figure 8, each bar again represents a different affirmative claim amount, but this time each segment shows the substantive outcomes for that range.<sup>93</sup>

Figure 7 shows forms of outcomes by affirmative claim amount for the 624 disputes where we could determine the size of the consumer's affirmative claims and that claim was less than \$1 million. (There were 41 disputes with undefined consumer affirmative claims and three consumer claims for over \$1 million.) There is relatively little variance across the different claim sizes. There is no claim amount range for which arbitrators resolve even 40% of disputes, except for the one range that features only three disputes.

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<sup>93</sup> As with Figure 6 in Section 5.6.8 above, Figure 8 does not cover debt forbearance outcomes. These are covered in Section 5.6.10 below.

**FIGURE 7: OUTCOME FORM BY CLAIM AMOUNT FOR DISPUTES INVOLVING CONSUMER AFFIRMATIVE CLAIMS, DISPUTES FILED 2010–2011**



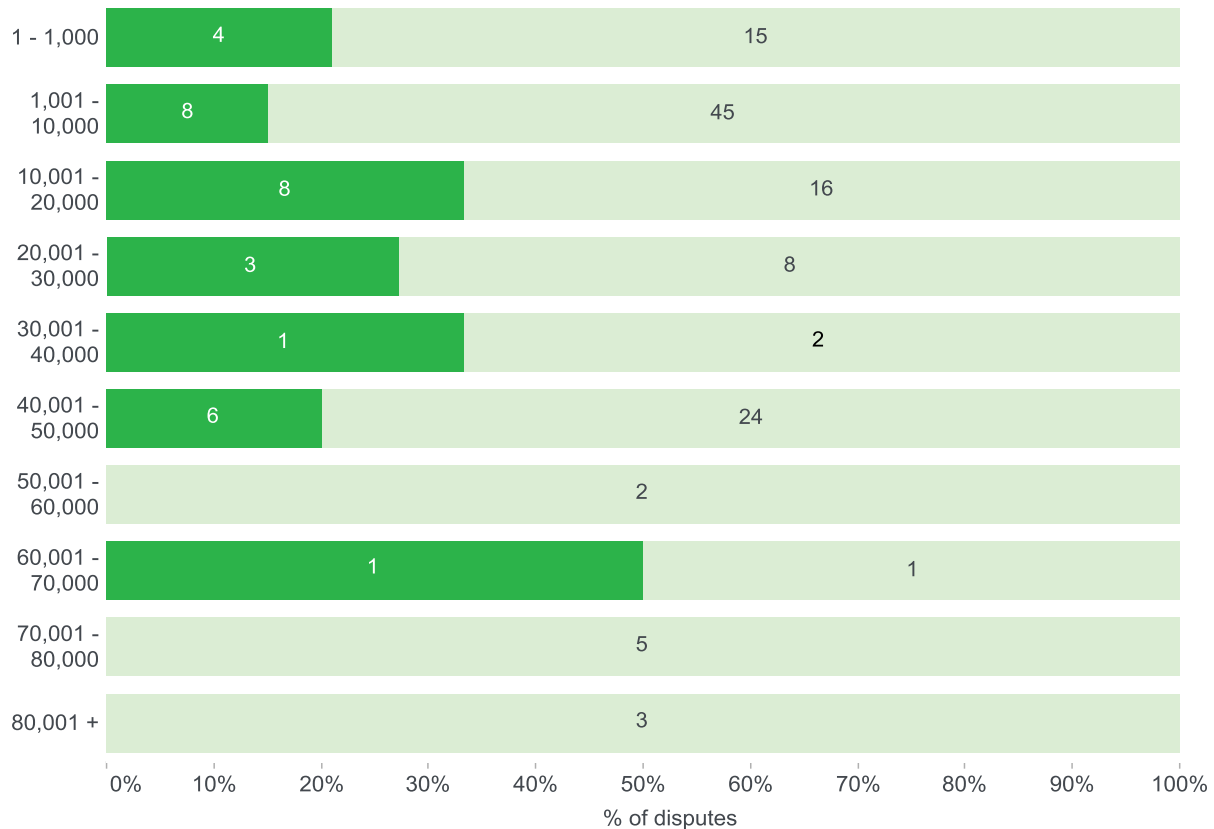
**Outcome groups**

Resolution by arbitrator    Known settlement    Possible settlement    Settlement unlikely

Figure 8, below, focuses on the subset of the disputes in Figure 7 above that arbitrators resolved and for which we were able to determine the arbitrator’s ruling. Of the 154 disputes that were resolved by an arbitrator’s decision on the merits, there were 152 such filings. For each affirmative claim range, it shows the share and number of such disputes in which the consumer achieved some form of monetary relief on his or her affirmative claims. Again, there is little variance in substantive outcome across the various claim sizes.



**FIGURE 8: SUBSTANTIVE OUTCOME BY CLAIM AMOUNT FOR ARBITRATOR-RESOLVED CONSUMER AFFIRMATIVE CLAIMS, DISPUTES FILED 2010–2011<sup>94</sup>**



**Did consumer receive affirmative award?**

■ Some form of consumer award      ■ No consumer award

### 5.6.10 Outcome form and substance by disputed debt amount

Figure 9 below shows outcome forms for the 632 disputes in which consumers disputed debts they were alleged to owe and for which we were able to determine the amount of the disputed debt. (There were an additional 43 disputes in which consumers disputed debts they were alleged to owe, but in which we could not determine the amount of debt in dispute.) Each bar in the figure represents a different debt dispute amount range, and each segment shows the

<sup>94</sup> There was one additional arbitrator award in favor of a consumer’s affirmative claim that is not displayed in this figure because we were unable to determine the size of the consumer’s claim.

outcome forms for that range. Again, the bars are normalized, with the absolute number of disputes shown within each segment. Unlike the prior figures, however, Figure 9 does not show any information relating to affirmative claims that consumers may have brought in conjunction with the debt disputes. Figure 9 shows that claims of \$5,000 or less are resolved by arbitrators less frequently than larger claims. The wide range of possible settlement outcomes make it difficult to determine whether cases of any claim size settle more frequently than others, however.

**FIGURE 9: OUTCOME FORM FOR FILINGS INVOLVING DISPUTED DEBTS BY AMOUNT OF DISPUTED DEBT, DISPUTES FILED 2010–2011**

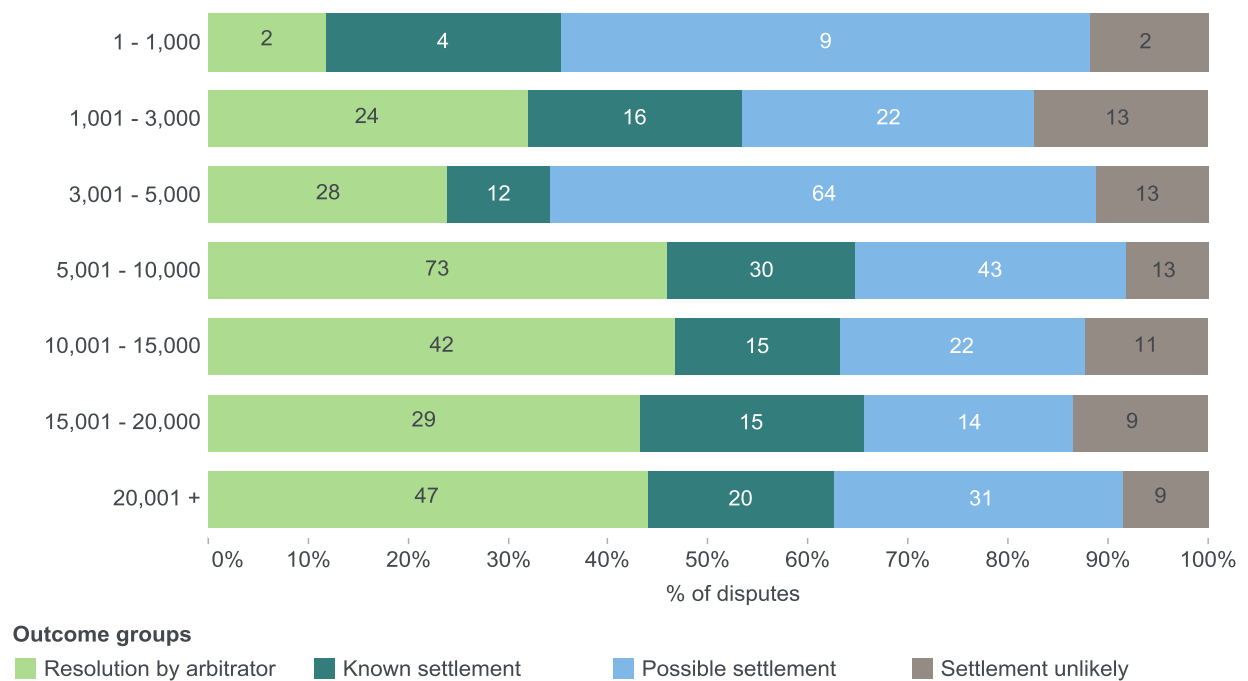
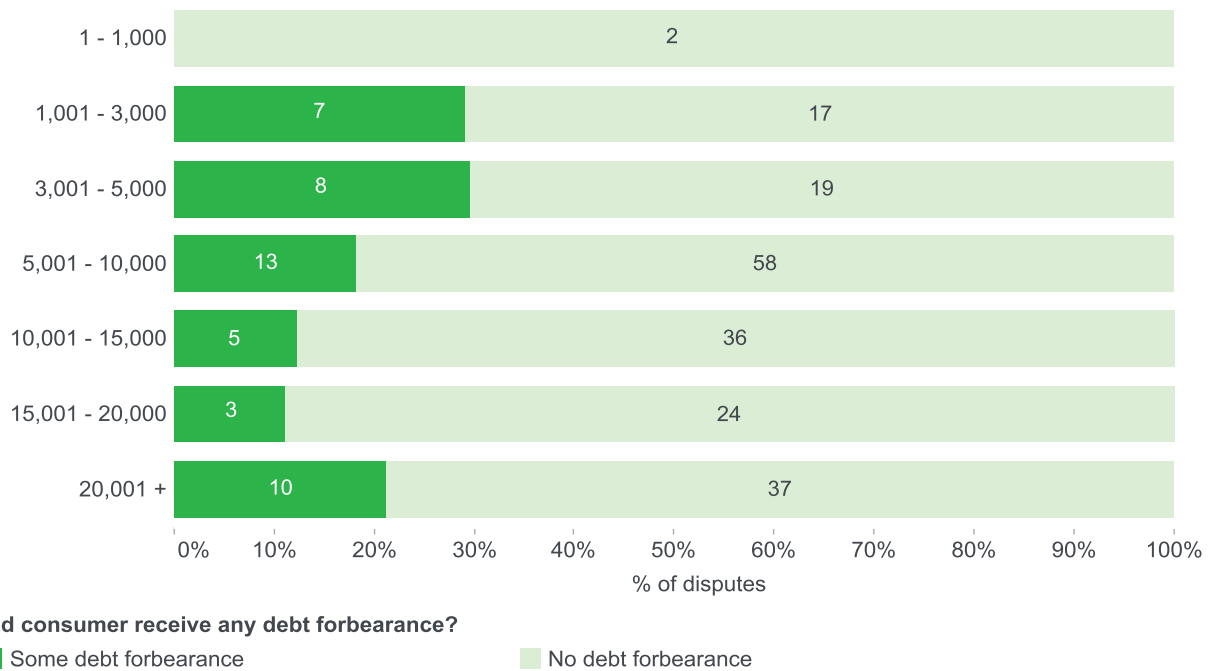


Figure 10 below focuses on the subset of the disputes in Figure 9 above that arbitrators resolved and in which we were able to determine the amount of the award. Of the 245 disputes that were resolved by an arbitrator on the merits and for which we were able to determine the amount of disputed debt, there were 239 such disputes (there were an additional three disputes involving alleged debts that went to resolution by an arbitrator on the merits, but for which we were unable to determine the amount of debt in dispute). For each disputed debt range, Figure 10 shows the share and number of such disputes in which the consumer achieved some debt forbearance, no matter how little. (The five smallest forbearance awards to consumers were for \$1, \$3, \$5, \$117, and \$152.) We do not include any information about affirmative claims in this figure. So, if a consumer disputed a ten dollar debt, was required to pay that debt, but was

granted \$10,000 in relief on affirmative claims, the dispute would be shown as “no forbearance.” There is little variance in substantive outcome by disputed debt amount.

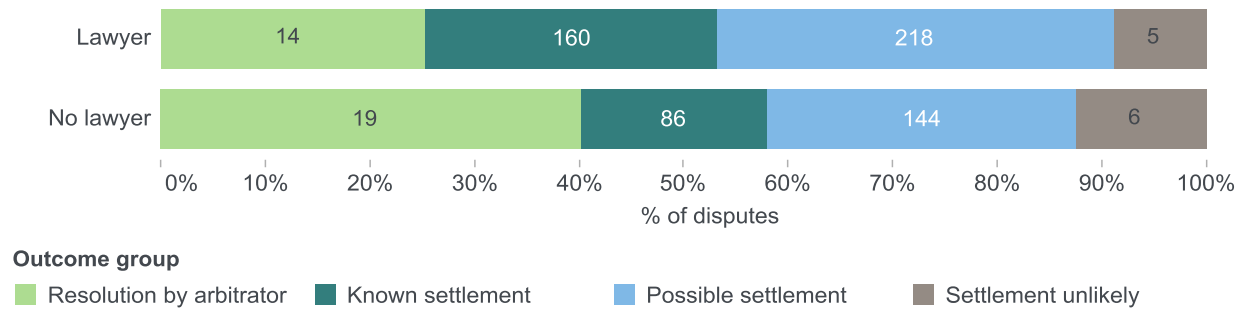
**FIGURE 10:** SUBSTANTIVE OUTCOME OF ARBITRATOR-RESOLVED DEBT DISPUTES BY DISPUTED DEBT AMOUNT, DISPUTES FILED 2010–2011



### 5.6.11 Outcome form and substance by representation

Figure 11 below shows outcome forms for 1,060 disputes in two categories: first, those in which consumers had counsel; and second, those in which consumers lacked counsel. Again, we use a normalized segmented bar chart, with each segment corresponding to one of our four outcome forms. The figure shows that consumers without lawyers are more likely to have the merits of their claims determined by an arbitrator award. While consumers *with* lawyers appear to have a higher proportion of their disputes resolved by settlement, the large proportion of “possible settlements” for both sets of cases makes it difficult to determine a relationship between representation and settlement rates.

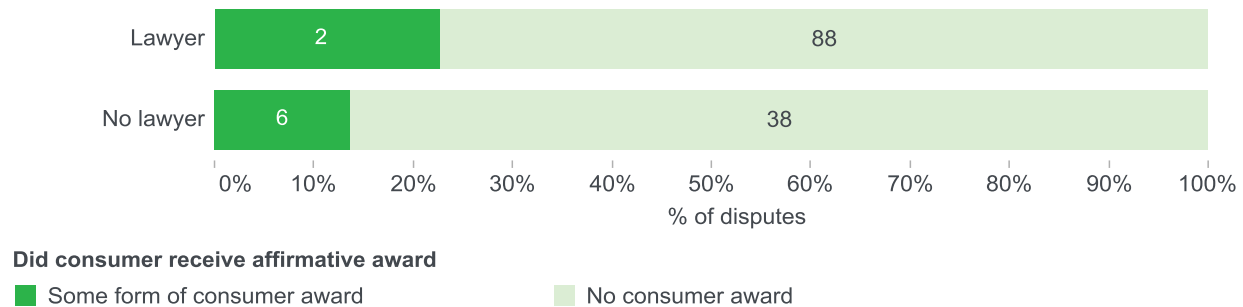
**FIGURE 11: OUTCOME FORM BY CONSUMER REPRESENTATION, DISPUTES FILED 2010–2011**



### Substantive outcomes of affirmative claims, by representation

Figure 12 below focuses on the substantive resolution of affirmative claims in the 158 disputes in which consumers brought affirmative claims that went to resolution by an arbitrator on the merits.<sup>95</sup> The figure describes disputes in which consumers only brought affirmative claims, as well as disputes in which consumers brought affirmative claims in conjunction with disputes regarding alleged debts. One bar covers disputes in which consumers had counsel; the other covers disputes in which consumers lacked counsel. The figures show no marked variance in the rate at which consumers obtained relief via arbitrator decisions on the merits of their claims.

**FIGURE 12: SUBSTANTIVE OUTCOME OF CONSUMER AFFIRMATIVE CLAIMS BY REPRESENTATION, ARBITRATOR-RESOLVED DISPUTES, DISPUTES FILED 2010–2011**

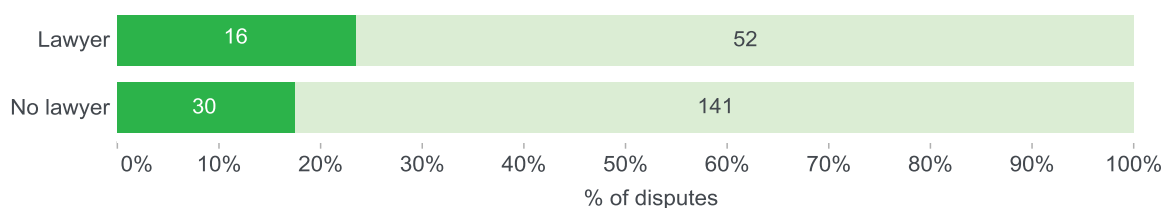


<sup>95</sup> This count does not include an additional three disputes in which consumers brought affirmative claims that were resolved by an arbitrator ruling on the merits but for which we were unable to determine what the arbitrator’s ruling was.

## Substantive outcomes in debt disputes, by representation

Finally, Figure 13 covers substantive outcomes in the 239 disputes in which consumers disputed debts they were alleged to owe.<sup>96</sup> It addresses only whether consumers achieved any debt forbearance in these disputes. It does not consider what results consumers achieved on affirmative claims, which were discussed in the prior subsection. (Consumers brought affirmative claims in 65 of these debt disputes and did not do so in the remaining 174 disputes.) The figure again shows no marked variance in the rate at which arbitrators provided some form of debt relief.

**FIGURE 13:** SUBSTANTIVE OUTCOME IN DEBT DISPUTES, BY REPRESENTATION, DISPUTES FILED 2010–2011



**Did consumer receive any debt forbearance?**

■ Some debt forbearance      ■ No debt forbearance

### 5.6.12 Repeat players

As described in the 2013 Preliminary Results, the AAA Case Data showed that parties participating in arbitration proceedings were frequently represented by “repeat counsel” — counsel that appeared in more than one filing in our data set.<sup>97</sup> Likewise, companies were frequently repeat participants.<sup>98</sup>

Scholars have opined that repeat players in arbitration proceedings may enjoy advantages over participants that are new to the forum, such as experience that could be useful in selecting

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<sup>96</sup> This count does not include an additional six disputes in which we were unable to determine the terms of the arbitrator’s award as well as four disputes in which we were unable to determine the amount of debt in dispute.

<sup>97</sup> 2013 Preliminary Results at 74–75.

<sup>98</sup> 2013 Preliminary Results at 82–84, 92–94.

favorable decisionmakers; incentives for arbitrators to curry favor while seeking future appointments; expertise in determining when to settle matters; or influence over rules through lobbying and other resources.<sup>99</sup>

The AAA Case Data allow us to explore potential correlations between repeat parties and the form and substance of the outcomes of disputes relating to the product markets that we have studied.

We use different definitions for “repeat players,” based on whether we are studying repeat participants on the consumer side of a dispute or the company side of a dispute:

- For consumers, we look to see whether they are represented by law firms that represented other consumers in disputes relating to the same consumer products and services.
- For companies, we look to see if the same *company* appeared in more than one dispute relating to the same consumer products or services.<sup>100</sup> We focus on companies as parties, rather than their attorneys, because, among other reasons, the possible presence of in-house counsel provides an opportunity for institutional learning, notwithstanding differing outside counsel.

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<sup>99</sup> See, e.g., Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St. J. on Disp. Res. 843, 857–62; 908–16 (2010); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Employee Rts. & Emp. Pol’y J. 189 (1997); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 Hous. L. Rev. 1237, 1253–58 (2001) (asserting that companies, who possibly face multiple claims on the same underlying dispute, will devote more resources than single consumers in defending a dispute; but also noting that “[c]onsumers also have begun to develop their own ‘repeat-player’ attorneys through the increased use of fee-generating statutes and substantial damage awards.”); see also *Cole v. Burns Int’l Security Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (“[T]here are several protections against the possibility of arbitrators systematically favoring employers because employers are the source of future business. For one thing, it is unlikely that such corruption would escape the scrutiny of plaintiffs’ lawyers or appointing agencies like the AAA. Corrupt arbitrators will not survive long in the business.”) (internal citations omitted). Cf., Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc’y Rev., 1, 98–101 (1974) (describing numerous benefits that repeat litigants may enjoy over “one-shotters”).

<sup>100</sup> Accordingly, for the purposes of the discussion below, a company that appeared in two credit card-related disputes filed in 2010 through 2012 would be a “repeat player.” We would not, however, find a repeat player if a single company only appeared in one credit card-related dispute, one payday loan-related dispute, and one dispute relating to student loans. We mainly chose this rule because, even in this more conservative estimate of the repeat player phenomenon, heavy repeat players dominated the arbitration filings.

Our classifications, however, likely understate the actual extent of any “repeat player” incidence in AAA arbitration proceedings. First, we limit our “repeat players” to companies and consumer attorneys that appear in disputes relating to the consumer financial products and services we are studying here. It is possible, however, that players could have participated in other arbitration proceedings — such as commercial disputes solely between companies or arbitrations between a company and an employee. Second, we also limit our “repeat players” to players that appeared in disputes relating to the same product markets. Repeat players, however, could have benefited from expertise gained in disputes relating to other products and services.<sup>101</sup> Third, in estimating a player’s experience, we only looked to disputes filed in 2010, 2011, and 2012.<sup>102</sup> If a company or consumer attorney participated in proceedings filed in other years, for example in 2009, we will not have accounted for such experience in classifying repeat players.<sup>103</sup>

### “Light” and “heavy” repeat players

To examine the frequency with which repeat players appear, we distinguish between what we term “light” and “heavy” repeat players. We define “light” as company parties or consumer attorneys that appeared in two or three disputes relating to the same product market filed in the years 2010 through 2012. We classify “heavy” repeat players as repeat players that appeared in four or more such disputes in the same time period.

### Light and heavy repeat players by product market

Figure 14 below uses a normalized segmented bar graph to illustrate the extent of company repeat players amongst disputes filed between 2010 and 2012. In addition to highlighting the relative proportion of light and heavy repeat players, the figure allows us to examine the

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<sup>101</sup> Indeed, in the 2013 Preliminary Results, we found significant overlap between the companies that appeared most frequently in AAA disputes relating to credit cards and the companies that appeared most frequently in disputes relating to checking accounts and debit cards (that analysis only looked at three product markets — credit cards, checking accounts/debit cards, and payday loans). 2013 Preliminary Results at 82–84 (compare Figures 16 and 17).

<sup>102</sup> We limit our reporting on the outcome of disputes to filings in 2010 and 2011. In determining which of these disputes involve repeat players, however, we “count” players’ participation in proceedings filed in 2010, 2011, and 2012.

<sup>103</sup> This is why we count participation in disputes filed in 2012 in determining the extent of a party’s repeat status, even when only considering the outcome of disputes filed in 2010 and 2011. The 2012 repetition essentially serves as a proxy for pre-2010 repetition.

distribution of such repeat players across disputes relating to the six different products and services that we studied.<sup>104</sup> As shown in the figure, heavy company repeat players dominated arbitration filings in 2010 and 2011, constituting over 80% of case filings. In the most extreme example, heavy company repeat players represented 96.9% of case filings relating to private student loans.

**FIGURE 14:** COMPANY REPEAT PLAYERS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2012<sup>105</sup>

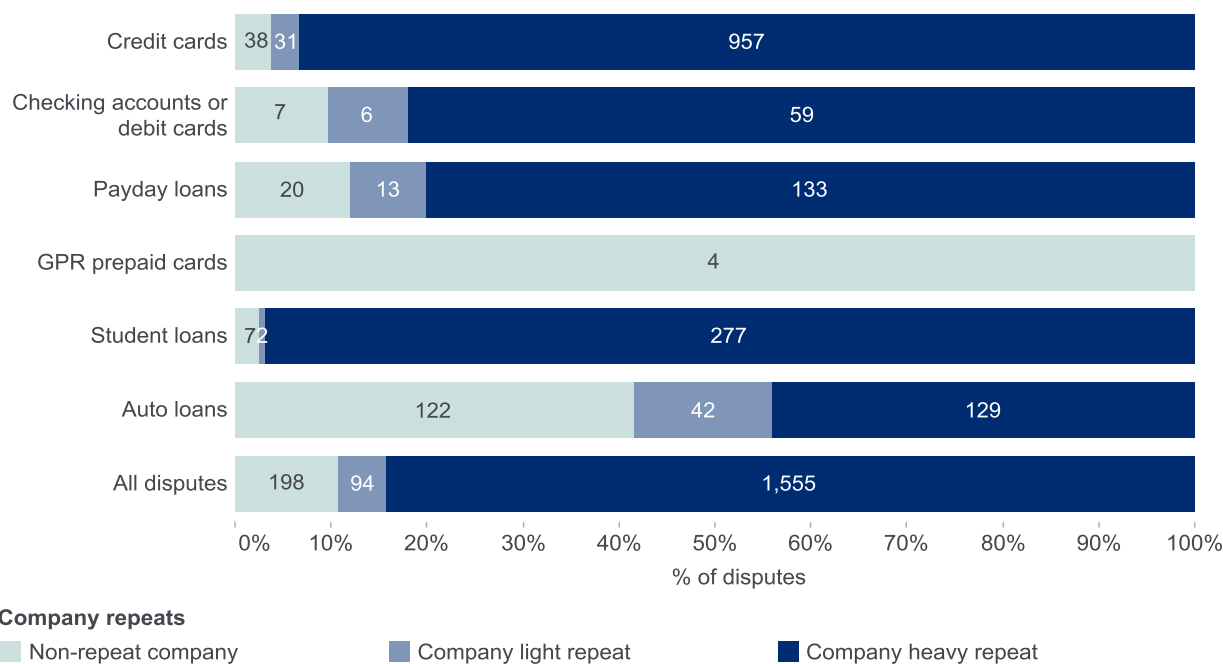


Figure 15 similarly uses a normalized segmented bar graph to illustrate the extent and distribution of repeat players amongst consumer attorneys in disputes filed in 2010 through 2012. While they appeared less frequently than company repeat players, heavy consumer attorney players constituted over 45% of all filings and were a significant majority of filings in

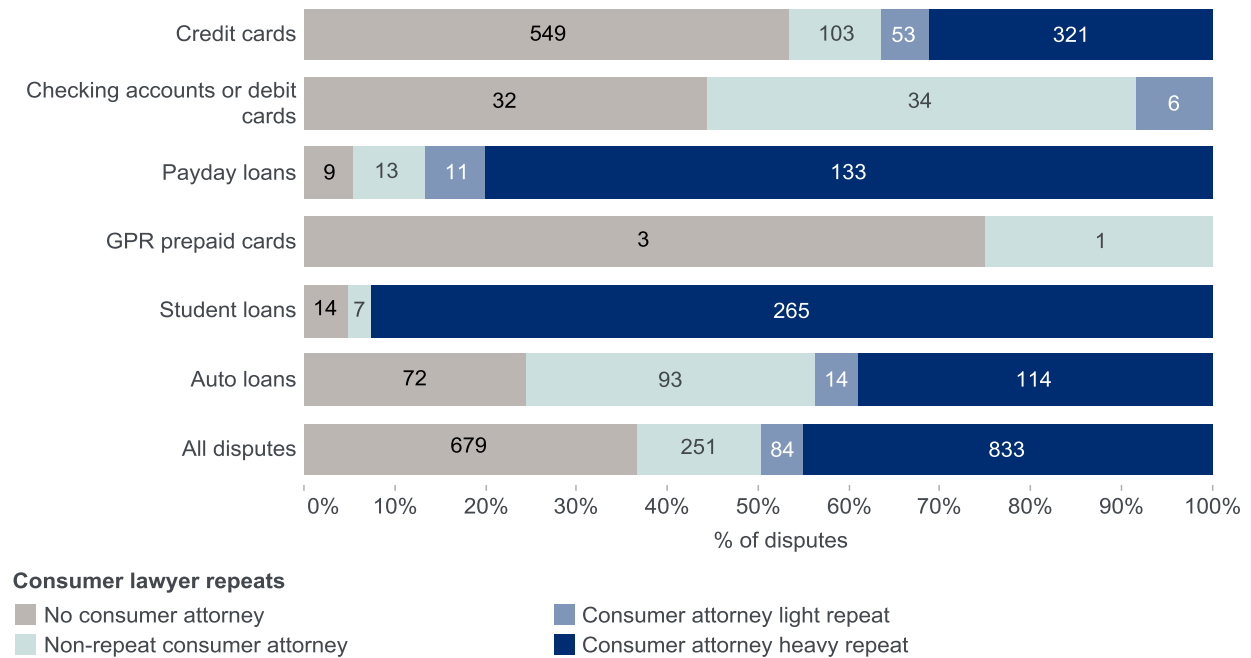
<sup>104</sup> Figures 14 and 15 essentially provide more granular detail to Table 5, which describes consumer and company representation rates, by product market.

<sup>105</sup> If we expanded the definition of light and repeat players such that participation in arbitration disputes relating to other product markets “counted” towards the totals, the frequency of light repeat players across all products would decrease from 94 to 85; heavy repeat players would increase from 1,555 to 1,573.



which consumers were represented by attorneys. Student loan disputes were again the most extreme example, where consumer attorney heavy repeat players represented 92.7% of consumers.

**FIGURE 15:** CONSUMER ATTORNEY REPEAT PLAYERS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2012



### Light and heavy repeat players, by disputed debts

Figure 16, below, compares the relative distribution of company repeat players between cases involving a disputed debt and cases not involving a disputed debt. Filings featuring debt disputes involved company repeat players more than 90% of the time. Over 60% of disputes not involving disputed debt also involved company repeat players.

**FIGURE 16:** COMPANY REPEAT PLAYERS BY DISPUTED DEBT CLAIMS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2012

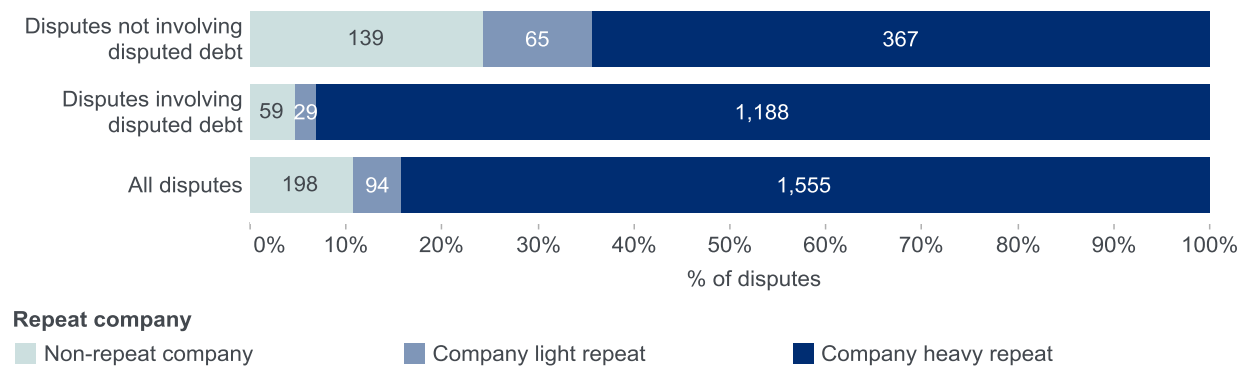
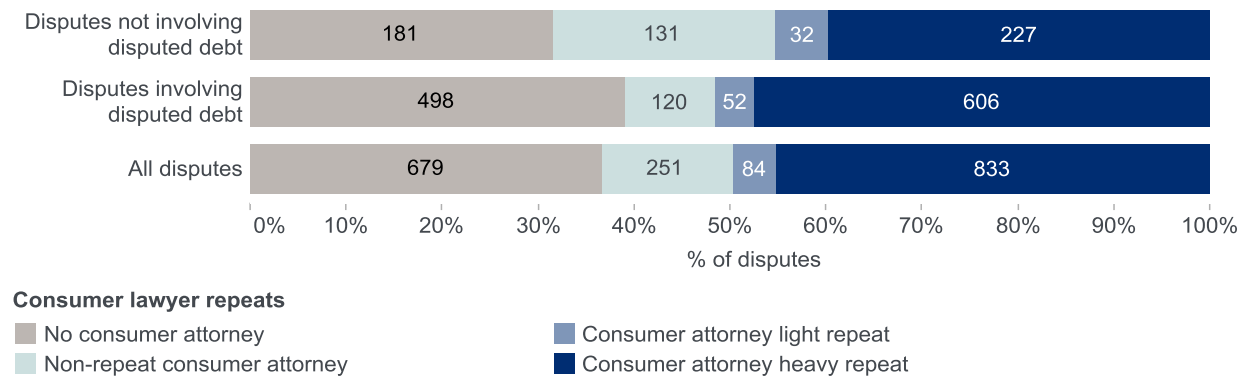


Figure 17 similarly uses a normalized segmented bar graph to compare the relative distribution of consumer lawyer repeat players in the same sample of cases. The top bar represents disputes not involving disputed consumer debts; the second bar represents disputes involving disputed consumer debts. The distribution of repeat players was more even across case types for consumer lawyer repeat players than for company repeat players.

**FIGURE 17:** REPEAT CONSUMER LAWYERS BY DISPUTED DEBT CLAIMS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2012



### Light and heavy repeat players, by size of consumer claims

Figure 18, below, compares the relative distribution of company repeat players by the size of any alleged consumer affirmative claims. The figure shows no significant variation by claim size, mainly due to the high preponderance of company heavy repeat players.

**FIGURE 18: COMPANY REPEAT PLAYERS BY SIZE OF CONSUMER AFFIRMATIVE CLAIMS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2012<sup>106</sup>**

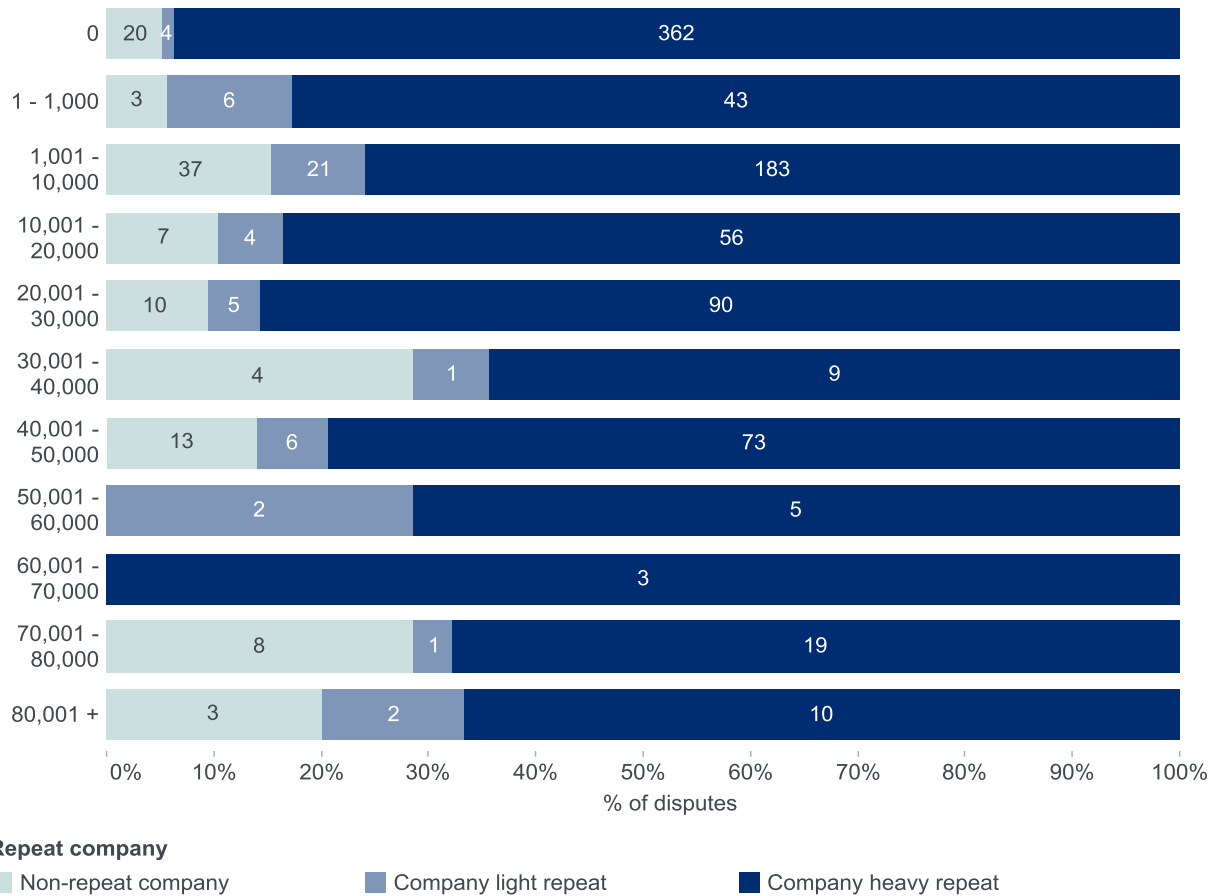
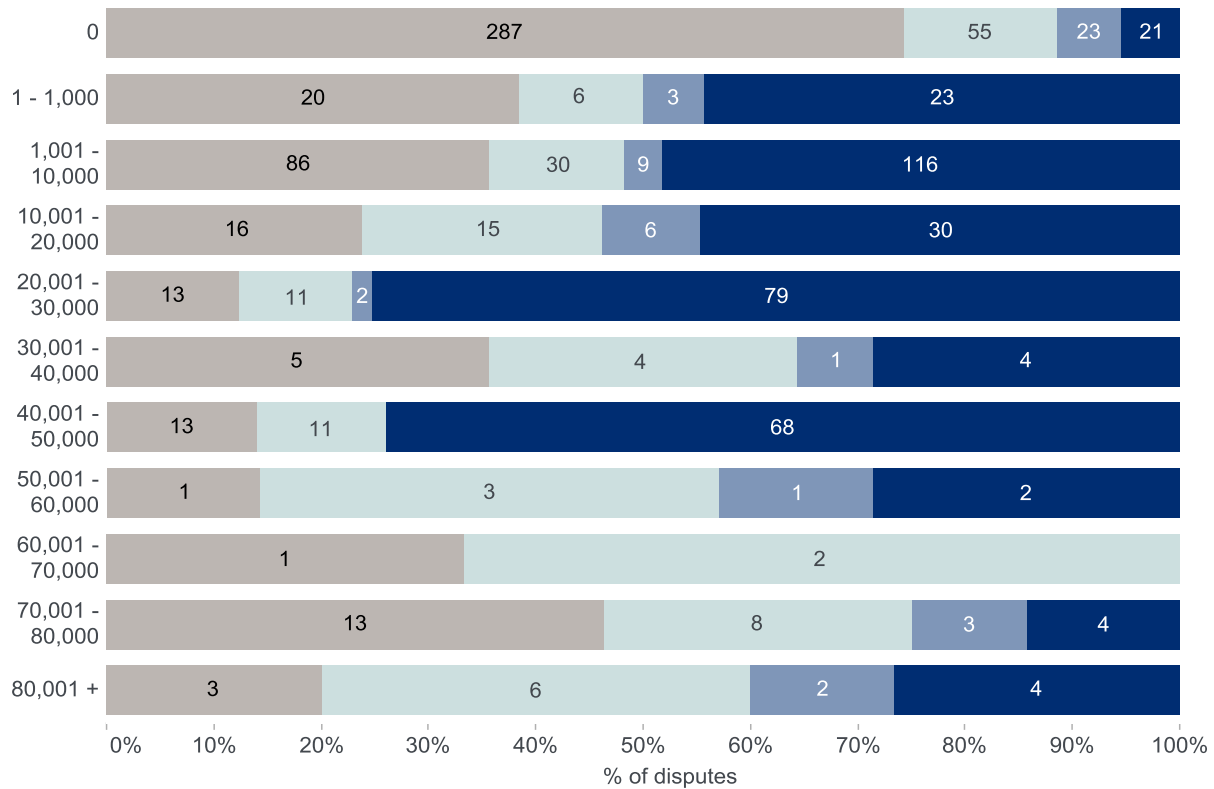


Figure 19 similarly uses a normalized segmented bar graph to compare the relative distribution of consumer lawyer repeat players by the size of any alleged consumer claims. The figure shows that 42% of consumer heavy repeat players were clustered in claims of \$20,001 to \$30,000 and \$40,001 to \$50,000.

<sup>106</sup> The first bar, with zero affirmative claims, represents filings where the consumer brought no affirmative claims, but did dispute that they owed alleged debt.

**FIGURE 19: REPEAT CONSUMER LAWYERS BY SIZE OF CONSUMER CLAIMS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2012<sup>107</sup>**



**Consumer lawyer repeats**

- No consumer attorney
- Non-repeat consumer attorney
- Consumer attorney light repeat
- Consumer attorney heavy repeat

### Light and heavy repeat players, by size of disputed debts

Figure 20, below, compares the relative distribution of company repeat players by the size of any disputes about debts allegedly owed by the consumer. Again, the figure does not appear to show much variance by size of disputed debt, mainly due to the high proportion of company heavy repeat players.

<sup>107</sup> The first bar, with zero affirmative claims, represents filings where the consumer brought no affirmative claims, but did dispute that they owed alleged debt.

**FIGURE 20:** COMPANY REPEAT PLAYERS BY SIZE OF DISPUTED DEBTS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2012<sup>108</sup>

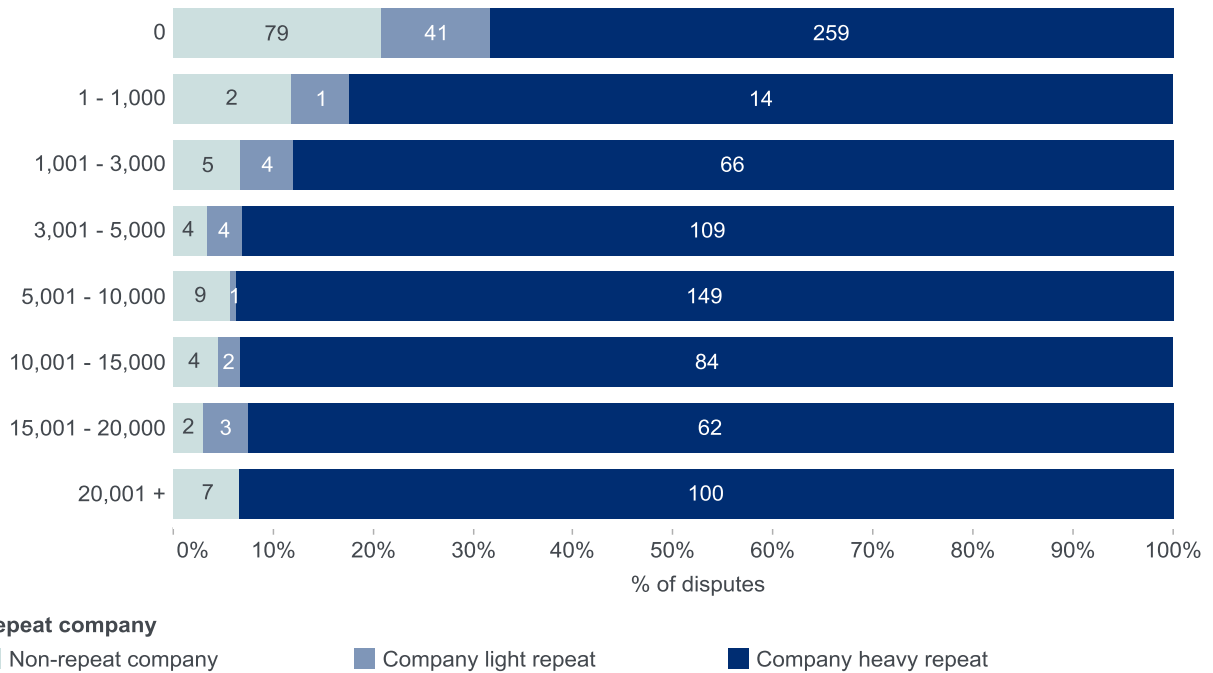
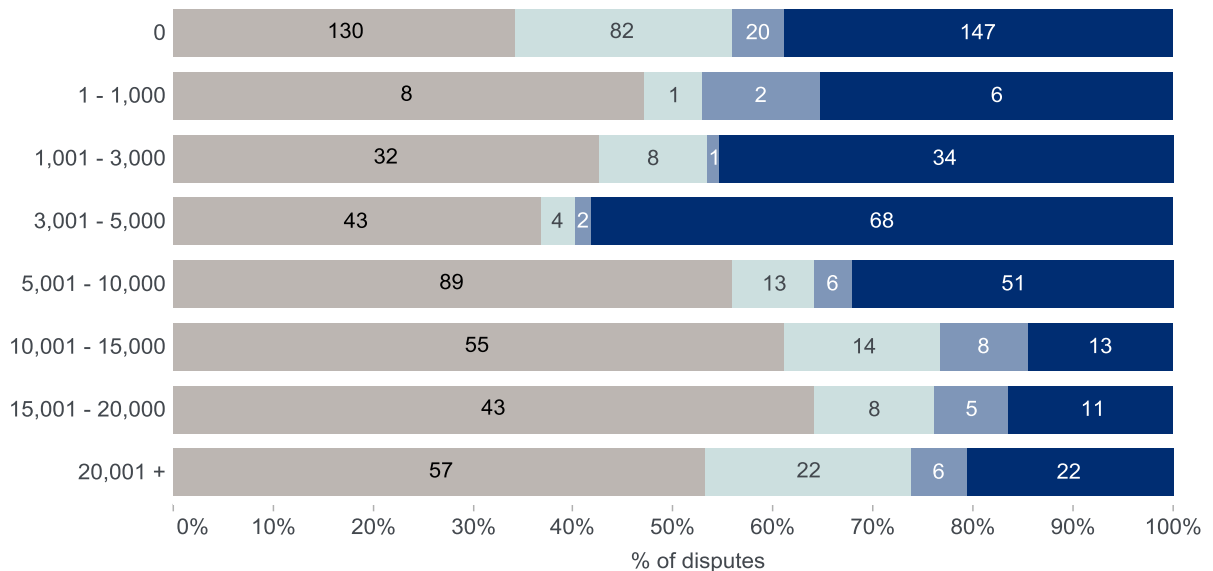


Figure 21 similarly uses a normalized segmented bar graph to compare the relative distribution of consumer lawyer repeat players by the size of any disputed debts the consumer was alleged to owe. The figure appears to show a decrease in the proportionate use of consumer heavy repeat players for disputed debts of over \$5,000.

<sup>108</sup> The first bar, with zero disputed debts, represents filings where there was no dispute about alleged debts, but there were consumer affirmative claims.

**FIGURE 21: REPEAT CONSUMER LAWYERS BY SIZE OF DISPUTED DEBTS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2012<sup>109</sup>**



**Consumer lawyer repeats**

- No consumer attorney
- Non-repeat consumer attorney
- Consumer attorney light repeat
- Consumer attorney heavy repeat

## Repeat players and the form and substance of outcomes for disputes

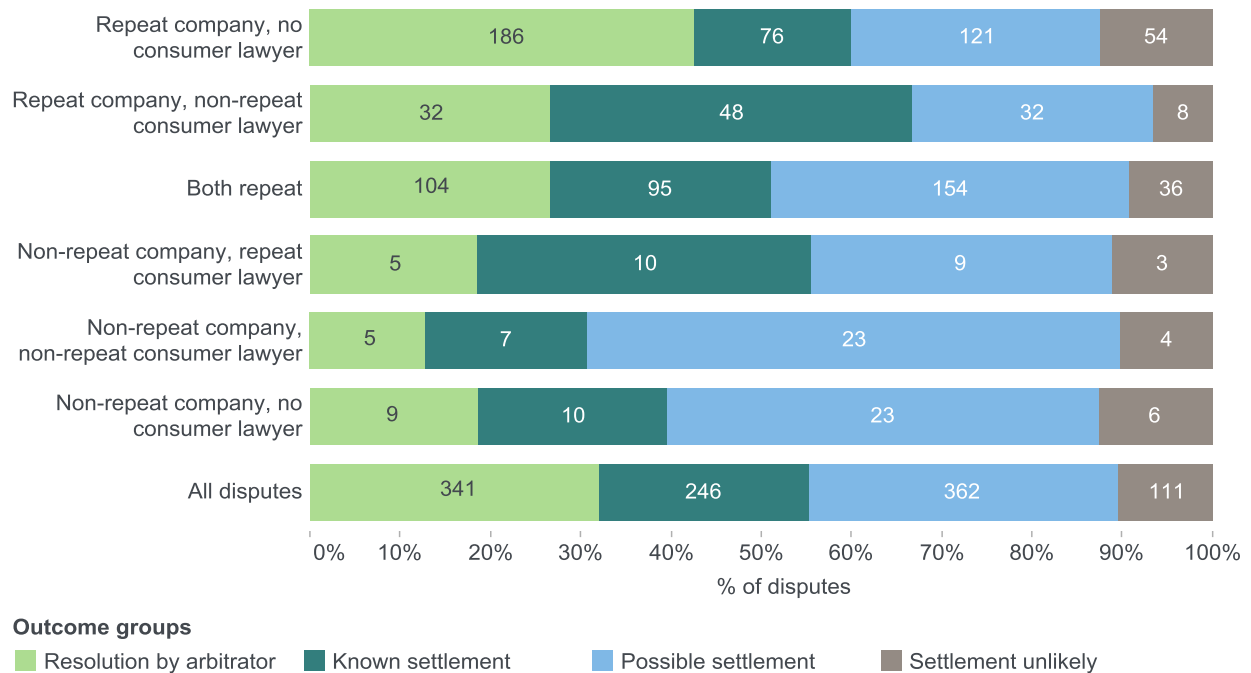
Figures 22 through 24, below, explore whether and to what extent there is a correlation between repeat players and different outcomes in arbitration disputes filed in 2010 and 2011.

Because there are necessarily two parties in a dispute, the figures address different possible combinations of repeat players. There are six subsets in total. We first segment disputes into two sets: (1) disputes involving repeat company players and (2) disputes that do not involve repeat company players. We then divide each of those sets into three different subsets: (1) disputes involving repeat consumer counsel; (2) disputes involving consumer counsel that are not repeat players; and (3) disputes where consumers are not represented by counsel at all. Figure 22 illustrates that disputes with repeat companies on one side and a consumer without an attorney on the other side are more likely to reach a decision on the merits by an arbitrator than any

<sup>109</sup> The first bar, with zero disputed debts, represents filings where there was no dispute about alleged debts, but there were consumer affirmative claims.

other pairing of parties.<sup>110</sup> The relatively high proportion of “possible settlement” outcomes for each subset make it difficult to draw conclusions about correlations between repeat players and settlement rates.

**FIGURE 22:** REPEAT PLAYERS AND FORMS OF OUTCOME, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2011



Figures 23 and 24, below, provide greater detail about the subset of disputes in Figure 22, above, that were identified as having been resolved by an arbitrator. In particular, we now focus on correlations between repeat players and arbitrator decisions on the merits of affirmative consumer claims and disputed debts. The figures divide disputes filed in 2010 and 2011 that were decided by arbitrators on the merits into four different subsets — we have combined all outcomes involving non-repeat companies, because there were only 14 such disputes.

<sup>110</sup> Fifty of the 186 disputes involving repeat companies on one side and a consumer without an attorney on the other side that reached a decision on the merits by an arbitrator were from the 60 quasi-default awards discussed above. Even excluding those 50 quasi-default disputes, disputes involving repeat companies on one side and a consumer without an attorney on the other side still were resolved by arbitrator decisions more frequently than the other company-consumer pairings.

Figure 23 focuses on the 158 disputes decided by arbitrators in which consumers brought affirmative claims (whether or not they also disputed the debt) and where we were able to ascertain the result. The figure highlights the disputes in which the arbitrators provided some form of relief to consumers, even a dollar. There were very few disputes that did not involve company repeat players making it difficult to draw distinctions between the outcome of disputes with and without such players. Further, there were only 32 grants of affirmative relief to consumers in our study period, overall.

We report the data, however, as a case study of what actually happened in the 158 consumer claims that were decided by an arbitrator on the merits over those two years of filings.<sup>111</sup>

**FIGURE 23:** GRANTS OF RELIEF TO CONSUMERS IN FILINGS WITH AFFIRMATIVE CONSUMER CLAIMS, BY REPEAT PLAYERS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2011

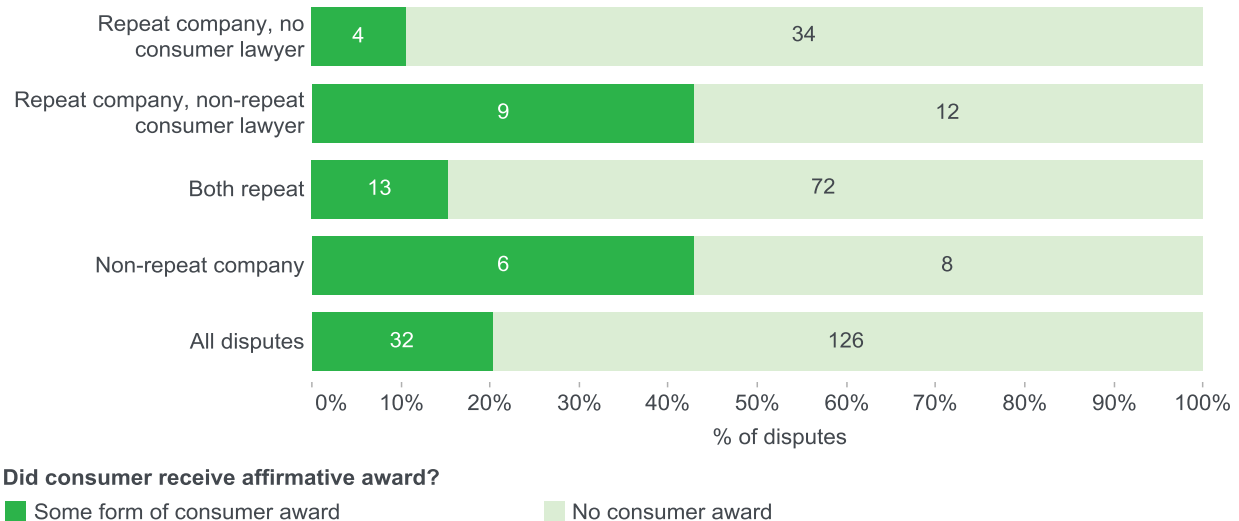


Figure 24 focuses on 239 disputes in which consumers disputed debts they were alleged to owe that were resolved by an arbitrator ruling on the merits.<sup>112</sup> The figure includes 174 filings in which consumers did not bring additional affirmative claims and 65 filings in which consumers

<sup>111</sup> Due to the number of repeat player combinations and the limited number of disputes that were decided by arbitrators, we present the overall case set, but not individual product markets.

<sup>112</sup> This count does not include an additional six disputes in which we were unable to determine the terms of the arbitrator’s award as well as four disputes in which we were unable to determine the amount of debt in dispute.

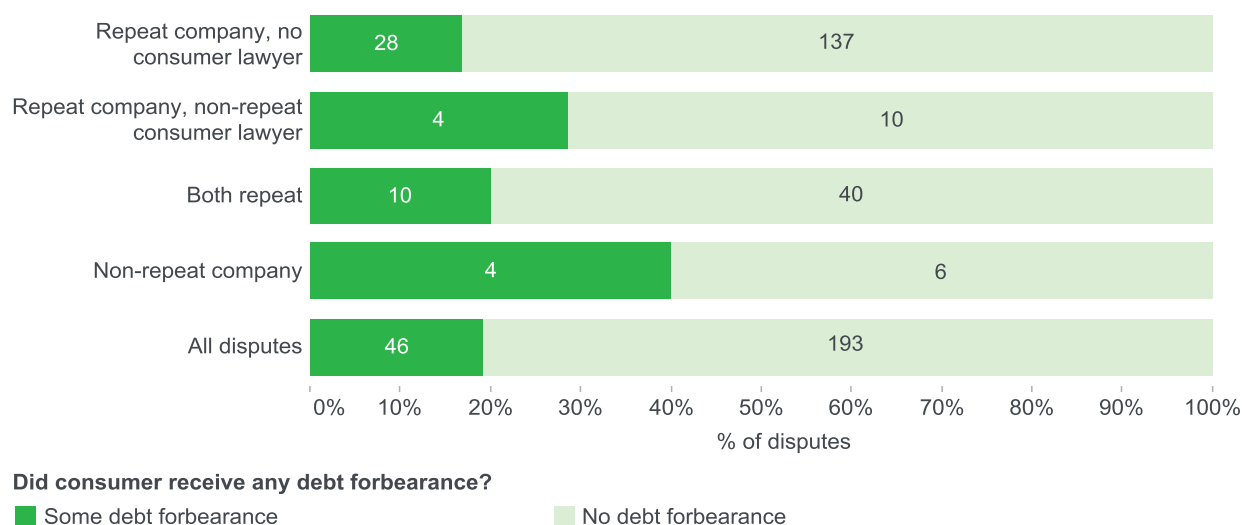


did bring affirmative claims. The figure, however, focuses only on whether consumers were provided some form of debt relief — even a dollar. We do not include any information about affirmative claims in this figure.

Again, there were so few disputes that did not involve company repeat players (ten) that we have combined them into one bar in the figure — making it difficult to draw distinctions between disputes with and without them. Further, there were only 46 grants of debt forbearance to consumers in our study period in the first place.

Again, we report the data as a case study of what actually happened in disputes filed in 2010 and 2011 where arbitrators reached a decision on the merits of the parties’ claims regarding disputed debts.

**FIGURE 24:** GRANTS OF RELIEF TO CONSUMERS ON CONSUMER DISPUTED DEBT CLAIMS, BY REPEAT PLAYERS, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2011



## 5.7 Other procedural issues

### 5.7.1 Types of hearings

Arbitrators determined the merits of parties' claims using a number of different procedural methods. One hundred and ten disputes were resolved via "desk arbitrations," meaning that the parties submitted documents and no in-person or telephonic hearing was held.<sup>113</sup> (Of the 60 "quasi-default" cases described above, 55 were resolved via desk arbitrations.<sup>114</sup>) One hundred and sixteen disputes were resolved after in-person hearings, 28 disputes were resolved after telephonic hearings, and eight disputes were decided by dispositive motion.

Under the AAA Supplementary Procedures, desk arbitrations were the default mode of resolution where neither party's claims exceeded \$10,000. Either party could request an in-person or telephonic hearing.<sup>115</sup> The arbitrator could also decide that a hearing was necessary. Where claims exceeded \$10,000, however, the default was that the arbitrator would conduct a hearing, either by telephone or in-person. The parties, however, could agree to forgo a hearing. The AAA Supplementary Procedures specified that a hearing could occur even if one party did not attend.

Table 7, below, provides more detail about this distribution across the different product markets we reviewed.<sup>116</sup> The entries for filings resolved by (1) dispositive motion; (2) desk arbitrations; (3) telephonic hearings; and (4) in-person hearings are shown as percentages of the total number of disputes in which arbitrators issued awards to any party for that product market. The table shows that in-person hearings were much more common in disputes relating to payday loans and auto loans, as opposed to credit cards. This may relate to factors such as claim size, the size of the disputed debt, or attorney representation — particularly because high proportions

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<sup>113</sup> The revised AAA Consumer Arbitration Rules, released in September 2014, define these proceedings as "Documents-only arbitrations" and "Documents-only hearings." <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased> (last visited Mar. 6, 2015).

<sup>114</sup> Of the remaining five, three were resolved via live hearings; two by telephone hearings.

<sup>115</sup> It is not clear whether parties were entitled to hearings in such circumstances.

<sup>116</sup> The one case filed in 2010 and 2011 relating to GPR prepaid cards did not proceed to a merits hearing.

of consumers in payday and student loan disputes were represented by repeat counsel (discussed above in Section 5.6.12).

**TABLE 7:** HEARING FORMATS BY PRODUCT TYPE, DISPUTES FILED 2010–2011

Product type	Total filings in 2010 2011 <sup>117</sup>	Total arbitrator decisions on merits	Dispositive motion <sup>118</sup>	Desk arbitrations	Phone hearing	In person hearing
Credit cards	670	237	2.1%	70.0%	10.5%	17.3%
Checking accounts/ debit cards	50	11	9.1%	27.3%	18.2%	45.5%
Payday loans	136	56	3.6%	16.1%	1.8%	78.6%
Private student loans	42	4	0.0%	75.0%	0.0%	25.0%
Auto loans	161	33	0.0%	24.2%	0.0%	75.8%
All markets combined	1,060	341	2.4%	55.4%	8.2%	34.0%

## 5.7.2 Travel distance to in-person hearings

As described in Section 5.3.9, the arbitration clause may specify the forum for in-person hearings. While the AAA Supplementary Procedures do not set out specific guidance for where the hearing will take place, the AAA’s due process standards require that any proceeding be

<sup>117</sup> The one GPR prepaid card dispute filed in 2010 and 2011 did not proceed to an arbitrator award.

<sup>118</sup> The AAA Case Data show little evidence of dispositive motion practice.

conducted at a location that is “reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances.”<sup>119</sup> If the parties are unable to agree on a location, the location will be determined by the AAA or by the arbitrator.

For disputes in the AAA Case Data that were resolved by in-person hearings, it was possible for us to estimate the travel burden faced by consumers.<sup>120</sup> It is important to emphasize that live hearings comprise only 34.0% of arbitrators’ decisions on the merits of the parties’ claims (and 41% after excluding the quasi-default cases). With this significant caveat in mind, we were able to generate a distance estimate in 86 of the 116 disputes filed in 2010 and 2011 that featured an in-person hearing.<sup>121</sup> For these 86 in-person hearings, the average and median travel distances for consumers were 30 miles and 15 miles, respectively.<sup>122</sup>

### 5.7.3 Time to resolution

Commenters frequently point to procedural speed when distinguishing arbitration proceedings from litigation proceedings.<sup>123</sup> We analyzed the time to resolution for the 341 disputes resolved

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<sup>119</sup>AAA Consumer Due Process Protocol, [https://adr.org/aaa/ShowPDF?doc=ADRSTG\\_005014](https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014) (last visited Mar. 6, 2015).

<sup>120</sup> To estimate the distance consumers traveled to participate in in-person hearings in the AAA Case Data, we used the “Directions” feature in Google, Inc.’s “Maps” tool to determine how far consumers were required to travel from their home address to the hearing location.

<sup>121</sup> The AAA Claim Form asks the claimant to list the parties’ addresses. Where the consumer’s address was listed as the address of the consumer’s attorney, we did not calculate distance. Where the consumer’s address was listed as a P.O. Box, we used the zip-code relating to the P.O. Box to calculate distance. We did not record the consumer’s home address — only the resulting distance from each address/in-person hearing pairing.

<sup>122</sup> The 25<sup>th</sup> and 75<sup>th</sup> percentile distances were nine and 27 miles, respectively.

<sup>123</sup> See, e.g., Harris Interactive, *Arbitration: Simpler, Cheaper, and Faster Than Litigation* (conducted for U.S. Chamber Institute for Legal Reform) (2005), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf> (last visited Mar. 6, 2015) (74% of 609 adults who had participated in arbitration reported perceiving arbitration as being faster than seeking relief in court); H.R. Rep. No. 97-542, at 13 (1982), reprinted in 1982 U.S.C.C.A.N. 37897 (“The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules . . .”).

by arbitrators on the merits. We also looked at the time to resolution in the 246 disputes that we know settled. Our starting point in either case was the filing of the AAA claim form.<sup>124</sup>

As shown below in Table 8, the median desk arbitration was resolved in about four months; the median telephone hearings in about five months; the median in-person hearing in about seven months; and the median dispositive motion in approximately eight months. (The time to resolution for dispositive motions may relate more to the complexity of the few disputes to feature such filings than to this type of outcome *per se*.) When a settlement was reflected in the case record, the median proceeding took approximately five months to resolve. Where a case was closed in a manner that is consistent with a settlement, the median closure occurred approximately two months after filing. All of these time estimates, however, do not account for 60 disputes that were still in progress or were otherwise incomplete when we collected the AAA Data.<sup>125</sup>

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<sup>124</sup> Our time to resolution numbers do not account for prior litigation proceedings in which one of the parties may have moved to compel arbitration.

<sup>125</sup> We have generally included these 60 disputes in our estimate of possible settlements, but have not included them in our time to resolution calculations, as their relevant terminal dates are indeterminate. Thirty-two of these 60 disputes were filed in 2010. The remaining 28 were filed in 2011.

**TABLE 8:** TIME TO RESOLUTION, ALL PRODUCT MARKETS, DISPUTES FILED 2010–2011

Dispute resolution	# cases	Average days	Median days
All disputes resulting in arbitrator decision on the merits of the parties' claims <sup>126</sup>	341	179	150
Desk arbitration	189	146	119
Telephone hearing	28	168	151
In-person hearing	116	231	210
Award on dispositive motion	8	243	232
Disputes that reference a settlement in the record	246	190	155
Claimant withdraws	86	108	91
Company failure to pay initial fees	85	49	38
Known closure, unclear why	74	163	122
Closed: no locale, claim amount, or clause	19	39	39
Stayed, not bankruptcy	7	278	300
Company prohibited for prior violations	55	9	7
Debt moratorium	24	16	16
Stayed with mention of bankruptcy	13	150	131
Conflicting proceeding	11	145	64

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<sup>126</sup> Included in this category are disputes that resulted in a desk arbitration, a telephone hearing, an in-person hearing, or a dispositive motion.

## 5.7.4 Arbitrator appointments

Under the AAA Supplementary Procedures, the AAA appoints an arbitrator immediately after the respondent files an answer or the deadline for filing an answer passes. Of the 1,847 disputes we studied, arbitrators were appointed in 975.<sup>127</sup> These appointments involved 477 arbitrators because in 704 of these disputes the AAA appointed an arbitrator that it had also appointed in another of these same consumer financial disputes. Some 26.8% of the arbitrators selected by the AAA in these disputes had been appointed in two or three disputes across the six product markets we studied from 2010 to 2012. An additional 15.3% of the arbitrators adjudicated more than three disputes.

Some 42.8% of disputes that went to resolution by an arbitrator were resolved by arbitrators who had been appointed with respect to three or more disputes in our sample set. Another 31.2% were resolved by arbitrators that had two or three disputes, meaning that while repeat arbitrators accounted for 48% of the cases in which an arbitrator was appointed (477 out of 975), a total of 74.0% of disputes that went to resolution by an arbitrator were resolved by a repeat arbitrator.

The AAA Supplementary Procedures allow parties seven calendar days after notice of the appointment to submit any “factual objections” to an arbitrator’s service. There were objections to the arbitrator’s service in 6.7% of the disputes in which the AAA appointed an arbitrator. The consumer alone challenged the appointment in 38 disputes. In 22 of these disputes (57.9%), the AAA then appointed a new arbitrator. The company alone challenged the appointment in 22 filings. In 19 of these disputes (86.3%), the AAA appointed a new arbitrator. Both parties challenged the appointment of an arbitrator in five disputes. The company challenges were successful in all five disputes, and the consumer challenges present more mixed results (in some disputes, the parties were challenging different arbitrators on a three-member panel).

Of the 43 filings in which consumers challenged arbitrator appointments, consumers were represented by counsel 65.1% of the time, which is roughly equivalent to the baseline rate at

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<sup>127</sup> We report here on cases filed in 2012 as well as 2010 and 2011. Three disputes involved the appointment of panels of three arbitrators. Disputes where arbitrators were not appointed were generally either resolved before an arbitrator was appointed, were potentially missing files from the case record, or were still in progress at the time of our data collection.

which consumers were represented (64.2%) in all cases in which an arbitrator was appointed. The AAA was more likely to appoint a new arbitrator after challenges by consumers represented by counsel (67.9%) than after challenges by consumers who were not represented (40.0%).

### 5.7.5 AAA fees

Under the fee schedule in effect for the disputes we studied, the AAA assessed two types of fees for consumer arbitrations: first, administrative fees to be paid to the AAA; and second, arbitrator fees to be paid to AAA arbitrators.<sup>128</sup> As discussed in Section 2.5.10, specific arbitration clauses may set out the allocation of initial fee responsibilities and the parties' rights to recover such payments.<sup>129</sup> The AAA Supplementary Procedures set out default rules regarding fee allocations, whether the disputes were filed by consumers, companies, or mutually. Administrative fees were generally to be paid by companies. Arbitrator fees were generally to be split.

Administrative fees were based on the size of the claims in the dispute, excluding requests for attorneys' fees or punitive damages. Under the AAA Supplementary Procedures for Consumer-Related Disputes, responsibility for administrative fees lay solely with companies, unless subsequently reallocated by the arbitrator or by agreement of the parties. For disputes of

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<sup>128</sup> American Arbitration Association Consumer Arbitration Costs, Fees Effective January 1, 2010, [http://www.povertylawsection.com/uploads/PAY\\_DAY\\_LENDERS\\_consumer\\_arbitration\\_costs.pdf](http://www.povertylawsection.com/uploads/PAY_DAY_LENDERS_consumer_arbitration_costs.pdf) (last visited Mar. 6, 2015). These fees were revised in March 2013 and again in September 2014. Under the current fee schedule, arbitrator compensation (which begins at \$750 and increases if there is a telephonic or in-person hearing) is paid by the business, "unless the consumer, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation." Consumers pay a non-refundable \$200 filing fee. Businesses pay a filing fee of \$1,500 (\$2,000 if more than one arbitrator is involved). Businesses also pay a hearing fee of \$500 if the case proceeds to a telephonic or in-person hearing. Arbitrator compensation, expenses, and administrative fees (including filing and hearing-related) are not subject to reallocation by an arbitrator except as may be required by applicable law or upon the arbitrator's determination that a claim or counterclaim was frivolous or filed for purposes of harassment. *See* American Arbitration Association Consumer Arbitration Rules, <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&revision=latestreleased> (last visited Mar. 6, 2015). Both the old and new fee schedules, however, simply provide default allocations of responsibilities for paying fees. The parties' specific contracts can, and frequently do, provide for a different allocation of responsibilities, as discussed in Section 2.3.10 (prevalence of fee-related terms) and Section 4.3 (describing relevant rules in litigation and arbitration).

<sup>129</sup> Certain cost allocations, however, may conflict with the AAA's Due Process Protocol, which requires that providers of goods or services facilitate access to ADR at a reasonable cost, based on the circumstances of the dispute (taking into consideration, the size and nature of the claim, nature of goods or services at issue, and the ability of the consumer to pay). [https://adr.org/aaa/ShowPDF?doc=ADRSTG\\_005014](https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014) (last visited Mar. 6, 2015).



\$10,000 or less, the business was to pay a \$775 administrative fee, as well as a \$200 case service fee if a hearing was held. For disputes over \$10,000, but not in excess of \$75,000, the business was required to pay a \$975 administrative fee and a case service fee of \$300 if a hearing was held. For disputes over \$75,000 (or if the business sought non-monetary relief), the business must pay an administrative fee set out by the AAA's Commercial Fee Schedule.

Arbitrator fees were also based on amounts at issue. Consumer payment of arbitrator fees was capped at \$125 for disputes involving claims of \$10,000 or less, unless subsequently reallocated by the arbitrator. For disputes over \$10,000, but not in excess of \$75,000, consumers' fees were capped at \$375 again unless subsequently reallocated.<sup>130</sup> The parties' combined administrative fee requirement for desk arbitrations and telephone hearings was \$250; in-person hearing fees were \$750 per day.

If the parties failed to pay the requisite fees, the AAA sent a warning letter and eventually closed the proceedings. In situations in which a party failed to pay its fees, the other party could advance funds to allow the proceedings to continue. The arbitrator was then permitted to assess such fees in any resulting award.

## Hardship waivers

As described in Section 4.3, under the AAA Supplementary Procedures, the AAA allowed consumers to apply for waivers of administrative fees, based on financial hardship.<sup>131</sup> Consumers were eligible to apply if their gross annual income fell below 200% of federal poverty guidelines.<sup>132</sup> Given that responsibility for administrative fees lay solely with companies under

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<sup>130</sup> For claims of over \$75,000 (or if the consumer sought non-monetary relief), the arbitrators' fees were set out in arbitrator-specific biographies provided by the AAA. American Arbitration Association Consumer Arbitration Costs, Fees Effective January 1, 2010, [http://www.povertylawsection.com/uploads/PAY\\_DAY\\_LENDERS\\_consumer\\_arbitration\\_costs.pdf](http://www.povertylawsection.com/uploads/PAY_DAY_LENDERS_consumer_arbitration_costs.pdf) (last visited Mar 6, 2015).

<sup>131</sup> American Arbitration Association, Administrative Fee Waivers and Pro Bono, [https://www.adr.org/aaa/ShowPDF%3Bjsessionid%3DR295PCqYD5MkNKhQqm9H7jhSMwYh2NnsYFSbG6yrMhgmGVB299Ic11082660915%3Fdoc%3DADRSTG\\_004098](https://www.adr.org/aaa/ShowPDF%3Bjsessionid%3DR295PCqYD5MkNKhQqm9H7jhSMwYh2NnsYFSbG6yrMhgmGVB299Ic11082660915%3Fdoc%3DADRSTG_004098) (last visited Mar. 6, 2016).

<sup>132</sup> Additional information, such as past income, assets, and income prospects were considered in the determination as well.

the Supplementary Procedures for Consumer-Related Disputes, it is unclear what value the hardship waivers offered consumers.<sup>133</sup>

Similarly, California Code of Civil Procedure Section 1284.3 entitles consumers with gross monthly income of less than 300% of the federal poverty guidelines to obtain a waiver of all fees and costs, exclusive of arbitrator fees. The waiver applies to consumer arbitrations conducted in California. But again, the majority of fees that were relevant to consumers were arbitrator fees.

We did not have consistently clear information detailing the waiver requests or their outcomes. Out of our 1,847 disputes, we were able to identify 22 consumer requests for AAA fee waivers and 23 requests for “California” fee waivers. Due to limited data, we did not record the results of these requests in the cases in which we were able to identify relevant documents.

## Contractual fee advancement

Separate and apart from the AAA’s hardship waivers, as described in Section 2.3.10, many pre-dispute arbitration agreements stated that companies would advance or otherwise pay consumers’ fees. Some of the clauses provided that the ultimate fee allocation would be determined by the arbitrator after resolving the parties’ claims; others provided that the company would not seek to recover fees it paid on behalf of the consumer.

The AAA Case Data reflects that in 368 disputes, the consumer requested (through the AAA) that the business advance or pay the consumer’s share of the fees. In an additional 177 disputes, the business paid the consumer’s fees without any request through the AAA reflected in the record. Companies may have done so for any number of reasons. They may have had contractual commitments to do so that were not indicated in the arbitration record. Or, the company may have paid the consumers’ fees to allow the arbitration proceedings to progress.

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<sup>133</sup> Although the waivers applied to administrative fees, as opposed to the arbitrator fees that consumers owed under the AAA Supplementary Procedures, the AAA committed to making an effort to appoint arbitrators willing to serve on a *pro bono* basis in disputes for which it granted a hardship waiver. The AAA also allowed parties to request *pro bono* or reduced-rate arbitrators even when waivers were not granted or requested.

## AAA Case Data

Consumers were initially charged arbitrator fees in 831 disputes filed in 2010 through 2012. The average and median charges were \$206 and \$125. Of these 831 disputes, 508 were filed in 2010 and 2011, which enhanced our ability to study their outcomes. In those 508 disputes, arbitrators issued awards in 132 filings. In 123 of those 132 cases, we were able to determine the final allocation of fees. In these 123 disputes, the consumer was reimbursed for some arbitrator fees in 56 filings.<sup>134</sup> The average and median reimbursements, when they occurred, were \$213 and \$250, respectively.

One hundred and thirty-two of the 368 disputes for which we found an AAA confirmation of contractual fee advancement requests were filed in 2010 and 2011, which better enabled our ability to study their outcomes. Of these 132 disputes, arbitrators made a final ruling on the merits in 41. In 40 of those 41 cases, we were able to determine the final allocation of fees. In eight of those 40 disputes, the consumer was ultimately charged some amount of arbitrator fees.<sup>135</sup>

Arbitrators resolved 55 of the 140 disputes filed in 2010 and 2011 for which we found no AAA confirmation of a contractual fee advancement request, but in which companies appeared to pay initial arbitrator fees on a consumer's behalf.<sup>136</sup> In 53 of those 55 cases, we were able to determine the final allocation of fees. In ten of those 53 filings, the consumer was ultimately charged some amount of arbitrator fees.<sup>137</sup>

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<sup>134</sup> The consumer did not “win” anything on his affirmative or disputed debt claims in 31 of these 56 disputes.

<sup>135</sup> For those eight cases, the consumer was ultimately charged an average of \$188 and a median of \$125. Some six of these disputes included affirmative consumer claims, with an average of \$39,843 and a median of \$42,500. There were four debt disputes in the eight cases, with an average of \$8,181 and a median of \$7,595.

We were also able to determine the final fee allocation in 26 cases where there was contractual fee advancement, but where the disputes were not resolved by arbitrator awards. Consumers were ultimately not charged arbitrator fees in any of those cases.

<sup>136</sup> It is possible that some or all of these cases also involved contractual fee advancement, but that the AAA case record did not reference such contractual requirements.

<sup>137</sup> For those ten cases, the consumer was ultimately charged an average of \$155 and a median of \$125. The consumer raised affirmative claims in three of these disputes, with an average of \$12,112 and a median of \$6,932. There were

In addition, arbitrators ultimately assessed consumers *administrative* fees in 54 of the 326 disputes filed in 2010 and 2011 that arbitrators resolved and for which we were able to determine the final allocation of fees.<sup>138</sup> Some 94.4% of those filings in which administrative fees were awarded involved disputes regarding debts the consumers were alleged to owe.<sup>139</sup> When assessed to consumers, the average and median administrative fee amounts were \$826 and \$775, respectively.<sup>140</sup>

### 5.7.6 Attorneys' fees

Parties can also be awarded attorneys' fees when pursuing or defending claims before the AAA either in situations in which the applicable law or the underlying contract allows for a fee award. Consumers were awarded attorneys' fees in 14.4% of the 146 disputes resolved by arbitrators in which consumers were represented by counsel.<sup>141</sup> We did not record the number of cases in which a fee award was requested. The largest award of consumer attorneys' fees was \$37,275. When consumers won attorneys' fees, the average and median fee awards were \$8,148 and \$4,800, respectively.<sup>142</sup>

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seven debt disputes in the ten cases, with an average of \$15,782 and a median of \$16,680.

We were also able to determine the final fee allocation in 23 cases filed in 2010 and 2011 that did not go to resolution by an arbitrator. In two of those 23 cases, the consumer was ultimately charged some amount of arbitrator fees. In one case, the consumer was charged \$62; in the other, \$188.

<sup>138</sup> The consumer raised affirmative claims in 19 of these 54 disputes, with an average of \$16,536 and a median of \$10,000 (one dispute, with an undefined consumer claim amount, is excluded from the average and median calculations here). There were 51 debt disputes in the 54 cases, with an average disputed debt amount of \$13,940 and a median of \$10,484.

<sup>139</sup> Many consumer contracts include provisions requiring the consumer to pay for the cost of collecting debt. Such provisions may have been at issue in at least some of these disputes.

<sup>140</sup> The top and bottom quartile awards were \$975 and \$672, respectively.

<sup>141</sup> Consumers were awarded attorneys' fees in 12.8% of disputes resolved by arbitrators in which consumers were represented by repeat counsel.

<sup>142</sup> If we look only at the disputes in which consumers were granted either debt relief or an affirmative award, consumers were awarded attorneys' fees 50% of the time.

Companies were awarded attorneys' fees in 14.1% of the 341 disputes resolved by arbitrators.<sup>143</sup> Again, we did not record the number of cases in which fees were requested. The largest award of attorneys' fees to a company was \$16,626. When companies were awarded attorneys' fees, the average and median awards were \$3,387 and \$2,137, respectively.<sup>144</sup>

### **Awards of consumer attorneys' fees by affirmative claim amount**

Table 9 below breaks out awards of consumer attorneys' fees by the amount of the consumer affirmative claims at issue. It does not include any disputes in which the consumer disputed alleged debt. The listed averages and medians are only for disputes in which consumers were awarded fees. The table illustrates that there appears to be little relationship between the size of the affirmative consumer claims asserted in a dispute and the granting or size of attorneys' fee awards.

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<sup>143</sup> In one of those filings, the companies recovered attorneys' fees solely in defending claims brought against them (*i.e.*, the company was awarded attorneys' fees where they had not brought a claim against the consumer).

Excluding the 60 quasi-default disputes, companies were awarded attorneys' fees in 14.6% of disputes resolved by arbitrators.

<sup>144</sup> If we look only at the disputes in which companies were granted an affirmative award, companies were awarded attorneys' fees 20.2% of the time.

**TABLE 9: AWARDS OF CONSUMER ATTORNEYS' FEES IN AFFIRMATIVE-ONLY DISPUTES BY CLAIM AMOUNT, DISPUTES FILED 2010–2011<sup>145</sup>**

Size of affirmative consumer claim	Number of disputes	Number of disputes resolved by arbitrators	Awards of consumer attorneys fees	Average consumer attorneys fee award	Median consumer attorneys fee award
\$1 – \$1,000	42	17	3	\$1,400	\$1,200
\$1,001 – \$10,000	128	21	4	\$4,344	\$2,250
\$10,001 – \$20,000	37	13	2	\$15,395	\$15,395
\$20,001 – \$30,000	24	7	1	\$14,000	\$14,000
\$30,001 – \$40,000	9	2	0	\$0	\$0
\$40,001 – \$50,000	76	23	5	\$6,764	\$5,840
\$50,001 +	34	7	0	\$0	\$0

### Awards of consumer attorneys' fees by size of consumer claims, filings involving disputed debts

As for filings involving disputed debts (regardless of whether the disputes also involved consumer affirmative claims or not), Tables 10 and 11 show the number of times arbitrators awarded consumers their attorneys' fees, as well as the average and median fee recovery.

Table 10 focuses on filings in which consumers disputed alleged debts and also brought affirmative claims. It breaks down the results by the size of the consumers' affirmative claims (not the size of the debts they dispute). The listed averages and medians are only for disputes in

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<sup>145</sup> Three disputes are not depicted in this chart. One of the disputes is a consumer claim of \$100,000,000, and two are disputes in which we could not determine what the consumer's claim size was. Consumers did not receive attorneys' fees in any of the three disputes.

which consumers won fees. Again, the table primarily illustrates that there appears to be little relationship between the size of the alleged debt disputed in an arbitration proceeding and the granting of attorneys’ fee awards.

**TABLE 10: AWARDS OF CONSUMER ATTORNEYS’ FEES IN FILINGS INVOLVING DISPUTED DEBTS, BY CONSUMER CLAIM SIZE, DISPUTES FILED 2010–2011<sup>146</sup>**

Size of affirmative consumer claim	Total disputes	Number of disputes resolved by arbitrators	Awards of consumer attorneys fees	Average consumer attorneys fee award	Median consumer attorneys fee award
\$0 <sup>147</sup>	386	180	0	\$0	\$0
\$1 – \$1,000	10	2	0	\$0	\$0
\$1,001 – \$10,000	113	34	1	\$4,680	\$4,680
\$10,001 – \$20,000	30	11	3	\$4,310	\$3,430
\$20,001 – \$30,000	81	4	1	\$16,036	\$16,036
\$30,001 – \$40,000	5	1	1	\$37,275	\$37,275
\$40,001 – \$50,000	16	7	0	\$0	\$0
\$50,000 +	19	4	0	\$0	\$0

<sup>146</sup> Fifteen disputes are not depicted in this chart. In all 15 disputes, we were unable to determine the size of the consumer’s claim. Consumers did not receive attorneys’ fees in any of the 15 disputes.

<sup>147</sup> Filings solely relating to disputed debts are reflected as having \$0 affirmative claims.

## Awards of attorneys' fees by company claim amount

Table 11 below breaks out the 48 awards of attorneys' fees by company claim amount. The listed averages and medians are only for disputes in which companies won fees.<sup>148</sup>

**TABLE 11:** AWARDS OF COMPANY ATTORNEYS' FEES, BY COMPANY CLAIM SIZE, DISPUTES FILED 2010–2011<sup>149</sup>

Size of company claim	Total disputes	Number of disputes resolved by arbitrators	Awards of company attorneys fees	Average company attorneys fee award	Median company attorneys fee award
\$0 <sup>150</sup>	639	91	1	\$15,878	\$15,878
\$1 – \$1,000	25	18	4	\$2,751	\$2,603
\$1,001 – \$10,000	183	116	21	\$3,286	\$1,350
\$10,001 – \$20,000	123	70	15	\$2,050	\$1,993
\$20,001 – \$30,000	56	31	5	\$5,310	\$4,382
\$30,001 – \$40,000	12	8	1	\$5,497	\$5,497
\$40,001 – \$50,000	7	4	1	\$3,880	\$3,880
\$50,000 +	14	2	0	\$0	\$0

<sup>148</sup> Of the 48 disputes in this set, 40 involved disputed debts, and 21 involved affirmative consumer claims.

<sup>149</sup> One dispute is not depicted in this chart; in that dispute, we were unable to determine what the company's claim size was. The company did not receive attorneys' fees in the dispute.

<sup>150</sup> Filings solely relating to disputed debts or consumer affirmative claims are reflected as having company affirmative claims of \$0.



## 5.8 Arbitration appeals

### Relevant rules and fee schedules

The American Arbitration Association does not have rules specific to consumer arbitration appeals.<sup>151</sup> In the absence of any specifically applicable appellate rules, when parties' contracts provide for arbitration appeals it appears that the AAA generally informs appellants that their filed appeal will follow the AAA Commercial Rules. We provide further discussion of the prevalence of contractual provisions setting out appeal rights in Section 2.3.13 and how those rules compare against those of court systems in Section 4.12.

Under the AAA Commercial Rules Fee Schedule effective June 2010, appellants owe three types of fees: (1) "Initial Filing Fees," payable in full upon initiation of an appeal with the AAA by the appellant; (2) "Final Fees," which are refundable at the conclusion of the appeal if no hearings have occurred; and (3) compensation for the arbitrator(s) who hear the appeal.

Under this fee schedule, the appeal-related initial and filing fees increase as the size of the appellants' claim increases.<sup>152</sup> The arbitrator fees are specific to each arbitrator. Parties are informed of the relevant arbitrator fee schedules after the appeal has begun, in the process of party selection of the arbitrator(s). As with other arbitration-related fees, the AAA's guidance about the distribution of responsibility for payment of appeal-related fees, however, is only a default rule. The parties' contracts can and, in some cases, do provide for different allocations of these fees.<sup>153</sup>

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<sup>151</sup> The AAA released Optional Appellate Arbitration Rules, effective Nov. 1, 2013, but those rules specifically do not apply to disputes arising from pre-dispute agreements between consumers and businesses "where the business has a standardized, systemic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices." American Arbitration Association, Optional Appellate Arbitration Rules, <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2016218> (last visited Mar. 6, 2015).

<sup>152</sup> American Arbitration Association Commercial Rules at 42, [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004103](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103) (last visited Mar. 6, 2015).

<sup>153</sup> *See* Sections 2.5.10 and Section 4.3.

## Consumer appeals

From 2010 to 2012, there were four consumer appeals in disputes about our six consumer financial markets. Three were about credit cards. One concerned payday loans. Companies filed no appeals. The consumers that appealed were not represented by counsel.

Of the three appeals relating to credit cards, all involved the same company. Two appeals were closed because the consumer failed to pay the required administrative fees or arbitrator deposits.<sup>154</sup> The third followed a different set of procedural rules, where the consumer was not required to pay the initial fees.<sup>155</sup> A three-arbitrator panel was appointed and ultimately upheld the original award, ruling in favor of the issuer. The appeal process took approximately 15 months.

In the payday loan-related appeal, the consumer sought damages of \$1 million and applied for a waiver of administrative fees, pursuant to California Code of Civil Procedure Section 1284.3. The AAA granted the waiver, cancelling the \$2,800 filing fee. When the AAA sent each party an invoice for \$7,000 for its share of the arbitration panel's fees, however, the parties declined to submit deposits, resulting in the closure of the appellate file.<sup>156</sup>

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<sup>154</sup> In at least one of the closed disputes, the AAA informed the consumer appellants that the AAA Commercial Rules include a deficient filing fee for filings where a party has filed a demand that does not meet the Rules requirement. In such circumstances, the case would be closed and whatever fee was paid to the AAA would be returned, minus a deficient filing fee of \$350.

<sup>155</sup> The issuer replaced its counsel around the time that the appeal-related filing fees were paid.

<sup>156</sup> The fee was a deposit representing each party's share of ten hours of work on preliminary matters.

## 5.9 Class arbitrations

In our review of the AAA Case Data, there were two class arbitration filings during 2010 to 2012 that concerned our six consumer financial markets.<sup>157</sup> We are unable to determine how either matter was finally resolved.

In the first such proceeding, the AAA case file did not contain any substantive records beyond the arbitration demand, the arbitration agreement, and the state court order on the respondent's successful motion to compel arbitration.<sup>158</sup> The claimants filed class claims before the AAA in 2010 against their auto dealer and lender, alleging various deceptive practices. The claimants specified on their claim form that they sought damages in excess of \$1 million.

The claimants in the second AAA class filing brought claims against their debit card provider in late 2012 regarding its alleged practice of reordering the posting of debit card transactions to

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<sup>157</sup>In footnote 146 of the 2013 Preliminary Results, we listed an additional class arbitration filing. That filing featured claims brought on behalf of two classes whose members purchased services from two Texas-based credit repair organizations. As explained in footnote 153 of the 2013 Preliminary Results and Section 5.4 of this report, because there are claims that payday lenders pose as credit service organizations (“CSOs”), we included in our count of payday-loan-related filings demands filed against CSOs when consumers alleged that the CSOs originated any loan other than auto-title loans. On further inspection, this class filing did not include allegations relating to loan origination, so we no longer include it in our count of class filings.

The small number of class arbitrations filed between 2010 and 2012 may be attributable to the Supreme Court's decision in April 2010 in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), holding that “a party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.” Seven years before *Stolt-Nielsen*, in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), a plurality of the Court had ruled that arbitrators, as opposed to courts, were to determine whether an arbitration agreement prohibited class arbitration. In the wake of *Bazzle*, the AAA had adopted class action rules, *see* AAA Supplementary Rules for Class Actions (Rules Effective Oct. 8, 2003, Fees Effective Jan. 1, 2010), *available at* [https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg\\_004129.pdf](https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf) (last visited Mar. 6, 2015) and the number of class arbitration filings significantly increased. Whereas in 2003 the AAA received only five class arbitration filings, in the ensuing six years, the AAA administered 280 class arbitrations, at least 106 of which related to disputes between businesses and consumers. *See* Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party, at 22–24 (2009) (No. 08-1198).

<sup>158</sup>The case is not listed on the AAA database of class arbitrations.

maximize the number of overdraft fees assessed against consumers.<sup>159</sup> The lead plaintiff had previously filed suit in federal district court on his own behalf and for all similarly situated individuals, and the court had then granted the respondent bank’s motion to compel arbitration. In their AAA demand, the claimants brought federal statutory claims, contract claims, and tort claims. The claimants specified that they were seeking damages of \$5 million on their claim form. The dispute involved two hearings in 2013 and two hearings in 2014. The first related to “clause construction” — “whether the applicable arbitration clause permits this arbitration to proceed on behalf of a class.” Four months after the hearing, the arbitrator determined that the arbitration clause authorized the claimants to bring a class arbitration. The other hearing in 2013 related to preliminary class certification. In March 2014, the arbitrator heard oral argument on a motion to dismiss via conference call. Approximately a month afterward, the arbitrator issued an order dismissing the claimant’s contract and tort claims. And in September 2014, the arbitrator heard oral argument on another motion to dismiss, again via conference call. We do not have additional information about how the case has progressed.<sup>160</sup>

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<sup>159</sup> The case progressed under the AAA Commercial Rules. It is not, however, listed as a Commercial case type in the AAA online class arbitration database.

<sup>160</sup> We last checked the AAA database for case updates on February 20, 2015.

# Section 6

What types of claims are brought in litigation and how are they resolved?



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# Introduction

In Section 5 we studied what types of claims are filed in arbitration and how they are resolved. To provide context for the analysis of the American Arbitration Association (“AAA”) Case Data, we study in this section what types of claims are filed in court and how they are resolved.

In the 2013 Preliminary Results, we presented initial data about the number and composition of consumer credit card cases filed in federal court during the period of time for which we have data with respect to filings with the AAA.<sup>1</sup> Our data at that time were limited to credit card cases filed in federal court and we reported only on the number of cases overall, the number that made jury demands, and the respective shares of class and individual cases.<sup>2</sup>

We have now expanded our data to include class and individual litigation in four additional consumer financial markets: checking accounts/debit cards; payday loans; general purpose reloadable (“GPR”) prepaid cards; private student loans; and, for class litigation only, in a fifth additional market, automobile loans. The expanded data also include class actions in selected state jurisdictions. We also have extended our analysis to cover additional information about the claims that are filed and to examine how these disputes are resolved.

## 6.1 Analysis scope and limitations

Analyzing court data empirically presents a number of challenges. Many of these parallel the challenges in reviewing arbitration data discussed in Section 5. Some are unique to litigation data. It is important to keep these limitations in mind when reviewing the present section of the report, particularly when comparing it to Section 5’s coverage of arbitration disputes.

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<sup>1</sup> See 2013 Preliminary Results at 69–70.

<sup>2</sup> Throughout this section we use “class case” to describe cases that are filed seeking relief for a class, though cases filed as class actions may not ultimately be certified by a court as such. We use “certified cases” when referring specifically to cases that courts have determined will proceed on a class basis. We use “individual case” to describe cases not filed as class actions. Note, however, that these “individual cases” may sometimes be filed on behalf of more than one consumer, but the number of consumers per case generally remains low.

First, we have not been able to identify the complete universe of complaints filed in court about the consumer financial products on which we focused. With respect to federal court cases, we have largely been limited to records contained in the Courtlink database maintained by LexisNexis and by the ability of search terms to identify potentially relevant complaints. Further, as we explain in detail in Section 6.4.1, state court data in particular are often not similarly accessible. Our review of class cases includes some state cases because workable methods exist to identify consumer financial class cases in some state jurisdictions, though the resulting data are not complete. With respect to individual state cases, however, we were unable to identify similarly workable methods. As a result, we limit our analysis of individual cases to federal court cases.

Second, as with arbitration disputes, the available data show that most court cases are resolved by settlement or in a manner that may be the result of a settlement. The terms of any settlement are typically unavailable from the court record unless the settlement is on a class basis. The bulk of the cases, therefore, result in outcomes in which the relief afforded, if any, is unknown. This is true for individual cases and for class cases that settle on an individual, non-class basis. (Settlements on a classwide basis in class cases, by contrast, require formal court approval, typically after a fairness hearing,<sup>3</sup> which means that some data about consumer outcomes usually are available for analysis.<sup>4</sup>)

Third, court records are sometimes less revealing than arbitration records, at least assuming the reviewer can access arbitration records. For example, as we discuss below, parties generally do not state overall claim amounts in complaints, leaving us unable to offer recovery rate data.<sup>5</sup> Moreover, litigation cases cannot necessarily be reduced to a single result because litigation

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<sup>3</sup> Where a proposed class settlement would bind class members, a court may approve it “only after a hearing and on finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2).

<sup>4</sup> We review the results of class settlements in federal court in Section 8.

<sup>5</sup> As discussed in Section 5.1, even when recovery rate data are available in arbitration, we may not know enough to say qualitatively whether or not a given outcome represents a “win” or a “loss” to one side or the other. If a consumer wins 60 cents of every dollar claimed, is that a win or a loss? What about 40 cents, or 80 cents? That same qualitative problem exists when interpreting litigation results as “wins” or “losses,” though the absence of overall claim amount data in court cases creates additional difficulty.



plaintiffs often allege multiple claims against multiple defendants and one case can have multiple outcomes.<sup>6</sup> Accordingly, we report on several types of outcomes, more than one of which may have occurred in any single case.

Comparing frequency, processes, or outcomes across litigation and arbitration is especially treacherous. Differences in the data may result from decisions consumers and companies make about or in either arbitration or litigation. Company decisions are involved in determining, in the first instance, whether the relationship between a consumer and a company is governed by a pre-dispute arbitration clause. Where it is so governed, consumer and company decisions also are involved in determining whether a case is filed at all, and if so, on a class or individual basis, as an arbitration or a court case and, if filed in court, whether the case is permitted to proceed in court. And, consumer and company decisions are involved in determining the form and substance of outcomes. The limited pools of data available on consumer financial disputes in litigation and arbitration, and these self-selection effects (known to researchers as “selection bias”), which may impact the number and types of cases in these pools and their outcomes, make comparative analysis quite challenging.<sup>7</sup>

Finally, it is necessarily true that litigation data do not capture disputes that consumers do not file in court because of the presence of a pre-dispute arbitration clause. Such disputes may be filed in arbitration or may not be filed at all. This seems especially likely to be true with respect to class actions in light of our findings, including those discussed in Section 6.7 with respect to the frequency with which pre-dispute arbitration clauses are invoked to obtain dismissal of class action court cases.<sup>8</sup> By the same token, of course, arbitration data do not capture disputes that

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<sup>6</sup> Consumer arbitrations may also involve multiple claims, but generally do not feature motion practice on the merits of different claims, thereby cutting down on the number of separate outcomes reached in a given arbitration dispute. We also found that arbitrators in the consumer arbitrations we studied very seldom broke out their awards by claim.

<sup>7</sup> In addition, as noted in Section 5, we report arbitration results only for cases filed in 2010 and 2011, but do so for six markets including auto finance; in this Section 6 we report on results for cases filed in 2010–2012 but do not include individual auto loan cases.

<sup>8</sup> As noted in Section 1.1, most arbitration clauses allow one party to compel arbitration unilaterally so that a case cannot be heard in court. Furthermore, most arbitration clauses do not allow class arbitrations. *See* Section 2.5.5; 2013 Preliminary Results at 37. To the extent a party invokes such a clause with these two very common features,

consumers do not file in an arbitral forum because of the absence of arbitration clauses. Such disputes may be filed in court or may not be filed at all.

## 6.2 Summary of analysis and results

Section 6.3 presents a summary review of prior empirical research on litigation cases.

Section 6.4 describes available data and our review processes in some detail.

Section 6.5 presents available data about the number and type of consumer financial disputes filed in court. This frequency analysis covers five product markets with respect to individual cases and six markets with respect to class cases, based on complaints filed in court between 2010 and 2012.

Section 6.6 presents available data about the outcomes of these court cases through February 2014.<sup>9</sup> As with our analysis of arbitration, we cover the form of the outcome.

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therefore, the clause precludes any dispute within its scope from proceeding as a class action, either in court or in arbitration. A similar effect occurs in clauses that directly prohibit litigation and class arbitrations, as well as in clauses that state that a consumer may not file or participate in a class action. In response to the 2013 Preliminary Results, some commenters noted instances of counsel rejecting representations because of arbitration clauses. *See, e.g.*, National Association of Consumer Advocates, National Consumer Law Center, August 21, 2014, RFI Comment (describing an informal survey of 35 consumer advocates from 20 states, in which “[o]ver 70% of respondents answered that they had decided not to represent auto-finance consumers with viable claims because of arbitration clauses”); National Association of Consumer Advocates, National Consumer Law Center, June 23, 2012, RFI Comment at 61, 64, 80, 81 (describing an informal survey of 340 consumer advocates from 46 states in which “84% of respondents answered that they had, in fact, rejected a client with a meritorious consumer claim because of an arbitration clause” and reporting that a number of respondents indicated they had turned down multiple cases for this reason). These commenters also noted that some respondents had specifically cited class action provisions in arbitration clauses as a particular concern.

<sup>9</sup> As discussed in Appendix L, this section focused on cases filed from 2010–2012 and captured outcomes reflected on dockets through February 28, 2014. Our summary and reporting of this data, therefore, are limited to those outcomes and do not capture any outcomes occurring after that date. In contrast, our analysis of arbitration cases in Section 5 was largely limited to outcomes through 2012. As a result, we reported in Section 5 on outcomes only for arbitration cases filed in 2010 and 2011.

Section 6.7 looks at the extent to which companies file motions to compel arbitration in court cases, as well as at the extent to which companies invoke arbitration clauses in a subset of court cases filed against credit card issuers that we know had arbitration clauses in the year the case was filed, and analyzes what occurs when they do so.

Our results can be summarized as follows:

### 6.2.1 Frequency results

- We found 562 cases filed as consumer class action cases from 2010 through 2012 in federal courts and selected state courts concerning the six products. (We sometimes refer to these as “putative class actions” because the plaintiff in these cases sought to represent a class but in most cases no judicial determination was made as to whether the case was appropriate to proceed as a class action.)
- Of the class cases, some 470 were filed in federal court. The remaining 92 class cases were filed in the state courts within our state court sample set. (This state sample covers jurisdictions accounting for around a fifth of the U.S. population.)
- We identified 3,462 individual litigation cases filed in federal court concerning our product markets during the period. As noted in Section 6.4.1, we do not have data on individual cases in state courts, and our federal individual case analysis is limited to five product markets.
- In federal court class cases, claims under the federal Fair Debt Collection Practices Act (“FDCPA”) and state Unfair or Deceptive Acts and Practices (“UDAP”) statutes were the most frequent types of claims. In state court class cases, state law claims predominated. In individual cases in federal court, FDCPA claims predominated.
- All federal and state class cases sought monetary relief, but very few complaints stated the total amount of monetary relief sought. Nearly half of the class cases, however, sought federal statutory damages only under statutes with class damages caps. Certification of an injunctive class was sought in roughly one-third of the federal class complaints.
- Juries were sought by the consumer in the overwhelming majority of class and individual cases.

- Consumers were nearly always represented by counsel in class cases. Even in federal individual cases, less than 6% of the cases were filed without counsel.

## 6.2.2 Outcome results

- Of the 562 class cases in our set, 12.3% (69 cases) had final class settlements approved by February 28, 2014. We reviewed the class cases that were still open at the end of the coding period for another six months and found an additional 14 final class settlements approved and 15 cases in which a class settlement agreement was pending approval.
- Where class certification occurs, it is typically in conjunction with class settlement. We identified ten class cases in which a class was certified independent of settlement.
- No class cases went to trial. In ten class cases, consumers obtained a judgment against a company party based on a motion: a judgment on a classwide basis in three of these cases and a judgment on a non-class basis in seven.
- Of the class cases, 24.4% involved a non-class settlement (137 cases) and 36.7% involved a potential non-class settlement (206 cases). The potential non-class settlements were cases in which a named plaintiff withdrew claims or the court dismissed claims for failure to serve or failure to prosecute, any of which may be because of a non-class settlement but in these cases the record did not disclose that such a settlement of the case occurred. Of the 206 cases with a potential non-class settlement, that was the only outcome type that occurred and the case was closed in 161 cases (meaning the potential non-class settlement likely resolved the case).
- In 10.0% of the 562 federal and state class cases (56 cases), the action against at least one company defendant was dismissed as the result of a dispositive motion unrelated to arbitration.<sup>10</sup> In 8.0% of the 562 class cases (45 cases), all claims against a company party were stayed or dismissed based on a company filing an arbitration motion.

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<sup>10</sup> Of the 56 cases, 13 had dismissals pursuant to a motion for summary judgment or similar motion and 43 had dismissals pursuant to a motion to dismiss. These outcomes are not mutually exclusive, and two cases included a stay on the basis of an arbitration motion and a dismissal on the basis of a non-arbitration motion to dismiss. No cases had dismissals pursuant to both a motion to dismiss and a motion for summary judgment.

- In the 1,205 federal individual cases for which we analyzed outcomes (including the sample of credit card cases<sup>11</sup>), the record in 48.2% (581 cases) reflected that a settlement had occurred, though the record only rarely (in around 5% of those 581 cases) reflected the monetary or other relief afforded by the settlement. In 504 cases (41.8%), there was either withdrawal by at least one consumer or another outcome potentially consistent with settlement, such as a dismissal for failure to prosecute or failure to serve, but where the plaintiff also might have withdrawn with no relief.
- In 82 of the 1,205 individual federal cases for which we analyzed outcomes (6.8%) (including the sample of credit card cases), a consumer obtained a judgment against a company party through a summary judgment motion, a default judgment, or a trial. (Most were default judgments, and there were only two trials.) The action against at least one company defendant was dismissed via a dispositive motion unrelated to arbitration in 3.7% of cases (44 cases).<sup>12</sup>
- Companies moved to stay or dismiss class disputes on the basis of arbitration clauses in 94 of the 562 class cases (16.7%). By contrast, only 12 of 1,205 federal individual cases we reviewed (including the sample of credit card cases) included such arbitration motions (1.0%).<sup>13</sup>
- In the 94 class cases where an arbitration motion was filed, the court granted the motion and dismissed or stayed the action against the movant(s) in 45 cases and partially

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<sup>11</sup> As described in Section 6.5.2, because of the high number of individual federal credit card cases identified, we reviewed a 14% sample of those cases. When we refer to data that include the sample of federal individual credit card cases, unless otherwise stated, we are referring to the sample and do not extrapolate from that sample to the population of federal individual credit card cases as a whole. Extrapolated data on outcomes from the credit card sample are reported in Appendix N.

<sup>12</sup> Of the 44 with at least one defendant dismissed via dispositive motion, 32 included dismissals pursuant to a motion to dismiss and 15 included dismissals pursuant to a motion for summary judgment or similar motion. These outcomes are not mutually exclusive and three of the 44 cases included dismissals on the basis of both a motion to dismiss and a motion for summary judgment or similar motion.

<sup>13</sup> These percentages of cases with an arbitration motion are not equivalent to the effective rate at which companies chose to invoke pre-dispute arbitration clauses, because the total case counts are not limited to cases that include corporate defendants with arbitration clauses.

dismissed or stayed the action against the movant(s) in one case.<sup>14</sup> In the other 48 cases there was no ruling (often because the case was resolved while the motion was pending), or the motion was denied.

- In the 12 federal individual cases in which arbitration motions were filed, the court granted a stay or dismissal of at least one movant in six cases.
- Aside from cases that were transferred to multidistrict litigation (“MDL” proceedings), federal class cases closed in a median of approximately 218 days for cases filed in 2010, and 211 days for cases filed in 2011. Class cases in MDLs were markedly slower, closing in a median of approximately 758 days for cases filed in 2010 and 538 days for cases filed in 2011. State class cases closed in a median of approximately 407 days for cases filed in 2010 and 255 days for cases filed in 2011. Again, leaving aside a handful of cases transferred to MDL proceedings, individual federal cases closed in a median of approximately 127 days. Of the class cases, more than three-quarters (446 out of 562) were closed by the end of our review period. Nearly all (1,182 out of 1,205) of the individual cases (including the credit card sample) were closed by that date.

## 6.3 Prior research

There are a number of empirical studies of litigation cases, some of which covered the frequency of litigation and the outcomes in those cases. The Federal Judicial Center produced some of the better-known studies concerning class actions<sup>15</sup> and some state bodies carried out similar

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<sup>14</sup> We were able to identify the arbitration agreements or excerpts of them cited in the pleadings in 44 out of these 46 cases. Consistent with the data on prevalence of class waivers in arbitration clauses presented in Section 2.5.5, in all but two of these 44 cases, the arbitration agreements we identified expressly included class waivers.

<sup>15</sup> *See, e.g.*, Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (Federal Judicial Center, 1996) (FJC 1996 Study); Thomas E. Willging & Shannon R. Wheatman, *An Empirical Examination of Attorneys’ Choice of Forum in Class Litigation* (Federal Judicial Center, 2005); Emergy G. Lee III & Thomas E. Willging, *Impact of the Class Action Fairness Act on the Federal Courts* (Federal Judicial Center, 2008). Other studies pertaining to class actions have focused on the content of class settlements, which is the focus of a separate section of this report. For

empirical work focused on individual states.<sup>16</sup> From time to time, other state and federal bodies publish data about civil litigation cases in federal courts<sup>17</sup> and state courts nationally, which includes cases filed on an individual (non-class) basis.<sup>18</sup>

To the extent empirical data on consumer financial litigation is reported, these reports often focus on frequency of cases filed under individual statutes,<sup>19</sup> or on broad undifferentiated groupings of cases.<sup>20</sup> Furthermore, the better-known empirical studies have focused on cases

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example, the FTC participated in a class action symposium in 2004. According to the FTC web site, this symposium focused on settlements, the settlement process, and associated remedies. *See* <http://www.ftc.gov/news-events/events-calendar/2004/09/protecting-consumer-interests-class-actions> (last visited Mar. 6, 2015). *See also* Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* (released in 2012). We discuss the content of class action settlements in Section 8.

<sup>16</sup> *See, e.g.*, State of California Administrative Office of the Courts Office of Research, *Findings of Study of California Class Action Litigation 2000–2006 (First Interim Report)* (Mar. 2009), <http://www.courts.ca.gov/documents/class-action-lit-study.pdf> (last visited Mar. 6, 2015); State of California Administrative Office of the Courts Office of Research, *Class Certification in California (Second Interim Report from the Study of California Class Action Litigation)* Feb. 2010, <http://www.courts.ca.gov/documents/classaction-certification.pdf> (last visited Mar. 6, 2015).

<sup>17</sup> The Administrative Office of the U.S. Courts publishes annual data concerning the incidence of case filings in federal court, among other data. *See, e.g.*, *Judicial Business of the U.S. Courts, Annual Report of the Director* (2013), <http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx> (last visited Mar. 6, 2015).

<sup>18</sup> *See, e.g.*, Nat’l Center for State Courts, *An Empirical Overview of Civil Trial Litigation (Caseload Highlights, Vol. 1 No. 11)* (Feb. 2005), *available at* <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/civil/id/24> (last visited Mar. 6, 2015); Bureau of Justice Statistics, *Civil Justice Survey of State Courts* (2005), <http://www.uscourts.gov/Statistics/JudicialBusiness/2013.aspx> (last visited Mar. 6, 2015).

<sup>19</sup> *See, e.g.*, ACA International, *FDCPA Lawsuits Decline While FCRA and TCPA Filings Increase*, Jan. 17, 2003 (reporting on January 2014 case filings under FDCPA as reported by Webrecon), <http://www.acainternational.org/news-fdcpa-lawsuits-decline-while-fcra-and-tcpa-filings-increase-31303.aspx> (last visited Mar. 6, 2015); Patrick Lunsford, *FDCPA Lawsuits Decline for Third Straight Year, But TCPA Suits Up 25%*, <http://www.insidearm.com/daily/fdcpa-lawsuits-decline-for-third-straight-year-but-tcpa-suits-up-25/> (last visited Mar. 6, 2015) (also citing data from Webrecon); American Bankers Association, Consumer Bankers Association, and The Financial Services Roundtable, June 22, 2012, RFI Comment at 10 (citing incidence of TILA actions filed in federal courts by individuals and on a class basis from 2002–2011 identified from LexisNexis Courtlink database).

<sup>20</sup> The annual reports of the Administrative Office of U.S. Courts provide data on annual filings by nature of suit, including the “consumer credit” nature of suit. *See* *Judicial Business of the U.S. Courts* (2013), Table C-2A

filed before 2010, often long before. In contrast, our case filing data cover the period from 2010 through 2012 and cover cases concerning selected consumer financial product markets rather than only those raising specific types of claims. Finally, even the most comprehensive studies carried out by the Federal Judicial Center have typically been limited to litigation data in particular jurisdictions.<sup>21</sup> In contrast, our federal court data set covers all district courts.

## 6.4 Data

This section describes how we identified state and federal court consumer financial cases. We focused on obtaining complaints because they set forth the nature of the dispute and generally identify the products concerned. We looked for individual disputes in five different consumer financial product markets: credit cards; checking accounts/debit cards; payday loans; GPR prepaid cards; private student loans; and for class actions only we looked in a sixth market, automobile loans.<sup>22</sup> Table 1, below, is an overview of our complaint coverage in state and federal court.<sup>23</sup>

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(reporting 8,453 cases filed in 2010, 9,822 cases filed in 2011, and 9,320 cases filed in 2012). The annual reports also provide data concerning the stage of the case when the action was terminated. *See id.*, Table C-4 (reporting that in 2013, 4,679 consumer credit cases terminated before the pretrial stage, 1,097 terminated during or after the pretrial stage, and 23 terminated during or after trial). These data appear to include class actions and individual cases, as well as cases removed from state courts nationwide, and are not limited to the specific products covered in our report. Unlike this report, however, the annual report of the AOUSC does not provide detailed information concerning the nature of the legal claims asserted, or detailed information regarding the type of outcome attained in the case.

<sup>21</sup> The FJC 1996 Study focused on four district courts (the Eastern District of Pennsylvania, the Southern District of Florida, the Northern District of Illinois, and the Northern District of California). FJC 1996 Study at 4. Another study gathered data on incidence of class actions nationwide, but its reporting emphasized discussion of case studies more heavily than reporting empirical data pertaining to all the class actions it had identified. Debora R. Hensler *et al.*, Class Action Dilemmas: Pursuing Public Goals for Private Gain (RAND Institute for Civil Justice, 2000) at 53–65 (discussing case incidence data from 1995–1996), *available at* [http://www.rand.org/pubs/monograph\\_reports/MR969.html](http://www.rand.org/pubs/monograph_reports/MR969.html) (last visited Mar. 6, 2015).

<sup>22</sup> In our 2013 Preliminary Results, we analyzed arbitration filings in four product markets and indicated our intent to expand the analysis to cover private student loans. We subsequently decided to also cover automobile loans and



**TABLE 1: COMPLAINT COVERAGE, 2010–2012**

Forum filed	Class	Individual
Federal court (all courts)	Six product markets	Five product markets –Credit card cases sampled –No automobile loan cases
State court (selected states and counties based on data availability)	Six product markets	Not covered because of data limitations

## 6.4.1 Collecting complaints<sup>24</sup>

### Federal court complaints

We first collected complaints concerning the identified consumer financial products filed in federal court in our time period. To do so we used LexisNexis Courtlink’s electronic database of pleadings in U.S. District Courts nationwide and used search terms relevant to the six products

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were able to do so in the arbitration data set because the universe of cases that had to be reviewed to find automobile loan cases was of a manageable size. However, our subsequent search for federal court complaints involving automobile loans in Courtlink, which we describe below, returned approximately 27,000 results. In contrast, when we limited that search to potential complaints concerning automobile loans that were class actions, it returned approximately 4,000 results which we were able to manually review to identify class actions involving automobile loans. See Appendix L for a detailed discussion of the complaint collection process.

<sup>23</sup> We use the term “court” in Section 6 to refer to a federal civil district court or state civil court of general jurisdictions, and not to other types of courts, such as small claims courts, bankruptcy courts, or state court coordinated proceedings.

<sup>24</sup> Our collection and analysis of federal and state court documents is covered by the Bureau’s Market Analysis of Administrative Data under Research Authorities Privacy Impact Assessment, as well as the Bureau’s Market and Consumer Research Records Systems of Records Notice (CFPB.022). Our use of personally identifying information was limited to activities such as: (1) identifying disputes filed in one forum that were transferred or re-filed in other forums; (2) assessing whether the same attorney or law firms filed similar complaints multiple times on behalf of one or several consumers; or (3) administrative purposes, such as deduplication of cases.

and manual review of the results to identify relevant complaints.<sup>25</sup> The method and search terms we used are detailed at Appendix L.

Due to limitations of the electronic database coverage and searchability of state court pleadings, we do not believe the electronic search of U.S. District Court pleadings identified a meaningful set of complaints filed in state court and removed to federal court.<sup>26</sup> Accordingly, we did not include in our federal case set the few removed state court complaints identified in our initial review of complaints returned from Courtlink. We covered cases originally filed in state court and removed to federal court in our state court class sample case set, which we collected through the separate process outlined below.

We also reviewed federal MDL proceedings established by the United States Judicial Panel on Multidistrict Litigation (“JPML”) to identify additional consumer financial complaints filed in federal court.<sup>27</sup> We first identified 12 MDL proceedings that were pending at any point between 2010 and 2012 whose subject matter concerned one of our six products, as outlined in Appendix L.<sup>28</sup> We then looked for complaints on the dockets of these MDLs filed between 2010 and 2012

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<sup>25</sup> LexisNexis describes its documents database on the Courtlink web site as part of the nation’s “largest collection of federal, state, and local court records.” See <http://courtlink.lexisnexis.com> (last visited Mar. 6, 2015).

<sup>26</sup> Our search necessarily could not retrieve any complaints if the text of the complaint had not been rendered searchable through Optical Character Recognition (“OCR”). During our review, we discovered that several complaints originally filed in state court and removed to federal court did not have text scanned using OCR in the Courtlink database. Even when the notice of removal had been scanned using OCR, the state court complaint that was either attached to or merged into the notice often did not. For example, after we obtained state class cases from selected jurisdictions through different means, we identified 13 that were removed and should have appeared in our Courtlink federal court search results. We found only three of the 13 cases in those results.

<sup>27</sup> An MDL proceeding is a procedural mechanism in which federal civil cases filed in different districts that involve common questions of fact may be transferred to a single district for coordinated or consolidated pretrial proceedings. 28 U.S.C. § 1407.

<sup>28</sup> These MDL proceedings were the following: Checking Account Overdraft (2036); National Arbitration Forum Trade Practices (2122); Capital One Bank Credit Card Interest Rate (2171); Discover Card Payment Protection Plan Marketing and Sales Practices (2217); Bank of America Credit Protection Marketing and Sales Practices (2269); Midland Credit Management, Inc., TCPA (2286); Portfolio Recovery Associates, LLC, TCPA (2295); Enhanced Recovery Company, LLC, TCPA (2398); Higher One Account Marketing and Sales Practices (2407); Capital One

concerning any of the six products covered by our review and added such cases to our data set if the cases had not been otherwise identified through our search methodology.

After we determined our set of federal class complaints concerning the six products and individual complaints concerning the five products, we collected the docket from the federal district court in which the complaint was filed in order to analyze relevant case events, as described in Appendix L.

## State court complaints

We could not identify a nationwide searchable repository of state court pleadings that has the same breadth of geographic coverage as the database we were able to use for our federal search.<sup>29</sup> In order to collect complaints in state court, we therefore researched the extent of electronic filing systems of courts in all 50 states to determine which states provided statewide electronic access to court filings. We identified only four states — Oregon, Utah, Oklahoma, and New York — that had a public, statewide electronic database in which complaints were regularly available.<sup>30</sup> Given the small number of states that had such statewide electronic databases, we researched electronic databases covering the ten most populous counties in the United States and found that, in addition to the two such counties located in New York, seven of the remaining eight counties had at least some complaints available in electronic databases: Los Angeles County, Cook County, Harris County, San Diego County, Orange County, Miami-Dade County,

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TCPA (2416); TRS Recovery Services, Inc., and TeleCheck Services, Inc., FDCPA (2426); and HSBC Bank U.S.A., N.A., Debit Card Overdraft Fee (2451).

<sup>29</sup> For example, Courtlink has only selected coverage of state courts, and that coverage varies widely from state to state and county to county. For instance, Courtlink’s online documents database only purports to include documents from one county-level trial court from Georgia’s 159 counties. *See* <https://courtlink.lexisnexis.com/AvailableCourts.aspx> (last visited Mar. 6, 2015) (searched for ‘Online Documents’ under ‘Court Capability’ with ‘Online Courts’ under ‘Access Method’). Similarly, Courtlink’s online documents database only includes documents from one county-level trial court in Ohio, which has 88 counties. *See id.*

<sup>30</sup> Even in states where complaints generally are electronically accessible, complaints may not be available in all cases, either because of gaps in the coverage of the electronic system or because courts can prevent certain complaints from being accessible to the public.

and Dallas County (collectively, with the four states with electronic databases, the “identified jurisdictions”).<sup>31</sup>

Ultimately, as described in Appendix L, we concluded that it was not feasible to identify state court individual complaints in the six consumer financial markets even in the identified jurisdictions. Our research indicated, however, that where a complaint was filed as a class action, the term “class action” often appeared at least once somewhere on the docket.<sup>32</sup> We therefore determined that we could identify many, if not most, class action cases (though not limited to complaints concerning the six identified consumer financial product markets) filed in a jurisdiction through word searching on available dockets to identify potential class action complaints.<sup>33</sup> We could then seek to obtain complaints in the identified cases directly from the state or county electronic filing system and review those complaints manually to determine whether each complaint concerned one of the six products. Accordingly, we adopted this approach to the collection of state court class action complaints. Because we could not access searchable dockets for Oregon, we ultimately were not able to cover class action complaints filed in that state. Collectively, the population in the three states and seven additional counties that we covered amounted to 18.1% percent of the U.S. population as of 2010.<sup>34</sup>

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<sup>31</sup> At the 2010 United States Census, the ten most populous counties in the United States were, in order: Los Angeles County, California; Cook County, Illinois; Harris County, Texas; Maricopa County, Arizona; San Diego County, California; Orange County, California; Miami-Dade County, Florida; Kings County, New York; Dallas County, Texas; and Queens County, New York. Of the ten most populous counties, all but three — Maricopa County, Cook County, and Miami-Dade County — had electronic filing systems at the state or county level that allowed direct access to complaints. In both Cook County, Illinois and Miami-Dade County, Florida, however, we found that some complaints were accessible online using the legal research database Bloomberg Law. We therefore included all top ten counties except Maricopa County, Arizona in our attempt to obtain complaints related to the six products.

<sup>32</sup> For example, complaints in class action cases are often titled “Class Action Complaint” with that document title appearing on the docket.

<sup>33</sup> The search string we used was “class” within three words of “action.”

<sup>34</sup> Although the data set we collected appears to be the most robust available, we recognize its limitations. For example, the three states and seven additional counties from which we collected complaints filed in state court may not be representative of the consumer financial litigation filed in state courts nationwide. We have outlined other potential limitations in Appendix L.

## 6.5 Frequency: Types of claims asserted

We report frequency results separately for class cases and for individual cases. For each type of case in our set, we report on certain characteristics of the cases reflected by the complaint: in which type of forum and year the case was filed; the consumer financial product about which the complaint alleges claims; whether a jury was demanded; the types of legal claims asserted; attorney representation rates;<sup>35</sup> and, for class action complaints, the type of relief sought.<sup>36</sup> We describe our methodology for coding claim information from complaints in Appendix L.

### 6.5.1 Class cases

#### Number of cases by date and product

Tables 2 and 3, below, show the court type and year in which the class action complaints concerning the six product markets were filed. We identified a total of 470 such class action cases filed in federal court, a roughly equal number in 2010, 2011, and 2012. We identified 92 state court class actions in the counties and states we studied, the bulk of which were filed in Cook County, Illinois, and Los Angeles County, California. Of these 92 cases, 19 were removed to federal court (and two of the 19 were later remanded to state court).

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<sup>35</sup> For class actions, we identified only two class cases as filed without counsel. We therefore discuss attorney representation rates for individual cases in a separate part of this section but do not do so for class cases.

<sup>36</sup> For the class cases, we do not report on the alleged number of putative class members because we found that when complaints allege the size of the putative class, the allegations typically are imprecise estimates, such as “more than 40,” “hundreds,” “thousands,” or “tens of thousands” of consumers. Moreover, for cases filed as class actions that are closed on the basis of non-class outcomes only (*e.g.*, cases that end with company dismissal through a dispositive motion or a non-class settlement), the complaint’s allegations pertaining to putative class size are arguably rendered moot by the non-class outcome. Further, for cases analyzed in this section that had an allegation in the complaint regarding class size and a class settlement finally approved by the court, settlement records indicated that the complaint’s allegations often had underestimated the class size, sometimes substantially. Section 8 analyzes consumer financial class settlements entered from 2008 through 2012 and reports on class size data in those settlements.

**TABLE 2: FEDERAL AND STATE CLASS COMPLAINTS BY FORUM, FILED IN 2010–2012 (562 CASES)**

	2010	2011	2012	2010 2012
Federal	158	149	163	470
State sample	14	44	34	92
Total	172	193	197	562

**TABLE 3: SELECTED STATE CLASS ACTION COMPLAINTS BY FORUM, FILED IN 2010–2012 (92 CASES)**

	2010	2011	2012	2010 2012
New York (statewide)	0	3	1	4
Oklahoma (statewide)	0	1	0	1
Utah (statewide)	0	0	0	0
Cook County, IL	2	12	8	22
Dallas County, TX	0	1	0	1
Harris County, TX	1	2	0	3
Los Angeles, CA	4	17	18	39
Miami-Dade County, FL	0	0	0	0
Orange County, CA	3	6	4	13
San Diego County, CA	4	2	3	9
Total	14	44	34	92

Table 4 below shows the distribution of class complaints among the six consumer financial product markets studied.<sup>37</sup> Complaints concerning credit cards represented almost half of the class complaints. By comparison, very few of the class complaints concerned GPR prepaid cards (0.5%) or private student loans (2.8%). We identified almost an identical number of class complaints concerning automobile loans filed in federal court and filed in our selected state courts. But because the total size of the state court sample was much smaller, state auto loan class actions were much more common (making up 51.1% of the state court class cases) than in the federal court sample (making up only 9.8% of the federal court class cases). Conversely, state credit card class cases were less common (16.3% of the state class cases) than federal credit card class cases (50.0% of the federal class cases).

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<sup>37</sup> As discussed below in this section, more than 40% of the class cases alleged FDCPA claims. Counting the incidence of class complaints by product is an imprecise exercise when the case is based on FDCPA claims. FDCPA cases generally are filed against debt collectors, who often collect more than one type of debt. We classified a complaint as concerning one of our six products if any debt mentioned with respect to any consumer party or putative class member included one of our six products — even if the class was not explicitly or exclusively defined with reference to that type of debt. None of our cases was classified as concerning more than one of the six products, however, as discussed in Appendix L. Thus there was no double counting of the same case in two different product sets. Further, we did not include in our set cases alleging FDCPA claims if the complaint did not allege the source of the underlying debt or alleged the source(s) of the underlying debt(s) to be only a product or products other than the six we study here.

**TABLE 4: FEDERAL AND STATE CLASS COMPLAINTS BY PRODUCT, FILED IN 2012–2012 (562 CASES)**

	Auto loans	Checking	Credit card	Payday loans <sup>38</sup>	GPR prepaid card	Student loan	All products
Federal	46	112	264	31	2	15	470
State sample	47	18	15	10	1	1	92
Total	93	130	279	41	3	16	562

## Claim types

Figure 1 shows the percentage of cases in our set of class cases filed in federal and state court that asserted various legal claims, including both federal statutory, state common law, and state statutory claims.<sup>39</sup> In our set of class complaints, both federal statutory claims (asserted in 61.9% of class actions) and state law claims (asserted in 63.3% of class actions) were common. Of the federal statutory claims, claims under the FDCPA were by far the most common, appearing in 41.3% of all of the class complaints, whereas the next most common federal statutory claims occurred in 8.9% (the Telephone Consumer Protection Act (“TCPA”)) and 5.7% (the Truth in Lending Act (“TILA”)) of the class complaints.

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<sup>38</sup> Of the 41 class complaints concerning payday loans in our set, 34 cases (82.9%) were filed in the same state (Illinois). This is partly a function of our covering Cook County, Illinois in our state sample. Indeed, all ten of the state-filed class cases concerning payday loans were filed in Cook County. In addition, in 33 out of the 34 class cases filed in federal or state court in Illinois, consumers were represented by the same law firm. We did not encounter a similarly concentrated cluster for individual payday loan cases, or in any other product markets in the class cases. We explore similar “repeat players” in our review of arbitration filings and outcomes, in Section 5.6.12.

<sup>39</sup> Note that the percentages reflected in Figures 1, 2, 3, and 6 respectively each add to more than 100% because a single complaint can allege claims under multiple statutes and under multiple common law theories.



**FIGURE 1: CLAIM TYPES IN FEDERAL AND STATE CLASS COMPLAINTS, FILED IN 2010–2012 (562 CASES)<sup>40</sup>**

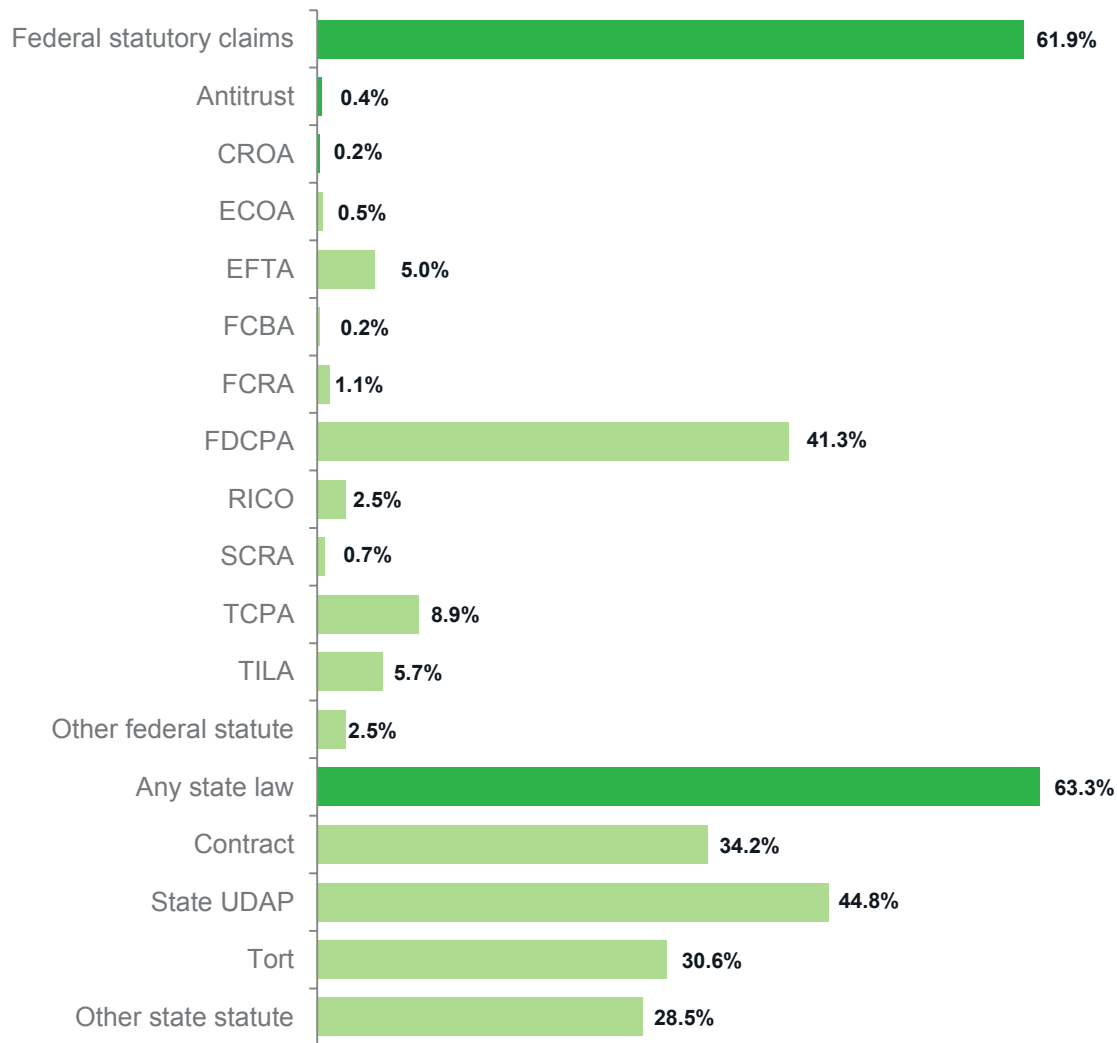


Figure 2 below shows the legal claims asserted in federal class complaints. Nearly half (48.3%) of the federal complaints asserted FDCPA claims with claims under the TCPA and TILA being

<sup>40</sup> In the 172 federal and state class cases that alleged tort claims, 156 alleged fraud or another intentional tort or a tort with an allegation of gross negligence or willful conduct. In addition, in the 2013 Preliminary Results, we attempted to characterize the disputes we reviewed by the core subject matter of their claims. 2013 Preliminary Results at 88–91. In Appendix M we constructed a similar typology of the subject matter of the class action complaints regarding credit cards, checking accounts and debit cards, and payday loans.

the next most common. More than half of the federal complaints (57.0%) asserted state law claims, with approximately one-third asserting claims under state UDAP statutes (37.9%), state contract law (35.3%), and state tort law (27.7%).

**FIGURE 2: CLAIM TYPES IN FEDERAL CLASS COMPLAINTS, FILED IN 2010–2012 (470 CASES)**

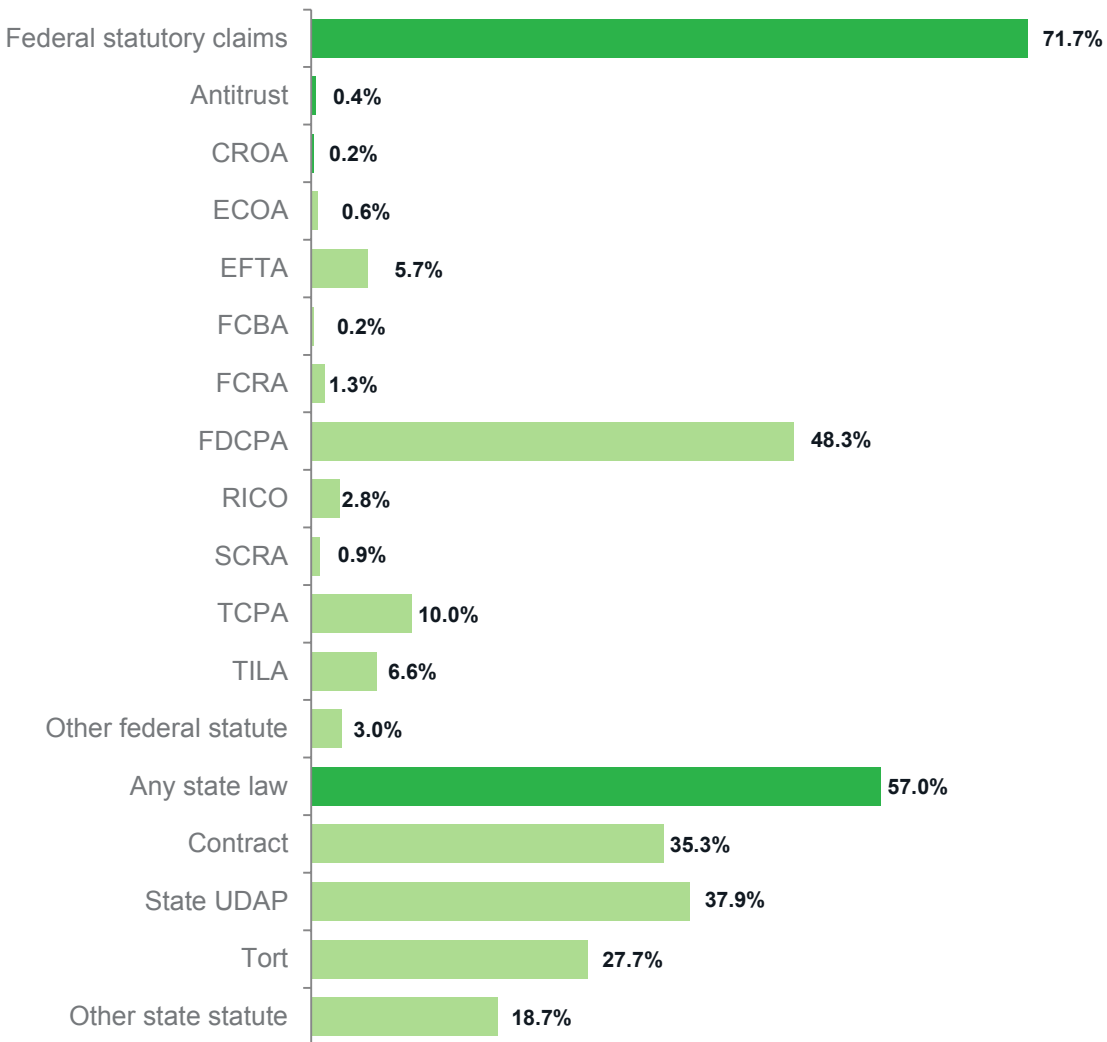
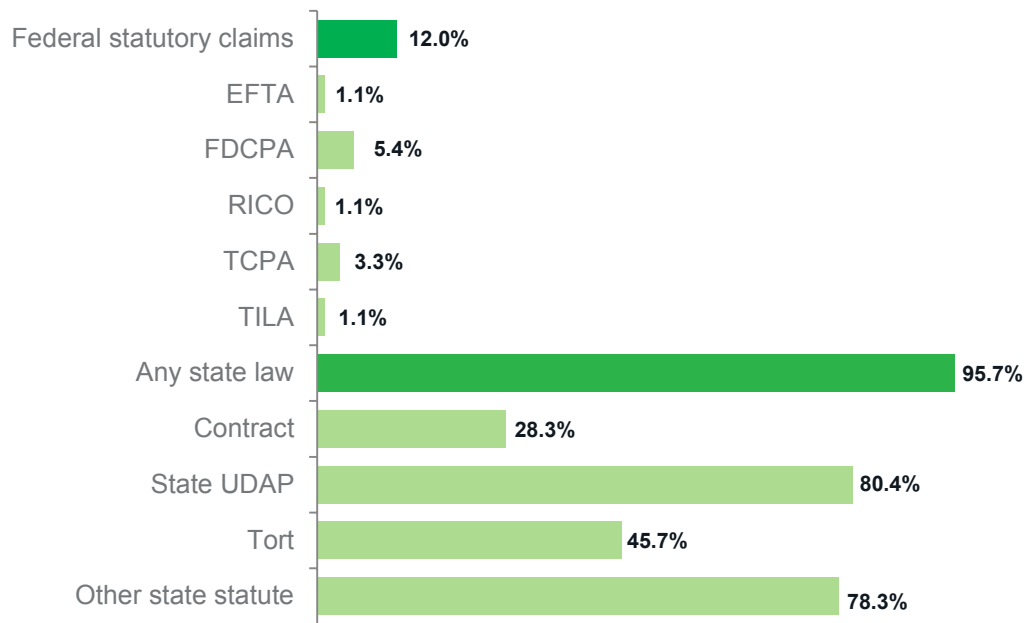


Figure 3 shows the legal claims asserted in the 92 state court class complaints. Relatively few of these asserted federal statutory claims (12.0%) while the overwhelming majority asserted state law claims (95.7%). State UDAP and other state statutory claims were the most commonly asserted in the state class complaints (80.4%). Tort and contract claims each occurred less frequently (45.7% and 28.3%, respectively).

**FIGURE 3: CLAIM TYPES IN STATE CLASS COMPLAINTS, FILED IN 2010–2012 (92 CASES)**



## Relief sought

All of the 562 class complaints sought some form of monetary relief, whether actual damages, statutory damages, punitive damages, or otherwise.<sup>41</sup> However, almost none of the class complaints specified a total amount of monetary relief sought.<sup>42</sup> Some cases alleged a minimum amount in controversy for jurisdictional purposes, but we do not view that as a reliable indicator

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<sup>41</sup> We include in this category any claim for monetary relief for consumers, however framed, thus including compensatory damages, restitution, refunds, disgorgement, statutory damages, punitive damages, and other forms of monetary relief.

<sup>42</sup> Only five of the 562 class complaints specified a dollar amount of monetary relief sought that encompassed all monetary relief sought in the complaint, and two of these five cases framed the relief on a per-class member basis such that the total amount of monetary relief sought classwide was not known.

of the amount of relief sought.<sup>43</sup> We thus report on the statutory damages sought and the limits on the amount of damages provided by the statutes, if any, as indications of the magnitude of monetary relief sought.

Of the federal statutes we specifically noted in our review (which we call “selected” statutes in Table 5 below), five cap statutory and punitive damages combined, to the extent either is available, in connection with a class claim under that statute at the lesser of \$500,000 (or for one of the statutes, \$1 million) or 1% of the net worth of the defendant.<sup>44</sup> These are the Expedited Funds Availability Act (“EFAA”), the Electronic Funds Transfer Act (“EFTA”), FDCPA, TILA (including the Consumer Leasing Act and the Fair Credit Billing Act), and the Equal Credit Opportunity Act (“ECOA”) (which provides for punitive and actual damages but not statutory damages).<sup>45</sup> Five other statutes which we noted in our review provide for statutory

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<sup>43</sup> Of the 194 cases that stated such a jurisdictional amount, 98% (190 cases) alleged damages of more than \$5 million. For reference, the Class Action Fairness Act provides for original federal jurisdiction of certain class actions seeking more than that amount. 28 U.S.C. § 1332(d)(2).

<sup>44</sup> Note that if a complaint alleged violation of a statute, but did not expressly seek statutory damages under that particular statute, then we did not code the claim as a statutory damages claim under that statute. For reference, we identified: eight such cases that alleged EFTA claims; six such cases that alleged FDCPA claims; seven such cases that alleged TILA claims; and one such case that alleged ECOA claims.

<sup>45</sup> These caps can be summarized as follows:

- EFAA: Capped amount of lesser of \$500,000 or 1% of net worth of creditor; capped amount is in addition to any actual damages; punitive damages are not expressly authorized. 12 U.S.C. § 4010(a)(2)(B)(ii).
- EFTA: Capped amount of lesser of \$500,000 or 1% of net worth of the defendant; capped amount applies to statutory damages for “the same failure to comply”; punitive damages are not expressly authorized. 15 U.S.C. § 1693m(a)(2)(B). As discussed in Appendix L, we did not cover cases related solely to violation of EFTA ATM disclosure requirements. EFTA also authorizes trebling of actual damages for certain claims under 15 U.S.C. § 1693f(e).
- FDCPA: Capped amount of lesser of \$500,000 or 1% of net worth of defendant; capped amount is in addition to any actual damages; punitive damages are not expressly authorized. 15 U.S.C. § 1692k(a)(2)(B).
- TILA including CLA, FCBA: Capped amount of lesser of \$1 million or 1% of the net worth of creditor; capped amount is in addition to any actual damages; punitive damages are not expressly authorized.

damages without explicitly placing a cap on the amount of damages recoverable under a class claim.<sup>46</sup> These are the Credit Repair Organizations Act (“CROA”), the Fair Credit Reporting Act (“FCRA”), the Racketeer Influenced and Corrupt Organizations Act (“RICO”), the Servicemembers Civil Relief Act (“SCRA”), and the TCPA.<sup>47</sup> We note that in class complaints where statutory damages were sought under federal statutes other than those listed above or under state statutes, we did not determine which of these statutes did and did not include class damage caps.

Table 5 shows statutory damages sought under selected federal statutes grouped by whether the statutes limit the amount of monetary relief available to a class. We found 44.4% of the class action complaints sought statutory damages only under one of the five selected federal statutes

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15 U.S.C. § 1640(a)(2)(B). Before the amendment in Section 1416(a)(2) of the Dodd Frank Act took effect in July 2010, the capped amount was the lesser of \$500,000 or 1% of the net worth of the creditor.

- ECOA: ECOA does not authorize statutory damages, but rather actual damages. ECOA also authorizes punitive damages up to \$10,000, with amounts in a class case subject to limit of lesser of \$500,000 or 1% of net worth of creditor. 15 U.S.C. § 1691e(b). Elsewhere in this report when we refer to federal statutory damages claims, we include ECOA in that reference.

<sup>46</sup> We reviewed complaints for relief sought under federal antitrust laws and the Truth in Savings Act (“TISA”), but these laws are not shown in Table 5. Only two class complaints in our review (less than 0.4%) asserted claims under federal antitrust law and sought statutory damages. TISA did not expressly authorize a private right of action during our review period and thus we did not find any class cases asserting claims under TISA.

<sup>47</sup> The statutory damage provisions pertaining to class claims in these statutes can be summarized as follows:

- CROA: Authorizes such “additional amount” as “punitive damages” as the court may allow for each named plaintiff and class member. 15 U.S.C. § 1679g(a)(2). As discussed previously, we did not cover cases against credit repair organizations engaged by the consumer, as those cases concerned the credit repair product itself, rather than one of the six covered products.
- FCRA: For willful violations, statutory damages of \$100–1,000 or actual damages. 15 U.S.C. § 1681n(a)(1).
- RICO: Treble damages. 18 U.S.C. § 1964(c).
- SCRA: Authorizes “appropriate” monetary relief in private actions. 50 U.S.C. § 597a(a)(2).
- TCPA: Greater of actual damages or \$500–1,500 per violation depending on whether willful or knowing. 47 U.S.C. § 227(b)(3)(B).

with damage caps and under no other federal statutes. A relatively smaller percentage of the class action complaints, 10.3%, sought statutory damages under any of the uncapped selected federal statutes.

**TABLE 5: STATUTORY DAMAGES SOUGHT IN FEDERAL AND STATE CLASS COMPLAINTS, FILED IN 2010–2012 (562 CASES)**

Damage claim basis	Number of cases
No federal statutes	246
Selected federal statutes with caps and no other federal statutes	250 <sup>48</sup>
and not under any state statute <sup>49</sup>	200
and under state statute	50
At least one selected uncapped federal statute	58
Other cases involving federal statutes	8

Apart from monetary relief, class complaints also can seek injunctive relief. In 25.7% of the federal class cases (121 of 470 cases), a consumer sought class certification under Federal Rule

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<sup>48</sup> Of the 250 cases seeking damages under capped federal statutes only, 101 sought damages under *only one* such capped federal statute (and no other federal statutes) without seeking actual damages, and 96 of those 101 did not seek statutory damages under a state statute or any other type of monetary relief. Another 144 of the 250 sought damages under *only one* such capped federal statute but did seek actual damages, and 102 of those 144 did not seek statutory damages under a state statute.

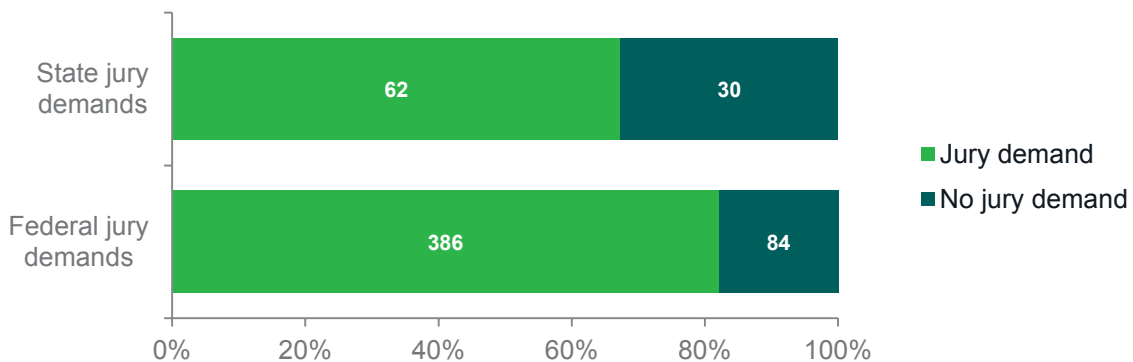
<sup>49</sup> Some of the cases included in this category seek additional monetary relief under non-statutory claims such as disgorgement, restitution, a refund, actual damages, or otherwise seek a remedy for a state contract or tort claim.

of Civil Procedure 23(b)(2) alleging that the company or companies had acted on grounds that applied generally to the class such that injunctive relief was appropriate.<sup>50</sup>

## Jury demands

Complaints sought juries in 79.7% of class cases we reviewed. Figure 4 shows the relative proportion of federal class complaints and state class complaints seeking a jury. Figure 5 breaks out the combined data by product. For all of the class cases, complaints sought a jury more often than not. A higher percentage of complaints sought a jury in federal class cases (82.1%) as compared to in state class cases (67.4%). The complaints in our set sought a jury at a relatively high rate for all products (80% or higher) except payday loans, for which complaints sought a jury in only 24.4% of the set of cases.<sup>51</sup>

**FIGURE 4: JURY DEMANDS IN FEDERAL AND STATE CLASS COMPLAINTS, FILED IN 2010–2012 (562 CASES)**

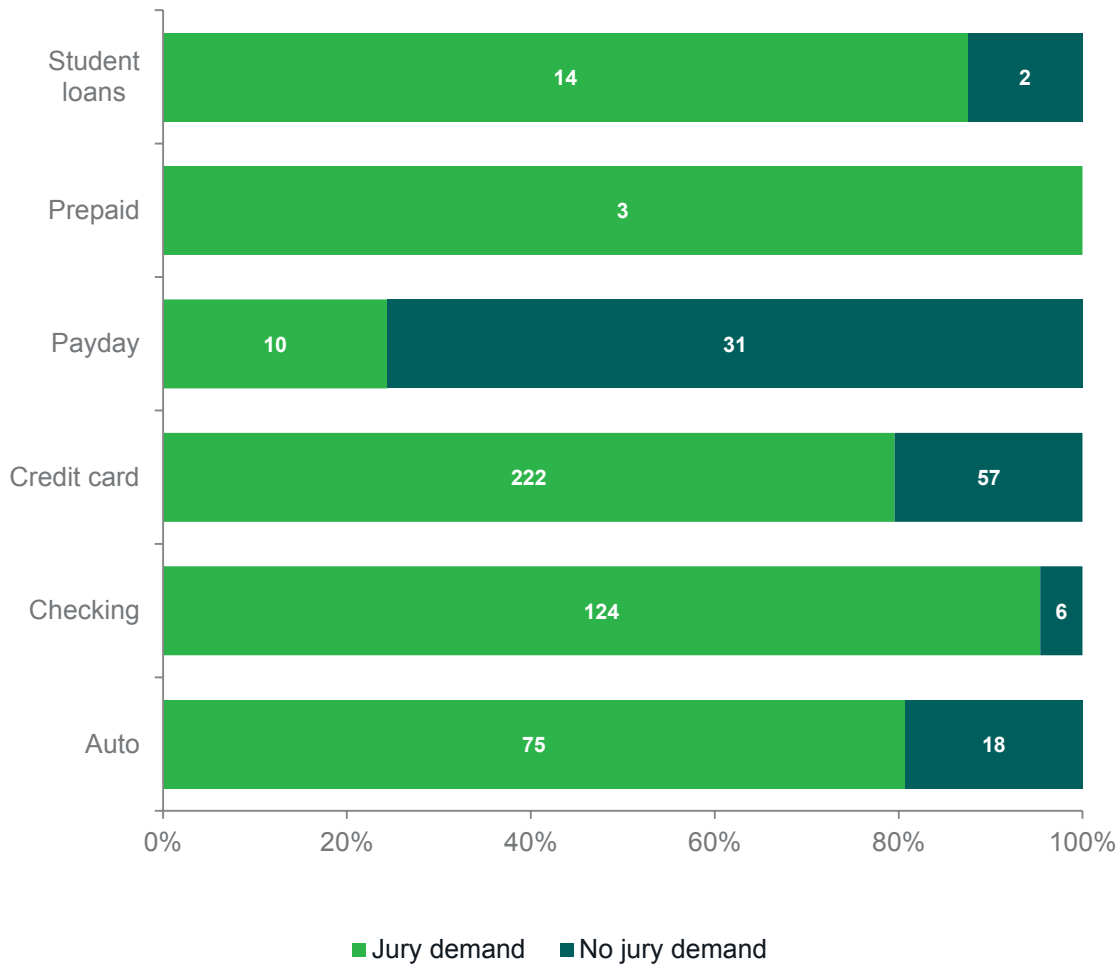


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<sup>50</sup> We did not obtain such data from class complaints filed in state court. Plaintiffs in the federal class cases also may have sought injunctive relief in cases that sought certification as class actions under other provisions of Rule 23(b).

<sup>51</sup> As noted, *supra* at n.38, a large majority of the payday loan class cases in our set were filed in one jurisdiction where consumers were represented by the same law firm.

**FIGURE 5: JURY DEMANDS IN FEDERAL AND STATE CLASS COMPLAINTS BY PRODUCT, FILED IN 2010–2012 (562 CASES)**



### 6.5.2 Federal individual cases

In our study of individual cases filed in litigation, we cover only cases filed in federal court and do not cover cases concerning automobile loans, for reasons discussed in Section 6.4. Thus our federal individual cases concern five products, instead of the six covered in the class set.

#### Number of cases by date and product

Table 6 shows the number of individual cases we were able to identify that were filed in federal court across our covered consumer financial products in 2010–2012. Like the class cases, the 3,462 individual cases filed in federal court are relatively evenly distributed among 2010, 2011,



and 2012. Cases concerning GPR prepaid cards occurred the least frequently. Given the high number of credit card cases, we reviewed only a randomly selected 13.3% sample of the total 2,604 credit card cases not transferred to MDLs, so that we ended up reviewing 364 credit card cases for further frequency and outcome data.<sup>52</sup> Table 6 contains data for the total set and for this sample.

Table 6 also shows the distribution of cases across products. Individual credit card cases occurred significantly more often than cases related to any other product (they were 75.7% of all the federal individual cases in our set).

**TABLE 6: FEDERAL INDIVIDUAL CASES BY PRODUCT AND YEAR FILED, BEFORE AND AFTER CREDIT CARD SAMPLING, FILED IN 2010–2012**

Product type	2010	2011	2012	2010 2012
Credit cards (before sampling)	857	752	1,012	2,621
Credit cards (sample only)	117	110	137	364
Checking accounts/debit cards	54	33	50	137
Payday loans	128	102	103	333
GPR prepaid cards	0	1	1	2
Private student loans	98	99	172	369
All products (before sampling)	1,137	987	1,338	3,462
All products (credit card cases sampled)	397	345	463	1,205

<sup>52</sup> The total credit card sample set includes 17 individual cases found in MDLs and a randomly selected portion (347) of individual cases that were not part of MDLs and were returned from the Courtlink results, for a total of 364 cases. With respect to the randomly-selected credit card cases, the 347 in 2,604 sampling creates a 95% confidence level with a 5% margin of error for the extrapolation in Appendix N to the entire set of individual credit card cases identified. With respect to the cases found in MDLs, because we found only 17 individual credit card cases on credit card MDL dockets, and these were in four different MDLs, we added all of these cases to our sample set.

## Claim types

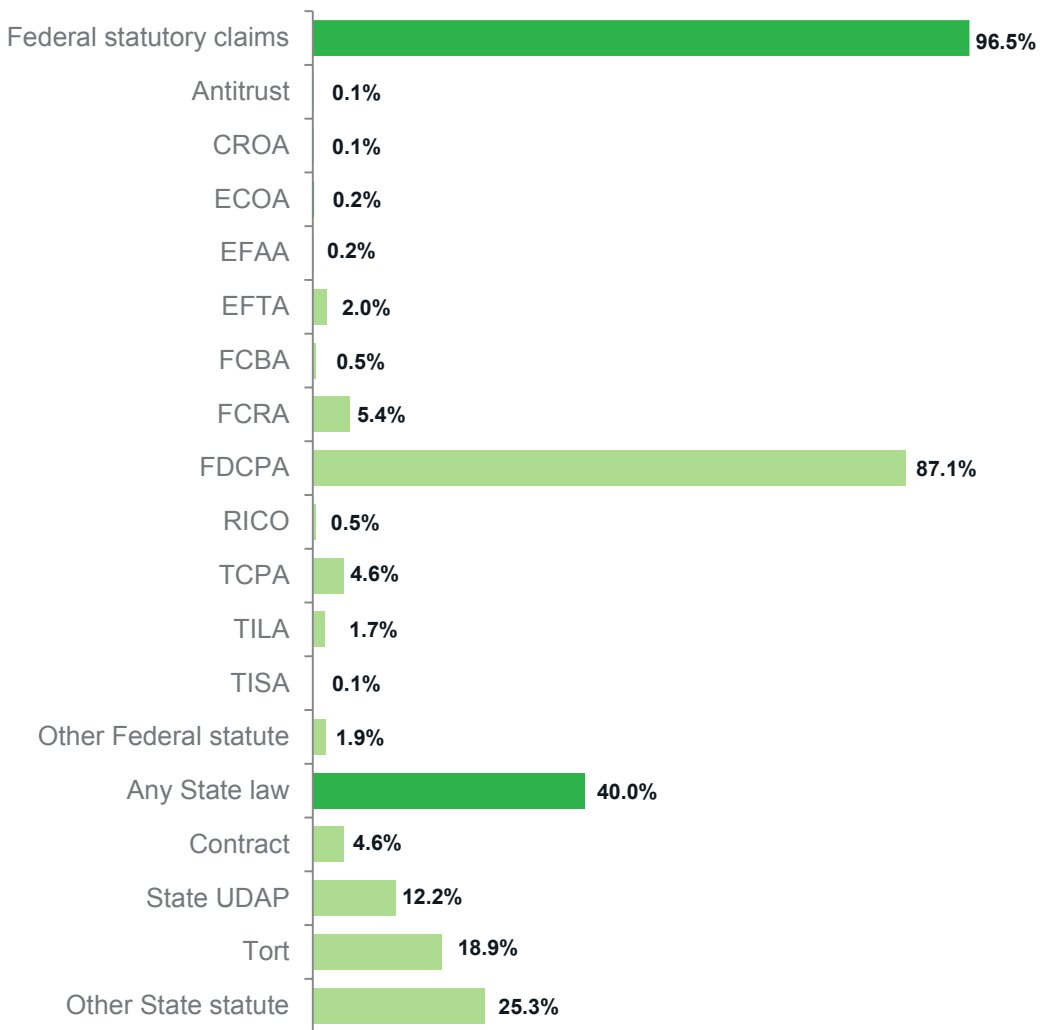
Figure 6 shows the percentage of cases in our set of federal individual cases that asserted various legal claims, including both federal statutory, state common law (*e.g.*, tort or contract), and state statutory claims. Almost all (96.5%) of these cases asserted federal statutory claims, a higher percentage than in either the entire class set (61.9%) or in the federal class set (71.7%). As was true for the class set, claims under the FDCPA were the most common in these individual cases, occurring in 87.1% of such disputes. (In the class set, some 41.3% of the cases asserted FDCPA claims.) The next most common federal statutory claims were under the FCRA, occurring in 5.4% of the federal individual cases, compared with 1.1% of the class set.

Some 40.0% of the individual cases (including the credit card sample) asserted claims under state law.<sup>53</sup> This is lower than the rate at which state claims arose in the class set overall (63.3%) and in the federal class set (57.0%).

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<sup>53</sup> In this section, when we refer to data that include the sample of federal individual credit card cases, unless otherwise stated, this sample is not extrapolated. Extrapolated data on outcomes from the credit card sample are reported in Appendix N.

**FIGURE 6:** CLAIM TYPES IN FEDERAL INDIVIDUAL CASES, FILED IN 2010–2012 (1,205 CASES) (INCLUDING SAMPLE OF CREDIT CARD CASES)<sup>54</sup>



<sup>54</sup> In the 228 federal individual cases that alleged tort claims, 188 alleged either fraud or another intentional tort or a tort with an allegation of gross negligence or willful conduct.

## Jury demands

The overwhelming majority (92.6%) of federal individual complaints requested a jury, as shown in Figure 7. This share is higher than the 79.7% of federal and state class complaints with a jury demand.

**FIGURE 7: JURY DEMANDS IN FEDERAL INDIVIDUAL CASES, FILED IN 2012–2012 (1,205 CASES) (INCLUDING SAMPLE OF CREDIT CARD CASES)**

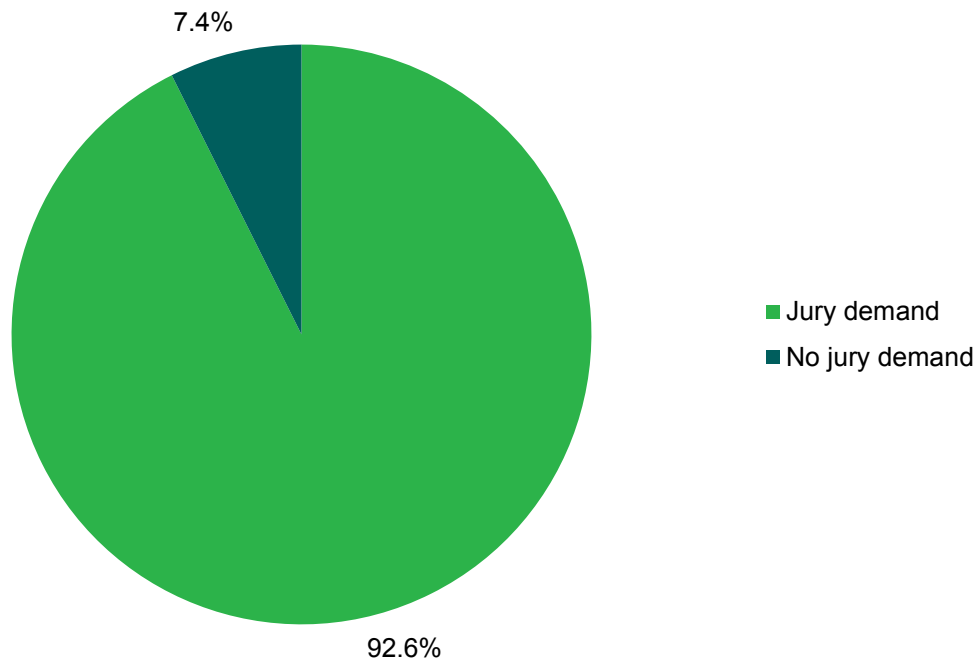
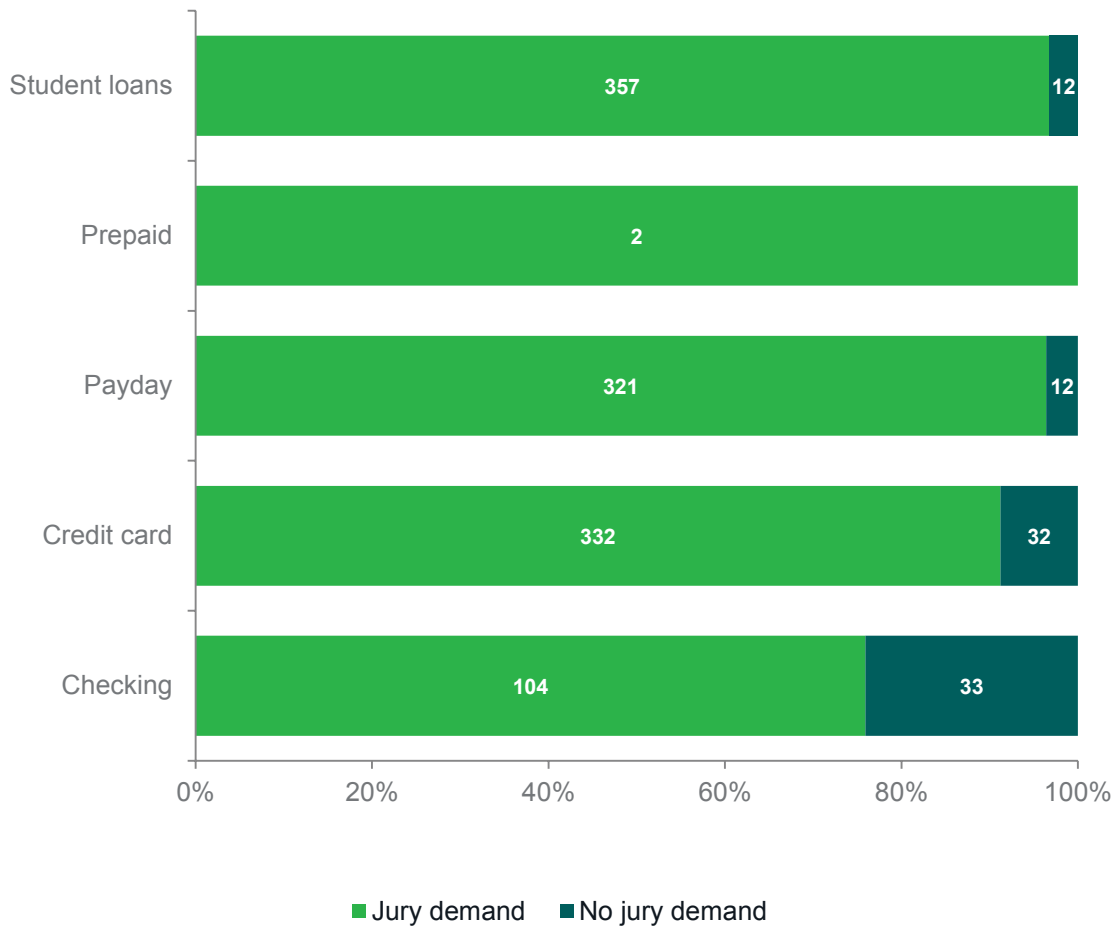


Figure 8 shows jury demands in federal individual cases by product. Federal individual complaints demanded juries in roughly similar proportions within each product set as for the class cases concerning those same products, with the exception of payday loan cases. In the class set, only 24.4% of the payday loan cases demanded a jury. In the individual case set, nearly all (96.4%) did so.

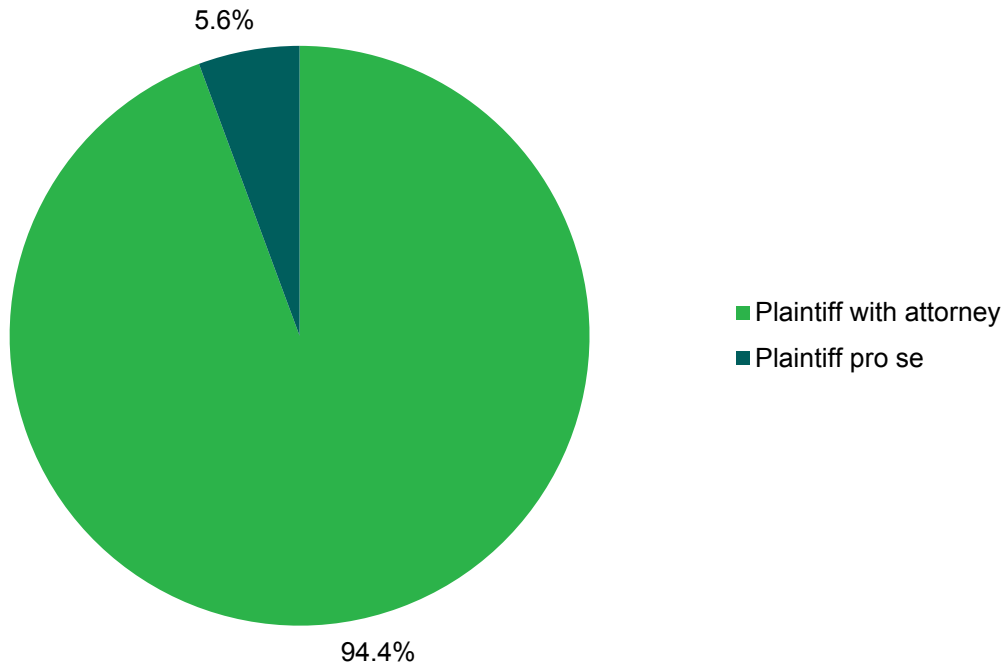
**FIGURE 8: JURY DEMANDS IN FEDERAL INDIVIDUAL CASES BY PRODUCT, FILED IN 2010–2012 (1,205 CASES) (INCLUDING SAMPLE OF CREDIT CARD CASES)**



### Attorney representation

Figure 9 below shows the relative proportion of individual cases (including the sample of credit card cases) filed without counsel (also known as “*pro se*”). Overall, only 5.6% (68) of these cases were filed by plaintiffs without counsel, and 67.6% (46) of these 68 cases concerned checking accounts or debit cards. In contrast, we identified only two federal class complaints filed without counsel, representing 0.4% of the federal class set.

**FIGURE 9:** ATTORNEY REPRESENTATION IN FEDERAL INDIVIDUAL CASES, FILED IN 2010–2012 (1,205 CASES) (INCLUDING SAMPLE OF CREDIT CARD CASES)



## 6.6 Outcomes: How claims were resolved

As with our arbitration data, outcome data for litigated disputes cannot be reduced to a simple “win” or “loss” tally broken out by case. Particularly on the class side, cases may involve numerous claims and several defendants, creating the potential for a multiplicity of by-party and by-claim outcomes for each case; we could not feasibly analyze how each separate legal claim was resolved as to each separate defendant for the number of cases in our set. These outcomes may apply to some claims and/or parties and not to others, and where the outcome is based on a court ruling on a motion, the motion may be granted or denied in whole or in part. Analysis of the litigation outcome data is further complicated by the absence of claim amount data, which is more available in arbitration filings.

To deal with this complexity, we developed an outcome review protocol that focused on whether a given case included one or more of a set of potential outcomes.<sup>55</sup> In class cases, for example, we report whether a given case includes any of the following outcomes at least once:

- A classwide judgment for consumers;
- A non-class judgment for individual consumer(s);
- Dismissal or stay of all claims against a company party on the basis of an arbitration motion;
- Dismissal of a company party through a non-arbitration dispositive motion;
- An approved final class settlement;
- Non-class settlement (*i.e.*, a settlement with one or more of the named plaintiffs, not with a settlement class, that is apparent from filings on the docket);<sup>56</sup>
- Potential non-class settlement (which includes a withdrawal of claims by a named plaintiff and dismissals of a company party for failure to serve or failure to prosecute); and
- *Sua sponte* dismissals initiated by the court, (*i.e.*, a dismissal absent a motion to dismiss), which often are for jurisdictional reasons.

For the individual cases, we report on all of these types of outcomes except of course for classwide judgments and approved class settlements. Note that a single case can have more than one type of outcome. We do not discuss trial outcomes in detail because only two of the 1,767 class and individual cases in the data set we analyzed went to trial (both were individual federal cases).

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<sup>55</sup> We provide additional detail regarding our methodology for coding information from dockets and related documents in Appendix L.

<sup>56</sup> For a putative class case to proceed on a class basis there must be claims or defenses of a class representative that are typical of those of the class. *See, e.g.*, Fed. R. Civ. P. 23(a). Thus, there must be a class representative. However, putative class representatives generally can settle their own claims prior to certification of the case as a class case.

Our outcome review also covers the timing to resolution. Specifically, we report the time from the filing of the complaint to the closure of the case, assuming that occurred by our cutoff date (February 28, 2014). Of the class cases, more than three-quarters (446 out of 562) were closed by the cutoff date. Nearly all (1,182 out of 1,205) of the individual cases (including the credit card sample) were closed by the cutoff date.

## 6.6.1 Class cases

### Data limitations

With respect to the state class cases, some of the dockets in the 92 state class actions in our set raised questions regarding whether one or more of the events we searched for had occurred. Overall, we found that state court dockets contained less information than federal court dockets on which motions had been filed and by whom, what court rulings were, whether settlements had occurred (and if so, of what type, class or non-class), whether potential settlements had occurred, whether the case was closed, and whether one party had appealed. As a result, these events may be undercounted in state cases.<sup>57</sup>

### Class certification

We do not treat class certification as an outcome, because it is a case milestone that does not itself terminate the case or any claims in the case. In any event, we found ten putative class cases (half of which were in the Checking Overdraft MDL, discussed in greater detail in Section 8) in which a class was certified separate from a class settlement.<sup>58</sup> In five of these ten cases (three of which five were in the Checking Overdraft MDL) the parties subsequently proposed a class

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<sup>57</sup> For example, as discussed *infra* at n.62, in ten of the 92 state class cases it was unclear whether a particular type of outcome had occurred and thus we did not count the outcome type, though there was some indication that outcome type may have occurred.

<sup>58</sup> To supplement our data on which cases in our set had certified classes, we reviewed an additional six months of docket activity in cases that were not coded as closed (or which had an appeal pending, a stay unrelated to arbitration in effect, or other indicia of pendency of claims) as of February 28, 2014. In this six month period, we found three additional cases in which classes were certified separate from a class settlement.



settlement for approval which was granted prior to the cutoff date for our analysis.<sup>59</sup> In the other five of these ten cases (two of which five were in the Checking Overdraft MDL), we found no finally approved class settlement in our coding period. (When we reviewed the dockets in these five cases for an additional six months, through August 31, 2014, to identify any class settlement activity, we found that in one of these five cases, the parties had sought approval of a class settlement.<sup>60</sup>)

## Outcome data

Of the 562 class cases in our data set, we identified at least one type of outcome in 478 cases as of our cutoff date.<sup>61</sup> We report on outcomes up to that cutoff date, even if the case was not yet closed (and thus additional outcomes may occur) or there was a pending appeal or stay in the case (indicating, when the appeal relates to outcomes, that some of the existing outcomes may change).<sup>62</sup> Figure 10 below shows the frequency of different outcomes in these class cases.<sup>63</sup> This

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<sup>59</sup> We reviewed the dockets in these five cases and found a motion seeking preliminary approval of a class settlement as soon as five months after certification, and as much as 18 months after certification. The case filings in these five cases also indicated that the parties typically reached an agreement in principle several months before filing the motion seeking preliminary approval of the settlement.

<sup>60</sup> In the four other cases for which we reviewed the dockets for an additional six months, we found the case either not closed or pending on appeal (including in one case an appeal of the certification decision) as of the end of August 2014 and the parties had not sought approval of a class settlement as of that time.

<sup>61</sup> Of the 84 class cases in which we did not identify any outcome, all but three cases were not reported as closed by the court on the docket, indicating that the case may be ongoing.

<sup>62</sup> When we found an indication of a possible outcome, but could not confirm the outcome had occurred, we did not code it as occurring. This was a particular issue in state class cases, due to unclear docket entries, incomplete dockets, and unavailable court filings. Thus in state class cases we tracked when the existence of any type of outcome seemed possible but unclear. There were potential additional outcomes like this in ten of the 92 state class cases: six cases with possible dismissals or stays on an arbitration motion, two cases with possible company dismissals on a dispositive motion, one case with possible *sua sponte* dismissal, one case with possible non-class settlement, and one case with a possible non-class judgment against a company. Those “potential outcomes” are not reported on our outcome charts because we could not confirm they had occurred.

information is presented by product for the class cases in Appendix N. The most common outcome was a potential non-class settlement (typically, a withdrawal of claims by the plaintiff), which occurred in 36.7% of cases, followed closely by a known non-class settlement, which occurred in 24.4% of cases.<sup>64</sup> Classwide judgment for consumers and *sua sponte* dismissal were the least frequent of the identified outcomes, each occurring in less than 1% of cases.

A class settlement finally approved by the court occurred in 12.3% of the 562 class cases.<sup>65</sup> Broken out by type of forum, 13.0% of class actions we identified filed in federal court (61 out of 470 cases), and approximately 8.7% of those filed in the selected state courts (eight out of 92 cases) led to final approval of class settlements in our review period. Of course, some of the unclosed cases may now or ultimately include class settlements.<sup>66</sup>

Consumers obtained a judgment against a company in ten cases (1.8% of all class cases), three of which were classwide judgments for consumers and seven of which were a non-class judgment for individual consumer(s).<sup>67</sup> In those ten cases, the liability was established through a default

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<sup>63</sup> Note that because more than one outcome can occur in any single case under our coding method, *see* Appendix L, the total number of outcomes in Figure 10 plus the number of cases without outcomes (84) is more than the total number of cases in the class set (562).

<sup>64</sup> A known non-class settlement and a potential non-class settlement both occurred in five cases. Of the 137 cases in which a known non-class settlement occurred, we were able to obtain the amount of the settlement from the court record in four cases. The settlement amounts ranged from \$1,001 to \$30,842 with an average of \$9,836 and a median of \$3,751.

<sup>65</sup> Named plaintiffs and putative class members in cases in our set that did not reach a class settlement may have obtained relief through class settlements that occurred in cases outside our set (whether outside our date range or not identified through our search methods).

<sup>66</sup> Because we noticed a number of cases with pending class settlement activity as of the end of our coding period, we reviewed an additional six months of docket activity in cases that were not coded as closed (or which had an appeal pending, a stay unrelated to arbitration in effect, or other indicia of pendency of claims) as of February 28, 2014. In this six month period, we found 14 additional cases in which a class settlement was finally approved and 15 other cases in which the court was in the process of reviewing a class settlement agreement.

<sup>67</sup> We were able to determine the amount of the monetary relief awarded for consumers set forth in the judgment in one of the three cases where there was a classwide judgment, and that amount was \$138,894. We were able to

judgment in seven cases and through a summary judgment motion in three cases. No putative class cases went to trial, either on a class or individual basis. At least one company party was dismissed on a dispositive motion in 10.0% of cases.<sup>68</sup> All claims against a company party were stayed or dismissed for arbitration in 8.0% of the cases. The outcome types are not mutually exclusive but are collectively exhaustive for any case in which we identified at least one outcome type.

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determine the amount of monetary relief awarded for consumers in the judgments in six of the seven cases with a non-class judgment for individual consumer(s). Those amounts ranged from \$500 to \$5,000 with an average of \$2,008 and a median of \$1,525.

<sup>68</sup> Companies filed dispositive motions (*i.e.*, motions for summary judgment or motions to dismiss) in 37.9% of the state and federal class cases (213 out of 562 cases). The court granted such a motion and dismissed a filing party in the 56 cases shown in Figure 10. Of the 69 class cases that went to a final class settlement, a dispositive motion was filed in 40.6% (28 cases) but none of these motions led to any party's dismissal from the court case. In contrast, of the 338 class cases that included a non-class settlement or potential non-class settlement, a company party filed a dispositive motion in 27.8% (94 cases). The court granted such a motion that led to dismissal of a company party in nine cases. As addressed more fully in Appendix L, we use the term dispositive motion to refer to companies seeking to dismiss any claim against it, even if not seeking to dismiss all claims. Further, we do not use the term "dispositive motion" here to include a motion seeking to stay or dismiss a case on the basis of a pre-dispute arbitration clause. We discuss motions using those clauses in Section 6.7.

**FIGURE 10:** FREQUENCY OF OUTCOMES IN FEDERAL AND STATE CLASS CASES, FILED IN 2010–2012 (562 CASES)<sup>69</sup>

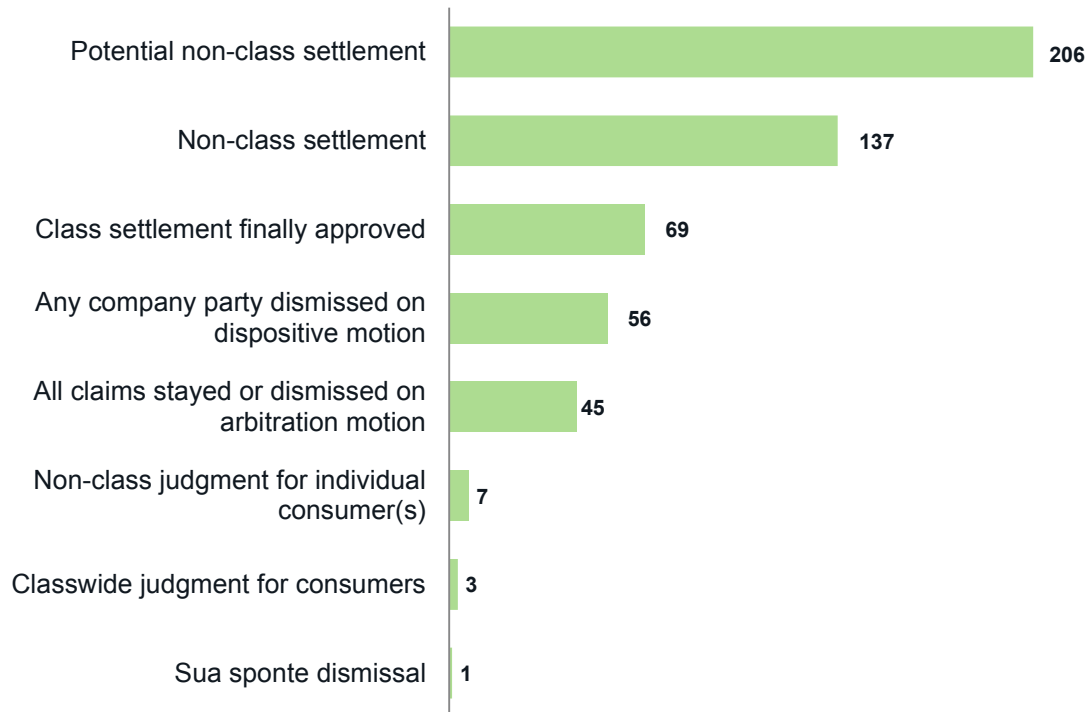


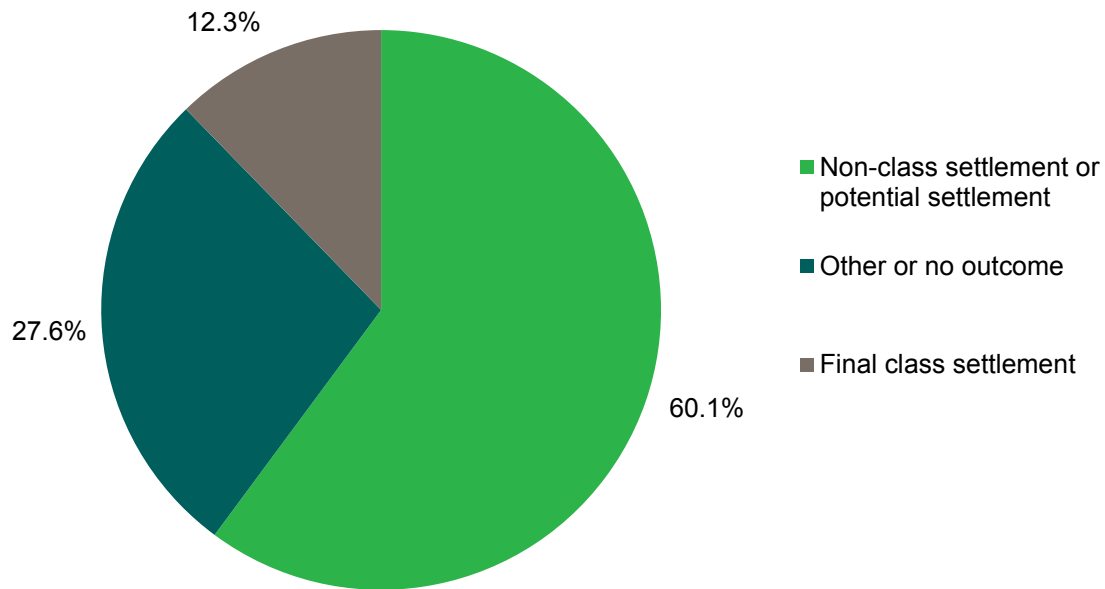
Figure 11 below shows the relative numbers of approved final class settlements, known individual settlements, and potential individual settlements in the class cases.<sup>70</sup> Class settlements occurred less often than known or potential non-class settlements.

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<sup>69</sup> In 84 of the 562 state and federal class cases, no outcome occurred prior to our coding cutoff. In addition, in this Section 6, all figures reporting frequency of outcomes that refer to the stay or dismissal of all claims on an arbitration motion are referring to all claims against at least one moving company party, and not necessarily all claims in the case.

<sup>70</sup> None of the cases with a known non-class settlement also featured a class settlement. We identified six class cases that had a potential non-class settlement (all of which were withdrawals resulting in a dismissal of claims against a defendant) and also featured a class action settlement, which are shown in Figure 11 as class settlements. There were five class cases with both a known non-class settlement and a potential non-class settlement.

**FIGURE 11:** CLASS AND NON-CLASS SETTLEMENT IN FEDERAL AND STATE CLASS CASES, FILED IN 2010–2012 (562 CASES)



In 44 of the 562 class cases, more than one type of outcome occurred. (Of these 44, 42 were closed, as shown in Figure 12, below.) We report in Appendix O on the frequency of cases that had at least two types of outcomes out of the 478 cases in which at least one outcome was identified. The most common combination of outcome types was for a case to have both a potential non-class settlement (usually, a plaintiff withdrawal of claims) and for all claims against at least one company party to be dismissed or stayed on the basis of an arbitration motion (a combination that occurred in 15 cases, or 2.7% of all class cases). The next most common outcome type combinations were for a case to have a known non-class settlement and all claims stayed or dismissed for arbitration, and for a case to have dismissal of a company party on a dispositive motion and a potential known non-class settlement; these two combinations that each occurred in seven cases.

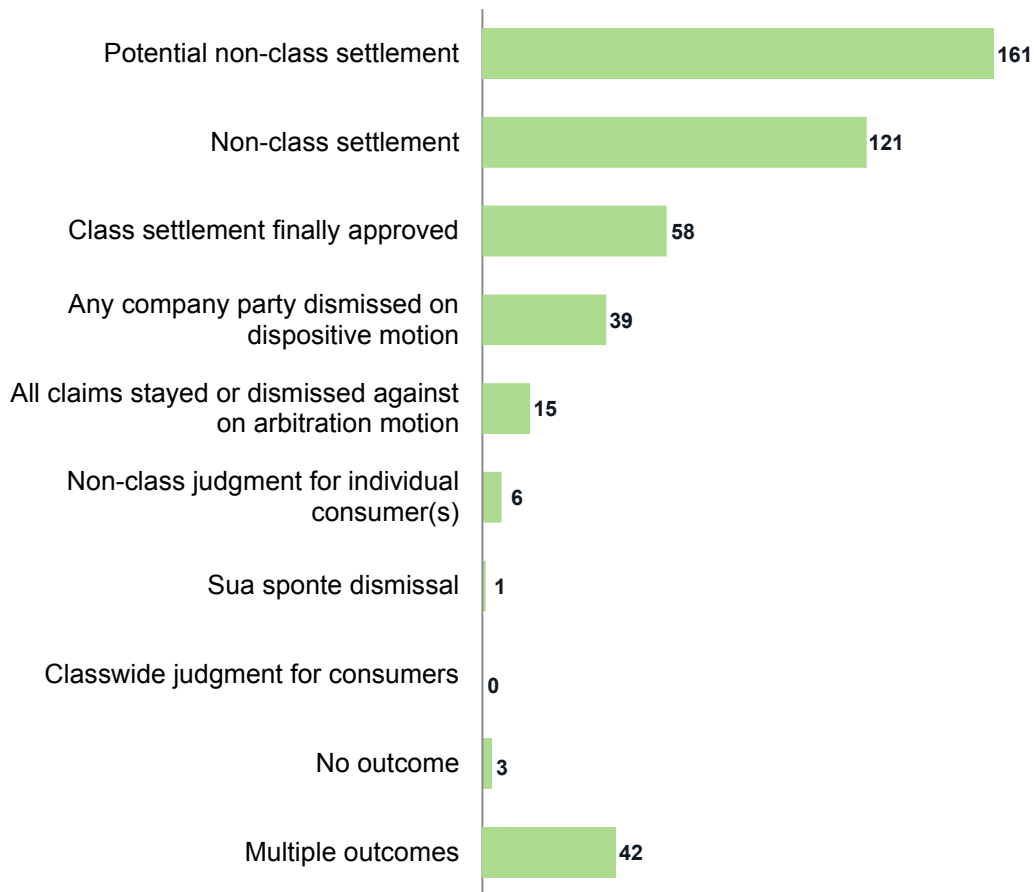
Figure 12 shows the distribution of outcomes for the 446 cases that were closed by our coding cutoff of February 28, 2014, based on whether there was only one type of outcome in the case

(and if so what the outcome type was), multiple outcome types, or no outcome.<sup>71</sup> For the cases where there was only one type of outcome (which suggests that the single identified outcome led to the closure of the case), the most common outcomes were potential non-class settlement, known non-class settlement, and then final approval of a class settlement. The least common were non-class judgment for individual consumer(s) and *sua sponte* dismissal. As reported in Figure 12, the outcome types are both mutually exclusive and collectively exhaustive.

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<sup>71</sup> We found no outcome in three cases because in two of these three cases the court had entered a stay of proceedings for reasons unrelated to arbitration and, in one case, the court indicated it was preparing to finally approve a class settlement but had not yet issued its final order. Because we only coded the fact that any given type of outcome occurred at least once in any case, any one type of outcome that occurred could have occurred multiple times in these cases. For example, a closed case in which two different company parties were dismissed on separate dispositive motions and no other outcome type occurred would be included in this count of 39 cases. Another 33 cases had single outcome types but were not reported as closed by our coding cutoff of February 28, 2014.

**FIGURE 12:** FREQUENCY OF SINGLE AND MULTIPLE OUTCOME TYPES IN CLOSED FEDERAL AND STATE CLASS CASES, FILED IN 2010–2012 (446 CASES)



## Timing

As of February 28, 2014, 446 (79.4%) of the class actions were shown as closed on the docket.<sup>72</sup> Figures 13 and 14 below show the average number of days to closure in class cases filed in 2010 and 2011 for those cases that were closed as of our cutoff date.<sup>73</sup> We report on time to closure

<sup>72</sup> See Appendix L for explanation of coding cases as closed.

<sup>73</sup> Of all class cases filed between 2010 and 2012, the class cases that were not reported as closed comprised 116 cases, 24 of which appeared not to be actively litigated at the trial level as of our coding cutoff date, whether due to the

only for cases filed in 2010 and 2011 because more than one-third of the cases filed in 2012 (69 of 197) are not reported as closed on the docket.<sup>74</sup>

Federal non-MDL class cases had the shortest time to closure at a median of 218 days for cases filed in 2010 and a median of 211 days for cases filed in 2011. Federal MDL class cases had the longest time to closure at a median of 758 days for cases filed in 2010 and 538 days for cases filed in 2011.<sup>75</sup> Class cases filed in state court had a median time to closure of 407 days for cases filed in 2010 and 255 days for cases filed in 2011. Average case times to closure were longer than the medians in state court and federal non-MDL class cases but were shorter for MDL class cases, as reflected in Figures 13 and 14.<sup>76</sup>

Our data regarding time to closure should be viewed as incomplete. To the extent cases that are not reported on the docket as closed are later closed, the median and average will increase.<sup>77</sup> At

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pendency of an appeal or a stay (for arbitration or otherwise), or because there was no docket activity in the six months after our coding cutoff date. Of these 24, four were filed in 2010, six were filed in 2011, and 14 were filed in 2012. The remaining 92 class cases presumptively were being actively litigated as of the coding cutoff date.

<sup>74</sup> Of the remaining cases not reported as closed, 14 were filed in 2010 and 33 were filed in 2011.

<sup>75</sup> If a case was conditionally transferred to an MDL, we included it in the MDL set, even if the transfer was ultimately vacated or the case was remanded to the transferor court. Note that as described more fully in Appendix L, we included in our set consolidated complaints filed from 2010 through 2012. To avoid double counting of cases, if a consolidated complaint included another complaint in our set, we removed the other complaint from our set. There are five consolidated MDL complaints in our set. We use the date of the consolidated complaint as the “filing date” because that was in fact the date the consolidated complaint was filed. In any event, for those cases where any of the complaints being consolidated were also in our case set, it would be inconsistent with our case counting method and impracticable to use multiple filing dates of the multiple complaints ultimately consolidated into one master MDL complaint. As a result, the time to closure data for federal MDL complaints do not include the number of days between filing of any of the complaints being consolidated and the consolidation for these five consolidated master complaints. In other words, the timing data for these cases represent the time between filing of the consolidated complaint and closing.

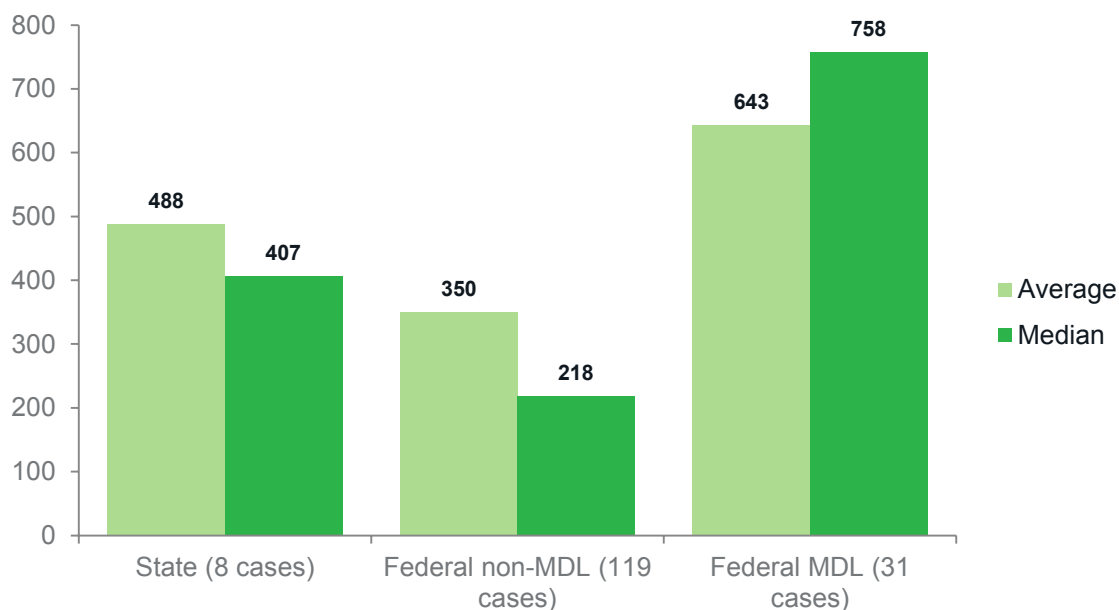
<sup>76</sup> Note that we do not report on time to trial because none of the class cases we analyzed went to trial.

<sup>77</sup> In the 22 cases filed in state court in 2010 and 2011 that were not reported as closed by our February 28, 2014 coding cutoff, the average time between the filing date and the cutoff date was 1,054 days and the median was 1,010 days. In the 15 federal non-MDL cases filed in 2010 and 2011 not reported as closed, the average time between the filing date and the cutoff date was 925 days and the median was 847 days. In the ten federal class cases transferred



the same time, given limitations on docketing information especially in state courts, some cases may be not be reported as closed even when the litigation between the parties effectively has been resolved.

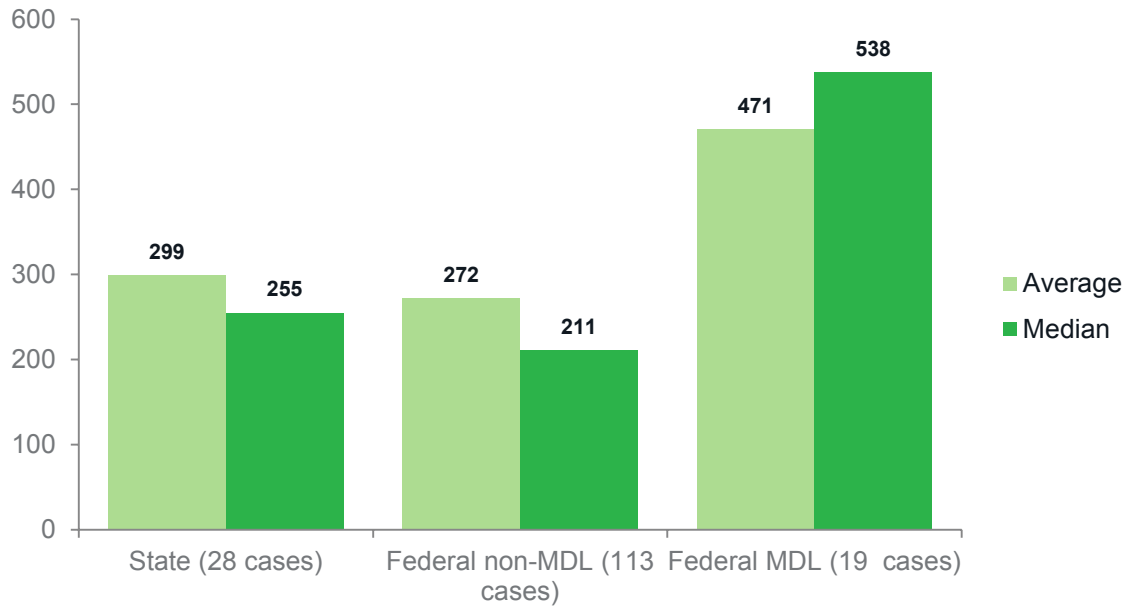
**FIGURE 13:** AVERAGE AND MEDIAN DAYS TO CLOSURE IN CLOSED FEDERAL AND STATE CLASS CASES, FILED IN 2010 (158 CASES)



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to an MDL filed in 2010 and 2011 and not reported as closed, the average time between the filing date and the cutoff date was 1,270 days and the median was 1,322 days.

**FIGURE 14:** AVERAGE AND MEDIAN DAYS TO CLOSURE IN CLOSED FEDERAL AND STATE CLASS CASES, FILED IN 2011 (160 CASES)



As shown in Table 7, the time to closure for the federal and state class cases differed depending on which outcomes occurred in the case. In general, cases with multiple outcome types took longer to close than cases with single outcome types. Of the single outcome type cases, cases with a finally approved class settlement took the longest time to close,<sup>78</sup> followed by cases in which all claims were dismissed against any company party on an arbitration motion. In contrast, the single outcome type cases that closed in a relatively shorter time period were those with non-class settlement, non-class judgment for individual consumer(s), and potential non-class settlement. The median time to closure in single outcome type cases with a final class settlement was more than one year longer than the median for cases where the only outcome type was a known non-class settlement (477 days longer) or a potential non-class settlement (540 days longer).

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<sup>78</sup> Note that our discussion of federal class action settlements in Section 8 also reports on time between filing and class settlement for a set of cases that settled between 2008 and 2012 (in contrast to this section, which reports on all class cases filed in 2010 through 2012, only some of which had a finally approved class settlement).

**TABLE 7: AVERAGE AND MEDIAN DAYS TO CLOSURE IN CLOSED FEDERAL AND STATE CLASS CASES BY OUTCOME, FILED IN 2010–2011 (316 CASES)<sup>79</sup>**

Outcome type	Only outcome type in case			One of multiple outcome types		
	Number of cases	Average days to close	Median	Number of cases	Average days to close	Median
Classwide judgment for consumers	0	n/a	n/a	3	614	754
Non-class judgment for individual consumer(s)	3	129	113	1	656	656
All claims stayed/dismissed against any company party on arbitration motion	13	497	341	17	446	417
Any company party dismissed on dispositive motion	32	370	299	9	510	447
Class settlement finally approved	41	726	670	7	812	829
Non-class settlement	75	234	193	11	654	656
Potential non-class settlement	117	218	130	24	608	527
All outcomes	281	326	218	35	592	534

<sup>79</sup> For this table and for Table 8 (the corresponding table for the federal individual cases), a case with multiple outcome types appears on each row for which it had a corresponding outcome; accordingly, the total number of cases in this column is more than the total number of closed cases with multiple outcomes. There were no closed cases filed in 2010–2011 that had a *sua sponte* dismissal and two closed cases in this period in which we found no outcome.

## Appeals

Of the 562 class cases, we identified 62 cases (11.0%) with at least one appeal filed on or before February 28, 2014. We found consumer appeals in 32 cases, company appeals in 21 cases, and appeals by third parties in ten cases (at least one case had more than one appeal).

The most commonly appealed decision was the grant of a company dispositive motion — which we found appealed in 23 cases. (In two other cases, companies appealed the full or partial denial of a dispositive motion.) The next most commonly appealed decisions were on arbitration motions, which we found appealed in 16 cases (11 cases with company appeals of a denial of an arbitration motion, five cases with consumer appeals of a grant of an arbitration motion, and one case with a company appeal of the deferral of a decision on an arbitration motion).<sup>80</sup> Class settlement decisions were appealed in ten cases, all by third parties. Class certification decisions were appealed in two cases (one by a company and one by a consumer). One case involved an appeal on whether entering a non-class judgment for the consumer would moot the class action. Other matters that did not constitute outcomes were appealed in three cases. The subject of the appeal was unclear in five cases, all of which were state class cases.

As of the coding cutoff, appeals were pending in 20 of the 62 cases with appeals. In the other 42 cases, appeals were resolved before the cutoff and only affected an outcome in seven of these 42 cases.<sup>81</sup> Five of the seven involved appeals of decisions on arbitration motions (one involving a consumer appeal of a grant of an arbitration motion and four involving company appeals of denials of arbitration motions); the other two cases involved consumer appeals of grants of company dispositive motions. In any case where an appeal affected an outcome on or before February 28, 2014, we incorporated the effect of the appeal on our outcome coding.

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<sup>80</sup> The case counts in parenthesis do not add up to the total number of cases with arbitration motion appeals because one case had both a consumer appeal of a grant of an arbitration motion and a company appeal of a denial of an arbitration motion.

<sup>81</sup> In the case with both consumer and company appeals, one of the appeals was pending as of the coding cutoff and the other appeal had been resolved and affected an outcome. The court's denial of an arbitration motion was reversed on the company appeal, and then an arbitration motion was granted, which was then the subject of the consumer's appeal, which was pending.

## 6.6.2 Federal individual cases

### Outcome data

Of the 1,205 individual cases in our analysis data set (which includes a sample of the credit card cases), we identified 1,191 that had at least one type of outcome.<sup>82</sup> As with class cases, the most common outcome types in these federal individual cases were known settlements and potential settlements, which occurred in 48.2% and 41.8% of the cases, respectively. In contrast with the class cases, however, known settlements were somewhat more frequent than potential settlements. Compared to these two outcomes, judgment for consumer(s) or company dismissal via dispositive (non-arbitration) motion both occurred relatively infrequently, in 6.8% and 3.7% of cases, respectively.<sup>83</sup> Relative to class cases where a consumer judgment (classwide or non-class) occurred in 1.8% of all cases, judgment for consumer(s) occurred more frequently in individual cases, in 6.8% of cases. Company dismissal by dispositive motion occurred less frequently in individual cases where they occurred in 3.7%, than in class cases where they occurred in 10.0%. Figure 15 summarizes this data. All claims against a company party were stayed or dismissed for arbitration infrequently, in only 0.5% of cases, as compared to 8.0% of class cases. The outcome types are not mutually exclusive but are collectively exhaustive for any case in which we identified at least one outcome type.

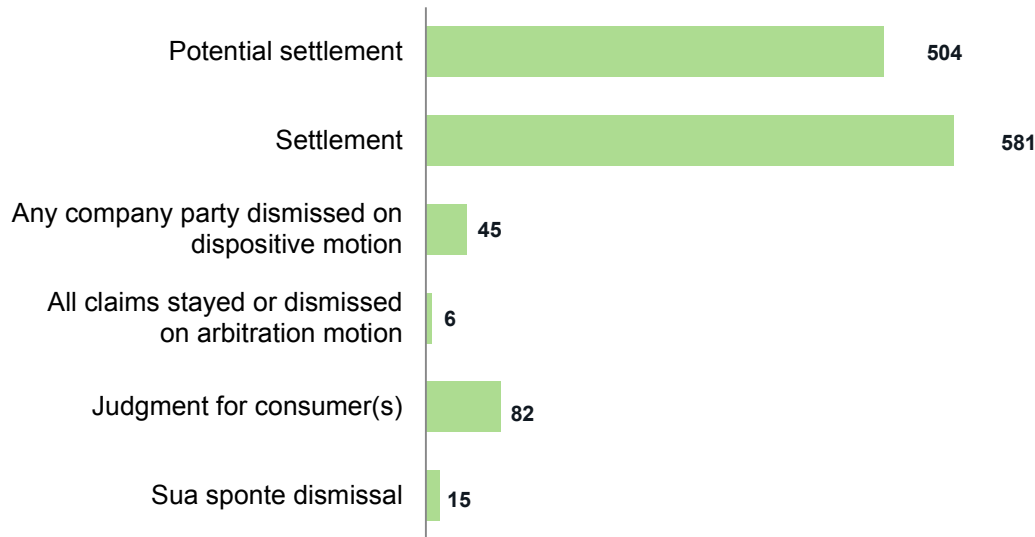
This information is presented by product for the individual cases in Appendix N. We report here on a sample of the credit card cases, and we also include in Appendix N outcomes for the entire set of credit card cases extrapolated from the sample set and for the entire set of all products including the extrapolated credit card outcomes.

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<sup>82</sup> All of the cases without an outcome had not been reported as closed.

<sup>83</sup> Companies filed dispositive motions in 9.0% of the 1,205 individual cases (108 cases) including the sample of credit card cases. Such motions were filed more frequently in class cases, where 37.9% of the cases included dispositive motions. Dispositive motions were granted and resulted in dismissal of a company party from the case in 44 individual cases or in 41.6% of cases in which a dispositive motion was filed (Figure 15 includes a company verdict on claims at trial in the set of 45 cases identified there). Such grants leading to dismissal of a company party occurred less frequently in class cases (in 56 of 213 cases in which dispositive motions were filed, or in 26.3% of such cases).

**FIGURE 15:** FREQUENCY OF OUTCOMES IN FEDERAL INDIVIDUAL CASES, FILED IN 2010–2012 (1,205 CASES) (INCLUDING SAMPLE OF CREDIT CARD CASES)



Of the 82 cases in which we found a judgment for consumer(s), 78 were the result of a default judgment, two were the result of a summary judgment, one was the result of both a default judgment and a summary judgment, and one was the result of a trial.<sup>84</sup> Of those 78 cases with a default judgment and no summary judgment, the majority (63 cases) concerned payday loans. We were able to identify information about a monetary award in 75 of the 82 cases in which we found a judgment for consumers.<sup>85</sup> Of these 75 cases, the complaint included an allegation regarding the claim amount in only four cases, each of which alleged a \$1,000 statutory damages FDCPA claim related to payday loan collection and each of which had a default

<sup>84</sup> Only two individual cases went to trial. In the other individual case that went to trial, the verdict was for the company, rather than the plaintiff, and is included on Figures 15 and 16 in the cases counted as having “any company party dismissed on dispositive motion.”

<sup>85</sup> We identified 74 cases in which a judgment for the consumer(s) was the sole source of monetary relief and the total relief awarded in those cases was \$971,668. The amounts awarded ranged from \$500 to \$588,810 (with the next highest being \$75,000). The average amount awarded in these cases was \$13,131 and the median was \$2,075. (Setting aside the outlying case in which there was a judgment of \$588,810, the average amount awarded was \$5,245 and the median was \$2,000.) We identified one case in which a consumer was awarded monetary relief through a judgment and a settlement combined in the amount of \$4,925.

judgment. Of the 581 cases in which we found a known settlement, we were able to identify the amount of the settlement in 35 cases.<sup>86</sup>

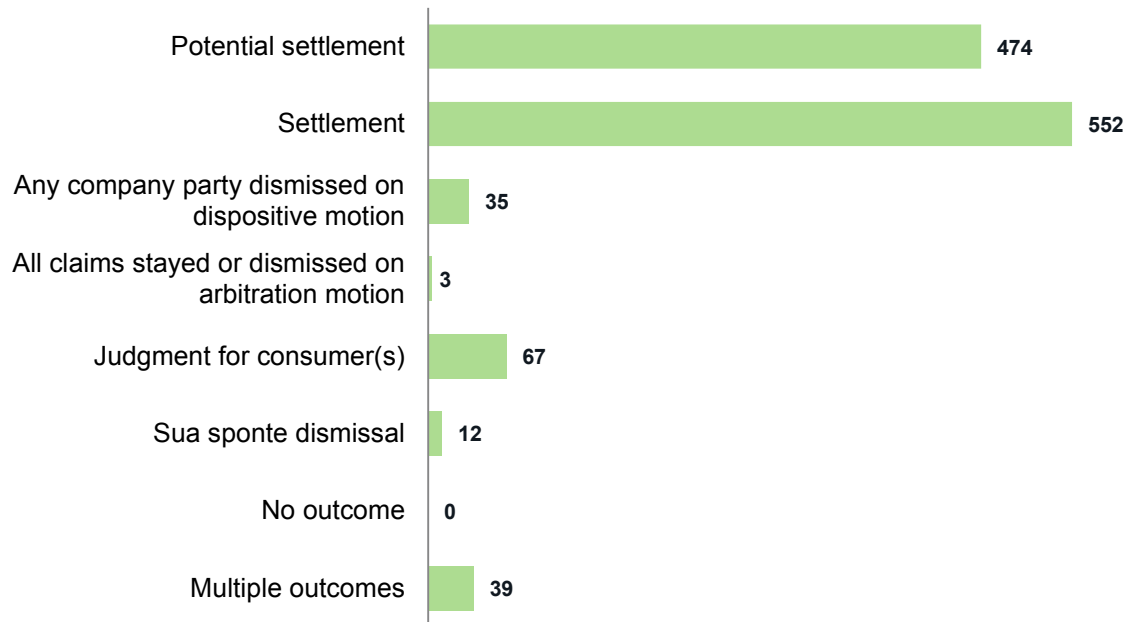
As with class cases, it was uncommon for individual cases to have more than one type of outcome in a single case. We identified only 40 cases with more than one type of outcome, 39 of which were closed as shown in Figure 16. We report in Appendix O on the frequency of cases that had at least two types of outcomes. The most common multiple outcome cases involved known settlements and potential settlements (typically, withdrawals) (15 cases), followed by cases combining judgment for consumer(s) with a potential non-class settlement (seven cases).

We identified 1,143 cases that had only one type of outcome in the 1,182 cases that were closed by our coding cutoff of February 28, 2014, which suggests that the single identified outcome led to closure of the case. These single outcome type cases as well as cases with no outcomes and multiple outcomes are shown below in Figure 16. As reported in Figure 16, the outcome types are both mutually exclusive and collectively exhaustive.

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<sup>86</sup> We identified 34 cases in which a known settlement was the sole source of monetary relief. The amounts of the settlements ranged from \$250 to \$15,000. The average settlement amount was \$2,128 and the median was \$1,001. In one other case (also described *supra* at note 85), a consumer obtained monetary relief through a judgment and a settlement combined in the amount of \$4,925.

**FIGURE 16:** FREQUENCY OF SINGLE AND MULTIPLE OUTCOME TYPES IN CLOSED FEDERAL INDIVIDUAL CASES, FILED IN 2010–2012 (1,182 CASES) (INCLUDING SAMPLE OF CREDIT CARD CASES)



## Timing

As of February 28, 2014, almost all (98.1%) of the 1,205 federal individual cases (including a sample of the credit card cases) had closed. Two of these cases reported as closed had a pending appeal. Of the 23 cases not reported as closed, most were federal individual cases that had been transferred to MDLs (12 cases). Of the 11 remaining non-MDL federal individual cases not reported as closed, ten were filed in 2012.<sup>87</sup>

The median time to closure for federal individual cases not transferred to MDL was 127 days and the average was 171 days.<sup>88</sup> For the small number of closed individual cases transferred to an MDL (seven cases) the median time to closure was 396 days and the average was 469 days.<sup>89</sup>

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<sup>87</sup> Of the 23 individual federal cases not reported as closed, 18 (78.3%) were filed in 2012. Another three were filed in 2010 and two in 2011.

<sup>88</sup> Note that we report on time to closure, rather than time to trial because only two individual cases that we analyzed went to trial. This section provides timing data for federal individual cases filed in 2010 through 2012. In addition,



Both the average and median time to closure in federal class cases was longer than in federal individual cases. Excluding MDL class and individual cases, the median time to closure was roughly 90 days longer for federal class cases than for individual cases. The median time to closure was 218 days for class cases filed in 2010 and 211 days for class cases filed in 2011, compared to 127 days for individual cases filed in 2010 through 2012. For class cases filed in 2010, the average time to closure was 350 days and for class cases filed in 2011, the average was 272 days, as compared to 171 days on average for federal individual non-MDL cases filed from 2010 through 2012.

As shown in Table 8, the time to closure for the federal individual cases differed depending on which outcomes occurred in the case. As was true in the class cases, individual federal cases had longer average and median times to closure if they had multiple outcomes types. Cases in which the single outcome type was *sua sponte* dismissal closed in shortest amount of time, whereas cases in which companies were dismissed on a dispositive motion took the longest to close.

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to provide information on a case set that includes fewer unclosed cases and because we report on time to closure for class cases filed in 2010 and 2011, we provide here timing data for individual federal cases filed from 2010 through 2011 (excluding the few such cases transferred to MDL). The average time to closure for these cases was 174 days and the median was 129 days (very similar to the average and median days to closure for non-MDL cases filed from 2010 through 2012).

<sup>89</sup> If a case was conditionally transferred to an MDL, we included it in the MDL set, even if it was ultimately vacated or remanded to the transferor court. Data on these are reported separately because MDL proceedings typically take longer. In the 11 federal individual cases not transferred to an MDL that were not closed by the February 2014 cutoff date, the average time between the filing date and the February 28, 2014 coding cutoff date was 631 days and the median was 546 days. In the 12 federal individual cases transferred to an MDL that were not closed by the cutoff date, the average time between the filing date and the cutoff date was 731 days and the median was 649 days.

**TABLE 8:** AVERAGE AND MEDIAN DAYS TO CLOSURE IN CLOSED FEDERAL INDIVIDUAL CASES BY OUTCOME, FILED IN 2010–2012 (1,182 CASES) (INCLUDING SAMPLE OF CREDIT CARD CASES)

Outcome type	Only one outcome type in case			Multiple outcome types in case		
	Number of cases	Average days to close	Median	Number of cases	Average days to close	Median
Judgment for consumer(s)	67	225	184	13	352	287
All claims stayed/dismissed against any company party on arbitration motion	3	121	132	3	190	98
Any company party dismissed on dispositive motion	35	354	319	10	433	407
Settlement	552	159	120	25	331	302
Potential settlement	474	156	117	26	334	278
<i>Sua sponte</i> dismissal	12	99	44	3	500	272
All outcomes	1,143	167	124	39	351	286

## Appeals

Of the 1,205 individual cases in our set (which includes a sample of credit card cases), we identified only 16 cases where either party appealed, 15 of which were filed by the consumer and one of which was filed by a company party. Nearly all (13) of the consumer-filed appeals were in *pro se* cases where the consumer was not represented by an attorney, 11 of which were in cases that concerned a checking account or debit card.

The most common decision appealed (in nine cases) was a grant of a company dispositive motion. Other decisions appealed include dismissal for failure to prosecute or other *sua sponte*

dismissal (in four cases), matters unrelated to outcomes, such as an award of attorneys' fees (in three cases). None of the appeals were of decisions related to arbitration motions.

As of the coding cutoff, appeals were pending in two of the 16 cases with appeals. In the other 14 cases, the appeals were resolved before the coding cutoff, and did not change any of the outcomes.

## 6.7 Company motions to compel arbitration

In this section, we study the invocation of arbitration in motions by company defendants. In particular, we explore issues such as:

- When companies are sued in court, how frequently they move to compel arbitration;<sup>90</sup>
- Whether companies invoke arbitration more frequently in certain types of cases;<sup>91</sup>
- How frequently motions to compel are granted; and

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<sup>90</sup> As we use the term in this discussion, “motions to compel arbitration” may also be styled as motions to stay or dismiss proceedings in favor of arbitration. We also use the phrase to describe a motion or stipulation seeking to discontinue the court case on the basis of an arbitration clause, regardless of whether movant actually seeks to compel arbitration. Our review methodology did not count the following events as such a motion: arbitration motions that were later withdrawn; four docket entries in state court that *may* have indicated a motion to compel that we were unable to verify; and company docket filings styled in any form other than a motion to dismiss, stay, or compel that relied on an arbitration clause. For example, we would not have included arbitration-related defenses in answers, arguments prior to class certification to exclude consumers whose agreements include pre-dispute arbitration provisions from class definitions, or oppositions to class certification.

<sup>91</sup> Some commenters have observed that arbitration clauses may be particularly targeted at class actions. *See, e.g.*, Thomas B. Hudson, *Arbitration: Use It or Lose It*, Spot Delivery (July 2014) (“You are concerned about class action lawsuits and out-of-control jury awards against your dealership, so you go to your friendly auto sales and finance lawyer and have her whip up a well-drafted mandatory pre-dispute arbitration agreement that prohibits class actions and eliminates juries. You’re in great shape, right?”).

- When motions to compel are granted, how frequently disputes are re-raised in subsequent arbitration filings and in what form they are raised (*i.e.*, whether on a class or individual basis).

After conducting a literature review, we have been unable to identify prior research describing how often companies invoke pre-dispute arbitration provisions in consumer financial cases, or how frequently consumers move forward with consumer financial claims in arbitration after company motions to compel arbitration are granted by courts. The Bureau’s 2013 Preliminary Results provides some initial context. There, we identified a set of arbitration filings involving a substantive debt dispute where the arbitration record indicated that there was a prior debt collection court proceeding as to which the consumer invoked arbitration.<sup>92</sup> Slightly more than half of the credit card arbitration filings were such “debt collection arbitrations.” We believe that the absolute number of these cases is still extremely low in relation to the overall number of debt collection cases filed in court against consumers. For example, our review of Philadelphia County small claims court data found that there were more credit card collection cases filed by just two issuers in that county for 2012 alone than for all three years of credit card data in the AAA case records from 2010 through 2012. *See* Section 7.

In contrast, in our analysis in this section, companies filed all of the motions to compel that we identified.<sup>93</sup> That is not surprising because we drew information on the invocation of arbitration from court filings rather than the AAA Case Data, because there were almost no company filed court claims at all in the cases that we reviewed.

We begin by analyzing data with respect to motions to compel arbitration in our data set of class cases in federal and state court, as well as individual cases in federal court filed from 2010 through 2012. We examine the overall percentage of filings of motions to compel; the percentage of such motions that are granted by courts; and when such motions are granted, how frequently and in what form disputes are re-raised in subsequent arbitration filings.

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<sup>92</sup> As explained in the 2013 Preliminary Results at 65–66, during the period under review here, the AAA would administer company-initiated debt collection disputes only if a court had compelled arbitration or if the consumer had affirmatively consented in writing to the arbitration after the dispute arose.

<sup>93</sup> We note that three of the 12 invocations we found in individual cases in federal court were filed by both the company and consumer as part of a stipulation.

The analysis is limited in one important respect. We do not know how many of the companies named as defendants in the court cases we review include pre-dispute arbitration provisions in their consumer contracts. Furthermore, where there was such a provision its scope may not cover particular disputes (such as a dispute with a debt collector engaged in collecting a debt that arose pursuant to the contract<sup>94</sup>). Accordingly, while the analysis can report the percentage of court cases in which motions to compel arbitration were filed, it does not provide direct information about the **rate** at which arbitration clauses were invoked in cases against companies with a clause to invoke.

In order to explore that question, we perform a second analysis, using a smaller sample set — those federal and state court class cases and federal individual cases against companies in our case set where we know whether the companies’ agreements contained pre-dispute arbitration provisions in the year in which the case was filed. As with other analyses in this Report, we again turn to the credit card marketplace because we are able to refer to the Bureau’s collection of credit card agreements to determine whether the defendant in each case used a consumer

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<sup>94</sup> Consumers asserted claims under the FDCPA in 17 of the 94 putative class cases with motions to compel as well as in one of the 12 individual cases with motions to compel. Even so, the extent to which individual debt collectors properly can invoke arbitration provisions in consumers’ underlying credit contracts is often unclear and will depend on the specific language of the contracts at issue. *See, e.g.*, Richard M. Alderman, *The Fair Debt Collection Practices Act Meets Arbitration: Non-Parties and Arbitration*, 24 Loy. Consumer L. Rev. 586 (2012) (“There is a division, however, regarding whether the arbitration clause is binding on subsequent non-parties enforcing the agreement or being sued for something that may have resulted from the agreement; in particular, debt collectors.”). The question of who may enforce an arbitration clause will usually depend on the precise wording of the clause and the applicable law, which may include law on incorporation by reference, assignment and assumption, veil piercing, estoppel, and agency. *See id.* (citing *Arthur Anderson LLP v. Carlisle*, 556 U.S. 624 (2009)). Compare *Lucy v. Bay Area Credit Svc. LLC*, 792 F. Supp. 2d 320 (D. Conn. 2011) (denying debt collector’s motion to compel arbitration of FDCPA claim where underlying contract contained agreement to arbitrate “all disputes and claims between us” where “us” was defined as “our respective subsidiaries, affiliates, agents, employees, predecessors in interest, successors, and assigns . . .”) and *Bellows v. Midland Credit Mgmt., Inc.*, 2011 WL 1691323 (S.D. Cal. 2011) (granting debt buyer’s motion to compel arbitration of FDCPA claim where underlying credit card contract contained agreement to arbitrate “any claim, dispute, or controversy . . . arising from or relating to this Agreement, including the validity or enforceability of this arbitration clause” and stated that the agreement and the account were assignable).

agreement that included a pre-dispute arbitration provision in the year a case was filed.<sup>95</sup> This allows us to estimate not just the overall number of motions to compel arbitration, but also the percentage of cases in which companies that have arbitration clauses invoked them.<sup>96</sup>

### **6.7.1 How frequently did companies move to compel arbitration and with what results?**

#### **How many court cases involved motions to compel arbitration?**

Companies moved to compel arbitration in 94 of the 562 class action cases concerning six consumer financial product markets filed in federal court or in selected state courts from 2010 through 2012.<sup>97</sup>

Our analysis shows that 36 of the 94 cases featuring a motion to compel arbitration involved credit card disputes; 23 involved checking and debit cards; 13 involved payday loans; one involved private student loans; 21 involved auto purchase loans; and none involved GPR prepaid cards. Of the class cases with arbitration motions, 71 cases were filed in federal court, with the remaining 23 cases filed in state courts.

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<sup>95</sup> As discussed in Section 2 of this Report, credit card issuers are required to file consumer credit card agreements with the Bureau if they have more than 10,000 open credit card accounts. *See* 12 C.F.R. § 1026.58(c)(5)(i).

<sup>96</sup> We assume for purposes of our analysis that if an arbitration clause was in effect in the year in which a case was filed, the company could have invoked that clause to compel arbitration. However, if the relevant agreement did not have an arbitration clause at the time the dispute arose, our estimates of the rate at which companies invoke arbitration clauses may be understated to the extent the law would bar the company from invoking an arbitration clause added later.

<sup>97</sup> The 94 cases in which a motion to compel arbitration was filed break out by year as follows: 27 of the 172 cases filed in 2010, 40 of 193 cases filed in 2011, and 27 of 197 cases filed in 2012. To supplement our data, we looked at the dockets in putative class actions that were not reported as closed, had an appeal pending, had a stay unrelated to arbitration in place, or otherwise appeared to be pending as of the February 28, 2014 docket coding cutoff. In the six month period after that date, we found two additional class cases beyond the 94 noted above in which company parties filed arbitration motions.

As for individual cases, we found 12 motions to compel arbitration in the 1,205 federal individual cases we reviewed (including the sample of credit card cases). Two involved credit cards;<sup>98</sup> five involved checking accounts or debit cards; two involved payday loans; three involved private student loans; and none involved GPR prepaid cards or auto purchase loans. Because of the low number of arbitration motions in federal non-class cases, we do not break out these cases by year.

## How frequently did courts grant motions to compel arbitration?

Of 94 class cases with motions to compel arbitration, the motion was granted in full or in part in 46 cases. In 45 of these 46 grants, the claims against one or more of the defendants were either dismissed or stayed; in the other case, the grant of arbitration was with respect to claims made by certain consumers, but not others.<sup>99</sup>

Of the 12 federal individual cases with motions to compel arbitration, the court stayed or dismissed the action against one or more defendants in favor of arbitration in six cases.

In the remaining 48 class cases and six individual federal cases where the court did not grant the motions to compel arbitration, the court either denied the motions, or did not rule prior to our coding cutoff or prior to the closure of the case on other grounds.

Beyond the cases in our set concerning the products covered in this Section 6, we conducted a separate search for other consumer financial cases in which companies invoked arbitration clauses. Using the Westlaw database, we identified opinions that: (1) cited *AT&T v. Concepcion*;<sup>100</sup> (2) involved products covered in this section as well as certain additional consumer financial products or services; and (3) involved a motion to compel arbitration. Up to December 31, 2014, we confirmed that motions to compel arbitration were granted in many

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<sup>98</sup> Recall, our conclusions about federal individual cases relating to credit card disputes is drawn from a sample of case filings.

<sup>99</sup> In five state court class actions we were not able to determine what any court response to the arbitration motion would have been, due to the limitations of the way the data were presented.

<sup>100</sup> 131 S. Ct. 1740 (2011). See Section 1.1 for a discussion of *Concepcion*.

additional cases — at least 50 were class cases and at least 25 were individual cases. We present additional data and describe this methodology in further detail in Appendix P.

### **When motions to compel are granted, how frequently do consumers re-file their claims in arbitration, and in what form do they re-file the claims?**

For the 46 class cases and six individual cases in our set in which a motion to compel arbitration was granted, we reviewed the court dockets as well as the AAA Case Data for indications of a subsequent filing in arbitration.

For the 46 class cases, we found 12 subsequent arbitration filings — nine identified in the court records and three additional subsequent filings identified in the AAA Case Data.<sup>101</sup> Court records indicated that two of these nine subsequent arbitration actions identified in court records were filed as putative class arbitrations.<sup>102</sup> None of the three additional subsequent filings identified in the AAA Case Data were filed on a putative class basis.<sup>103</sup>

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<sup>101</sup> Of the nine cases in which court records indicated there were subsequent arbitration proceedings, five indicated filing in the AAA (we confirmed three were in our AAA case data and the other two were not stayed or dismissed until late 2012 such that a subsequent filing in AAA likely was not made until after 2012) and four indicated filing in JAMS, Inc. (“JAMS”) (another arbitration administrator). These nine cases break out to include four credit card cases, two auto loan cases, one payday loan case, one checking account/debit card case, and one private student loan case. For the three additional arbitration filings identified in the AAA Case Data, we matched a consumer and company named in the arbitration filing to a plaintiff and defendant in a case in our litigation set in which the claims had been dismissed or stayed for arbitration. Two of these three arbitration filings related to a single payday loan case in our set and one related to a checking account case.

<sup>102</sup> One of the two putative class arbitration filings identified in the court records was filed with the AAA, as indicated in the court records. That putative class action AAA filing is one of the two putative class action filings that were filed with the AAA that we discuss in Section 5.9. The second putative class arbitration filing identified in the court records was filed in JAMS. The federal court record indicates that the JAMS arbitrator denied class status to the filing.

<sup>103</sup> These data are consistent with the data we had from court filings regarding the content of the arbitration clause being invoked. In 42 of the 46 cases, court filings indicated the arbitration clauses at issue contained an explicit waiver of the consumer’s right to participate in a class action proceeding. (In two of the 46 cases we were unable to obtain a copy of the clause due to state court data limitations.) In 40 of the 42 cases in which the arbitration clauses



For all of the six federal individual cases in which the court granted an arbitration motion,<sup>104</sup> we found no evidence in the court record that a subsequent arbitration proceeding was filed. We identified one subsequent filing in the AAA Case Data in a private student loan case.

## 6.7.2 Invocation by credit card issuers in class and federal individual cases

As discussed above, by turning to court cases regarding credit cards, we are able to limit our focus to complaints against companies with a pre-dispute arbitration provision in their consumer contracts in the year in which a case was filed. This allows us to determine not just the number of cases in which such defendants filed motions to compel arbitration, but also to estimate the rate at which they do so when they had a clause that they could invoke. As noted earlier, this analysis is subject to certain limitations. The fact that in the year in which a suit was filed an issuer's credit card agreement included a pre-dispute arbitration clause does not necessarily mean that the suit was subject to the clause. There are a number of reasons why that is so. For example, the dispute that is the subject of the lawsuit may have arisen during a year when the issuer did not have a pre-dispute arbitration clause in its agreement or the individual plaintiff may have opted out of the arbitration clause in accordance with its terms. Our calculation of the rate at which credit card issuers invoked arbitration clauses ignores these

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included waivers of class proceedings, the clauses specifically referred to waiver of the right to proceed in arbitration on a class basis (*e.g.*, by imposing a duty to proceed in arbitration on an individual basis only).

<sup>104</sup> In three of these six cases, the court accepted the parties' stipulation seeking a stay or dismissal based on what appeared to be a pre-dispute arbitration agreement; when we identified them, we counted such stipulations as arbitration motions. Accordingly, we counted these as cases with granted motions to compel arbitration (because the court acted on the stipulations by dismissing the case in favor of arbitration), and not potential settlements (because the withdrawal indicated a different reason than settlement). However, a party is not required to set forth the reasons for withdrawing a case pursuant to Fed. R. Civ. P. 41(a). Therefore, in other cases where consumers did not specify any reason for the withdrawal, it is possible that the withdrawal was in favor of arbitration on the basis of a pre-dispute arbitration clause. For example, we found in at least one class case that a company had written a demand letter to the consumer's counsel seeking that the consumer withdraw the action due to the invocation of a pre-dispute arbitration clause. In that case, the consumer did not accede to the demand and the company filed a motion to compel arbitration. However, it is possible that in other cases similar demands were made on consumers who withdrew the action without the invoking party needing to file a motion to compel.

considerations and assumes that in each case in which an arbitration clause was in effect when the suit was filed the issuer had the opportunity to invoke arbitration.

### **How frequently do credit card issuers who use arbitration clauses invoke them in class cases?**

In our set of 279 federal class cases and sampled state class cases concerning credit cards, we identified 40 class cases against one or more credit card issuers that we knew included pre-dispute arbitration agreements in their consumer agreements the year in which the case was filed. A credit card issuer filed a motion to compel arbitration in 26 (65.0%) of these 40 cases.<sup>105</sup> The court granted motions to compel in 16 (61.5%) of these 26 cases in which they were filed.

### **How frequently do credit card issuers who use arbitration clauses invoke them in federal individual cases?**

Of the 2,621 individual credit card cases that we identified (before sampling), based upon cross-referencing party names with credit card agreements we were able to identify 140 in which the credit card issuer being sued included a pre-dispute arbitration clause in its consumer agreement in the year in which the case was filed. The remaining cases either did not name a credit card issuer as a defendant (*e.g.*, FDCPA cases against a credit card debt collector) or named a credit card issuer who did not report having an arbitration clause in the year the case was filed. Of these 140 cases against issuers with a pre-dispute arbitration clause in the year the case was filed, eight (5.7%) included motions to compel arbitration. The court granted the motion and stayed or dismissed the action against a company party in five of these eight cases.

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<sup>105</sup> In two of the 40 cases, a card issuer filed, but then withdrew, a motion to compel. In another two of the 40 cases, we found that a card issuer had raised the arbitration clause as an affirmative defense in its answer to the consumer's class action complaint. We did not code any of these cases among the 26 cases in which an arbitration motion was filed.

# Section 7

Do consumers sue companies in small claims courts?



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# Introduction

In the 2013 Preliminary Results we presented data from our review of small claims court filings.<sup>1</sup> Our analysis drew on a number of different state and county small claims court databases. We reviewed these for suits filed against and by ten large credit card issuers, which collectively account for a very significant portion of the consumer credit card market.

We reviewed small claims court data for two reasons. First, as discussed in Section 2.5.2, the clear majority of the arbitration clauses within our review specifically recognize — and allow — access to small claims court as an alternative to arbitration.<sup>2</sup> In addition, small claims courts are reported to handle a significant share of some types of disputes about consumer financial products.<sup>3</sup> Furthermore, small claims courts are generally considered faster, cheaper, and simpler than ordinary trial courts of plenary jurisdiction, and are intended to be easier for individuals to pursue claims without using a lawyer.<sup>4</sup> (In fact, some small claims court jurisdictions generally require parties to proceed without representation.<sup>5</sup>) We, therefore,

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<sup>1</sup> Our collection and analysis of court documents is covered by the Bureau’s Market Analysis of Administrative Data under Research Authorities Privacy Impact Assessment, as well as the Bureau’s Market and Consumer Research Records Systems of Records Notice (CFPB.022).

<sup>2</sup> Industry groups also urged the Bureau to study small claims courts, especially in the context of small claims court carve-outs to arbitration clauses. *See, e.g.*, Chamber of Commerce RFI Comment at 12–13 (“The study should compare the features of different types of arbitral and litigation forums, including . . . small claims courts.”).

<sup>3</sup> *See* Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection*, 60 Fla. L. Rev. 1, 27–28 (2008) (“[M]ost unsecured consumer debts fit comfortably within the jurisdiction of the limited-jurisdiction courts, and the overwhelming majority of suits are filed in these courts when they are available.”); *see id.* at 28 (noting that “the exclusion of courts of limited jurisdiction renders most prior studies inapplicable to the questions of how much consumer debt collection litigation exists and how it has changed over time.”).

<sup>4</sup> *See* Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 Iowa L. Rev. 433 (1990); John C. Ruhnka & Steven Weller, *Small Claims Courts: A National Examination* at 2–3 (Nat’l Ctr. for State Courts 1978) (noting broad consensus as to the goals of the small claims court process, including “accessibility, speed, low cost, simplicity, self-representation, fairness, [and] effectiveness.”); John A. Goerdts, *Small Claims & Traffic Courts: Case Management Procedures, Case Characteristics, and Outcomes in 12 Urban Jurisdictions* (Nat’l Ctr. for State Courts ed. 1992).

<sup>5</sup> *See, e.g.*, California Department of Consumer Affairs, *Basic Considerations and Questions: What Is Small Claims Court?*, [http://www.dca.ca.gov/publications/small\\_claims/basic\\_info.shtml](http://www.dca.ca.gov/publications/small_claims/basic_info.shtml) (last visited Mar. 6, 2015) (“In most situations, parties to a small claims action must represent themselves. As a general rule, attorneys or non-attorney representatives (such as debt collection agencies or insurance companies) may not represent you in small claims

wanted to see what use parties made of small claims courts with respect to consumer financial disputes.

We have not updated or extended these results, but reprint them here for the convenience of the reader.

Some commenters argue that the presence of small claims court carve-outs in pre-dispute arbitration clauses alleviates any need for any other litigation method to resolve small-dollar disputes.<sup>6</sup> The argument is that small claims courts are “consumer friendly”<sup>7</sup> so that having a small claims court carve-out helps endow an arbitration clause with “fundamental fairness.”<sup>8</sup> Both the American Arbitration Association’s Due Process Protocol and the JAMS’ Minimum Standards of Procedural Fairness, which are applicable to most consumer arbitrations, require that pre-dispute arbitration clauses permit access to small claims courts.<sup>9</sup>

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court. Self-representation is usually required. There are, however, several exceptions to this general rule: If the court determines that a party is unable to properly present his or her claim or defense for any reason, the court may allow another individual to assist that party.”).

<sup>6</sup> See Peter Rutledge, *Whither Arbitration*, 6 Georgetown J.L. & Pub. Pol’y 549, 570 (2008) (asserting that the argument that a mandatory arbitration provision combined with a class action waiver denies consumers access to justice is exaggerated by noting that, amongst other things, most arbitration clauses provide access to small claims court); see also AFSA RFI Comment at 8 (“[M]any arbitration agreements will allow consumers to bring claims otherwise subject to arbitration in small claims court. Thus, for smaller claims, consumers frequently have a choice between arbitration and small claims court. This context is important in order to understand the dynamics of the claims that are (and are not) asserted in arbitration versus other methods of resolving disputes between consumers and covered persons.”).

<sup>7</sup> ABA/CBA/FSR RFI Comment at 14.

<sup>8</sup> ABA/CBA/FSR RFI Comment at 6. See also Mark Furletti, Mandatory Arbitration Provisions in the Credit Card Industry at 5–6 (Jan. 2003), [http://www.phil.frb.org/consumer-credit-and-payments/payment-cards-center/events/workshops/2003/MandatoryArbitrationClauses\\_012003.pdf](http://www.phil.frb.org/consumer-credit-and-payments/payment-cards-center/events/workshops/2003/MandatoryArbitrationClauses_012003.pdf) (last visited Mar. 6, 2015). Dean Roscoe Pound of Harvard Law School is often credited as being the first to articulate a vision of a court to “provide for disposing quickly, inexpensively, and justly of the litigation of the poor, for the collection of debts in a shifting population, and for the great volume of small controversies which a busy, crowded population, diversified in race and language necessarily engenders.” Commonwealth of Massachusetts, District Court Department of the Trial Court, Report of the Small Claims Working Group (Aug. 1, 2007) at 3, <http://www.mass.gov/courts/docs/lawlib/docs/smallclaimreport.pdf> (last visited Mar. 6, 2015) (citing Roscoe Pound, *The Administration of Justice in the Modern City*, 26 Harv. L. Rev. 302, 315 (1912–1913)).

<sup>9</sup> The American Arbitration Association’s Protocol states that: “Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its

## 7.1 Prior research

We have not identified significant numbers of recent empirical studies on the incidence and nature of consumer financial claims in small claims courts.<sup>10</sup> Two older studies cover small claims courts in multiple jurisdictions, but neither report on the incidence of consumer financial disputes.<sup>11</sup> Some studies do suggest that companies make more use of small claims court than consumers do, but these findings are not specific to consumer financial products. Goerdts's 1992 study of 12 urban small claims courts showed that business-initiated disputes against individuals made up 53% of all cases studied; by contrast, individual-initiated disputes against businesses made up 13% of the sample.<sup>12</sup> Similarly, in a 1990 study, Elwell and Carlson found that in the Iowa small claims court system many more businesses sued individuals than individuals sued businesses.<sup>13</sup> In their sample of 1,802 disputes, individuals filed against

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jurisdiction.” Principle 5, Consumer Due Process Protocol. The JAMS’ Minimum Standards state that: “[N]o party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction.” Minimum Standard No. 1, JAMS Minimum Standards. Explaining the basis for the carve-out, the Reporter for the AAA’s Protocol indicated that “[t]he Advisory Committee concluded that access to small claims tribunals is an important right of Consumers which should not be waived by a pre-dispute ADR Agreement.” American Arbitration Association, Consumer Due Process Protocol at 18 (Apr. 17, 1998), *available at* [www.adr.org](http://www.adr.org) (last visited Mar. 6, 2015).

<sup>10</sup> Using data from 2007, Drahozal and Zyontz randomly sampled 500 cases filed in Oklahoma small claims court, finding 336 disputes related to consumer debt cases, of which “330 were brought by creditors seeking to recover unpaid debts [and] only six were brought by consumers against businesses.” Drahozal & Zyontz, *Creditor Claims, supra*, at 88 (analyzing sample of cases closed between March 31, 2007, and January 1, 2008). Of the six consumer-initiated claims in Drahozal and Zyontz’s sample, just one dispute involved a credit card. This same work cites to a number of older studies of small claims court proceedings that focus primarily on debt collection issues, including default incidence. *See id.* at 82 n.18.

<sup>11</sup> *See, e.g.*, Ruhnka & Weller, *supra* n.4, at 49–50 (allocating the subject matter of disputes in small claims courts in 15 cities into just five categories: “Consumer Plaintiff,” “Seller Plaintiff,” “Property Damage,” “Landlord-Tenant,” and “Other”); Goerdts, *supra* n.4, at 7 (analyzing small claims court data from the cities of Cambridge, Denver, Des Moines, Fairfax, Hartford, Minneapolis, Portland, Sacramento, San Diego, Seattle, Washington, and Wichita); *id.* at 47–48 (noting incidence of general categories of claims including, “consumer complaints,” “debt collection,” “torts,” “housing,” and “other”).

<sup>12</sup> Goerdts, *supra* n.4, at 7 (analyzing small claims court data from Cambridge, Denver, Des Moines, Fairfax, Hartford, Minneapolis, Portland, Sacramento, San Diego, Seattle, Washington, and Wichita); *id.* at 43–44 (showing filing rates by individuals and businesses).

<sup>13</sup> Elwell & Carlson, *Iowa Small Claims Court, supra* n.4, at 487.

companies in 4% of the cases, and businesses filed against individuals in 47% of the cases.<sup>14</sup> The significant use of small claims court for debt collection is well documented.<sup>15</sup>

## 7.2 Data

No centralized, comprehensive, and searchable source of small claims court cases or dockets exists.<sup>16</sup> Documents related to small claims cases are generally only available on databases maintained by the administrative staffs of the small claims courts themselves (or by physically requesting the materials from the clerk’s office). These databases appear to have been designed with individual litigants in mind. Working with these databases for the purpose of collecting large volumes of data is painstaking. This may be why there is such a dearth of empirical data and academic literature on the topic — or why such studies tend to look at fragmentary data.

Our main sources of data were online small claims court databases for states that offered free or reasonable-cost access to case information. In addition to these cost criteria, we used three searchability criteria for the state court databases. To be included, such databases must:

(1) purport to provide statewide data; (2) permit searches by party name (or ready identification by party if keyword searches are not possible); and (3) allow for by-year date sorting. Databases for 13 state jurisdictions and the District of Columbia met these criteria. We refer to this as the “state-level sample.” We identified 12 states via this method, plus the District of Columbia. We also added New York because with the exception of New York City — for which we were able to obtain data by other means, as described further below — it otherwise met these same criteria.

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<sup>14</sup> *See id.*

<sup>15</sup> In 2007, a working group of Massachusetts trial court judges and administrators “recognized that a significant portion of small claims cases involve the collection of commercial debts from defendants who are not represented by counsel.” Commonwealth of Massachusetts, District Court Department of the Trial Court, Report of the Small Claims Working Group (Aug. 1, 2007) at 3, <http://www.mass.gov/courts/docs/lawlib/docs/smallclaimreport.pdf> (last visited Mar. 6, 2015).

<sup>16</sup> There is no analog to the PACER system for federal courts. Westlaw and LEXIS provide limited small claims court data, mainly dockets, for certain jurisdictions. We used these to check our primary research. As of our search on October 16, 2013, Westlaw and LEXIS provided only a limited number of small claims court dockets, from one entire state (Wisconsin) and nine counties out of the top 30 across two different states, California and Florida.



The 14 jurisdictions in the state-level sample, excluding New York City, cover approximately 52 million people of all ages.

To supplement the state-level sample, we also used county-level data. We selected the 30 most populous counties in the United States, which largely included areas not in the state-level sample. We then reviewed all of the databases in that sample of 30 that met the same cost and equivalent searchability criteria the state-level sample: free or reasonably priced; searchable county-wide; searchable by party name; and restrictable by date. We refer to this as the “county-level sample.” Seventeen of the 30 counties met these criteria.<sup>17</sup> These 17 counties include jurisdictions covering approximately 35 million people of all ages. We are not aware of another study with coverage as broad as our combined county-level and state-level samples.<sup>18</sup>

In all these jurisdictions, we looked for potential credit card cases involving a set of ten large credit card issuers. Given the relative concentration of the consumer credit card market, those credit card issuers cover a predominant share of that market.<sup>19</sup> In addition to covering very large players overall, our sample specifically covers companies with small claims court carve-outs for both consumer and company claims (Citibank, Wells Fargo, USAA, and U.S. Bank); non-mutual small claims court carve-outs, meaning that only consumers may require that a dispute be brought in small claims court (American Express and Discover); no small claims court carve-out

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<sup>17</sup> These added partial geographic coverage in six states not covered under our state-level review — California, Florida, Nevada, Pennsylvania, Texas, Washington — and coverage of a number of major cities or urban areas, including Houston, Philadelphia, and Silicon Valley. Three New York counties met these criteria as well; we included those results under the county search, not the New York state-level search.

<sup>18</sup> Under the auspices of the National Coalition on State Courts, Ruhnka & Weller conducted a study in 1978 of 15 separate jurisdictions, mainly urban small courts. *See generally* Ruhnka & Weller, *supra* n.4. In 1992, also working with the National Center for State Courts, Goerdts conducted an analysis of 12 small claims and traffic courts in urban jurisdictions. *See generally* Goerdts, *supra* n.4.

<sup>19</sup> As of year-end 2012, our sample covers \$564.75 billion in credit card outstandings, which represents a predominant share of the consumer credit card market. Our sample for the small claims court analysis covers 84% of the outstandings covered by the credit card contract sample used for Section 3. Concentration at the top-end of the credit card market has remained roughly the same over the last decade. *Compare* The Nilson Report, Issue #1,012 at 1, 8 (Feb. 2013) (as of 2012, top 10 accounted for 85% of market) *with* Hynes, *supra* n.3, at 51 (in 2004, top 10 accounted for almost 90% of market).

at all (Fifth Third); and no arbitration clause in 2012 (Bank of America, JPMorgan Chase, and Capital One).<sup>20</sup>

As the issuers in our sample cover such a large share of credit card loans outstanding, we should uncover most consumer-issuer disputes involving credit card accounts in the small claims courts we selected. We will only uncover suits that can be filed in small claims court. The small claims courts covered by our review use a range of jurisdictional limits on the amount that can be claimed in small claims court. These limits — which are generally between \$2,500 and \$15,000 — are laid out in detail in Appendix Q.

To identify consumer credit card suits, we used small claims court dockets to identify cases filed by individuals<sup>21</sup> against specific issuers and against colloquial names for these entities (such as “Bank of America” or “Chase”).<sup>22</sup> By attempting to capture all credit card suits filed by consumers against these issuers, our search will tend to be over-inclusive. It will include, for example, some consumer cases that are not about credit cards.<sup>23</sup> It should not, however, undercount consumer credit card cases against these issuers.<sup>24</sup> Our consumer-filed case

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<sup>20</sup> A small claims court carve-out is not necessary for either party to bring a claim in small claims court. Very few pre-dispute clauses require arbitration of all disputes. Instead, the clauses enable either party to invoke arbitration unilaterally. A small claims court carve-out, therefore, simply immunizes a small claims court filing from this potential effect of the arbitration clause. Entities with a clause but no carve-out, therefore, may still be sued or sue in small claims court. It is simply that the other party could then invoke arbitration, although that does not mean that the other party will do so.

<sup>21</sup> We excluded cases filed by non-natural persons such as corporations or partnerships.

<sup>22</sup> We included potentially common misspellings, and alternative arrangements of character strings. We excluded suits by individuals against entities within the corporate family that included in their name terms such as “mortgage,” “home loan,” “auto,” and “insurance.” We would not expect such suits to be credit card cases.

<sup>23</sup> For example, we may capture consumer cases about checking accounts (at least if there are any in small claims court). As discussed in Appendix Q, our searches using company names that a consumer might associate with our ten issuers will also uncover cases against eight of the largest U.S. retail banks.

<sup>24</sup> Our data do not capture credit card-related claims by these issuers’ cardholders against other parties besides the issuer. So we are not capturing claims against private label partners. It is possible that consumers intending to sue their “credit card company” sue such partners instead. For Philadelphia County, where detailed data are available, we did look for suits against the major retail partners of an issuer in our sample that has a large private label business. We did not find any such suits. In addition, our data also will not capture claims against (or by) debt collection companies that act for issuers or purchase debt from them.

numbers, therefore, can be seen as an *outer limit* on the number of consumer credit card cases against these issuers.

To identify suits that credit card issuers filed against consumers, we focused on suits in which the docket listed: (1) the correct legal name of one of the specific credit card issuing subsidiaries<sup>25</sup> in our review; and (2) an individual as the defendant. This search will tend to overcount such suits to the extent that: (1) any of the credit card issuers also provide consumers with products other than credit cards; and (2) non-credit card activity causes companies to sue consumers in small claims court. However, our review of public data suggests that this effect should not be significant as to most of the issuers.<sup>26</sup>

Further details about our sources and methodology are included in Appendix Q.

## 7.3 Incidence

We start, first, with data from Philadelphia County and Alameda County. These were the two jurisdictions in our defined samples for which we were able to obtain underlying case

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<sup>25</sup> Thus, if there was ambiguity in the name of the company claiming (*e.g.*, the docket identified the plaintiff only as “Chase” and not “Chase Bank USA, National Association”), we excluded the dispute from the company-filed results. Although we consider it reasonable to assume that outside or in-house counsel will ensure that companies sue using their correct legal name, to the extent that is not the case for credit card company suits, we will undercount such suits.

<sup>26</sup> According to call reports, at year-end 2012, three issuers in our sample — American Express, Discover, and USAA — had *no* consumer loans other than credit card loans. Based on call reports, the other issuers we studied generally had as their primary business large consumer loans, such as mortgages or smaller-dollar loans in the form of credit card borrowing. Our results from Philadelphia (*see* Section 7.3) suggest that companies are unlikely to file mortgage-related claims in small claims court. Leaving aside mortgage, therefore, call reports indicate that most of the remaining issuers had a low volume of non-mortgage consumer loans compared to their credit card holdings. This is true for Citibank, National Association (\$106.7 billion in credit card loans and \$894 million in other consumer loans), Chase Bank USA, National Association (\$93.3 billion in credit card loans and \$616.3 million in other consumer loans), Capital One (\$77.8 billion in credit card loans and \$277.5 million in other consumer loans), and JPMorgan Chase, National Association (\$21.5 billion in credit card loans and \$3 billion in other consumer loans). Three of our ten issuers, however, had a significant volume of consumer loans other than credit cards: Bank of America, National Association and FIA Card Services, National Association (\$94.8 billion in credit card loans, \$26 billion in auto loans, and \$22.8 billion in other consumer loans), Wells Fargo Bank, National Association (\$16.3 billion in credit card loans, \$12.5 billion in auto loans, and \$8.9 billion in other loans) and Fifth Third Bank (\$2.1 billion in credit card loans, \$11.3 billion in auto loans, and \$445 million in other loans).

documents on a systematic basis. These allowed us to establish, definitively, the nature of the claims at issue.

Using the broad case identification method outlined above, we identified for Philadelphia some 2,245 cases filed by issuers in our sample. (We identified no such cases in Alameda. In that county and in the rest of California, companies face severe limits on bringing collections claims in small claims court.<sup>27</sup>) By using the detailed review of actual pleadings available in Philadelphia, we were then able to establish that all but one of the company-filed cases were, in fact, credit card debt collection cases. This suggests that our broad methodology provides a reasonable, even close, approximation of issuer use of small claims court for credit card disputes against consumers.

Our broad case identification method also identified four Philadelphia cases and 39 Alameda cases as consumer-filed credit card cases against the issuers in our sample. When we reviewed the actual pleadings in these cases, however, none of the four Philadelphia cases involved an individual filing credit card claims against one of the ten issuers.<sup>28</sup> Reviewing the pleadings in the 39 Alameda cases, we identified only four that were clearly individuals filing credit card claims against one of the ten issuers.<sup>29</sup> This suggests that our broad methodology may well overstate the actual number of small claims court cases filed by credit card consumers against our sample of issuers.

Even using the broad methodology, however, we see relatively low outer limit estimates for consumer-filed credit card cases. For our 31 jurisdictions combined, we were able to estimate an outer limit of 870 such cases for all of 2012.<sup>30</sup> We provide the detailed results of these searches

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<sup>27</sup> *See infra* n.31.

<sup>28</sup> The four consumer-initiated cases involved (1) a stolen debit card; (2) certain mortgage payments not recognized as timely by the bank holding the mortgage; (3) an insurance claim; and (4) a tort that occurred in a bank (a bicycle hit a customer).

<sup>29</sup> Thirty-two disputes manifestly did not involve credit cards. These were 17 disputes involving checking accounts; ten alleging interference with real estate listings; four about home loans; and one about insurance. Another three disputes might conceivably have involved credit cards, but the record was insufficient to show that they actually did so. One of these three cases did not clearly identify any product, and merely alleged in a single sentence Fair Credit Reporting Act violations by the issuer. The other two concerned unspecified “lines of credit.”

<sup>30</sup> This adjusts for the actual count in Philadelphia and Alameda counties.

in Table 21 in Appendix Q. In only three jurisdictions was our outer limit estimate higher than 70 cases against all issuers combined, and the outer limit for any one issuer was 245 across all jurisdictions combined. The outer limit of 36 cases filed against one issuer in Orange County, California was the maximum for any one issuer and jurisdiction.

Claims filed by credit card issuers against individuals show a different pattern. We report these data in Table 1 below. Claim numbers are either substantially lower or higher than the numbers of consumer-filed claims. The low numbers in Table 1 predominantly correspond to jurisdictions that impose substantial limitations on the use of small claims courts by businesses. These include California (here represented by Orange, Riverside, San Bernardino, Santa Clara, and Alameda Counties)<sup>31</sup> and New York.<sup>32</sup> Other jurisdictions have certain procedures that, while not targeted explicitly at businesses, may dampen the number of company-initiated claims. For instance, in Utah, the clerk of court or a judge is empowered to remove multiple disputes filed by the same plaintiff from small claims court to the district court.<sup>33</sup> In King County (WA),

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<sup>31</sup> In California, corporations and partnerships may bring no claim larger than \$5,000 in small claims court, and no more than two such claims of more than \$2,500 per calendar year. *See* California Department of Consumer Affairs, Basic Considerations and Questions: What Is Small Claims Court?, *available at* [http://www.dca.ca.gov/publications/small\\_claims/basic\\_info.shtml](http://www.dca.ca.gov/publications/small_claims/basic_info.shtml) (last visited Mar. 6, 2015) (“Corporations, partnerships, unincorporated associations, governmental bodies, and other legal entities cannot claim more than \$5,000. Also, no claimant (natural person or legal entity) may file more than two small claims court actions for more than \$2,500 anywhere in the state during any calendar year.”).

<sup>32</sup> New York imposes various restrictions on legal entities filing in small claims court. A corporation or partnership may only bring a claim in small claims court if it has its principal office in New York State. Further, a corporation or partnership must submit a demand letter before filing a claim, and can file no more than five claims per calendar month. *See* Access to Justice NY Courts, Your Guide to Small Claims & Commercial Small Claims, <http://www.nycourts.gov/COURTS/nyc/civil/pdfs/smallclaims.pdf> (last visited Mar. 6, 2015). But the claims that corporations or partnerships cannot bring in New York small claims court do not disappear. Rather, it appears that corporations bring their would-be small claims disputes instead in Civil Court, the next court of limited jurisdiction. Of the 523,186 cases filed in Civil Court in Bronx, Kings, Queens, and Richmond Counties in 2006, 53% of these cases were categorized by one study as “consumer credit litigation.” *See* Urban Justice, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* 8 (Oct. 2007). Similarly, over half of the 320,000 cases filed in New York County Civil Court involved consumer credit. *See id.* (“More and more, New York City Civil Court is becoming a ‘credit card court,’ with over 50% of cases filed in that court arising out of ‘consumer credit transactions.’”). Based on a limited sample, the study estimated that 10.7% of “consumer credit litigation” cases were, in turn, initiated by the original creditors, including credit card issuers. Further, many if not most of these claims would have been under the small claims jurisdictional limit of \$5,000. *See id.* 14–16.

<sup>33</sup> Utah Code Title 78A Chapter 8 § 102 (“If a person or corporation other than a municipality or a political subdivision of the state files multiple small claims in any one court, the clerk or judge of the court may remove all

attorneys and paralegals are not allowed to appear for either party without the judge’s permission.<sup>34</sup>

**TABLE 1: CREDIT CARD ISSUER SMALL CLAIMS COURT SUITS AGAINST INDIVIDUALS BY JURISDICTION (2012)**

	Citi	Wells	USB	USAA	AmX	Dis	5/3	BoA	Cap1	JPM	Total
Alaska	0	10	0	0	0	0	0	0	0	0	<b>10</b>
Connecticut <sup>35</sup>	262	8	0	0	91	718	0	301	4,274	0	<b>5,654</b>
Delaware	0	0	1	0	22	444	0	0	0	0	<b>467</b>
District of Columbia	76	1	0	0	22	115	0	21	865	0	<b>1,100</b>
Iowa	246	33	0	0	4	501	1	94	260	0	<b>1,139</b>
Minnesota	147	0	0	0	1	114	0	0	2,029	0	<b>2,291</b>
New Mexico	0	2	0	0	29	386	0	2	2	0	<b>421</b>
New Jersey	0	0	0	0	0	0	3	0	0	0	<b>3</b>
New York, excl. NYC	0	0	0	0	0	0	0	0	0	3	<b>3</b>
North Dakota	0	0	0	0	0	0	0	0	0	0	<b>0</b>
Oklahoma	0	4	0	0	0	0	*	0	0	0	<b>4</b>
Oregon	0	0	0	0	0	0	0	0	0	0	<b>0</b>

but the initial claim from the court’s calendar in order to dispose of all other small claims matters. Claims so removed shall be rescheduled as permitted by the court’s calendar.”).

<sup>34</sup> See King County District Court Services, Information about Small Claims, <http://kingcounty.gov/courts/DistrictCourt/Smallclaims.aspx> (last visited Mar. 6, 2015).

<sup>35</sup> Search results for Capital One in Connecticut exceeded 4,274, but further information beyond the 4,274 could not be retrieved from that database.

Utah	0	0	0	0	0	0	0	0	0	0	0	0
Wisconsin	704	96	48	0	76	2,162	27	1	9,361	14	12,489	
Alameda (CA)	0	0	0	0	0	0	0	0	0	0	0	
Broward (FL)	265	74	0	0	254	227	2	103	2,647	0	3,572	
Clark (NV)	0	0	0	0	0	0	0	0	0	0	0	
Harris (TX)	614	356	47	0	319	380	0	1,051	5,046	92	7,905	
Hillsborough (FL)	70	0	1	0	67	125	1	0	1,325	57	1,646	
King (WA)	0	0	0	0	0	0	0	0	0	0	0	
Kings (NY)	0	0	0	0	0	0	0	0	0	0	0	
New York (NY)	0	0	0	0	0	0	0	0	0	0	0	
Orange (CA)	0	0	0	0	0	0	0	0	0	0	0	
Palm Beach (FL)	174	15	0	0	177	306	0	86	1,594	2	2,354	
Philadelphia (PA)	79	0	0	0	46	743	0	165	1,212	0	2,245	
Queens (NY)	0	0	0	0	0	0	0	0	0	0	0	
Riverside (CA)	0	0	0	0	0	0	0	0	0	0	0	
Sacramento (CA)	0	0	0	0	0	0	0	0	0	0	0	
San Bernardino (CA)	0	0	0	0	0	0	0	0	0	0	0	
San Diego (CA)	0	0	0	0	0	0	0	0	0	0	0	
Santa Clara (CA)	0	0	0	0	0	0	0	0	0	0	0	
<b>Totals</b>	<b>2,637</b>	<b>599</b>	<b>97</b>	<b>0</b>	<b>1,108</b>	<b>6,221</b>	<b>34</b>	<b>1,824</b>	<b>28,615</b>	<b>168</b>	<b>41,303</b>	

The higher numbers in our sample are present in jurisdictions that do not have similar limits on company filings. In addition, two issuers accounted for the vast majority of company-filed cases.<sup>36</sup> This may be attributable to the fact that these two issuers are in the subprime credit card business, where smaller credit lines are the norm. It may also reflect other issuers making greater use of debt buyers or collection agencies. Other studies have also found relatively concentrated use by particular issuers of small claims court.<sup>37</sup> Appendix Q depicts these numbers relative to our outer-limit estimates for consumer-filed cases in different jurisdictions.

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<sup>36</sup> One of these issuers uses a non-mutual small claims court carve-out, which applies only to guarantee the consumer's right to remain in small claims court. The lack of mutuality in a clause, therefore, may not have any impact on company use of small claims court.

<sup>37</sup> Beth Healy, *Debtor's Hell, Part 2: A System Compromised*, The Boston Globe (July 31, 2006), *available at* [http://www.boston.com/news/special/spotlight\\_debt/part2/page4.html](http://www.boston.com/news/special/spotlight_debt/part2/page4.html) (last visited Mar. 6, 2015).



# Section 8

What is the value of class action settlements?



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# Introduction

In Section 6, we presented findings with respect to the types of consumer finance claims brought in litigation and the form of resolution of those claims based upon a data set of cases filed in 2010–2012. That data set covers six consumer finance markets and included slightly more than 70 cases in which classwide relief was obtained, almost always through a settlement. To expand our understanding of class actions and more specifically the substance of class settlements, we identified a larger data set consisting of 422 consumer financial class action settlements finalized in federal district courts from 2008 through 2012. (Where the analysis in Section 6 focused on *complaints* that were filed during a defined period of study, this section discusses *settlements* that were entered in its period of study.) This data set covers substantially all consumer finance markets and overlaps with the data set used for our analysis of class and individual litigation and also the data set used in the 2013 Preliminary Results.<sup>1</sup>

Commenters from different perspectives asked us to look into class action settlements, including **whether “weight should be given to data concerning class action lawsuits,”**<sup>2</sup> and to compare “the benefits to consumers of individual arbitration as compared with class action litigation.”<sup>3</sup> While

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<sup>1</sup> We explain in Section 8.3 and Appendix S how we defined “consumer finance class action” for purposes of developing the data set we analyze here. The data set includes a number of cases that are also part of the data set used for the litigation analysis; these overlapping cases were filed between 2010 and 2012 (the period used to bound the litigation data set) and finally resolved by the end of 2012 (the period used to bound our class action settlement data set). In Section 4.8.2 of the 2013 Preliminary Results (which, as previously noted, we are including as part of this Report) we identified a set of state and federal class actions involving credit cards, deposit accounts, or payday loans for which a settlement was approved beginning in the last half of 2009 and where the relationship between the class members and the defendant was governed by an arbitration clause that offered AAA as an arbitral forum. We reported on the number of claims submitted or number of consumers eligible for relief, the amount of the relief, and the number of class members who opted out of the class and the total number who after opting out submitted individual claims in arbitration. Three of the 8 cases in that data set were federal class settlements finally resolved between 2008 and 2012 and thus are included in our class settlement data set.

<sup>2</sup> Ltr. from American Bankers Association, the Consumer Bankers Association, and The Financial Services Roundtable to the Bureau of Consumer Financial Protection, Re: Comments on Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements (Docket No. CFPB-2012-0017) at 8 (June 22, 2012).

<sup>3</sup> Ltr. from the U.S. Chamber of Commerce to Consumer Financial Protection Bureau, “Re: Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements,” Docket No. CFPB-2012-0017,” at 18 (June 22, 2012).

these stakeholders appeared to have varied approaches and attitudes toward the topic of class settlements, all seem to agree at least on the need to study class settlements and their outcomes.

The data set of class settlements assembled for analysis here permits us to perform a more detailed analyses of class settlement outcomes, including analysis of the number of class members eligible for relief in these settlements and the amount and types of relief available to class members under these settlements; the number of class members who had received relief and the amount of that relief; and the extent to which relief went to attorneys. We supplement this data analysis with a case study drawn from multidistrict litigation about the overdraft practices of a number of banks.

This data also provided the basis for us to conduct further analyses on the overlap between government enforcement actions and class actions in Section 9.

## 8.1 Summary of analysis and results

Our work resulted in the following general findings (later sections provide further details) as to consumer financial class action settlements in federal court from January 1, 2008, through December 31, 2012:

- **Case incidence.** We analyze 419<sup>4</sup> consumer financial class action settlements, the bulk of which (89%) involved just four products or services: debt collection, checking/savings accounts, credit cards, and credit reporting.
- **Class members.** We were able to find precise figures or estimates for the class size for 329 of the 419 settlements. There were 350 million total class members in these consumer financial class action settlements for cases reporting such data. These numbers include one class action settlement (*In Re TransUnion Privacy Litigation*) in which 190 million class members were eligible for cash and in-kind relief. Excluding that one action, there were 160 million class members overall.

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<sup>4</sup> Of the 422 settlements we identified, we analyze only 419. For the purposes of uniformity in analyzing data, we excluded 3 cases for which we were unable to find data on attorneys' fees; these would not have affected results materially. From this point on, our analysis is based on the 419 cases, or subsets of those 419 cases.

- **Forms of relief.** We were able to determine the type of relief obtained in all of the 419 cases. The vast majority provided for cash relief<sup>5</sup> (410 settlements reporting data, including settlements where in-kind and/or behavioral relief were also components). There were 24 settlements that provided in-kind relief (including where cash and/or behavioral relief were also components),<sup>6</sup> and 56 settlements that provided “**behavioral relief**” (including settlements where cash and/or in-kind relief were also components).<sup>7</sup> The numbers do not add up to 419 because some settlements feature more than one type of relief.
- **Total relief.** Of our 419 settlements, the total amount of gross relief – defined as the total amount defendants offer to provide in cash relief (including debt forbearance) or in-kind relief and to pay in fees and other expenses was \$2.7 billion. This estimate includes cash relief of \$2.0 billion and in-kind relief of \$644 million.<sup>8</sup> These figures represent a floor. Many settlements had relief, such as provisions in which companies agreed to change company behavior towards consumers, that was not quantified as of final approval.
- **Payments.**<sup>9</sup> Of the 251 settlements (60% of all settlements) reporting data, \$1.1 billion had been or was scheduled to be paid to class members in cash or debt forbearance as of the time of the last document we were able to review.

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<sup>5</sup> We use the term cash relief to include all money payments provided for in the settlement other than payments to class representatives that exceeded the amount paid to class members. This includes cash payments to class members, debt forbearance for class members, and class expenses and fees paid for by defendants as part of the settlement. For 28 settlements which provided for a *cy pres* payment for the benefit of class members but no payment directly to class members, cash relief also includes the amount of the *cy pres* payment.

<sup>6</sup> We use the term “in-kind relief” to refer to class settlements in which consumers were provided with free or discounted access to a service, such as credit monitoring.

<sup>7</sup> We use the term “behavioral relief” to refer to class settlements which contained a commitment by the defendant to alter its behavior prospectively, for example by promising to change business practices in the future or implementing new compliance programs.

<sup>8</sup> In-kind relief is valued based upon the difference between the market price of a service given to class members and the price the class members were required to pay. Most often, in-kind relief entailed free access to a service.

<sup>9</sup> As set out in Section 8.3.3, *infra*, we define “payment” as an amount that a defendant must actually pay to class members because (i) class members actually submitted claims; (2) the settlement requires an automatic distribution of relief to known class members (*e.g.*, all customers of the defendant during time period x); or (3) the

- **Individual payments and claims.** Of 236 settlements reporting data (56% of all settlements), 34 million consumers were guaranteed recovery as of the time of the last document available for review, having made claims (11 million consumers) or participated in an automatic distribution (24 million consumers).
- **Claims rate.** Of 105 settlements requiring claims and reporting both the number of claims made by class members and the number of total claims-eligible class members (including claims for cash and claims for in-kind relief), the average claims rate was 21%, and the median was 8%. Rates for these cases should be viewed as a floor, given that the claims numbers used to calculate these rates may not be final for many of these settlements. The weighted average claims rate was 4% including the *TransUnion* settlement, and 11% without *TransUnion*. Interviews with claims administrators suggest that these claims rate figures are consistent with their data.
- **Attorneys' fees.** Of the 419 settlements, the overall percentage was 21% of cash relief, or 16% of total cash and in-kind relief.<sup>10</sup>
- **Time to settlement.** Of the 419 settlements, the average time to settlement (from the filing of the initial complaint to entry of the final approval order) was 690 days; the median was 560 days.
- **Motions practice.** Attempts to dispose of claims through motions to dismiss or summary judgment motions were filed in 191 (46%) of the cases. Of these, 169 (or 88% of 191) involved the adjudication of at least one motion prior to the parties reaching a settlement.

We provide further details below on settlement incidence, the number of class members eligible for relief, claims rates, monetary relief and payments, attorneys' fees and other costs, subject matter of claims, time to settlement, and motions practice.

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settlement requires defendant to pay the class a fixed amount under a pro rata distribution (*i.e.*, the total amount the defendant must pay is fixed, and the individual amount to be paid each individual is contingent on the total number of claims submitted). We do not include in payments any bonus amounts paid to class representatives, any *cy pres* payments, or any payments of expenses or fees.

<sup>10</sup> We do not calculate fee rates that include any value for behavioral relief because behavioral relief is seldom quantified in the cases. This exclusion, however, means that we are generally overstating fee percentages. As a share of total relief, calculated attorneys' fees would fall to the extent that behavioral relief was included.

## 8.2 Prior research

A number of previous studies of class action settlements have been published. Few of these were quantitative in nature and none focused on consumer financial cases.

For instance, RAND and the Federal Judicial Center (FJC) conducted studies in 1999 and 2001, but both relied largely on case studies rather than attempting to comprehensively catalogue and analyze class settlements.<sup>11</sup> The FJC produced a more recent study of the impact of the Class Action Fairness Act of 2005 (CAFA) on class actions in federal courts, presenting interim findings on class action filings and removals in the federal courts from July 1, 2001, through June 30, 2007.<sup>12</sup> Other major studies have been conducted of insurance class actions, mass torts and securities class actions.<sup>13</sup> More recently, the law firm Mayer Brown LLP issued a study of putative employee and consumer class actions filed in or removed to federal court in 2009.<sup>14</sup> The study also did not purport to be comprehensive, relying on certain published reports on class actions, to identify 188 filed class actions, of which 40 had settled by the time the study was published.<sup>15</sup>

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<sup>11</sup> See Deborah Hensler, *et al.*, *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Institute for Civil Justice, Monograph MR - 969/1 - ICJ) (1999); Laural L. Hooper & Marie Leary, *Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study*, 209 F.R.D. 519, Appx. A (Federal Judicial Center ed. 2001).

<sup>12</sup> Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, (2008), [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf) (last visited Mar. 6, 2015).

<sup>13</sup> See, e.g., *supra* n.11.

<sup>14</sup> Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* at 1 (Dec. 11, 2013). On February 27, 2015, the National Association of Consumer Advocates and the American Association for Justice released a study that reviewed a number of the same class action filings addressed in the Mayer Brown LLP study. *Class Actions are a Cornerstone of our Civil Justice System: A Review of Class Actions Filed in 2009*, <http://www.consumeradvocates.org/sites/default/files/Class%20Action%20Report%202-27-15.pdf> (last visited Mar. 6, 2015).

<sup>15</sup> See generally Mayer Brown, *supra* n.14.

Of the existing studies we reviewed, the single most comprehensive was a study conducted by Professor Brian Fitzpatrick.<sup>16</sup> In one study, he set out a methodology to cull, from Westlaw and other sources of federal dockets, class action settlements in 2006 and 2007.

While not specifically focused on consumer financial cases, Professor **Fitzpatrick's** study classified the class settlements by subject areas, of which three appeared to be potentially relevant to our study: consumer, debt collection and antitrust.<sup>17</sup> For each subject area, he reported on case incidence,<sup>18</sup> the duration of the cases (time from initial complaint to settlement),<sup>19</sup> monetary relief,<sup>20</sup> and attorneys' fees.<sup>21</sup> What follows expands on his work and focuses exclusively on federal consumer financial class settlements.

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<sup>16</sup> Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. of Empirical Leg. Stud. 811 (2010).

<sup>17</sup> **Professor Fitzpatrick's analysis set out 9 different categories of class action settlements**, by subject matter: securities, labor and employment, consumer, employment benefits, civil rights, debt collection, antitrust, commercial, and other. *See* Fitzpatrick, *supra* n.16, at 818 tbl 1. Four of the categories – securities, labor and employment, employee benefits, and commercial—by definition do not include any consumer financial cases. *Id.* **Debt collection cases were cases “brought under the Fair Debt Collection Practices Act” and thus are predominantly cases involving consumer financial services. *Id.* At least some of what Fitzpatrick labeled “consumer cases” involved consumer financial products or services. *See id.* (“cases brought under the Fair Credit Reporting Act as well as cases for consumer fraud and the like”). Finally, based on the description of antitrust cases (“cases brought under federal or state antitrust laws”) we could not definitively exclude the possibility that this category included consumer financial cases.**

<sup>18</sup> Overall, Fitzpatrick recorded 688 settlements in all subjects for 2006 and 2007. Of the three potentially consumer financial related subject areas, there was an upper limit of 72 settlements in 2006 and 87 settlements in 2007. For 2006, Fitzpatrick reported 40 consumer settlements, 19 debt collection settlements, and 13 antitrust settlements, for a total of 72. Fitzpatrick, *supra* n.16. For 2007, Fitzpatrick reported 47 consumer settlements, 23 debt collection settlements, and 17 antitrust settlements, for a total of 87 settlements. *Id.*

<sup>19</sup> Fitzpatrick, *supra* n.16 at 820. For all settlements, Fitzpatrick reported an overall average of 1,196 days and overall median of 1,068 days from complaint filing to final settlement. For consumer settlements, Fitzpatrick reported an average of 963 days and median of 720 days. For debt collection settlements, he reported an average of 738 days and median of 673 days. For antitrust settlements, he reported an average of 1,140 and median of 1,167.

<sup>20</sup> Fitzpatrick, *supra* n.16, at 820. **For consumer cases** – which included financial and non-financial cases – the overall totals were \$517.3 million in 2006 and \$732.8 million in 2007. Consumer settlements recovered an average of \$18.8 million and median of \$2.9 million. For debt collection cases, all of which we would categorize as consumer financial cases, the overall total was \$8.9 million in 2006 and \$5.7 million in 2007. The average amount paid by defendants was \$370,000 and the median was \$88,000. For antitrust cases, some of which may be consumer



## 8.3 Data

Below is a summary of our methodology in identifying and reviewing federal class action settlements. A more complete treatment of our methodology is set out in Appendices R S.

To build our data set, we applied search terms related to final settlement orders to the Westlaw database for federal district court docket sheets.<sup>22</sup> Our analysis covered settlement orders reported in case dockets from 2008 through 2012.<sup>23</sup>

Our search in Westlaw yielded about 4,500 dockets. We eliminated cases based on the civil cover sheet descriptions that were clearly unrelated to consumer financial cases (such as pharmaceuticals, etc.). We then reviewed the remaining dockets and documents within each docket sheet manually to determine if the settlement involved consumer financial products and services. Specifically, we focused on those settlements where the complaint alleged a violation of one of the enumerated consumer protection statutes under Title X of the Dodd-Frank Act (statutes administered by the Bureau), and settlements where the plaintiffs were primarily consumers and the defendants institutions selling consumer financial products or engaged in providing consumer financial services (other than consumer investment products and services), regardless of the basis of the claim. To the extent that the case involved *any* such consumer financial product or service – not only the six main product areas we have identified in our arbitration and litigation data sets – we included it in our data set. However, we excluded cases involving disputes between borrowers and a residential mortgage lender because they are

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financial cases, the overall total for 2006 was \$1.079 billion, and the total for 2007 was \$660.5 million. The average settlement was \$60 million and the median settlement was \$22 million.

<sup>21</sup> See Fitzpatrick, *supra* n.16, at 830. Fitzpatrick calculated that, as to all settlements in his set, attorneys' fees as a percentage of total settlement recovery were an average of 25.7% and median of 25%. *Id.* at 835. In consumer cases, including FCRA, attorneys' fees constituted an average of 23.5% and a median of 24.6% of total recoveries. *Id.* In debt collection cases, the average was 24.2% and the median was 25%. *Id.* In antitrust cases, the average was 25.4% and median was 25%. *Id.*

<sup>22</sup> Our collection and analysis of federal and state court documents is covered by the CFPB's Market Analysis of Administrative Data under Research Authorities Privacy Impact Assessment, as well as the Bureau's Market and Consumer Research Records Systems of Records Notice (CFPB.022).

<sup>23</sup> Professor Fitzpatrick covered a two-year period (2006–2007). Fitzpatrick, *supra* n.16, at 816. Additionally, Fitzpatrick searched Westlaw for published and unpublished final settlement orders; we believe that searching docket sheets resulted in the identification of a more complete set of settlements. *Id.*

outside of the scope of this study<sup>24</sup> and we further excluded another subset of settlements because, while involving claims under enumerated consumer financial statutes, they did not involve “covered persons” regulated by the Bureau.<sup>25</sup> We elaborate on these exclusions in Appendix S.

As a check on the robustness of this methodology, we reviewed BNA Class Action Litigation **Reporter and Mealey’s Jury Verdicts and Settlements**.<sup>26</sup> We found no additional cases in those reporters not already in our data set, leaving us with a data set of 422 settlements.<sup>27</sup>

As to each settlement, we captured information pertaining to the identity of the parties, product type, claim type (federal and state laws), class sizes, forms of relief (cash, in-kind, behavioral), method of distribution (automatic or claims made), opt-outs, and claims rates, and other matters.<sup>28</sup>

In collecting numerical data, we followed a hierarchy of data sources. In order, we relied first on court findings and orders. We then relied on settlement administrator submissions or reports, and then lastly relied on shared party positions (*e.g.*, settlement agreements or joint motions). We relied on more precise data (*e.g.*, “1,573,298” notices sent) over estimates (*e.g.*, “more than 2

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<sup>24</sup> We did not include cases about mortgages and related agreements (here, any consumer credit transaction secured **by a consumer’s dwelling, including a home equity line of credit**) because, under the Dodd-Frank Act amendments to the Truth in Lending Act, arbitration clauses were banned from mortgage agreements effective June 1, 2013. 15 U.S.C. § 1639c(e)(1) & 12 C.F.R. § 1026.36(h). As such, mortgage loans are outside the scope of this study. However, we did include mortgage-related contracts, such as cases about title or mortgage insurance, which are generally not covered by the statute.

<sup>25</sup> For example, we did not include cases in which the defendants were merchants even if the claim was brought under one of the enumerated consumer protection statutes. There were 97 Fair and Accurate Credit Transaction Act (FACTA) settlements brought against merchants, and we excluded these from our data set.

<sup>26</sup> These sources were also used by Mayer Brown and by Fitzpatrick, amongst others, to identify class action settlements. *See* Mayer Brown, *supra* n.14, at 17; Fitzpatrick, *supra* n.16, at 816.

<sup>27</sup> We also reviewed documents provided to the Illinois Attorney General pursuant to the Class Action Fairness Act, 28 U.S.C. §1715 from 2009 through 2013 to determine whether there was additional relevant information with respect to class action settlements in our data set. Because the documents provided to the Illinois Attorney General did not comprise a complete set of the class action settlements within our study, and because the information included in the provided documents was not determined to be additionally relevant information for purposes of analyzing the settlements within our study, we did not rely on this information.

<sup>28</sup> We detail **our methodology and our definition of terms** such as “in kind” or “behavioral” in Appendix S.

million” **class members**) when both were available, using the same priority of sources (court order, settlement administrator reports, etc.) where there was more than one source with precise but inconsistent data.<sup>29</sup>

For a list of data inputs we extracted from the settlements, please review Appendix S.

There are limitations to our analysis, including the following. First, our data may not include every federal consumer finance class action settlement between 2008 and 2012. It is possible that some dockets pertaining to final settlements were not responsive to our search terms and were not reported in the sources we used to check our results.

Second, we did not attempt to identify class settlements in state court class action litigation, so the results reported here do not cover the entire universe of class settlements in consumer finance cases during the period under study.

Third, not every settlement offered information on every data point or metric we analyzed. As such, for every metric we report on, we offer the number of settlements that provided numbers or estimates, in accord with the methodology set out in Appendix S. Caution is advised in comparing between data points, as the universe of cases from which we were able to calculate any given metric may not be the same as the universe for which we were able to calculate another metric.

Fourth, as the description of our methodology suggests, settlements are often complex and varied. Even where information exists, it is often partial or ambiguous and requires interpretation and judgment of case documents. Our aggregate figures (overall dollar amounts and class member counts), however, may be less sensitive to these limitations, likely because such larger settlements (despite the complexity of some of them) tend to be better documented.

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<sup>29</sup> Except as specified in Appendix S, we did not rely on numbers provided by only one side in the dispute (*i.e.*, the defendant alone or the plaintiff alone). The exceptions did not apply to relief numbers, only to certain class size metrics. *See* Appendix S. For instance, in one settlement in our data, *Griffin v. Capital One Bank*, Case No. 8:08cv132 (M.D. Fla.), the **plaintiff’s motion for attorneys’ fees** stated a claims-made cash relief amount of \$250 million. *See Mem. In Support of Pl.’s Mot. for Award of Attorney’s Fees at 11 [Dkt. #154], Griffin v. Capital One Bank*, Case No. 8:08cv132 (M.D. Fla. Oct. 1, 2010). This amount did not appear to have been mentioned or sanctioned in the court’s final approval order (or subsequent orders), nor was it in the parties’ settlement agreement. According to our methodology, we could not include this in our calculation of gross relief for the Griffin settlement.

Finally, the claims data that we have on the settlements we have identified is necessarily incomplete. A case was included in our data set if there was a final settlement order issued by the court. Final settlement orders may be issued in class action settlements before claims numbers are final; often, the docket is closed once the final approval settlement order is issued.<sup>30</sup>

### **8.3.1 Settlement incidence**

As noted, our search methodology yielded 419 individual federal consumer financial class action settlements (after excluding three cases) from 2008 through 2012, an average of 84 settlements per year. We further analyze settlement incidence by product type and claim type.

#### **Product type**

As Table 1 shows, 89% of the cases in our data set were concentrated among just four product areas: debt collection, checking or savings products, credit card, and credit reporting.

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<sup>30</sup> If additional settlement information was available after the entry of the final approval order, we incorporated that data into our results.

**TABLE 1: SETTLEMENT INCIDENCE BY PRODUCT AND YEAR**

Product or service	2008	2009	2010	2011	2012	Total
Auto	2	5	5	3	3	18
Checking/savings	5	19	15	25	19	83
Credit card	2	9	8	7	4	30
Credit reporting	9	4	1	8	3	25
Debt collection	49	49	45	49	42	234
Debt settlement				2	2	4
Money transfers					1	1
Mortgage-related	1	7	1	2	3	14
Prepaid		1	1			2
Privacy/ID				1	1	2
Student loan		1	2	3		6
<b>Total</b>	<b>68</b>	<b>95</b>	<b>78</b>	<b>100</b>	<b>78</b>	<b>419</b>

In the majority of debt collection cases, the nature of the underlying debt was either not clear from the pleadings or involved multiple consumer financial products or services.<sup>31</sup>

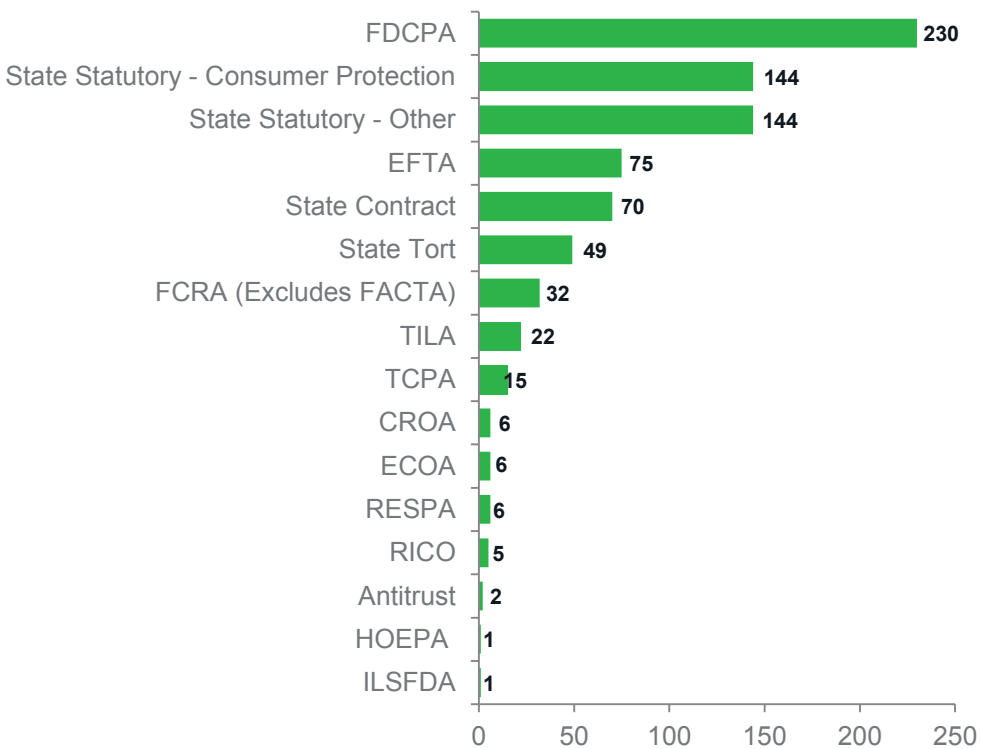
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<sup>31</sup> In our review of litigation cases in Section 6, we excluded debt collection cases if those cases could not be attributed to one of the product markets being studied. Here we include such cases.

## Claims type

We reviewed the complaints and coded federal and state grounds for relief. By the number of cases, as Figure 1 below indicates, overall the three most frequently invoked legal grounds of requested relief in our set of class action settlements were the FDCPA (55% of settlements), state statutory claims not specific to consumer finance (34%) and state statutory claims specific to consumer finance (also 34%). The sum of all percentages exceeds 100% because any given complaint may contain multiple claims on alternate grounds.

**FIGURE 1: FREQUENCY OF CLAIM TYPES BY SETTLEMENT<sup>32</sup>**



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<sup>32</sup> See, e.g., Fitzpatrick, *supra* n.16; Mayer Brown, *supra* n.14;

## 8.3.2 Number of class members

We review, below, two separate metrics for determining the number of persons reached by consumer financial class action settlements: (1) the number of claims forms or other notices sent; and (2) the number of class members eligible for relief.<sup>33</sup>

### Notices

Federal civil procedure requires in a settlement of most class actions seeking damages that individualized notice be sent to prospective class members who can be identified through reasonable effort.<sup>34</sup> In our data set, 267 settlements reported numbers of prospective class members to whom such notices were sent. As set out in Table 2 below, 130 million notices were sent to individual class members in those settlements. The average number of notices sent per settlement reporting individualized notice was 485,494; the median was 2,724.

**TABLE 2: NUMBER OF REPORTED INDIVIDUALIZED NOTICES TO CLASS BY PRODUCT**

Product	n	Notices	Average	Median
Auto	13	173,487	13,345	2,680
Checking/savings	15	20,779,365	1,385,291	137,763
Credit card	21	56,927,131	2,710,816	30,000
Credit reporting	19	20,154,839	1,060,781	4,377

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<sup>33</sup> Neither Fitzpatrick nor Mayer Brown provided data on the number of class members participating in settlements. *See generally* Fitzpatrick, *supra* n.16; Mayer Brown, *supra* n.14.

<sup>34</sup> Fed. R. Civ. P. 23(c)(2)(B) (“For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including *individual notice to all members who can be identified through reasonable effort*. The notice must clearly and concisely state in plain, easily understood language (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).”) (emphasis added).

Debt collection	184	12,112,304	65,828	1,410
Debt settlement	4	919,084	229,771	106,462
Mortgage-related	9	16,252,627	1,805,847	24,330
Prepaid	1	2,724	2,724	2,724
Privacy/ID	1	2,305,429	2,305,429	2,305,429
<b>Total</b>	<b>267</b>	<b>129,626,990</b>	<b>485,494</b>	<b>2,724</b>

It is important to note that the number of notices sent is not necessarily equal to the size of the class in these cases, since a class may include consumers who cannot be identified with reasonable effort as well as individuals who can be so identified, or the notice program may have (intentionally or unintentionally) sent more notices than the number of unique individuals who were expected to be in the class.

## Class membership

In many settlements the case records report on the number of class members separate from the number of notices sent; in some other settlements only the former and not the latter is reported. Table 3 below shows that, out of 329 settlements reporting data on class size, there were 350 million class members in total.<sup>35</sup> Of these, 190 million came from one settlement as explained in the margin below.<sup>36</sup> Excluding that action, the total number of class members was 160 million.

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<sup>35</sup> We used the number of individual notices sent as a proxy for the number of class members where a settlement did not report on the number of class members.

<sup>36</sup> A single class action settlement, *In Re TransUnion Corp. Privacy Litig.*, 1:00-CV-04729, Final Approval Order (N.D. Ill. Sept. 17, 2008) covered 190 million class members. Plaintiffs alleged a settlement class including “[a]ll persons in the United States whose consumer reports were disclosed by *TransUnion* or its agents to an unaffiliated third party, without authorization by the consumer” from 1997 to the filing of the complaint (and later extended to 2008 in the settlement order). Second Am. Consol. Compl., *In Re TransUnion Corp. Privacy Litig.* (N.D. Ill. Nov. 1, 2002). Where we offer aggregate data on the number of class members that would include the *TransUnion* settlement, we report those figures with and without that case. Note that the *TransUnion* settlement did not provide individualized notice, given the size of the class.



**TABLE 3: NUMBER OF REPORTED CLASS MEMBERS IN CONSUMER FINANCIAL SETTLEMENTS BY YEAR**

<b>Year</b>	<b>n</b>	<b>Class members</b>
2008	58	246,809,644
<i>Without TransUnion</i>	57	56,809,644
2009	74	34,913,394
2010	60	10,726,995
2011	71	22,360,972
2012	66	35,151,309
<b>Total</b>	<b>329</b>	<b>349,962,314</b>
<i>Without TransUnion</i>	328	159,962,314

The total number of unique persons directly covered by these settlements may be, indeed is likely to be, less than 160 million (*i.e.*, one person may have been a class member in more than one settlement). On the other hand, this figure excludes class members from the 90 settlements for which we had no data on class size and also did not have data on the number of individual notices sent. Figure 2 below sets out the distribution of class members by the size of the settlement class including the one large settlement. As the figure illustrates, even putting this one case aside, a small number of the settlements accounted for most of the class members.

**FIGURE 2: DISTRIBUTION OF CLASS MEMBERS BY SIZE OF CLASS**

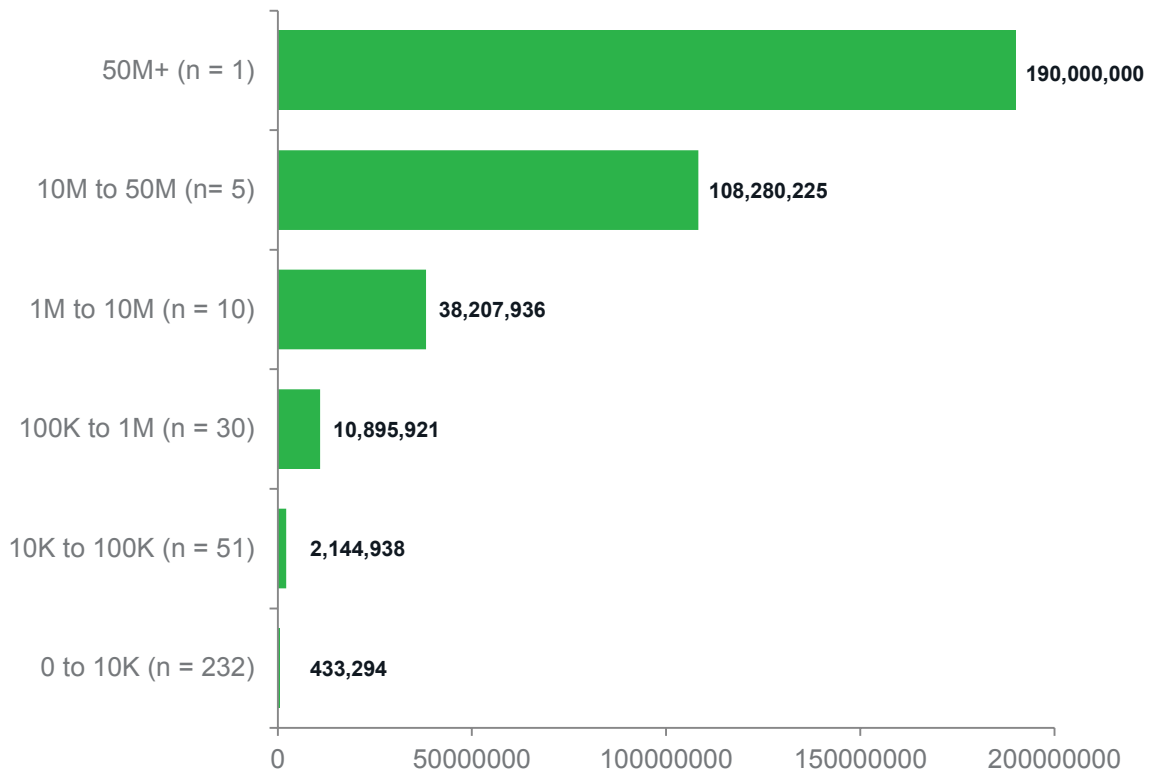


Table 4 below sets out the number of class members by the type of consumer financial product at issue in the settlement.

**TABLE 4: NUMBER OF CLASS MEMBERS BY PRODUCT**

Product	n	Class members	Average	Median
Auto	17	568,212	33,424	2,172
Checking/savings	37	21,035,501	568,527	8,136
Credit card	22	57,118,228	2,596,283	25,000
Credit reporting	22	230,001,344	10,454,607	7,175
<i>Without TransUnion</i>	21	40,001,344		
Debt collection	213	20,630,235	96,856	1,106

Debt settlement	4	919,082	229,771	106,461
Mortgage-related	10	17,259,083	1,725,908	21,514
Prepaid	1	2,700	2,700	2,700
Privacy/ID	1	2,305,429	2,305,429	2,305,429
Student loan	2	122,500	61,250	61,250
<b>Total</b>	<b>329</b>	<b>349,962,314</b>	<b>1,063,715</b>	<b>2,190</b>
<i>Without TransUnion</i>	<i>328</i>	<i>159,962,314</i>		

## Forms of relief and method of distribution

One important aspect of settlements is the form of relief and how relief is distributed. Previous studies offered little data on this topic.<sup>37</sup> For each settlement, we captured three general forms of settlement relief: cash, in-kind, and behavioral.

We also captured two methods of distributing cash relief and in-kind relief: claims made and automatic payment. In a claims-made process class members must submit some form of documentation to obtain cash relief or in-kind relief (and for in-kind claims-made cases, relief is sometimes a voucher given to those who submit a claim<sup>38</sup>). With an automatic payment, cash or in-kind relief (often in the form of a voucher) is distributed to class members identified through administrative records of the defendant without requiring any affirmative action by these individuals (although class members still are given notice and an opportunity to opt out of the class if they prefer not to be bound by the judgment and preserve their right to pursue an individual action). Both automatic payment and claims-made processes can be used in a single

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<sup>37</sup> See generally Fitzpatrick, *supra* n.16; Mayer Brown, *supra* n.14, at 7–8.

<sup>38</sup> Some academics have criticized in-kind relief, in the form of coupons or vouchers, in class actions. Christopher R. Leslie, *The Need to Study Coupon Settlements in Class Action Litigation*, 18 Geo. J. Legal Ethics 1395, 1396-97 (2005) (criticizing coupon settlements on the grounds that they do not “provide meaningful compensation to most class members,” “fail to disgorge ill-gotten gains from the defendant,” and may force class members “to do future business with the defendant”).

settlement **where some but less than all class members can be identified through the defendant's records.**

Claims-made processes may be used for several reasons. In some cases, claim eligibility may **turn on data only customers possess or a company's customer data may** be inadequate because of – for example – a merger or lapsed contact with customers. In other cases, claims processes help determine the amount to which an individual claimant is entitled, even where claim eligibility is determinable from administrative records. Additionally, settlement administrators interviewed for this study suggested that in some instances, claims-made processes are adopted for tactical reasons even if they are not needed to identify class members or determine their claims. For example, a claims made process may reduce what defendants ultimately pay or increase the per person payment for class members relative to an automatic payment process.<sup>39</sup>

The vast majority of settlements involved cash relief. Some form of cash relief was available in 410 settlements. In addition to these cash settlements, there were 6 settlements that offered only in-kind relief, and 3 that offered only behavioral and in-kind relief.

Figure 3 breaks down the incidence of the class settlements that offer cash relief. From the 410 settlements making cash relief available, we excluded 28 cases in which cash relief consisted solely of a *cy pres* payment or reward payment to the lead plaintiff(s).<sup>40</sup> Figure 3 breaks down the remaining 382 settlements by whether they make any cash available automatically.

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<sup>39</sup> A claims-made process can be used in connection with an agreement to pay out a fixed amount pro rata to those submitting claims so the amount received by each claimant will be inversely proportional to the number of claims.

<sup>40</sup> We exclude these cases because, for class members, they are neither automatic nor claims-made distributions. The 28 cases we excluded also include settlements with a behavioral relief component in addition to the cash relief in the form of *cy pres* or an incentive payment for the lead plaintiff.

**FIGURE 3: BREAKDOWN OF SETTLEMENTS INCLUDING CASH RELIEF**

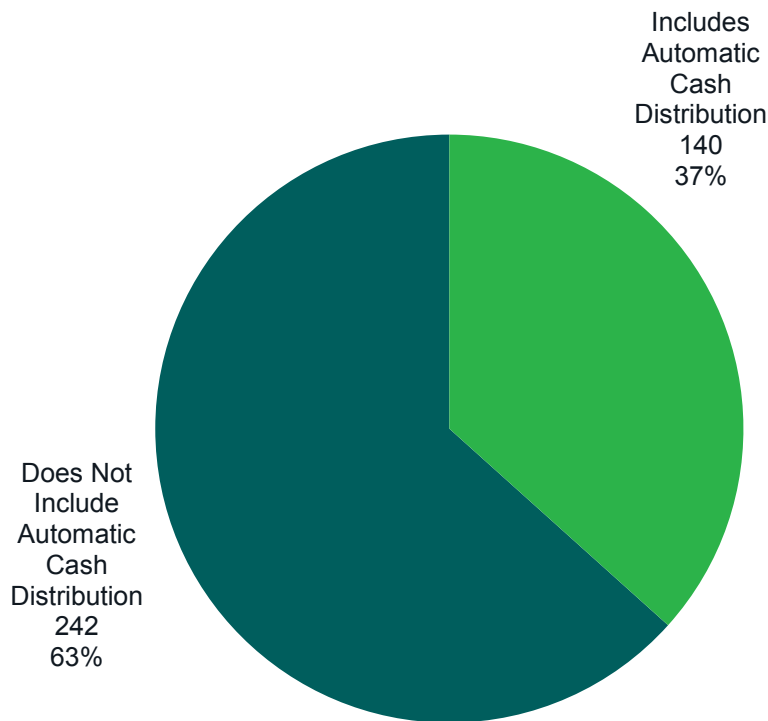


Table 5 below shows the different forms of relief employed by settlements pertaining to different product types and the method of distribution. The counts for the three types of distribution are not meant to be mutually exclusive; any one settlement may employ one, two or all three forms of relief for class members.

**TABLE 5: METHOD OF DISTRIBUTION OF RELIEF BY PRODUCT**

Product	n	Cash	Behavioral	In kind
Auto	18	18	3	3
Checking/Savings	83	83	5	2
Credit Card	30	28	2	2
Credit Reporting	25	20	7	7
Debt Collection	234	234	28	6

Debt settlement	4	4	1	0
Money transfers	1	1	1	0
Mortgage-related	14	13	4	2
Prepaid	2	1	2	1
Privacy/ID	2	2	1	0
Student loan	6	6	2	1
<b>Total</b>	<b>419</b>	<b>410</b>	<b>56</b>	<b>24</b>

Cash was the single most common form of relief for class members; it was the primary form in a majority of settlements across all but three product areas. In-kind relief was relatively infrequent though somewhat more prevalent in auto loan and credit card settlements. Behavioral relief was somewhat more common, in aggregate, than in-kind relief.

### Class members eligible for claims-made relief

There were 319 million individual class members eligible for claims-made cash or in-kind relief in 208 settlements from 2008 through 2012 in our data set for which eligibility numbers can be ascertained. *TransUnion Privacy Litigation*, previously discussed, accounted for nearly 190 million claims-eligible class members, or nearly all consumers in the United States during the relevant class period who had an open credit account or a credit grantor located in the United States. Excluding this one settlement, claims-made cash or in-kind relief was available to 129 million class members. (Because some consumers may have been class members in more than one instance, it is possible that less than 129 million unique individuals were involved.)

The average number of claims-made damages class members per settlement was approximately 622,000 (excluding the *TransUnion* case), and the median number of claims-made damages class members per settlement was approximately 3,300. The large difference between average and median reflects the significance of the small number of large class actions. Almost all these class members were eligible for claims-made cash relief.

## Automatic relief

As set out in Table 6, below, there were 24 million class members who had received or were to receive automatic cash or in-kind distributions in the 133 settlements reporting automatic distribution figures.<sup>41</sup> Almost all these class members were eligible for automatic cash relief.

**TABLE 6:** REPORTED NUMBER OF AUTOMATIC DAMAGES CLASS MEMBERS BY PRODUCT

Product	n	Members
Auto	10	17,404
Checking/Savings	11	20,063,100
Credit Card	10	1,130,683
Credit Reporting	9	1,477,140
Debt Collection	89	1,095,575
Debt Settlement	1	1,090
Prepaid	1	2,724
Student Loan	2	122,500
<b>Total</b>	<b>133</b>	<b>23,910,216</b>

## Behavioral relief

Of 53 settlements reporting behavioral relief for which there is also some report of class size information, at least 106 million individual class members were included within the scope of behavioral relief.<sup>42</sup>

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<sup>41</sup> In comparison to Figure 3 above, these 133 cases include a handful of settlements with in-kind only automatic distributions, but excludes settlements which did not report the number of class members.

### 8.3.3 Monetary relief and payments

Since there is no uniform way of referring to different types of recovery in a settlement – no specific terms for what a defendant agrees to pay, what a defendant pays out of pocket, and what is paid to consumers – **we define such terms for purposes of our analysis here. We define “relief”** as the quantity of recovery – in the form of cash or in-kind relief – that a defendant commits to make available to or for the benefit of a class pursuant to a settlement order. This excludes the value, or cost to the defendant, of making agreed behavioral changes to business practices.

**Subject to this exclusion, therefore, “gross relief” refers generally to aggregate amounts** promised to be made available to or for the benefit of damages classes as a whole, calculated **before any fees or other costs are deducted. “Net relief” deducts from gross relief attorneys’ fees** and other costs such as settlement administrator fees. **“Relief,” whether gross or net, represents** everything a defendant has agreed to pay (other than the costs associated with carrying out agreed behavioral changes, **any “bonus” payments made to class representatives**, and any direct settlement administrator costs the defendant assumes without reimbursement from settlement funds), but is not necessarily what the defendant actually pays.

**As a result, we define “payment” to refer to the actual amount a defendant has paid or is** unconditionally obligated to pay to class members as of the date of the last document available for review. It includes (1) amounts attributable to claims already made; (2) automatic **distributions; and (3) amounts that must be paid under pro rata settlements. Here, a “payment”** is always net of fees and costs and is not subject to further contingency or claw back by the defendant, with the exception of uncashed checks. The overall payment figure we calculated, therefore, is a floor with respect to the cases for which we have numbers, to the extent it does not account for any of the claims made after final approval orders.

As set out in Table 7, gross relief was \$2.7 billion in 419 settlements, which consisted of the following:

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<sup>42</sup> These numbers generally reflect the record on the number of consumers affected by the relevant conduct during the class period. Some of those consumers may no longer have or in the future may cease to have a relationship with the defendant and thus may not be beneficiaries of the behavioral relief. On the other hand, these numbers do not include additional consumers who may in the future have a relationship with the defendant and become direct beneficiaries of the relief. In cases which provided behavioral relief in combination with cash and in-kind relief, all but the latter group (not sized in the number stated in text) would also be included within the number of class members eligible for cash or in-kind relief.



- Cash relief of \$2.0 billion (of 410 settlements reporting); and
- In-kind relief of \$644 million (of 16 settlements reporting quantifiable in-kind figures).<sup>43</sup>

There were 7 cases in this set reporting both cash and in-kind relief figures. After all settlement and litigation related costs (**including attorneys' fees**, other litigation costs, and settlement and administrators fees which together totaled \$489.2 million or 18% of the gross relief), net relief available to class members was \$2.2 billion. These amounts are set out by year, in Table 7 below.

**TABLE 7: GROSS AND NET RELIEF TO PLAINTIFFS BY YEAR (IN DOLLARS)**

Year	n	Cash relief	In kind relief	Total gross relief	Fees + costs	Net Relief
2008	68	121,216,540	620,306,813	741,523,353	41,070,981	700,452,372
2009	95	599,597,668	2,932,525	602,530,193	106,812,523	495,717,670
2010	78	156,162,419	175,000	156,337,419	36,832,704	119,504,715
2011	100	701,872,599	13,559,557	715,432,156	168,034,003	547,398,153
2012	78	471,102,619	7,225,000	478,327,619	136,420,649	341,906,970
<b>Total</b>	<b>419</b>	<b>2,049,951,845</b>	<b>644,198,895</b>	<b>2,694,150,740</b>	<b>489,170,860</b>	<b>2,204,979,880</b>

Table 8 below shows a breakdown by product type. It shows that the largest settlements by cash relief involved checking and savings products, credit cards, and auto loans. The larger overall gross from these three product areas largely corresponds with the higher incidence of settlements in these areas.

The bulk of in-kind relief came from credit reporting (of which \$575 million came from a single settlement<sup>44</sup>). Settlements in many product categories – auto loans, checking/savings, and

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<sup>43</sup> Of this, nearly \$575 million of in-kind relief (in the form of credit monitoring from one of the national credit reporting agencies) was provided by a single multidistrict settlement in *Lockwood v. Certegy Check Services, Inc.* This was the value of services offered to consumers pursuant to requests in a claims-made process.

student loans – had no or practically no in-kind relief offered. Credit reporting included the highest number of settlements reporting in-kind relief, but in that product category, however, more settlements involved cash relief than in-kind relief.

Overall, therefore, the product areas that provided for the most cash and total relief were checking and savings, credit reporting, credit cards, and auto loans. The product areas that provided the smallest aggregate relief were prepaid and money transfers. We found no payday cases within these 419 settlements.

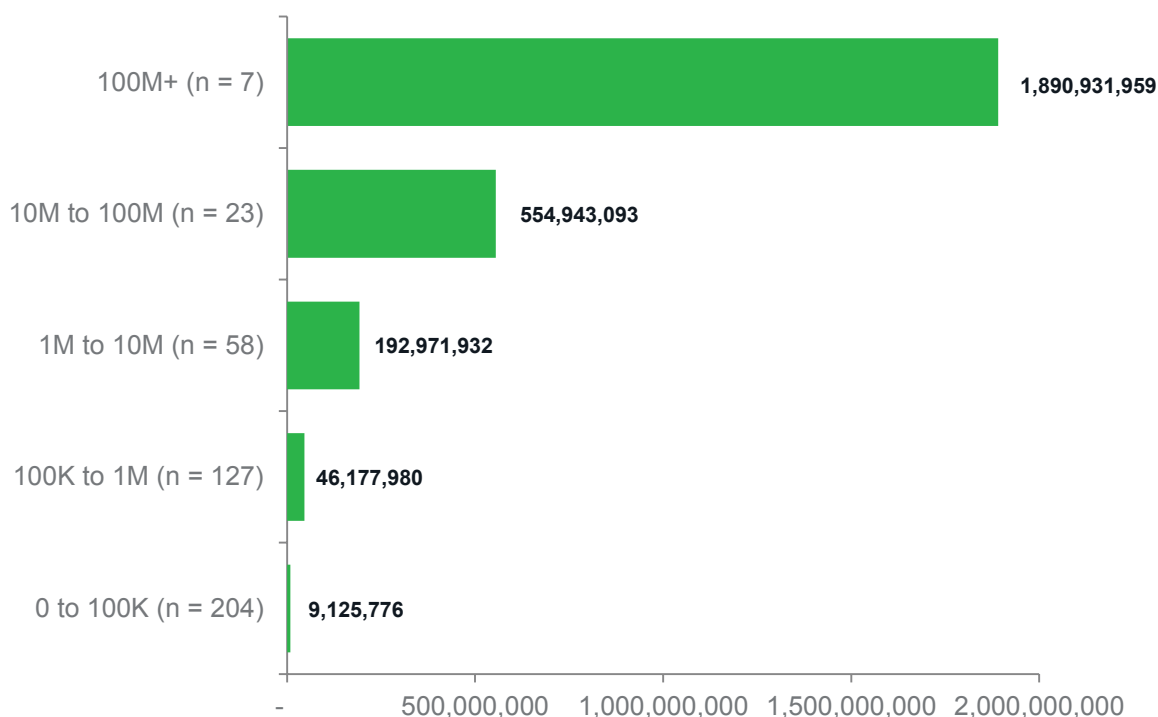
**TABLE 8: GROSS RELIEF TO CLASS MEMBERS BY PRODUCT (IN DOLLARS)**

Product	n	Cash relief	n	In kind relief	n	Total relief
Auto	18	202,863,349	0		18	202,863,349
Checking/Savings	83	844,955,851	0		83	844,955,851
Credit Card	28	566,825,830	2	9,225,000	30	576,050,830
Credit Reporting	20	133,537,750	7	628,609,157	25	762,146,907
Debt Collection	234	95,965,067	4	860,525	234	96,825,592
Debt Settlement	4	8,910,031	0		4	8,910,031
Money Transfers	1	5,500,000	0		1	5,500,000
Mortgage-Related	13	26,611,094	2	5,329,213	14	31,940,307
Prepaid	1	484,640	1	175,000	2	659,640
Privacy/ID	2	12,400,000	0		2	12,400,000
Student Loan	6	151,898,233	0		6	151,898,233
<b>Total</b>	<b>410</b>	<b>2,049,951,845</b>	<b>16</b>	<b>644,198,895</b>	<b>419</b>	<b>2,694,150,740</b>

<sup>44</sup> Final Approval Order, *Lockwood v. Certegy Check Services, Inc.*, No. 8:07-cv-01434 (M.D. Fla. Sept. 3, 2008).

As Figure 4 below shows, the bulk of cash and in-kind relief in our data set came from a number of larger settlements. Over 90% of cash and in-kind relief came from settlements exceeding \$10 million in total relief.

**FIGURE 4: GROSS RELIEF GROUPED BY BANDS OF GROSS RELIEF**



## Number of Class Members Receiving Payments

Although relief figures (amounts defendants agreed to put up initially) are usually determinable from settlement documents, *payment* information, as we have defined it here, is more difficult to ascertain. Such information in claims-made settlements is – if available at all – often included in final approval orders or settlement administrators’ reports, which are not consistently available and are not required to be made public. Further, where administrator’s reports are available, they may not contain the final numbers. And even in automatic relief cases, the court records do not always specify the amount of relief or the number of class members receiving such relief.

Given these limitations, our calculation of the number of class members receiving payments and the amount of aggregate payments represents a conservative floor on the value of actual payments in the case for which we have data to make these calculations. Specifically, we include

several categories of information: (1) the value of actual cash claims made where reported; (2) the value of automatic cash distributions; and (3) claims-made floors or minimums defendants committed to in the settlement order (*e.g.*, *pro rata* cases). We excluded settlements if (1) not even interim claims figures were available for our review and (2) the settlements were not otherwise subject to a floor or minimum (*e.g.*, non-*pro rata* claims-made settlements). Our payment figures also exclude the value of behavioral relief, given that it is not distributed to individual class members. To be conservative, we excluded in-kind payments as well, in part because there are so few pure in-kind settlements.

Of the 208 settlements reporting an estimated number of claims-eligible class members, 129 of these reported an actual number of cash claims made by eligible class members. In these 129 cases, 11 million class members made claims for relief, as shown in Table 9 below as of the date of the last document that was available for review.<sup>45</sup> There were also 24 million recipients of automatic distributions, in 137 settlements reporting such data, as reported above in Table 6. Combined, 236 settlements reported 34 million class members who received, or will receive, a cash payment.

**TABLE 9: SUMMARY OF CLAIMS MADE IN SETTLEMENTS BY YEAR**

Year	n	Claims made
2008	20	508,685
2009	36	10,103,601
2010	19	59,944
2011	31	272,153
2012	23	271,893
<b>Total</b>	<b>129</b>	<b>11,216,276</b>

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<sup>45</sup> By way of comparison, in the four class settlements that were discussed in our 2013 Preliminary Results – but that are outside of our data set for this analysis because they were settled after 2012 or in state court – there were 1,255,000 class members entitled to automatic relief, with payments amounting to \$29.8 million. *See* 2013 Preliminary Results at 106–10.

## Dollar Amount of Payments Received by Class Members

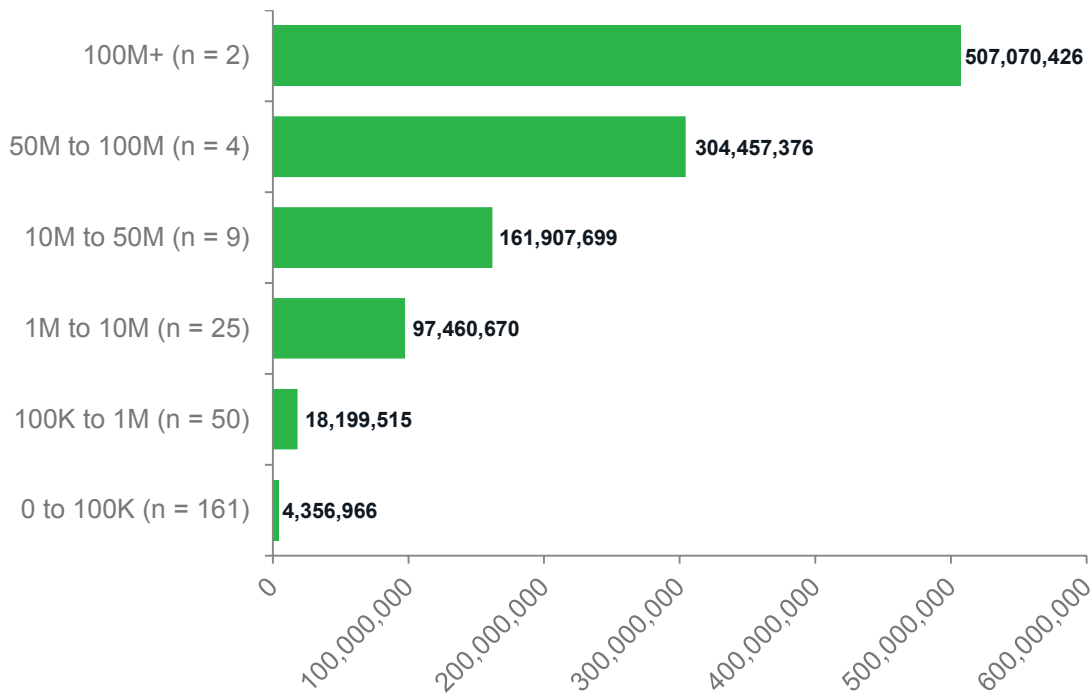
Overall, we estimate a total of \$1.1 billion in 251 settlements reporting data on the dollar amount of payments. Of these, 241 settlements (\$980 million in payments), involved *only* cash distributions – whether automatic or claims-made.<sup>46</sup> The remaining 10 settlements, or about \$114 million in payments, involved a combination of in-kind distributions and cash (but only cash payments are included in this calculation). Figure 5 below shows the distribution of settlements reporting cash payments by the dollar volume of payments.<sup>47</sup>

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<sup>46</sup> Of these 251 settlements reporting payments, 127 cases (\$322 million in payments), were in exclusively claims-made cash distribution cases; 100 cases (\$709 million in payments), were in exclusively automatic cash distribution cases, and 24 settlements (\$63 million in payments), were in joint automatic and claims-made distribution cases.

<sup>47</sup> The settlements resulting in total payments to class members over \$50 million include *In re Currency Conversion Fee Litigation*, Final Approval Order, 1:01-md-01409 (S.D.N.Y. Sept. 17, 2008); *Tornes v. Bank of America, NA (In re Checking Account Overdraft Litig.)*, Order of Final Approval of Settlement, 1:08-cv-23323-JLK (S.D. Fla. Nov. 22, 2011); *Faloney v. Wachovia*, Final Approval Order, 2:07-cv-01455 (E.D. Pa. Jan. 22, 2009); *Holman v. Student Loan Xpress, Inc.*, Final Approval Order, 8:08-cv-00305 (M.D. Fla. Jan. 4, 2011); *In re Chase Bank USA NA Check Loan Contract Litig.*, Final Approval Order and Judgment, 3:09-MD-02032, (N.D. Cal. Nov. 11, 2012); *Lopez v. JPMorgan Chase Bank NA (In re Checking Account Overdraft Litig.)*, Order of Final Approval of Settlement, 1:09-cv-23127-JLK (S.D. Fla. Dec. 19, 2012).

**FIGURE 5: TOTAL PAYMENTS BY BANDS OF PAYMENT**



### 8.3.4 Claims rates

#### Claims rates from settlements

Other studies have not offered comprehensive data on claims rates by claims-eligible class members in consumer financial class action settlements using a claims-made form for distributing relief.<sup>48</sup> The data below, subject to limitations, is the most comprehensive treatment

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<sup>48</sup> Professor Fitzpatrick did not present data on claims rates. *See generally* Fitzpatrick, *supra* n.16. Out of its sample of 40 settlements initiated by complaints filed in 2009, Mayer Brown found claims data as to only 6 settlements, none of which it identified as consumer financial cases. *See* Mayer Brown, *supra* n.14, at 7-8 & n.20. Mayer Brown selected an additional 14 settlements, outside of the data range of its sample, identified as “Additional Examples of Settlements With Payments to a Very Small Percentage of Class Members.” Of these additional settlements, only one settlement was identified as a consumer financial case, a FCRA case. *See id.* at 13, 22 & n.53.

of claims rates we are aware of specific to consumer financial cases.<sup>49</sup> We supplement this data with qualitative information, based on interviews with settlement administrators.

We were able to calculate an estimated claims rate in 105 settlements because for these cases at least some claims numbers were reported, even if they were preliminary or estimated figures, and an eligible class size also was stated or estimated. Because final claims numbers are not available in many of these cases, however, these calculated claims rates have to be viewed as claims rate floors for these settlements (assuming the class size was not understated in the court files). Final claims rates would increase to the extent that additional claims are filed after the last recorded claims information available for a given case.

For these 105 settlements the *unweighted* average claims rate was 21% and the median was 8%.<sup>50</sup> The *weighted* average claims rate was 4% including the TransUnion settlement, and 11% without *TransUnion*.

## Settlement administrator interviews

Because final claims rate data was often incomplete or missing, we supplemented our data with qualitative research—interviews with settlement administrators about their experience with claims processes. Five class action settlement administrators, all of which administer multiple consumer financial cases every year, provided information on claims processes and claims rates. We estimate that these five companies administer slightly over half of the consumer financial class actions settled each year. They reported as follows.

**Claims rates.** The five administrators each provided a range for claims-made rates in consumer finance cases based upon their experience. Each provided the same estimate for the bottom of the range based on their internal data: 5%. However, there was considerable variance in their upper-end experience, with one administrator stating an upper end of 12% and others an upper

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<sup>49</sup> In general, claims rate data is difficult to acquire from public sources. *See* Mayer Brown, *supra* n.14, at 7. District courts usually issue final approval orders in claims-made settlements long before the period to file claims ends. In some cases, after the entry of the final approval order, the parties submit the **settlement administrator's report** that often contains final claims rates. In other cases, the parties do not file a report.

<sup>50</sup> We calculate the claims rate based on the estimated class size before opt-outs. However, opt-out rates where known are well under 1% so that excluding opt-outs from the denominator for calculating claims rates would not materially change the estimates.

end as high as 40% or 50% in consumer financial class action settlements, The administrators reported that these claims rates were higher than the overall average for class action settlements they administered, but lower than some other types of class action settlements (*e.g.*, securities, small employment-related classes).

The administrators reported that procedural complexity influenced claims rates. Claims rates fell nearly 90% if documentary proof was required compared to claims rates in settlements where there is no such requirement of proof. A signature-only form increases claims rates by 5-10% compared to other types of forms requiring a class member's response to specific questions or requests. An online process, combined with mail claims, increases rates by 5-10% compared to a mail-only process. Most consumer financial claims forms were simple.

***Claims rates by amount.*** Most administrators felt that the dollar amount that an individual can receive influenced claims rates. One offered data that claims rates rose with claim amounts, plateauing after \$500.<sup>51</sup> Others agreed generally that the magnitude of the relief available to an individual claimant affected claims rates. The description of a claim amount (*e.g.*, “**you could receive up to \$75**”) also influences claims rates. One administrator cited internal research that, within a reasonable range, claim amounts do not impact claims rates much. The nature and “viscerality” of the claims also mattered.

***Recent trends and changes to class actions.*** Settlement administrators noted recent trends and changes in the structure and administration of class action settlements that may affect claims rates in the future. Judges have been encouraged by the Federal Judicial Center to maximize class member claims,<sup>52</sup> and recent judicial decisions suggest, in the view of settlement

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<sup>51</sup> For example, that firm found that claims rates were 2–6% for \$25 claims, 5–10% for \$100 claims, and 8–15% for \$500 claims.

<sup>52</sup> The Federal Judicial Center, part of the federal court system, researches and publishes on best practices in class actions for counsel and judges. *See, e.g.*, Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* (3d Ed. 2010), [http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/\\$file/ClassGd3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/$file/ClassGd3.pdf) (last visited Mar. 6, 2015); Class Action Notices Page, [http://www.fjc.gov/public/home.nsf/auto\\_frame?openform&url\\_l=/public/home.nsf/inavgeneral?openpage&url\\_r=/public/home.nsf/pages/376](http://www.fjc.gov/public/home.nsf/auto_frame?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/376) (last visited Mar. 6, 2015). The FJC seeks to ensure effective notice and increase the number of eligible class members receiving relief. *See Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (2010)*, [http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf) (last visited Mar. 6, 2015). It advises judges to “consider whether a claims process is necessary at all” where “defendant [has] the data it needs to automatically pay the claims of at least a portion of class members who do not opt out.” Rothstein & Willging, *supra*, at 30.



administrators, increased attention to claims rates. Final approvals have come later in a settlement process, sometimes after the end of the claims period. Further, courts have scrutinized settlements, especially the reasonableness of a claims-made process instead of an automatic one.<sup>53</sup> Where a claims-made procedure is used, the active oversight of the process by judges can improve claims and distribution rates.<sup>54</sup>

### 8.3.5 Attorneys' fees and other expenses

Below we review metrics for determining the amount of class relief money going to attorneys' fees. We cover attorneys' fees as a percentage of gross cash relief, as a percentage of gross cash and in-kind relief, and as a percentage of cash payments. We do not factor behavioral relief into these calculations because its quantification may be incomplete or missing. For some cases included in these calculations, then, we will have the full numerator (attorneys' fees) but not the full denominator (total relief, including the value of behavioral relief). As a result, the rates expressed in this section will generally overstate attorneys' fees as a share of relief, so these reported rates should be seen as ceilings.

#### Attorneys' fees as a percentage of gross relief

In Table 10 below, we show again that in our set of 419 settlements, the cash relief available to plaintiffs was \$2.0 billion, and the gross cash and in-kind relief made available was \$2.7 billion.

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<sup>53</sup> *See, e.g., De Leon v. Bank of Am., N.A. (USA)*, 6:09-CV-1251-ORL-28, 2012 WL 2568142 (M.D. Fla. Apr. 20, 2012) (citing FJC and questioning the necessity of a claims made process for a consumer finance settlement in which the defendant was able to identify all injured class members); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 391 (C.D. Cal. 2007) (observing that credit reporting agency defendants “already maintain all of [the necessary] information” causing the court “to question the necessity of [a] claims-made procedure”); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1340–41 (S.D. Fla. 2011) (approving use of an automatic distribution and noting that “[t]he absence of a claims-made process further supports the conclusion that the Settlement is reasonable”).

<sup>54</sup> *See, e.g.,* Francis McGovern, *Distribution of Funds in Class Actions—Claims Administration*, 35 J. of Corp. Law 123 (2009). For example, in the foreign currency exchange rate settlement, the number of claims was boosted from 90,000 (0.45% of the class) to 10,115,836 (27% of the class) by redesigning the claims forms and making the claims process simpler. Over 7 million class members in that case filled out a form for just \$25, demonstrating that considerable numbers of consumers will claim small-dollar recoveries if the claims process is simple and easy to understand. *Id.* at 128–29. Additionally, one judge has stated that “tying the award of attorneys’ fees to claims made by class members is one step that judges can take toward repair[ing]” class actions. *In re TJX Companies Retail Sec. Breach Litig.*, 584 F. Supp. 2d 395, 4 (D. Mass. 2008).

The attorneys' fees awarded to counsel in cases reporting both attorneys' fees and cash and/or in-kind relief data was \$424 million. That is equal to 21% of cash relief or 16% of gross relief.

**TABLE 10: PERCENTAGES OF ATTORNEYS' FEES TO CASH RELIEF AND GROSS RELIEF, BY PRODUCT**

Product	n	Attys Fees	Cash Relief	Attys Fee %	Total Gross Relief	Atty Fee %
Auto	18	9,437,896	202,863,349	5%	202,863,349	5%
Checking/ Savings	83	213,003,911	844,955,851	25%	844,955,851	25%
Credit Card	30	117,372,359	566,825,830	21%	576,050,830	20%
Credit Reporting	25	31,107,537	133,537,750	23%	762,146,907	4%
Debt Collection	234	22,709,015	95,965,067	24%	96,825,592	23%
Debt Settlement	4	3,541,701	8,910,031	40%	8,910,031	40%
Money Transfers	1	1,200,000	5,500,000	22%	5,500,000	22%
Mortgage- Related	14	9,187,814	26,611,094	35%	31,940,307	29%
Prepaid	2	305,000	484,640	63%	659,640	46%
Privacy/ID	2	5,400,000	12,400,000	44%	12,400,000	44%
Student Loan	6	11,230,218	151,898,233	7%	151,898,233	7%
<b>Total</b>	<b>419</b>	<b>424,495,451</b>	<b>2,049,951,845</b>	<b>21%</b>	<b>2,694,150,740</b>	<b>16%</b>

As Table 10 shows more clearly, there were variations by product. The highest attorneys' fee to gross cash and in-kind relief percentages were in prepaid and debt settlement. The lowest attorneys' fee to gross relief percentages were in auto lending, credit reporting, and student loans. Variations in behavioral relief may explain some of the product differences we observed.

Other studies – including Professor Fitzpatrick's – primarily compiled data on a per-settlement basis. This tends to skew the overall average and median figures and figures per product, because attorneys' fees tend to constitute a smaller proportion of gross relief as gross relief increases. Table 11 below shows that, for smaller settlements (less than \$100,000 gross relief),

the average attorneys' fee percentage was 56%. For the larger settlements (more than \$100 million), the average was 10%. Between these extremes, the general trend was downward: The larger the recovery, the lower the percentage to attorneys' fees. Medians follow the same trend.

**TABLE 11: UNWEIGHTED AVERAGE AND MEDIAN ATTORNEYS' FEES VS. TOTAL RELIEF BY SETTLEMENT**

Total Gross Relief	n	Average	Median
0+ to 100K	204	55.9%	57.0%
100K+ to 1M	127	33.7%	39.6%
1M+ to 10M	58	25.7%	33.8%
10M+ to 100M	23	21.0%	18.8%
100M+	7	9.9%	15.4%
<b>Total</b>	<b>419</b>	<b>40.9%</b>	<b>45.7%</b>

Table 12 below shows attorneys' fee rates weighted by class size. Over 90% of individual class members in consumer financial settlements (of the 329 settlements reporting both number of class members and attorneys' fee percentages) are in settlements where the fee rate is under 40%. Indeed, the vast majority of class members are in settlements where the fee rates, even excluding behavioral relief, are less than 20%.

**TABLE 12: NUMBER OF CLASS MEMBERS GROUPED BY ATTORNEYS' FEE BAND**

Attorneys Fee Percentage	n	Class Members	% of Total
0 to 10%	28	228,752,031	65%
10% to 20%	19	52,485,034	15%
20% to 30%	60	36,963,650	11%

30% to 40%	59	3,955,330	1%
40% to 50%	46	15,141,865	4%
50% to 60%	31	5,104,770	1%
60% to 70%	24	66,847	0%
70% to 80%	26	2,205,802	1%
80% to 90%	20	389,542	0%
90% to 100%	16	4,897,443	1%
<b>Total</b>	<b>329</b>	<b>349,962,314</b>	<b>100%</b>

### Attorneys' fees as a percentage of cash payments

One potential criticism of using gross relief as a denominator in calculating attorneys' fees is that it may overestimate the actual amount received by the class. Under this view, a fairer measure is a comparison of attorneys' fees to the actual payments made to class members.

Below, we conducted a percentage-of-payments calculation. We calculated attorneys' fees as a percentage of cash payments, as we have defined it here. For these calculations, then, we are excluding not only the value of behavioral relief but also the value of any in-kind relief. Table 13 presents the results by product and overall. These results are not calculated by case, but are weighted by the value of payments.

**TABLE 13: ATTORNEYS' FEES AS A PERCENTAGE OF CASH PAYMENTS (IN DOLLARS)**

Product	n	Attorneys fees	Payments to class	Denominator (payments + attys fees)	Attys fees / (attys fees + payments)
Auto	10	3,425,339	82,595,328	86,020,667	4%
Checking/Savings	39	205,261,797	470,638,729	675,900,526	30%
Credit Card	15	94,372,062	388,795,637	483,167,699	20%
Credit Reporting	12	9,035,337	12,264,050	21,299,387	42%
Debt Collection	164	9,735,788	38,522,642	48,258,430	20%
Debt Settlement	3	3,241,701	4,816,223	8,057,924	40%
Mortgage-Related	3	3,457,425	9,358,887	12,816,312	27%
Prepaid	1	180,000	299,640	479,640	38%
Student Loan	4	9,406,354	86,161,516	95,567,870	10%
<b>Total</b>	<b>251</b>	<b>338,115,803</b>	<b>1,093,452,652</b>	<b>1,431,568,455</b>	<b>24%</b>

### 8.3.6 Time to settlement

One metric reported in many studies of class action settlements is the number of days between the filing of a complaint and final settlement approval by the district court. Professor **Fitzpatrick's analysis** found that for the entire body of federal class action settlements he studied in 2006 to 2007, the average case duration was 1,196 days, and the median case duration was 1,068 days.<sup>55</sup>

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<sup>55</sup> See Fitzpatrick, *supra* n.16, at 820.

The consumer financial cases in our data set settled somewhat more quickly than settlements overall in Fitzpatrick’s earlier and more general data. In our data set, the average was 690 days, and the median was 560 days. There were, of course, variations in the time to settlement.

Settlements involving smaller recoveries tended to settle faster than those involving larger recoveries. Overall, based on different ranges of settlement recoveries, there appeared to be a generally linear relationship between the settlement size and the average and median number of days to settlement as Table 14 shows. In the smallest settlements, less than \$100,000, between filing and final settlement, there were an average of 557 days. In the largest recoveries, over \$100 million, the average time to settlement was 1,455 days. Medians followed a similar trend.

**TABLE 14: DAYS TO SETTLEMENT BY BANDS OF TOTAL RELIEF**

Total gross relief	n	Average	Median
0+ to 100K	204	557	463
100K+ to 1M	127	764	619
1M+ to 10M	58	875	834
10M+ to 100M	23	757	808
100M+	7	1,455	1,056
<b>Total</b>	<b>419</b>	<b>690</b>	<b>560</b>

### 8.3.7 Motions practice

Overall, as Table 15 below shows, just under half of the settlements in our data set were preceded by a dispositive motion<sup>56</sup>— 191 cases out of 419. The disposition of those motions is set out in Table 16, below.

**TABLE 15: INCIDENCE OF SETTLEMENTS BY MOTIONS TO DISMISS AND SUMMARY JUDGMENT FILED**

	Motion to Dismiss Filed	Motion to Dismiss Not Filed	Total
Summary Judgment Filed	51	33	84
Summary Judgment Not Filed	107	228	335
<b>Total</b>	<b>158</b>	<b>261</b>	<b>419</b>

**TABLE 16: DISPOSITION OF MOTIONS TO DISMISS AND/OR SUMMARY JUDGMENT MOTIONS**

	MTD and SJ decided	Motion to dismiss only	Summary judgment only	No motions decided	Total
MTD and SJ	34	11	3	3	51
Motion to dismiss only		92		15	107
Summary judgment only			29	4	33
<b>Total</b>	<b>34</b>	<b>103</b>	<b>32</b>	<b>22</b>	<b>191</b>

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<sup>56</sup> Here, and as set out in Section 6.6.1, we define a dispositive motion to mean any motion to dismiss or summary judgment motion that would result in the disposition of one or more claims as to one or more parties; the motion need not seek the dismissal or disposition of the entire action.

There were 107 settlements where at least one motion to dismiss was filed and no summary judgment motions; the motion was decided prior to settlement in 92 of these cases.

There were 33 cases in our set in which a summary judgment motion, but no motion to dismiss, was filed before settlement. Of these, 29 were resolved before settlement.

There were 51 instances in which *both* a motion to dismiss and a summary judgment motion were filed before settlement. In 34 cases, at least one motion to dismiss and one summary judgment motion were decided before settlement. In 14 cases, either one of a motion to dismiss or for summary judgment were decided (but not both). In just 3 cases, no motions were decided.

### 8.3.8 Case study of the Checking Account Overdraft Litigation

Our data set includes several cases from *In Re Checking Account Overdraft Litigation*, MDL 2036, a class action proceeding that, as explained further below, illustrates the intersection of arbitration clauses and class action litigation and settlements. This MDL action also helps to shed light on the extent to which consumers are able to resolve disputes raised by consumers, at the customer service level, before they become formal legal claims.<sup>57</sup>

The Overdraft MDL consolidated many individual putative class actions against different financial institutions all of which were sued based on the order in which these institutions posted transactions to checking accounts. Plaintiffs in these cases claimed that by posting transactions from highest-to-lowest transaction size the banks caused consumers to pay millions of dollars more in overdraft fees than they would have had the transactions been posted in a more neutral order.

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<sup>57</sup> Some commenters have suggested that this is particularly likely to occur where companies have adopted arbitration clauses and thereby may reduce the number of formal disputes filed. *See, e.g.*, Class Defense Blog, “*Preliminary Results*” of the Consumer Financial Protection Bureau’s Ongoing Study of Arbitration Reveal Much More Work to Do, at 1–3 (Dec. 17, 2013). For instance, some have noted that AAA rules require companies to pay at least \$1,500 in arbitration filing fees and consumers not more than \$200; thus, companies have a strong incentive to settle any non-frivolous consumer dispute of less than approximately \$1,500. *Id.* These commenters also contend “bonus provisions” in arbitration agreements—which require companies to pay a specified sum to consumers who receive an arbitration award greater than the company’s last settlement offer—give companies a strong incentive to settle non-frivolous consumer disputes of less than the amount of the bonus. *Id.* Our research on the extent of bonus provisions is at page 51 of the 2013 Preliminary Results.



Across the defendants in these cases, there was broad similarity in business practices and the legal claims against the banks, but variety in the contracts between the consumers and the banks and also in their approach to litigation. Some banks did not have arbitration clauses in their checking account agreements with consumers and settled the cases, generally providing both monetary and behavioral relief. Other banks had arbitration clauses in their agreements, moved to compel arbitration, and secured dismissal of federal class actions in favor of individual consumer arbitration. Yet other banks had arbitration provisions in their consumer agreements and nevertheless settled either without invoking the arbitration clause or after invoking the clause with something less than complete success.

The tables below reflect the outcomes in these cases, including some cases that were already in our data in this section and in our litigation data, Section 6.4, and some cases that were not (because they were out of the date range we set for our data). Note that we have limited this analysis to cases consolidated in or transferred to the Overdraft MDL. It does not cover still other overdraft reordering cases that are not within the Overdraft MDL.

Table 17 shows each defendant (several of which resolved multiple cases in the same settlement) that settled. These 18 settlements covered 29 million class members and provided for \$1.0 billion in cash relief. Nearly all received automatic cash payments (after deduction of fees). In 10 settlements, 13 million class members were also in the scope of behavioral relief. In two settlements, banks changed their challenged practices prior to settlement such that the settlement itself did not incorporate behavioral relief.

**TABLE 17: CLASS SETTLEMENTS IN THE OVERDRAFT REORDERING MULTIDISTRICT LITIGATION<sup>58</sup>**

Defendant	Class members	Cash Relief?	Behavioral Relief?	Arbitration Clause?
Associated Bank	197,050	Automatic	Yes	Yes
Bank of America	13,200,000	Automatic	No	Yes <sup>59</sup>
Bank of Oklahoma	270,000	Automatic	No	No
Bank of the West	380,000	Automatic	No	No
Comerica Bank	190,000	Automatic & Claims-Made	No	No
Commerce Bank	393,169	Automatic & Claims-Made	Yes	No
Compass Bank	870,000	Automatic & Claims-Made	No	Yes
Great Western Bank	27,490	Automatic & Claims-Made	Yes	No
Harris Bank	116,132	Automatic	Yes	No
IBERIABANK Corp	50,000	Automatic & Claims-Made	Yes	No

<sup>58</sup> This table excludes a settlement nearly reached in *Given v. M&T Bank Corp.*, Case No. 10-cv-20478-JLK (S.D. Fla.). The hearing for final approval of the settlement was held on March 4, 2015, just before this Report went to press.

<sup>59</sup> Bank of America had an arbitration clause in the applicable deposit account agreement but in 2009 began to issue checking account agreements without an arbitration clause. In the *Tornes* action filed in Dec. 2008, Bank of America moved to stay pending the resolution of the *Closson* matter and to compel individual arbitration (*See* Dkt # 1885 at p.4–5). Once *Tornes* was transferred to the MDL (June 10, 2009) Bank of America did not seek to compel arbitration but listed it as an affirmative defense. (*See* Dkt # 1885 at 9).

JPMorgan Chase Bank	5,000,000	Automatic & Claims-Made	Yes	Yes
M&I Marshall & Ilsley Bank	189,500	Automatic & Claims-Made	Yes	Yes
PNC Bank	2,000,000	Automatic	Yes	No
RBS Citizens/ Citizens Financial Group	2,000,000	Automatic	Yes	No
Susquehanna Bank	60,737	Automatic	No	No
TD Bank	1,006,309	Automatic	No	No
Union Bank	300,000	Automatic	No	Yes
U.S. Bank	2,700,000	Automatic	Yes	Yes
<b>Total</b>	<b>28,950,387</b>			

Second, in Table 18 below, we review those cases in which defendants with arbitration provisions moved to compel arbitration and achieved final dismissal of their cases as a result. We note the date that the motion to compel arbitration was granted.

**TABLE 18: DEFENDANTS IN OVEDRAFT MDL THAT COMPELLED ARBITRATION AND ULTIMATELY WON**

Defendant	Date(s) motion to compel was granted
Huntington National Bank	5/25/2010
Regions Bank	12/21/2012, 3/12/2013
BB&T Bank	8/31/12, 9/5/2012, 3/12/2013
M&T Bank	8/6/2013
SunTrust Bank	12/12/2012

Table 19 below sets out the settlements that involved companies that did not have arbitration provisions, listing the number of class members and the total cash relief, and describing behavioral relief.

**TABLE 19: OVERDRAFT DEFENDANTS WITH NO ARBITRATION PROVISIONS THAT SETTLED**

<b>Defendant</b>	<b>Class members</b>	<b>Total cash relief</b>	<b>Behavioral relief</b>
Bank of Oklahoma	270,000	\$19,000,000	None.
Bank of the West	380,000	\$18,000,000	None.
Comerica Bank	190,000	\$14,850,000	Already stopped overdraft.
Commerce Bank	393,169	\$18,300,000	For at least 2 years agreed to post debit card transactions in chronological order.
Great Western Bank	27,490	\$2,200,000	Agreed, for at least two years, to low-to-high or chronology order for transactions, to limit overdraft fees to 5 per day per account, and to refrain from assessing fee unless balance is under -\$10.
Harris Bank	116,132	\$9,400,000	Agreed to modify posting methodology.
IBERIABANK Corp	50,000	\$2,500,000	Agreed to modify posting methodology.
PNC Bank	2,000,000	\$90,000,000	Agreed to post transactions in chronological order.
RBS Citizens/ Citizens Financial Group	2,000,000	\$137,500,000	Agreed to post debit card transactions in chronological order for at least 3 years.
Susquehanna Bank	60,737	\$3,680,000	None.
TD Bank	1,006,309	\$62,000,000	None.
<b>Total</b>	<b>6,493,837</b>	<b>\$377,430,000</b>	

Table 20 below sets out the settlements that involved companies that had arbitration provisions but did not file motions to compel arbitration, listing the number of class members and the total cash relief, and describing behavioral relief.

**TABLE 20: DEFENDANTS IN OVERDRAFT SETTLEMENTS THAT HAD ARBITRATION PROVISIONS BUT DID NOT COMPEL ARBITRATION**

Defendant	Class members	Total cash relief	Behavioral relief
Associated Bank	197,050	\$13,000,000	For at least 3 years, agreed to (1) post transactions in chronological order, (2) assess fee on no more than 4 transactions per day, and 3) cap fee at \$35 per transaction
Bank of America <sup>60</sup>	13,200,000	\$410,000,000	None (already stopped overdraft).
Union Bank	300,000	\$35,000,000	None.
<b>Total</b>	<b>13,697,050</b>	<b>\$458,000,000</b>	

Table 21 below sets out the settlements that involved companies that had arbitration provisions and did file motions to compel arbitration, listing the number of class members and the total cash relief, describing behavioral relief, and setting out the status, if any status is clear, of the motion to compel arbitration before settlement.

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<sup>60</sup> See *supra* n.66.

**TABLE 21: DEFENDANTS IN OVERDRAFT MDL THAT MOVED TO COMPEL ARBITRATION THEN SETTLED**

Defendant	Class members	Cash Relief	Behavioral relief	Disposition of Motion to Compel
Compass Bank	870,000	\$11,500,000	None.	Motion filed but not resolved before settlement
JPMorgan Chase Bank	5,000,000	\$110,000,000	Agreed to modify posting methodology for at least 2 years.	Motion denied, appealed, remanded in light of <i>Concepcion</i> , and refiled before settlement.
M&I Marshall & Ilsley Bank	189,500	\$4,000,000	Agreed to post transactions in chronological order and limit fees for at least 3 years.	Motion denied and then appealed before settlement.
U.S. Bank	2,700,000	\$55,000,000	Agreed to post debit card transactions in chronological order for at least 2 years.	Motions filed, denied, and appealed before settlement.
<b>Total</b>	<b>8,759,500</b>	<b>\$180,500,000</b>		

In almost all of these cases, the finalization of the settlement relief, and of the number of class members, came after specific calculations by an expert witness who took into account the number and amount of fees that had already been reversed and consumers reimbursed presumably as a result of informal dispute resolution.<sup>61</sup> The expert witness used data provided by the banks to calculate the amount of consumer harm on a per-consumer basis; the data

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<sup>61</sup> Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with Associated Bank, Case No. 1:09-MD-02036-JLK at 7 (Jan. 28, 2013); Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with Compass Bank, Case No. 1:09-MD-02036-JLK at 11 (May 16, 2013); Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with Harris Bank, N.A., Case No. 1:09-MD-02036-JLK at 11 (May 17, 2013); Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with PNC Bank, N.A., Case No. 1:09-MD-02036-JLK at 12 (Mar. 22, 2013); Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with U.S. Bank, Case No. 1:09-MD-02036-JLK at 11 (Oct. 23, 2013).

showed, and the calculations reflected informal reversals of overdraft charges.<sup>62</sup> Thereafter, nearly \$1 billion in relief was made available to more than 28 million class members in these MDL cases.<sup>63</sup>

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<sup>62</sup> *See, e.g.*, Decl. of Arthur Olsen in Support of Final Approval of Class Action Settlement with JPMorgan Chase Bank N.A., Case No. 1:09-MD-02036-JLK at 9 (Oct. 15, 2012).

<sup>63</sup> **The expert submitted data in 17 of the 18 settlements. The witness’s methodology and results were approved of by the Court in *Gutierrez v. Wells Fargo Bank*, 730 F. Supp. 2d 1080, 1139–40 (N.D. Cal. 2010). The MDL court also rejected several challenges to the expert’s methodology. *See, e.g.*, Order Denying Defs. Bancorpsouth Bank and PNC Bank, N.A.’s Mot. to Strike the Decl. of Arthur Olsen, Case No. 1:09-MD-02036 (Apr. 23, 2012); Order Denying Def. Comerica Bank’s Mot. to Excl. the Test. of Pl.’s Expert Arthur Olsen, Case No. 1:09-MD-02036 (July 2, 2012). Indeed, the MDL court cited the expert’s calculations as part of the basis for approving several of the settlements. *See, e.g.*, Order of Final Approval of Settlement, *Harris v. Associated Bank*, Case No. 1:09-MD-02036 at 19 (Aug. 2, 2013); Order Granting Final Approval of Settlement, *Simmons v. Comerica Bank*, Case No. 1:09-MD-02036 at 16 (Jun. 10, 2014).**





# Section 9

What is the relationship between public enforcement and consumer financial class actions?



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# Introduction

Many federal and state consumer financial protection laws provide for enforcement by one or more federal or state regulators and also allow consumers to bring private rights of action, individually or collectively via the class action mechanism.<sup>1</sup> Related statutory and judicial mechanisms reflect this dual structure. For example, the Class Action Fairness Act (“CAFA”) puts federal and state regulators on notice of proposed private class action settlements.<sup>2</sup> Reflecting established case law, a guidebook for federal judges instructs them to take account of preceding government enforcement action when approving class action settlements.<sup>3</sup>

Commenters offer different views on the relative utility of public and private actors in the enforcement of consumer laws. Some have argued that governmental action “reduces the need for class actions.”<sup>4</sup> Others suggest that class actions are needed to supplement or complement

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<sup>1</sup> For details on statutory references to class actions in the federal consumer financial laws, *see* Appendix T.

<sup>2</sup> CAFA requires notice of a potential settlement be sent to the U.S. Attorney General, relevant federal banking regulator, and/or appropriate state attorneys general. *See* 28 U.S.C § 1715(a)–(b). The district court may not approve of the proposed settlement until 90 days after such notice is given. *Id.* § 1715(d).

<sup>3</sup> *See, e.g.*, Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 15 (Federal Judicial Center 3d ed. 2010), [http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/\\$file/ClassGd3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ClassGd3.pdf/$file/ClassGd3.pdf) (last visited Mar. 6, 2015) (“**When a government regulator has sought or obtained a monetary remedy for a class, examine the description of the intended beneficiaries of the government’s action and decide whether you should define the class to be certified in the same way. Aligning the class definition with the description of the beneficiaries in the governmental action will most likely produce efficiencies in notifying the class, reviewing the settlement, distributing the proceeds, and evaluating requests for fees.**”) (emphasis added).

<sup>4</sup> Letter from American Bankers Association, Consumer Bankers Association & The Financial Services Roundtable to the Bureau Re: Comments on Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements 11 (June 22, 2012) (“**The Bureau should study the effect of actual and threatened governmental action by the Bureau, the FTC, the Department of Justice and state attorneys general and other enforcement agencies on corporate behavior and whether it reduces the alleged need for class actions to encourage compliance with the law. In addition, the Bureau should study whether the interests of consumers are better protected through actions brought by governmental agencies, as opposed to private class action lawyers, since the former act in the public interest while the latter have an economic stake in the case, and whether governmental agencies do a better job than the private bar at determining and prioritizing which actions should be pursued in order to further the ‘public interest.’**”).

governmental enforcement, particularly given limited governmental resources.<sup>5</sup> Some commenters suggest that while the relationship between public and private enforcement can be symbiotic, many private litigations “free ride” on prior government enforcement to extract easy settlements from companies already depleted by regulatory investigation.<sup>6</sup> Yet others suggest that private litigation may precede public actions and that the private suit may have given the government “the idea for a [public] suit or spur to action those who had been considering such a suit.”<sup>7</sup>

To date, there has been little empirical analysis of the relationship between private class actions and public enforcement actions in the context of consumer financial litigation. This section of the Bureau’s study analyzes data on the extent of the overlap between government enforcement and private class actions involving consumer financial issues. Within the cases that do overlap, we present data that show the frequency with which private class actions follow on from preceding public enforcement actions — at the very least, identifying cases filed after a government enforcement action was filed against the same defendant on the same issue. But the data we present also show the converse of the “follow-on” or “coattail” phenomenon posited by some commenters: Public enforcement following on from private class actions. In short, our

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<sup>5</sup> Letter from the Leadership Conference on Civil Rights *et al.*, Letter to Director Richard Cordray, at 6–7 (July 29, 2014) (on file with the Bureau); *see id.* at 7 (“**Not only do the nation’s laws assume strong private enforcement, but also resource limitations on public offices make private enforcement necessary. Government regulators lack the resources to pursue the vast majority of cases brought to them.**”). *See also* Attorney General Roy Cooper to Director Richard Cordray, Re: Study Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Section 1028(a) Regarding Pre-dispute Arbitration Agreements at 1 (Nov. 21, 2014) (“**It has been long understood that law enforcement resources are limited and need to be supplemented by a consumer’s right to pursue relief on his or her own behalf. In fact, most state consumer protection statutes . . . contain a private right of action provision . . . showing a specific legislative intent, on the state level, to provide customers with this ability.**”).

<sup>6</sup> *See, e.g.*, Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. Davis L. Rev. 1, 6 (2000) (“Coattail riding happens in various ways. At the outset, a government lawsuit or investigation may simply give lawyers or litigants the idea for the private suit, or spur to action those who had been considering such a suit, and may suggest ideas or language for the complaint. Government litigation may also generate documentary discovery or other information that private litigants use in their lawsuits. The government suit may result in a judgment with issue preclusive effect against the defendant in subsequent private litigation. Successful government litigation may facilitate private claims by altering public **attitudes about the defendants’ liability. In economic terms, the plaintiff’s attorney, who in most cases is compensated only for success, rationally seeks to minimize both failure rates and search costs by free riding on the government’s work.**”).

<sup>7</sup> *Id.*

inquiry is: To what extent do private class actions overlap with public enforcement activity? When they do overlap, which came first?

## 9.1 Summary of analysis and results

As described further below, for the records that we studied relating to consumer financial enforcement actions filed by state and federal regulators, we were unable to find an overlapping private class action complaint in 88% of the enforcement actions.

Likewise, for the private class actions for which we sought to find related public enforcement action, we were unable to do so in 68% of the cases. This was particularly the case with class action settlements of less than ten million dollars, where we were unable to identify a corresponding public enforcement action for 82% of the time.

When we did find overlapping activity by government entities and private class action lawyers, public enforcement activity was preceded by private activity 71% of the time. In contrast, private class action complaints were preceded by public enforcement activity 36% of the time.

## 9.2 Prior research

While a robust body of work exists on the interaction between government and private action, the literature does not appear to address the issue of overlap for consumer financial protection cases. The data come from other regulatory contexts and only indirectly inform the nature of the public-private relationship in the area of consumer finance.

One study of antitrust cases from 1977 to 1983 showed that about 25% of private antitrust claims were “follow-on” cases to government enforcement actions.<sup>8</sup> Another study, of securities class actions from 1990 to 2003, found that 19% of the private class action securities cases settled

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<sup>8</sup> Thomas E. Kauper & Edward A. Snyder, *Private Antitrust Cases that Follow on Government Cases*, in Private Antitrust Litigation: New Evidence, New Learning, 329, 358 (Lawrence J. White ed., 1988), *cited in* Samuel Issacharoff, *Class Actions and State Authority*, 44 Loyola Univ. Chicago L.J. 369, 380 n.44 (2012). Such studies do not make clear, however, what percentage of government actions followed private actions. *Id.*

during that period had a parallel SEC enforcement action challenging the same conduct underlying the private suit, but did not attempt to determine whether private or public proceedings tended to start first.<sup>9</sup> Other studies have attempted to quantify the incidence and dollar volume of public enforcement actions and private class actions in securities cases, without measuring overlap.<sup>10</sup>

Further, to the extent that previous studies consider whether the private class bar or government moved first, they focus on the number of instances of government-first overlaps. There does not appear to be research — even in the more analyzed areas of securities and antitrust — addressing private-first overlap.

## 9.3 Analysis scope and limitations

Focusing on consumer financial cases, we identified “overlapping” public and private actions using the methodology set forth below and in Appendix U. We deemed actions to be overlapping when they challenged the same underlying conduct by the same party. When we identified overlap, we further analyzed how often public enforcement actions preceded private class action filings. We call this “government-first overlap.” We also measured how often private class cases started before public enforcement. We call this “private-first overlap.”<sup>11</sup>

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<sup>9</sup> James D. Cox & Randall S. Thomas, *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 Notre Dame L. Rev. 893, 1 (2005), available at <http://scholarship.law.nd.edu/ndlr/vol80/iss3/3> (last visited Mar. 6, 2015) (“Our data set consists of 389 securities class action settlements that occurred between 1990 and 2003. For this data set, we obtained from the Compustat data base certain financial information, discussed below, regarding the companies that were the defendants in the settled securities class actions. We then reviewed the Enforcement Releases on the SEC’s website as well as conducting a search of the Lexis-Nexis database. From these searches, we identified seventy-three cases, or nineteen percent of our sample, that had a parallel SEC enforcement action challenging the same conduct that was the subject of the private suit.”).

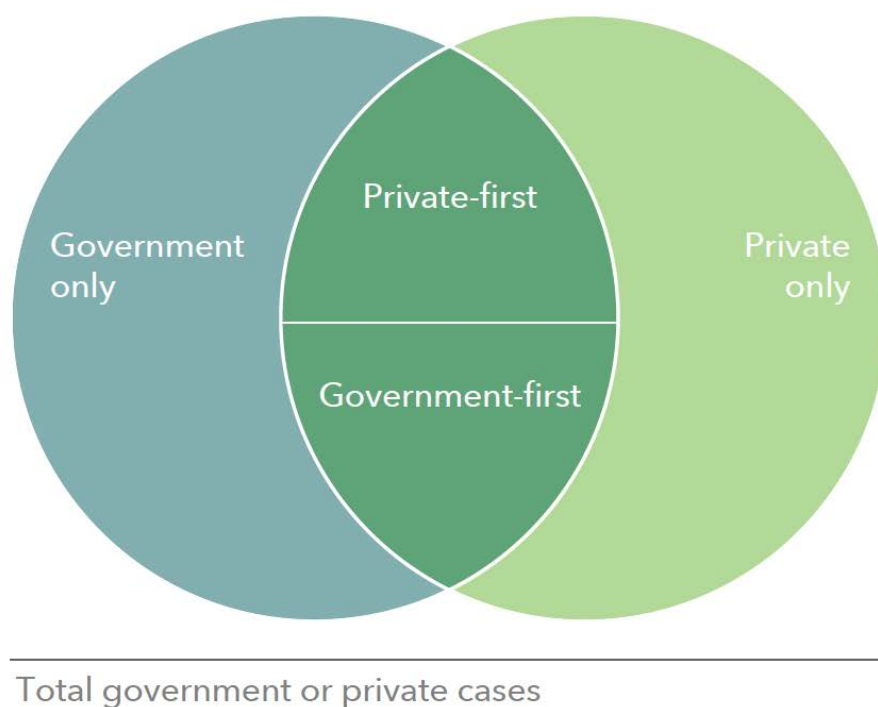
<sup>10</sup> Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 Yale J. on Reg. 253, (2007) (noting that the public sector — including the DOJ, SEC and state regulators — brought 2,227 actions, collecting about \$4.0 billion for investors, while the private bar brought 2,824 actions (including class actions and NYSE/NASD arbitrations), collecting about \$3.5 billion during the time period studied).

<sup>11</sup> In a few instances, both governmental and private actions were announced the same day.

The Venn/Euler diagram, shown below as Figure 1, shows these different categories of overlap. (We return to this diagram repeatedly in our analysis below.) The left-hand circle, in blue, represents government consumer financial enforcement actions. The right-hand circle, in light green, represents private consumer financial class actions. The blue crescent to the left shows the set of public actions brought with no overlapping private litigation. The light green crescent shows the set of private class cases brought with no corresponding government action.

The dark green area shows “overlap.” Here, both public action and private class proceedings involve the same underlying conduct or activity by the same party. The dark green area can be further divided. The top section represents “private-first overlap,” where private precedes public action. The bottom section shows “government-first overlap,” where public action started first. None of these areas are drawn to scale. They merely illustrate the range of possible temporal and subject-matter relationships between private and public proceedings.

**FIGURE 1:** SAMPLE VENN-EULER DIAGRAM OF OVERLAP ANALYSIS



We reviewed two main sources of data for this analysis.

First, we identified and collected a set of government enforcement actions pertaining to consumer financial products. We did this by reviewing websites for state and federal regulatory and enforcement agencies. We then used LexisNexis’s Courtlink tool to search for pleadings identifying overlapping private cases.<sup>12</sup>

Second, we conducted an analysis reviewing a different pool of data, collecting a sample of private actions and searching for public enforcement actions based on them. We identified and collected information about consumer financial class action lawsuits from several sources. We began with our class action settlement data discussed in Section 8, identifying every settlement offering consumers a gross relief of \$10 million or more and a random sample (about one in ten) of smaller settlements. As a robustness check, we also reviewed the websites of certain prominent plaintiffs’ class action law firms (as determined by the *National Law Journal*) and collected announced lawsuits pertaining to consumer finance. To find overlapping public cases, we used Google and key words specific to the underlying private action to find overlapping government enforcement actions.

We then analyzed all the instances of identified overlap (private class actions that overlapped with the public enforcement actions we identified from agencies’ websites; government enforcement actions that overlapped with the private class action settlements from Section 8 and the *National Law Journal* search). Specifically, we looked to see, of these overlaps, how many times government action preceded private action in time (“government-first”) and vice-versa (“private-first”).<sup>13</sup>

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<sup>12</sup> **Our collection and analysis of court documents is covered by the Bureau’s Market Analysis of Administrative Data under Research Authorities Privacy Impact Assessment, as well as the Bureau’s Market and Consumer Research Records Systems of Records Notice (CFPB.022).**

<sup>13</sup> To be clear, whether an analysis starts with government enforcement actions or private litigations as sources should not be confused with whether an overlap is government-first or private-first.



### 9.3.1 Review of government enforcement actions

Our analysis of public enforcement actions proceeded in several steps.

First, we identified potential sources of government enforcement actions and reviewed the individual actions announced on the websites of these governmental entities.<sup>14</sup> There is no centralized, comprehensive, and searchable source of state or federal enforcement actions because these do not always result in the filings of complaints that would be available on databases like Westlaw, LexisNexis, or PACER.<sup>15</sup> As a result, we canvassed the websites of public bodies responsible for enforcing consumer financial laws.

In identifying public enforcement actions:

- We reviewed the websites of state attorneys general in the ten largest and ten smallest states to identify enforcement actions. These areas cover more than half the U.S. population and include most major U.S. banking centers.<sup>16</sup>
- From all of these 20 states, we also identified the four largest metropolitan areas with active city or county attorneys that posted press releases about consumer enforcement actions. This led to the inclusion of four municipal or county **attorneys'** offices, including San Francisco, Los Angeles, San Diego, San Francisco, and Santa Clara.

We also surveyed state and federal agencies with specific enforcement authority over consumer financial protection:

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<sup>14</sup> In particular, we identified complaints in civil cases and press releases announcing enforcement actions (for which there may not be civil complaints).

<sup>15</sup> Westlaw and LexisNexis appear to have only a limited sample of civil actions filed in state courts. PACER may store consent orders but is not easily searchable. SNL Financial provides many federal enforcement actions but appears not to cover state enforcement actions.

<sup>16</sup> The states in our sample included: Alaska, California, Delaware, Florida, Georgia, Illinois, Michigan, Montana, New York, New Hampshire, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, and Vermont. We also include the District of Columbia as a state for this analysis.

- First, from the 20 states we included we reviewed the websites of state banking regulators that have enforcement authority over consumer financial issues independent of the state attorneys general.
- Second, we surveyed federal agencies with enforcement authority over consumer financial protection including:
  - The Consumer Financial Protection Bureau;
  - The Department of Justice’s Civil Division (which has a consumer protection subdivision) (“DOJ Civil Division”);
  - The Department of Justice’s Civil Rights Division (“DOJ Civil Rights”);
  - The Federal Deposit Insurance Corporation (“FDIC”);
  - The Federal Reserve Board of Governors (“Fed”);
  - The Federal Trade Commission (“FTC”);
  - The Department of Housing and Urban Development (“HUD”);
  - The National Credit Union Administration (“NCUA”);
  - The Office of Comptroller of Currency (“OCC”); and
  - The Office of Thrift Supervision (“OTS”).<sup>17</sup>

For all our sources, we did this for the period January 1, 2008, through December 31, 2012.<sup>18</sup>

Second, in our review we determined which of the enforcement actions we had identified pertained directly to consumer financial protection. Many of these cases were brought under federal consumer financial laws or otherwise involved other federal and state law claims

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<sup>17</sup> As required by the Dodd-Frank Act, the OTS’s operations were merged into the OCC, CFPB, FDIC and Federal Reserve Board of Governors on July 21, 2011, and the OTS ceased to exist as an independent agency on October 19, 2011.

<sup>18</sup> The Bureau has only been operational since July 21, 2011, so we reviewed the website for cases from that date to December 31, 2012. OTS dissolved on July 21, 2011, so we reviewed its website for enforcement actions from January 1, 2008 through that date.

pertaining to defendants selling consumer financial products or services. We did not collect cases that pertained only to safety and soundness or that contained no specific allegations that consumers were directly harmed.

Third, to identify potentially overlapping private actions, we followed a protocol in using information from those enforcement actions to create standard search terms, set out in more detail in Appendix U, which we used to conduct queries in Lexis’s Courtlink product for class actions involving the same underlying defendants. We then further scrutinized the search results and, for purposes of the overlap analysis, collected only those private class action cases that, when cross-referenced with government enforcement actions, addressed the same underlying conduct — the same transactions at issue by the same defendant(s) as to at least some subset of the same consumers. It did not matter, for our analysis, if different legal theories were employed by the private attorneys and the government.

### 9.3.2 Review of private class actions

We reviewed private class actions for overlapping public enforcement actions, following a similar protocol as our review of government actions.

First, we identified sources of private class actions, including filed cases and settlements. We analyzed three sources of data to identify private class actions:

- All 30 large dollar volume (\$10 million or greater in relief) consumer financial class action settlements, drawn from our class action settlement data set out in Section 8;
- A random sample of 39 of the remaining consumer financial class action settlements, which were under \$10 million in relief, again using our data on class settlements from Section 8; and
- To assure robustness, we also searched the websites of 19 prominent plaintiffs’ class action firms drawn from the *National Law Journal*’s “2012 Plaintiffs’ Hot List” and identified consumer financial protection cases described on the websites of any of these firms. We reviewed all of the consumer financial cases that listed complaints filed between 2008 and 2012 on their websites as of February 28, 2014, when we finished our collection of cases.

Second, to identify potential overlapping public enforcement cases we followed a simple protocol in using information from those private class actions to create standard search terms,

set out in more detail in Appendix U. We used these search terms to conduct queries in Google (as opposed to Lexis’s Courtlink database) for overlapping government enforcement actions. We did this because many enforcement actions culminate in a publicly-announced settlement and no formal complaint filed in court. A database such as Lexis or PACER, therefore, would not capture such governmental enforcement activity. If initial search results returned too many potentially relevant results (perhaps mixing relevant with irrelevant public enforcement actions, or returning private causes of actions) we added terms to the search string to narrow the results and reviewed the follow-up search results for relevant public enforcement actions addressing the same conduct.<sup>19</sup>

### 9.3.3 Limitations

By its terms, this review has certain limitations. First, while we have focused on a wide breadth of data sources, we have not identified the complete universe of either public or private actions during the observation periods. We limited our search to certain states and localities and even within those jurisdictions we may not have identified every relevant action.<sup>20</sup>

Second, for the public and private actions that we did identify and that we are classifying as non-overlapping there may, in fact, be an overlapping case that is missing from our sources.

Third, when we identify overlaps, we do not conclude that the first action helped trigger the second. That is, we can say that a case was filed first in time, but we cannot say *why* this was so. In any given case, there may or may not be a causal relationship.

Fourth, we use an objective definition of “government-first” and “private-first” that is based on case announcements. Particularly as the number of days between the earlier and later filed

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<sup>19</sup> In conducting our searches, we did not attempt to find every possible overlapping public enforcement action. Instead, our search was simply: given an identified private class action, could we find an overlapping public enforcement.

<sup>20</sup> A website may simply not list every enforcement action; political appointees or elected officials may not list the actions pursued by predecessors; and some sites may not archive or list enforcement actions from previous years comprehensively, even if they do so for more recent years. There also may be some sort of survivor bias, in that agencies may de-list enforcement filings that were unsuccessful or drew unfavorable scrutiny. Finally, it is possible that some enforcement actions may be subject to non-disclosure agreements and, as such, are not on public websites.

actions narrows, of course, that objective definition may not reflect which side first began to work on the matter in question. One side may have started to investigate conduct first, even though it was second to announce an action or settlement. To address this, we note the average and median number of days between the earlier and later action in any given overlap.

Fifth, our search was only one-way. Accordingly, the search results may not reflect the entire universe of public and private actions relating to the same subject matter. For example, if we began a search with a public enforcement action, under our methodology we would stop looking for a matching private class action when we found one that was filed before the public enforcement action. We do not look for another *public* enforcement action that may have preceded both cases.<sup>21</sup> Accordingly, our findings are limited to determining whether each enforcement action or class action we reviewed was pre-dated by a corresponding action of the opposite type. It is not a general conclusion that the first similar lawsuit against the defendant was brought by a public agency or private attorney.

Finally, our analysis is not intended to address whether later-filed cases — whether filed by the government or by the private bar — do or do not have merit. A government enforcement action that follows a private settlement may be able to achieve a wider range of remedies or impose penalties that provide additional deterrence to wrongdoing (*e.g.*, bringing public attention to an issue). Similarly, private litigations that follow government enforcement actions may also have occurred independent of the public action and have their own value, either in themselves or by allowing public actors to deploy limited resources more efficiently than would otherwise be the case.<sup>22</sup>

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<sup>21</sup> It is possible, therefore, that additional earlier public actions were not captured in our searches. Likewise, if we began with a private class action, we only looked to see if there was a corresponding public enforcement action, stopping when the search identified a public enforcement action that was filed earlier in time than the private class action settlement. We did not seek out earlier private class action filings. In some cases, then, there could have been additional earlier private actions not captured in our search results.

<sup>22</sup> For instance, the Federal Trade Commission has publicly stated that it supports so-called “follow-on” class actions because they “often can provide a beneficial complement to government enforcement actions” and can “provide a superior remedy to injured consumers than would be possible in a government action.” FTC, Opening Remarks, Workshop on Protecting Consumer Interests in Class Actions (Sep. 13, 2004); FTC & U.S. Dep’t of Justice, Br. for the United States as Amicus Curiae Supporting Respondents, *American Express Co. v. Italian Colors Restaurant*, No. 12-333, at 21 (U.S. Sup. Ct. Jan. 2013) (noting that private suits “‘provide a significant supplement to the limited resources available’ for government enforcement.”) (citations omitted). At the same time, as part of its Class Action

## 9.4 Data

Whether reviewing government or private actions as data sources, the results of our analysis were broadly consistent.

First, for more than seven out of eight public enforcement actions we were unable to find a corresponding private enforcement action. Similarly, for 68% of the private class actions we were unable to find a corresponding public enforcement action.

Second, within overlaps, private actions preceded government actions about twice as often as government preceded private actions. For about 12% of government actions we analyzed we found overlapping private actions. Within the overlaps, 71% were private-first and 29% were government-first.<sup>23</sup> For about 32% of private actions we analyzed we found overlapping government actions, of which 61% were private-first, 36% were government-first, and 3% were simultaneously-filed.<sup>24</sup> These results are in Table 1 below.

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Fairness Project, the FTC has sought to participate in the review of settlements in consumer financial cases, especially where the FTC has brought a preceding or parallel enforcement action. *See, e.g., FTC’s Br. as Amicus Curiae*, Dkt #55, *Vassale v. Midland Funding, LLC*, 3:11-cv-00096-DAK (N.D. Ohio June 21, 2011), at 1 (settlement under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 — 1696p) (opposing a proposed settlement in a **FDCPA case on the grounds that the class release clause in the agreement “may deprive over a million customers across the nation of their existing rights to challenge improper judgments entered against them”**); **FTC’s Mem. In Opp. To Class Plaintiffs’ Petition for Award of Counsel Fees and Reimbursement of Expenses, *In re: First Databank Antitrust Litig.***, 1:01CV00879 (TPJ), at 1 (D.D.C. Jan. 2, 2002) (opposing fee petition because class counsel “‘piggybacked’ on the Commission’s investigation and prosecution of defendants’ underlying law violations” but “virtually ignore[d] the substantial role played by the Commission in developing the case and, particularly, in creating the bulk of the common fund”).

<sup>23</sup> A negligible number of pairs of overlapping public and private actions were filed the same day — less than one tenth of a percent.

<sup>24</sup> While we conducted a dual review of government sources and private sources of overlap, and while both sources included both government-first and private-first overlaps, we do not have a single summary combining these sources because of the difficulty of deduplicating enforcement actions and litigations that appear in both reviews.

**TABLE 1: OVERALL SUMMARY OF DATA**

Data set	Total actions	Total overlap <sup>25</sup>	% overlap	Private first <sup>26</sup>	Gov t first <sup>27</sup>	Tie <sup>28</sup>	Ratio Of private first to government first <sup>29</sup>
Review of government enforcement actions (seeking corresponding private class actions)	1,150	133	12%	94	38	1	2.5 to 1
Review of private class actions (seeking corresponding public enforcement actions)	103	33	32%	20	12	1	1.7 to 1

### 9.4.1 Review of government enforcement actions

We identified 1,150 consumer financial enforcement actions filed between 2008 and 2012 by state, municipal and federal entities whose websites we searched. Of these, 133 (12%) had one or more matching class action litigations which we were able to identify. There were 94 private-first overlaps (71% of overlaps, 8% of enforcement actions), 38 government-first overlaps (29% of overlaps, 3% of enforcement actions), and one where both actions were simultaneously filed. Figure 2 shows these results (not drawn to scale).

<sup>25</sup> The number of instances in which government enforcement actions overlapped with private class actions.

<sup>26</sup> The number of instances of overlap in which a private class action preceded a government enforcement action.

<sup>27</sup> The number of instances in which a government enforcement action preceded a private class action.

<sup>28</sup> The number of instances in which overlapping government and private actions were announced the same day.

<sup>29</sup> Ratio of private-first overlaps to government-first overlaps.

**FIGURE 2:** SUMMARY OF GOVERNMENT ENFORCEMENT AND REGULATORY ACTIONS

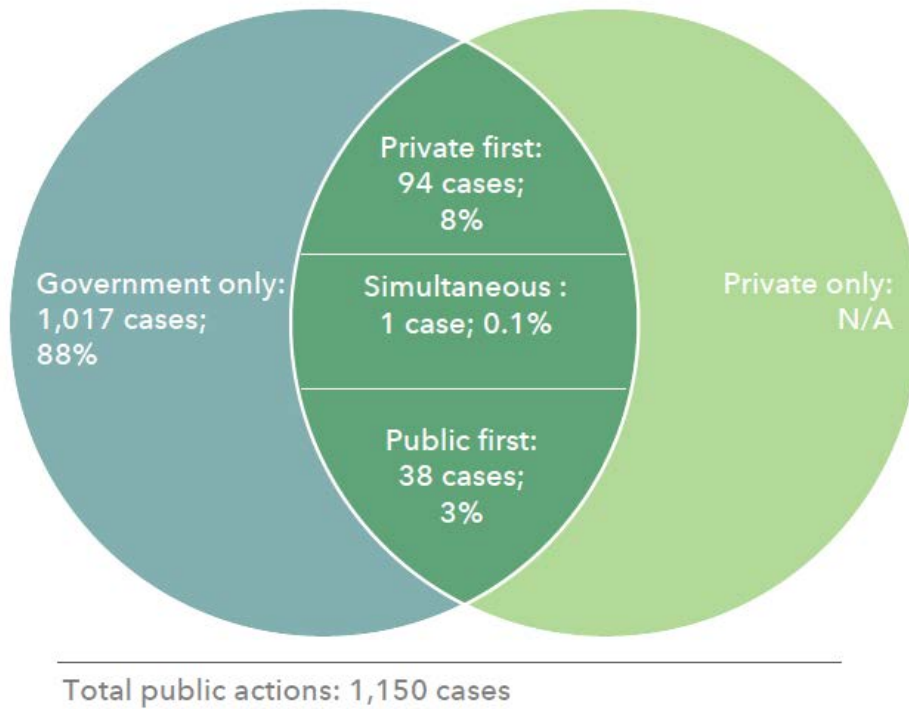


Table 2 then shows this data broken down by the different categories of government action. The relative frequency of government-first and private-first overlaps within our review of government actions held across the various public actors. As to most, private-first overlaps outnumbered government-first pairings. Indeed, there were no federal agencies for which government-first overlaps outnumbered private-first overlaps. The overall ratio in our review of government enforcement actions, of private-first to public-first overlaps, is between 2.3 to 1 and 4.5 to 1, with variations among specific federal or state regulators.



**TABLE 2: SUMMARY OF GOVERNMENT ENFORCEMENT AND REGULATORY ACTIONS**

Source	Total actions	Total overlap <sup>30</sup>	% overlap	Private first <sup>31</sup>	Avg., med. days <sup>32</sup>	Gov t first <sup>33</sup>	Avg., med. days <sup>34</sup>	Tie <sup>35</sup>	PF:GF ratio <sup>36</sup>
State AGs & city attorneys	183	23	13%	18	471, 512	4	497, 495	1	4.5:1
State banking regulators	557	33	6%	22	762, 702	11	685, 679	0	2:1
Federal regulators	410	77	20%	54	579, 569	23	310, 214	0	2.3:1
<b>Total</b>	<b>1,150</b>	<b>133</b>	<b>12%</b>	<b>94</b>	<b>591, 537</b>	<b>38</b>	<b>413, 236</b>	<b>1</b>	<b>2.5:1</b>

### 9.4.2 Review of private class actions

Our data set for our private-based analysis consisted of 103 consumer financial class action cases selected, as described above. Of these, for 33 class actions we found overlapping

<sup>30</sup> The number of instances in which government enforcement actions overlapped with private class actions.

<sup>31</sup> The number of instances of overlap in which a private class action preceded a government enforcement action.

<sup>32</sup> The average and median number of days, within the set of private-first overlaps, by which private class actions were announced before government enforcement actions.

<sup>33</sup> The number of instances in which a government enforcement action preceded a private class action.

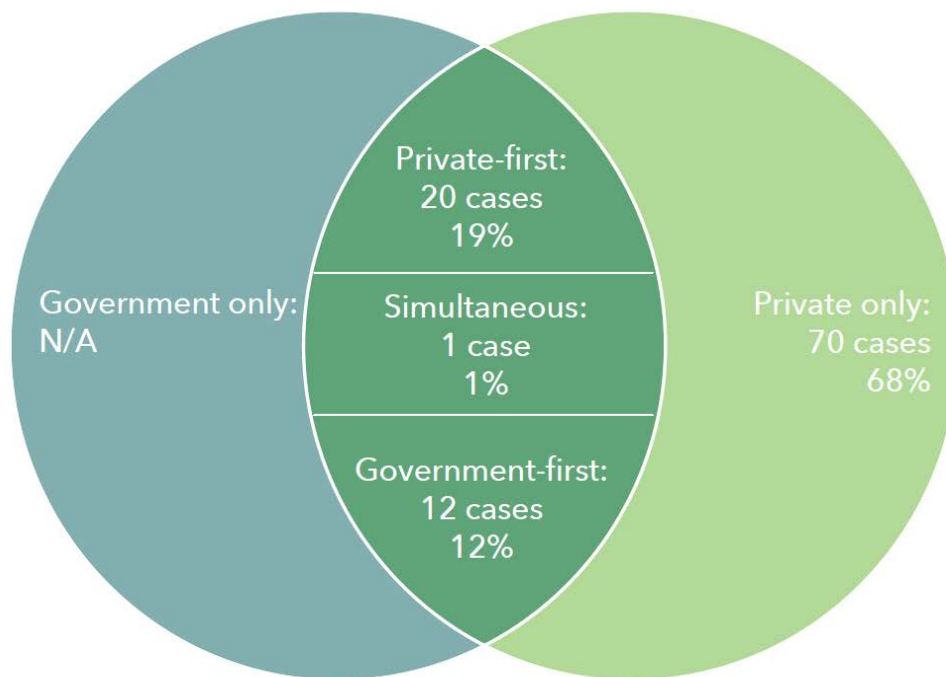
<sup>34</sup> The average and median number of days, within the set of government-first overlaps, by which government enforcement actions were announced before private class actions.

<sup>35</sup> The number of instances in which overlapping government and private actions were announced the same day.

<sup>36</sup> Ratio of private-first overlaps to government-first overlaps. Where there are no government-first overlaps, this is reported as “N/A.”

government actions, or 31% of the entire sample set. There were 20 private-first overlaps (19% of the class actions, 61% of overlaps), 12 government-first overlaps (12% of the class actions, 36% of overlaps), and one instance in which the actions were filed simultaneously (1% of class actions, 3% of overlaps). Figure 3, below, shows these results (not drawn to scale).

**FIGURE 3: SUMMARY OF PRIVATE CLASS ACTIONS**



Overall, private-first overlaps outnumbered government-first overlaps by a ratio of about 1.7-to-1. The relative frequency of government-first and private-first overlaps varied across the three data sources, although none of the sources showed government-first overlaps outnumbering private-first. In large-dollar volume or higher profile class actions, the private-first to government-first overlap ratio tended to be lower than for small-dollar volume cases. For federal class action settlements over \$10 million in gross relief (defined in Section 8.3.3 as total cash relief and in-kind relief made available to class members before deducting attorneys’ fees and expenses), the ratio was 2-to-1; for the *National Law Journal* 2012 Hotlist Firms (larger firms that tend to bring larger cases), the ratio was 1-to-1. For our sample of lower-dollar volume settlements, under \$10 million in gross relief and representing the bulk of our class settlement cases, the private-first to government-first overlap ratio was much higher at 6-to-1.

**TABLE 3: SUMMARY OF PRIVATE CLASS ACTIONS**

Source	Total actions	Total overlap <sup>37</sup>	% overlap	Private first <sup>38</sup>	Avg., med. days <sup>39</sup>	Gov't first <sup>40</sup>	Avg., med. days <sup>41</sup>	Tie <sup>42</sup>	PF:GF ratio <sup>43</sup>
Class settlements > \$10 million	30	9	30%	6	752, 826	3	1,047, 565	0	2:1
Sample of class settlements < \$10 million	39	7	18%	6	1,036, 560	1	159, 159	0	6:1
Cases filed by <i>NLJ</i> Hotlist firms	34	17	50%	8	456, 450	8	663, 550	1	1:1
<b>Total</b>	<b>103</b>	<b>33</b>	<b>32%</b>	<b>20</b>	<b>654, 578</b>	<b>12</b>	<b>457, 253</b>	<b>1</b>	<b>1.7:1</b>

Another means of analyzing the data is by the amount of monetary relief provided by overlapping and non-overlapping cases. Below we analyze the amount of net relief available in government-first overlaps, private-first overlaps, and private actions with no overlap at all, to the extent such data is available within our class settlement records. We do not have monetary data for the cases brought by *the National Law Journal Hotlist Firms*.

<sup>37</sup> The number of instances in which government enforcement actions overlapped with private class actions.

<sup>38</sup> The number of instances of overlap in which a private class action preceded a government enforcement action.

<sup>39</sup> The average and median number of days, within the set of private-first overlaps, by which private class actions were announced before government enforcement actions.

<sup>40</sup> The number of instances in which a government enforcement action preceded a private class action.

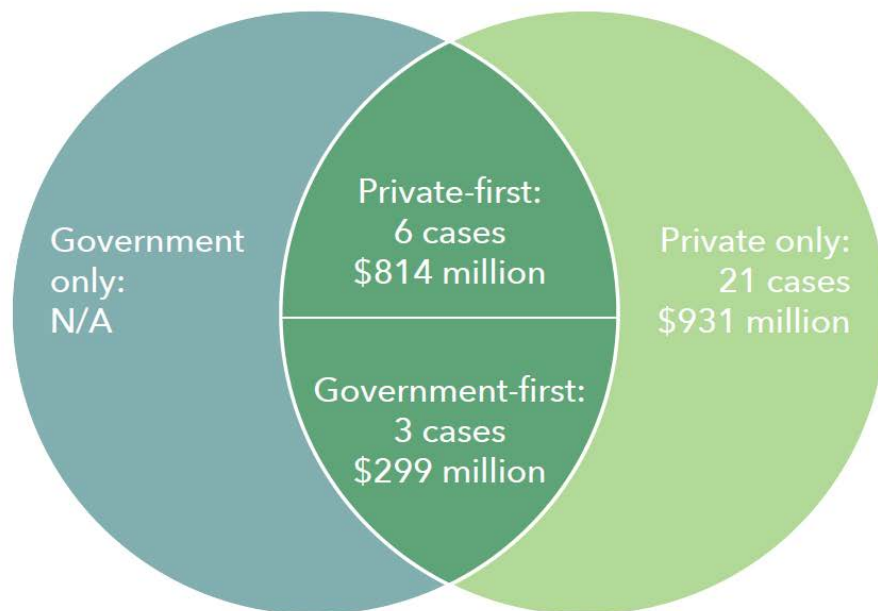
<sup>41</sup> The average and median number of days, within the set of government-first overlaps, by which government enforcement actions were announced before private class actions.

<sup>42</sup> The number of instances in which overlapping government and private actions were announced the same day.

<sup>43</sup> Ratio of private-first overlaps to government-first overlaps. Where there are no government-first overlaps, this is reported as "N/A."

As set out in Figure 4 below (not drawn to scale), out of 30 class actions settlements over \$10 million, we found nine overlapping government actions. Of the nine instances of overlap, the class settlements in the six instances of private-first overlap settlements made \$814 million in net relief (defined in Section 8.3.3 as total cash and in-kind relief less attorneys’ fees, litigation costs and settlement administrator costs) available to class members. In three instances of government-first overlap, class settlements made \$299 million in net relief available to class members net of attorneys’ fees and other costs. In the instances in which there was no overlap, 21 class settlements made \$931 million in net relief available to class members net of fees and expenses.

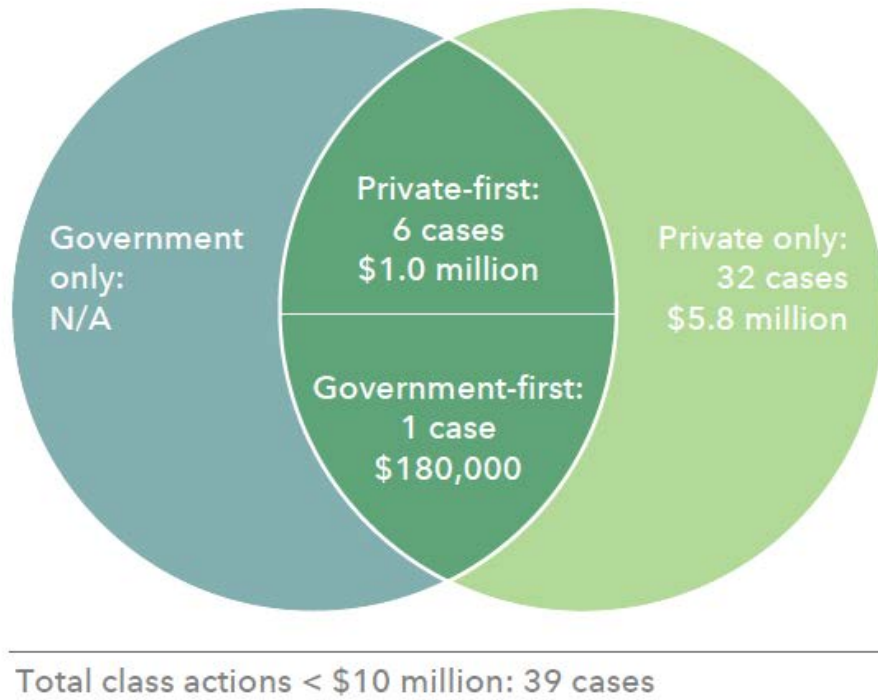
**FIGURE 4:** SUMMARY OF CLASS SETTLEMENTS OVER \$10 MILLION



Total class settlements > \$10 million: 30 cases

As set out in Figure 5 below (not drawn to scale), from the sample of 39 class settlements under \$10 million, in six instances of private-first overlap, the class settlements made \$1.0 million in relief available to consumers, net of attorneys’ fees and other costs. In the one instance of government-first overlap, the corresponding class action settlement made \$180,000 in net relief available to consumers. In the 32 instances where there was no overlap, the class settlements made \$5.8 million in net relief available to class members.

**FIGURE 5:** SUMMARY OF CLASS SETTLEMENTS UNDER \$10 MILLION





# Section 10

Do arbitration clauses lead to lower prices for consumers?



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# Introduction

Some commenters, building on existing scholarship, suggest that the Bureau explore whether pre-dispute arbitration clauses lower the price of financial services to consumers.<sup>1</sup>

For arbitration provisions to lower the prices consumers pay for financial services, they must first lower costs for the companies that use them. Second, these companies would then have to pass along at least some of the resulting cost savings to consumers.

Concerning the first component, companies that use pre-dispute arbitration provisions may benefit from a range of possible costs savings. Some of these relate to the different procedural costs associated with arbitration and litigation. Arbitration may reduce certain costs associated with judicial proceedings, such as discovery costs. It may also offer companies cost savings from procedural uniformity.<sup>2</sup> Some cost savings could arise if there were different substantive outcomes between arbitration and litigation. Arbitration clauses, as discussed in Section 2, frequently reduce the risk of classwide liability for disputes within their scope. They may also reduce the likelihood of high damage awards that may be associated with jury trials. Cost savings may also result if arbitration deters consumers from raising certain disputes, such as

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<sup>1</sup> *See, e.g.*, U.S. Chamber of Commerce RFI Comment at 19 (suggesting that the Bureau “[i]dentify any difference in cost for businesses from arbitration as compared to judicial litigation, and the extent to which that cost burden related to awards in meritorious cases on the one hand, or the increased litigation costs and settlements in questionable cases on the other; also examine the effect of any such cost differential on the cost and availability of consumer financial products and services.”); Letter to Consumer Financial Protection Bureau from U.S. Chamber of Commerce (Dec. 11, 2013) (“[C]laimants obtain the same or more in arbitration as in litigation – businesses can avoid the higher litigation costs associated with *defending* claims in court. That enables them to eliminate costs that otherwise would inflate the prices of their products or services. As scholars have noted, ‘companies . . . include arbitration clauses in their contracts to cut dispute resolution costs and produce savings that they may pass on to consumers through lower prices.’”) (internal citations omitted). *But see* Public Justice RFI Comment at 21 (“If the supporters of arbitration are correct, annual fees, interest charges, late fees, and over-limit fees should have dropped after arbitration clauses were adopted. Our guess is that the opposite occurs, and that fees and interest among the top ten credit card issuers that adopted arbitration clauses in the late 1990s and early 2000s rose substantially (and substantially faster than inflation) in the years after they adopted arbitration clauses.”)

<sup>2</sup> *See, e.g.*, Letter to Consumer Financial Protection Bureau from U.S. Chamber of Commerce (Dec. 11, 2013) (“If faced with the prospect of incurring significant incremental transaction costs in connection with setting up an effective, consumer-friendly arbitration system on one hand, and simultaneously dealing with the huge costs of litigating class actions in court, all rational companies will choose to minimize those transaction costs.”).

class disputes. In addition, arbitration may yield cost benefits to companies because of the decreased risk of adverse publicity associated with private arbitration disputes.

Some scholarship takes the view, therefore, that pre-dispute arbitration clauses accordingly reduce a company's overall dispute resolution costs.<sup>3</sup> Not all commenters agree on this point. One commenter has asserted that carrying out arbitrations involves costs that are not associated with comparable dispute resolution proceedings in federal or state court.<sup>4</sup>

Regarding the second component — the notion that companies would have to pass on cost savings to consumers — some commenters conclude that, over time, businesses necessarily pass through at least some cost savings in the form of lower prices.<sup>5</sup> This “pass-through” is said to

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<sup>3</sup> Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 90 (2001); *see, e.g.*, Amy J. Schmitz, *Building Bridges to Remedies for Consumers in International eConflicts*, 34 U. Ark. Little Rock L. Rev. 779 (2012) (“[C]ompanies often include arbitration clauses in their contracts to cut dispute resolution costs and produce savings that they may pass on to consumers through lower prices.”); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254–57 (2006), available at <http://ssrn.com/abstract=791807> (last visited Mar. 6, 2015) (“The consensus view is that businesses using adhesive arbitration agreements do so because those businesses generally find that those agreements lower their dispute-resolution costs.”); *cf.* Steven E. Abraham & Paula B. Voos, *The Ramifications of the Gilmer Decision for Firm Profitability*, 4 Emp. Rights and Emp. Pol. J. 2 (2000) (finding increase of shareholder returns of 1–4% for securities firms after the *Gilmer v. Interstate/Johnson Lane Corp.* decision, which the authors describe as an indication that such firms benefited from being able to require that employees arbitrate, rather than litigate, employment-related disputes).

<sup>4</sup> Letter from David Hirschmann and Lisa A. Rickard, U.S. Chamber of Commerce and U.S. Chamber Institute for Legal Reform to Consumer Financial Protection Bureau, Page 41 (Dec. 11, 2013), [http://www.instituteforlegalreform.com/uploads/sites/1/2013\\_12.11\\_CFPB\\_-\\_arbitration\\_cover\\_letter.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB_-_arbitration_cover_letter.pdf) (last visited Mar. 6, 2015) (“[A] company that sets up an arbitration program incurs significant administrative costs in connection with carrying out arbitrations – costs that the company does not incur in connection with judicial litigation . . . . Companies are willing to incur those costs because, on average, the aggregate costs of resolving disputes in arbitration are lower than the aggregate costs of resolving disputes in litigation in court.”). Another commenter explained that some of its member organizations find arbitration agreements to be of limited overall value. Letter from Dillon Shea, National Association of Federal Credit Unions (June 22, 2012), <http://www.nafcu.org/workarea/downloadasset.aspx?id=27506> (last visited Mar. 6, 2015).

<sup>5</sup> *See, e.g.*, Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements – with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254–57 (2006), available at <http://ssrn.com/abstract=791807> (last visited Mar. 6, 2015) (“In the case of consumer arbitration agreements, this benefit to businesses is also a benefit to consumers. That is because whatever lowers costs to businesses tends over time to lower prices to consumers.”); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91–92 (2001) (discussing the “rate-of-return

occur “regardless of whether consumers understand, or even notice, the arbitration clauses.”<sup>6</sup> Proponents of this view generally recognize that the extent to which pass-through occurs will depend on many factors. These include whether a company’s cost savings relate to fixed or variable costs; the price elasticity of demand; the market power of the company; the shapes of the cost and the demand functions; the existence, nature, and scope of comparison shopping; the competitiveness of the associated market; the costs associated with making changes to prices (“menu costs”); and external price constraints, such as regulatory restrictions.<sup>7</sup>

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equalization principle” in the context of pre-dispute arbitration provisions); *see also* Peter B. Rutledge, *Whither Arbitration*, 6. The Geo. J. of L. & Pub. Pol’y 549, 579–80 (2008), *available at* [http://digitalcommons.law.uga.edu/fac\\_artchop/420](http://digitalcommons.law.uga.edu/fac_artchop/420) (last visited Mar. 6, 2015) (“Recall that the theoretical model suggests that the savings generated from arbitration would be passed onto consumers, employees, and investors depending on the elasticity of demand for products, labor, and capital. As with the literature on cost savings, there appears to be no systematic study on the distributive effect of commercial arbitration. Nonetheless, several anecdotes do suggest both that arbitration does yield economic benefits to those constituencies and that the absence of pre-dispute arbitration would eliminate these economic gains.”); *cf.* Christopher R. Drahozal, “*Unfair*” *Arbitration Clauses*, 2001 U. Ill. L. Rev. 695 (2001) (discussing example of a finance company that varied the interest rate on its credit facility, such that a borrower who agreed to arbitration received an APR of 16.96%; a borrower that did not agree to arbitrate received an APR of 18.96%).

<sup>6</sup> Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91–92 (2001); *see Ross v. Bank of America et al.*, Expert Report of Orley C. Ashenfelter MDL No. 1409, 23, 60 (Sept. 21, 2010) (“Moreover, competition in the credit card industry ensures that some of Discover’s cost savings will be passed through to all Discover card members (both those who take advantage of arbitration and those who do not) in the form of lower prices for its services, better services, or both lower prices and better service.”).

<sup>7</sup> *See, e.g.*, Donghun Kim & Ronald W. Cotterill, *Cost Pass-Through in Differentiated Product Markets: The Case of U.S. Processed Cheese*, 56 J. Industrial Econ. 32 (2008); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements — with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. Am. Arb. 251, 254–57 (2006), *available at* <http://ssrn.com/abstract=791807> (last visited Mar. 6, 2015) (“While the entire cost-savings is passed on to consumers only under conditions of perfect competition, some of the cost-savings is passed on to consumers under non-competitive conditions, even monopoly. The extent to which cost-savings are passed on to consumers is determined by the elasticity of supply and demand in the relevant markets. Therefore, the size of the price reduction caused by enforcement of consumer arbitration agreements will vary, as will the time it takes to occur. But it is inconsistent with basic economics to question the existence of the price reduction.”); *see also* Alexei Alexandrov, *Pass-through Rates In the Real World: The Effect of Price Points and Menu Costs*, 79 Antitrust L.J., 349 (2013); David S. Evans, Howard Chang, & Steven Joyce, *The Impact of the U.S. Debit Card Interchange Fee Regulation on Consumer Welfare: An Event Study Analysis* (The University of Chicago, Institute for Law and Economics Working Paper Series, Oct. 20, 2013), <http://www.law.uchicago.edu/files/file/658-dse-hj-sj-impact-fixed.pdf> (last visited Mar. 6, 2015) (summarizing pass-through literature regarding issuers and finding that issuers around the world typically pass through nearly 100% of savings from changes in market interest rates in the form of issuer lending and deposit rates).

Other commenters reject the notion that arbitration provisions result in lower prices for consumers. Some commenters cite the lack of any empirical demonstration to this effect.<sup>8</sup> Others contend that at least in certain instances companies do not appear to have altered consumer prices in the wake of changes to their use of pre-dispute arbitration clauses.<sup>9</sup>

There is little empirical evidence to support either position. This is not surprising. The assertion that pre-dispute arbitration clauses generate cost savings, in itself, is difficult to test and has not been established or disproved. Whether such savings, to the extent they exist, are passed along to consumers is even more difficult to establish or disprove. Importantly, even a correlation between the use of pre-dispute arbitration clauses and price levels should not be construed as a causal relationship between the two, absent additional information.

With that said, a set of class action settlements in the consumer credit card market offers a relatively unique fact set with which the Bureau is able to explore whether a correlation exists between the use of pre-dispute arbitration provisions and the cost of credit to consumers. In these settlements, certain credit card issuers agreed to remove pre-dispute arbitration clauses from their consumer credit card contracts for at least three and one-half years.<sup>10</sup> Using data from before and after that event, the Bureau has looked to see whether it can find statistically significant evidence, at standard confidence level (95%), that companies that eliminated

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<sup>8</sup> See, e.g., Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium, The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 Ohio St. J. on Disp. Resol. 757, 851 (2004) (“there is nothing to suggest that vendors imposing arbitration clauses actually lower their prices in conjunction with using arbitration clauses in their contracts”); Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient, Business Practice or Unconscionable Abuse?*, 67 Contemp. Probs. 75, 98 (2004).

<sup>9</sup> See, e.g., Adam J. Levitin, *Mandatory Arbitration Offers Bargain-Basement Justice*, American Banker, May 13, 2014, <http://www.americanbanker.com/bankthink/mandatory-arbitration-offers-bargain-basement-justice-1067419-1.html> (last visited Mar. 6, 2015) (“Financial services companies do not appear to be passing the cost savings of arbitration on to consumers in general. When Bank of America, JPMorgan Chase, Capital One and HSBC dropped arbitration clauses as the result of a litigation settlement their prices did not go up. Nor did mortgage rates go up when Fannie Mae and Freddie Mac stopped buying mortgages with arbitration clauses or when Congress later banned arbitration clauses in mortgages. Binding mandatory arbitration for consumer financial contracts has no consumer welfare benefit.”)

<sup>10</sup> The Bureau is unaware of any evidence that the issuers that ultimately agreed to forgo pre-dispute arbitration clauses self-selected in a manner such that the settlers would be the only defendants for whom pre-dispute arbitration clauses did not represent a sizable cost savings, on the one hand, and where the non-settling defendants did appreciate some significant cost effect, on the other.

arbitration raised their prices (measured by total cost of credit) in a manner that was different from that of comparable companies that had not changed their policies regarding arbitration provisions.<sup>11</sup> We are unable to identify any such evidence from the data.<sup>12</sup>

We performed a similar inquiry into whether affected companies altered the amount of credit they offered consumers, all else being equal, in a manner that was statistically different from that of comparable companies. Using two measures of credit offered, we did not find any statistically significant evidence that companies that eliminated arbitration provisions reduced the credit they offered. However, as discussed in further detail below, our output inquiry is more limited than our price analysis.

## 10.1 The *Ross* settlement

Beginning in the late 1990s, a number of large credit card issuers began incorporating pre-dispute arbitration clauses in all or most of their consumer credit card contracts. Consumer plaintiffs eventually sued several of these large credit card issuers in an antitrust class action, *Ross v. Bank of America*, alleging that the credit card issuers colluded to include pre-dispute arbitration clauses and associated terms limiting the availability of class proceedings in arbitration.<sup>13</sup> At the end of 2009, four of the defendants (the “*Ross* settlers”) settled the claims against them, agreeing to stop using their arbitration clauses for at least a three and one-half year period.<sup>14</sup> The case continued against three non-settling defendants, who continued to use arbitration clauses in their consumer credit card contracts.

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<sup>11</sup> No commenter supporting the claimed price and/or output benefits of arbitration has contended to the Bureau that these benefits would not apply in the credit card market even as they apply elsewhere.

<sup>12</sup> Like all real world “experiments,” this result has limitations, which we discuss below.

<sup>13</sup> We describe the *Ross* litigation, No. 05-Civ. 7116 (S.D.N.Y.) in Section 2 and 3 of the 2013 Preliminary Results.

<sup>14</sup> The effective dates of removal of the arbitration clause differed for each settling defendant and ranged from January 1, 2010, to May 1, 2010. *See* Stipulation and Agreement of Settlement with Bank of America, N.A. (USA) (N/K/A/ FIA Card Services, N.A.) and Bank of America, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), *available at* <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-bank-of-america.pdf> (last visited Mar. 6, 2015) (“Bank of America will not restore or

Our analysis, described below, explored whether, when compared to other issuers (including the **Ross** defendants that did not settle), we could identify any statistically significant evidence that the price of consumer credit card services increased after the **Ross** settlers eliminated pre-dispute arbitration clauses from their credit card agreements.<sup>15</sup> We do not find any such statistically significant evidence of increases in prices to consumers that we can associate with eliminating pre-dispute arbitration clauses. It is possible that there was no increase in business costs; that there was an increase in business costs that was not passed along to consumers; or that there were such pass-along effects but we were unable to measure them.

## 10.2 Data and methodology

### 10.2.1 The Credit Card Database

For this analysis, the Bureau uses a representative random sample of the Bureau’s Credit Card Database (the “CCDB”). The CCDB provides loan-level information, stripped of direct personal

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otherwise insert into its United States Cardholder Agreements either an Arbitration Clause or a Class Action Waiver within three and one-half (3.5) years following May 1, 2010; provided, however, that if Bank of America fails to substantially complete the required Mailings within 60 days of May 1, 2010, the Settlement Agreement will remain effective, but the commencement of the Forbearance Period shall be extended by the same amount of time by which Bank of American is late in substantially completing the mailings.”); Stipulation and Settlement Agreement with Capital One Bank (USA), N.A. and Capital One, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), *available at* <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-capital-one.pdf> (last visited Mar. 6, 2015) (January 15, 2010, trigger date, 60-day substantial compliance period); Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and Chase Bank USA, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), *available at* <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-chase.pdf> (last visited Mar. 6, 2015) (January 1, 2010, trigger date, 60-day substantial compliance period); Stipulation and Agreement of Settlement with HSBC Finance Corp. and HSBC Bank Nevada, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 24, 2010), *available at* <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-24-stip-and-agreement-with-hsbc.pdf> (last visited Mar. 6, 2015) (March 31, 2010, trigger date, 60-day compliance period).

<sup>15</sup> Our model would have also identified a relative pricing “increase” where the treatment group’s prices decreased but by less than the price decreases of the control group.

identifiers, regarding consumer and small business credit card portfolios for a sample of large issuers, representing 85–90% of credit card industry balances.<sup>16</sup>

To detect price impacts associated with changes relating to pre-dispute arbitration clauses, we begin with data for our “treatment” group, which is composed of all the **Ross** settlers (issuers that ceased using arbitration provisions during our study period) whose data are in the CCDB. We then compare the treatment group with a “control group,” meaning issuers that did **not** alter their use of arbitration provisions during the study period. The issuers in our control group could have been **Ross** defendants that continued in the litigation or they could have been issuers that were not involved in the litigation at all.<sup>17</sup> The issuers in the control group may or may not have used pre-dispute arbitration provisions — what is important is that they did not **change** their usage of arbitration agreements during the analysis period.<sup>18</sup> Both our treatment group and our control group contain a large sample of accounts from which to draw observations.

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<sup>16</sup> Information in the database cannot be tied to any particular individual nor can multiple accounts in the database that may belong to a single individual be linked in any way. The Bureau has no direct personal identifiers for loans in the CCDB. For a more detailed description of the CCDB *see* the Bureau’s October 2013 CARD Act Report, [http://files.consumerfinance.gov/f/201309\\_cfpb\\_card-act-report.pdf](http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf) (last visited Mar. 6, 2015).

<sup>17</sup> The data upon which we rely were obtained through the Bureau’s supervisory authority. The Bureau considers all supervisory information to be confidential. Consistent with the Bureau’s confidentiality rules, findings presented in this paper do not directly or indirectly identify the institutions involved or the exact number of issuers in either group. *See* 12 C.F.R. § 1070.41(c).

<sup>18</sup> Our analysis focuses on whether companies changed prices due to a **change** in their use of pre-dispute arbitration clauses. Accordingly, if a company in the control group uses pre-dispute arbitration clauses throughout our study period, any changes in its total cost of credit (“TCC”) cannot result from a change in their use of the pre-dispute arbitration clauses. Likewise, if a company in the control does **not** use arbitration clauses through the period, any changes in its TCC cannot result from a change in their use of pre-dispute arbitration clauses. In any event, an issuer’s use of arbitration provisions was one of our control variables in our regression analysis. (If we identified a non-**Ross** settler that changed its use of pre-dispute arbitration provisions, we used a control variable to prevent it from clouding our analysis.)

For maximum protection of supervisory data, we do not state specifically whether any such issuer is included in the control group. We cannot clarify whether or not we specifically used the aforementioned non-**Ross** control variable, as that could identify specific issuers in our sample.

To measure changes in companies' prices to consumers, the Bureau uses the "total cost of credit" ("TCC") measure used in our CARD Act Report.<sup>19</sup> In that regard, to measure consumers' all-in costs, we calculate, on an annualized basis, a figure that includes everything that consumers pay to keep and use their credit cards — all fees and interest charges — as a percentage of the average cycle-ending balance for those accounts. Thus, the calculation we use excludes revenue generated through separate agreements between the credit card issuer and other businesses, such as those offering add-on products to an issuer's customer base.

To compare our treatment group against our control group, the Bureau utilized a type of regression analysis known as a difference-in-differences analysis.<sup>20</sup> A difference-in-differences analysis allows us to parse out how much of any price change over time was *specific* to the treatment group because we can contrast how much the treatment group changed its pricing over time relative to how much the control group changed its pricing over the same time period. Any difference in these price changes — in other words, any "difference in differences" — can be correlated to characteristics that exist in one group and not the other, such as the treatment group's ceasing to use pre-dispute arbitration clauses. In other words, the difference-in-

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<sup>19</sup> In so doing, the Bureau uses a methodology based on a cost metric developed by Argus Information & Advisory Services in a presentation it made in collaboration with nine large card issuers at a conference sponsored by the Bureau in 2011. Argus calculated what it called "gross effective asset yield," which was computed as the sum of interest charges, fees, and gross interchange fees as a percentage of average daily balance. Note, however, that the Bureau's calculation, in both the CARD Act Report and this analysis, differs from Argus's methodology by excluding interchange revenue. CFPB CARD Act Report (Oct. 1, 2013), *available at* [http://files.consumerfinance.gov/f/201309\\_cfpb\\_card-act-report.pdf](http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf) (last visited Mar. 6, 2015). We exclude interchange revenue because it is a cost that is not paid directly by the consumer to the card issuer. Also, where Argus utilized average daily balance, our data used account balances at the end of monthly cycles.

As described in the CARD Act Report (p. 19):

*Although changes in component costs and the composition of pricing are therefore important to consider, the ultimate question posed to the Bureau concerns the "cost of credit." To measure all-in costs, we calculate, on a monthly basis, a metric that includes everything that consumers pay to possess and use their credit cards and state that total as a percentage of the average cycle ending balance on an annualized basis for those accounts. This "Total Cost of Credit" ("TCC") metric incorporates all fees and interest charges the consumer pays to the issuer. It excludes revenue generated through separate agreements between other businesses and the issuer, such as interchange fees paid by merchants and marketing fees or commissions paid by companies offering add-on products to an issuer's customer base. This TCC metric thus captures all of the component costs that consumers pay.*

<sup>20</sup> See, e.g., Marianne Bertrand, Esther Duflo & Sendhil Mullainathan, *How Much Should We Trust Differences-In-Differences Estimates?*, 119 Quarterly J. of Econ. 249 (2004).



differences analysis allows us to “difference out” confounding factors that would affect both our treatment and control group and thereby to isolate changes that correlate to our “treatment” effect.<sup>21</sup>

A difference-in-differences analysis requires a comparison between two time periods: the period before an event and the period after an event. In our regressions, the event separating the before and after periods was the date of the **Ross** settlements.<sup>22</sup> Settlements in **Ross** were formalized in November and December 2009. Accordingly, our “before” period is the period from November 2008 through October 2009. Our “after” period is the period from January 2010 through November 2011.<sup>23</sup> These long time periods allow us to control for seasonality. (Both the “before” and “after” periods each feature one holiday season.<sup>24</sup>) We intentionally did not analyze accounts originated in the two month period of November and December 2009 in order to obtain two study periods that would clearly reflect pricing changes “before” and “after” the settlements. These two months were “during” the period in which the **Ross** settlers ceased enforcing pre-existing pre-dispute arbitration clauses and could therefore reflect pricing structures in flux, rather than structures associated with pre- or post-change periods.<sup>25</sup> As described further below, we also conducted difference-in-differences analyses using different

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<sup>21</sup> Guido Imbens and Jeffrey Wooldridge, *Difference-in-Differences Estimation*, NBER Summer 2007 “What’s New in Econometrics” Lectures, *available at* [http://www.nber.org/WNE/lect\\_10\\_diffindiffs.pdf](http://www.nber.org/WNE/lect_10_diffindiffs.pdf) (last visited Mar. 6, 2015).

<sup>22</sup> The accounts in our control group were created before the **Ross** settlements, where the accounts in our treatment group were created afterwards. The accounts in our control group may have continued to be active, however, into and through our separating event.

<sup>23</sup> So, focusing on accounts that were created in our “before” period, we determined the “difference” of the TCC for accounts in our control group and our treatment group. We then compared that difference against the difference of the TCC for accounts in our control group and our treatment group for accounts created in our “after” period.

<sup>24</sup> Recall that the TCC measure we use is essentially consumers’ all-in costs for using their credit cards, divided by the amount of credit they carry on their credit card. So if we used a short period of study (for example from November 2009 to June 2010) our analysis might be confused by a dip in the TCC that was simply attributable to increased credit card debt (the denominator in our formula) reflected in cycle-ending balances around the month of December.

<sup>25</sup> In each of the four **Ross** settlements, the settling party agreed to stop *seeking* to enforce arbitration clauses or class action waiver clauses against settlement class members, with limited exceptions, before the settlements were submitted for preliminary approval to the court.

“before” and “after” windows. There similarly was no evidence of a statistically significant change in pricing for any of those other windows.

We limit our analysis to *new* accounts.<sup>26</sup> With older accounts, price and credit availability could be clouded by a credit card company’s past experience with a consumer. Further, companies may have been constrained in their ability to reprice older accounts. Consequently, we identify accounts originated by the treatment group and by the control group during the “before” period and accounts originated during the “after” period and follow those accounts from their point of origination forward to calculate the TCC. Our methodology included multiple regressions studying the impact on two different TCC measures: (1) average monthly TCC over the first 12 months of an account and (2) average monthly TCC over the first 24 months of an account. We selected these different time periods in case there was a particular price sensitivity in the first few months of an account’s creation.<sup>27</sup>

## 10.2.2 Regression (difference-in-differences)

As noted, to compare our treatment group against our control group, the Bureau utilized a difference-in-differences analysis to measure how much, if at all, the treatment group (*i.e.* issuers that stopped using pre-dispute arbitration provisions) changed their pricing of new accounts over time relative to how much the control group changed their pricing of new accounts over the same time period. Any difference in the price “differences” can be correlated

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<sup>26</sup> More precisely, for each month, starting from November 2008 and ending with November 2011 (excluding the November and December of 2009 window), we take the accounts that were originated that month. Then we track these accounts forward for a given period of time (*e.g.*, 24 months) to compute the realized pricing (*e.g.*, TCC). The independent observations for that month are then the account characteristics and the dependent variable is the computed realized pricing for a given period of time (*e.g.*, 24 months).

<sup>27</sup> “Teaser rates” may be unevenly used across our sample, which could cause variations in interest rates that would change when the teaser rates expired after an initial period.

In addition to studying TCC for the 12 and 24 month periods, we also studied TCC over the lifetime of the accounts. This analysis was limited by the fact that pre-*Ross* new accounts have longer lifetimes than post-*Ross* new accounts, simply because they were originated earlier in time. Accordingly, while our results for this sample set were consistent with the result of our analyses for the 12 and 24 month periods, we did not include the lifetime analysis in this discussion because longer-lived accounts may enjoy some type of pricing benefit or cost unaccounted for by the other controls.

to characteristics that exist in one group and not the other, such as the treatment group's ceasing to use pre-dispute arbitration clauses.

We also controlled for effects that could have impacted pricing because credit card companies may change their prices for any number of external factors. Credit card issuers may alter their pricing because the economy got better or worse; because the CARD Act created new pricing requirements or incentives to change prices; or for any number of other reasons.

Accordingly, when comparing our treatment group against the control group, we controlled for a number of variables, including:

- Month of origination;
- Year of origination;
- How the credit card account was originated (*e.g.*, pre-approved solicitation; non-pre-approved solicitation; take-ones; portfolio acquisition; and other);
- The extent of the borrower's other banking relationships with the issuer;
- Whether the borrower had other credit cards with the issuer;<sup>28</sup>
- Whether the company started the time period using a pre-dispute arbitration clause or not;
- Borrower's credit score at origination;
- Borrower's refreshed credit score (for example, if the dependent variable is TCC 24 months after origination, then we use the most recent credit score of that consumer 24 months after they originated their account); and
- Borrower's stated income at time of origination.<sup>29</sup>

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<sup>28</sup> Our data did not allow us to control for the number of cards a given consumer may have across more than one issuer.

<sup>29</sup> It is important to note that our study period, the three years between November 2008 and 2011, overlapped with a period of historic economic turbulence. The difference-in-differences analysis, as well as our numerous control

We used the same controls in our output-related inquiries, discussed in Section 10.4. In the case of credit score and borrower's income, we used linear and non-linear variants to control for linear and non-linear relationships with our dependent variables.<sup>30</sup>

Using these controls allowed us to account for a number of different variables that could otherwise have affected our comparison of changes in the TCC of our treatment group, on the one hand, with changes in the TCC of our control group, on the other hand. For example, the results were controlled to account for the possibility that an issuer in one of the sets had more subprime consumers than other issuers.<sup>31</sup> The results are similarly controlled to account for the possibility that one issuer originated more accounts before or after the financial crisis; originated more accounts during the holiday shopping season than other months; or originated more consumers via one channel rather than another.

We also conducted additional regression analyses limited to consumers with credit scores under 660. This is a commonly used boundary for defining consumers with a subprime credit score. (The Bureau used this boundary in its October 2013 CARD Act Report.) Although our other analyses included linear and non-linear controls for credit scores, these additional regression specifications help us evaluate the possibility that credit card issuers treat the category of consumers with credit scores under 660 differently from those with scores of 660 or higher in a

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variables, is designed to mitigate the analytical “noise” attributable to background economic events affecting both the treatment and control groups. While it is theoretically possible that the recession impacted some members of either our treatment or control groups in a way that could have affected our analysis, any impact would have to have arisen separate and apart from the control variables used in our analysis. Please *see* Appendix U for a more comprehensive list of controls used in this analysis.

<sup>30</sup> It is possible that, due to issuer-driven front-end pricing or consumer-driven back-end costs, TCC may not vary on a linear basis with credit score band (or borrowers' income) (*e.g.*, increasing total cost of \$1,000 of credit by  $\$2[X]$ , on the one hand, for each credit score point decrease of  $[X]$ , on the other hand). Instead, the relationship may be better described by a higher-order polynomial model (*e.g.*, increasing total cost of \$1,000 of credit by  $\$[X]^2$ , on the one hand, for each credit score point decrease of  $[X]$ , on the other hand). So we also included non-linear controls for credit score band and borrower income (*e.g.*, value-squared and logarithmic).

<sup>31</sup> While we controlled for credit score at the individual account level, if the treatment group was so uniquely concentrated in sub-prime accounts that the concentration changed *other* aspects of the treatment issuers' business models, our analysis would not have controlled for such an effect. For such a concentration to affect our results, however, the concentration would have to relate to a systemic difference in the affected issuers' pricing and cost structure such that, all of our other controls being equal, sub-prime accounts were somehow *uniquely* profitable or costly for the treatment group. In other words, the treatment group would somehow have to price subprime accounts differently than the control group, assuming all of our other controls were held equally.

way that would not be accounted for by continuous controls. For example, a consumer with a credit score of 659 could be classified as subprime and receive a much higher interest rate offer than a consumer with a credit score of 661 classified as prime.<sup>32</sup>

As previously noted, our “before” period for identifying new accounts for the control group is the period from November 2008 through October 2009. Our “after” period for identifying new accounts for the treatment group is the period from January 2010 through November 2011. (Accordingly our “excluded period” is November and December of 2009.) However, because it may have taken issuers more or less time to internalize any price changes relating to the settlements, to maximize robustness, the Bureau ran additional regressions using several other different time windows:

- Nov. 2008 to Oct. 2009 (before) paired with May 2010 to Nov. 2011 (after) (thereby excluding the effective date of each **Ross** settlers’ removal of its pre-dispute arbitration clause);<sup>33</sup>
- Nov. 2008 to Oct. 2009 (before) paired with Nov. 2010 to Nov. 2011 (after) (pushing the excluded period six months later, in the event that any price adjustments by the **Ross** settlers took place over a longer period of time); and
- Nov. 2008 to April 2009 (before) paired with May 2010 to Nov. 2011 (after) (pushing up the excluded period by several months, in the event that the **Ross** settlers anticipated the potential removal of their pre-dispute arbitration clauses and made any price adjustments *before* settling with the **Ross** plaintiffs).

As discussed below, all of our windows of analysis produced similar results.

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<sup>32</sup> Some commenters have asserted that a 660 credit score “is the threshold to be approved for a mortgage, auto loan and unsecured credit card.” Justine Rivero, *The New Credit Score Rules*, Forbes.com (Aug. 19, 2011), <http://www.forbes.com/sites/moneywisewomen/2011/08/19/the-new-credit-score-rules/> (last visited Mar. 6, 2015).

<sup>33</sup> The effective dates of removal fell between January and May 2010.

## 10.3 Results

After performing the regression analyses described above, the *p*-values relating to the respective TCC inquiry for each regression ranged between 0.16 and 0.64. The only exception was one regression, where the relevant TCC inquiry resulted in a negative coefficient with a 0.09 *p*-value, indicating that prices potentially *decreased* after the treatment issuers ceased using pre-dispute arbitration provisions. Overall, we did not find a statistically significant difference between our treatment group and our control group with respect to the change in TCC before and after the *Ross* settlement.<sup>34</sup> After multiple attempts, therefore, we did not find statistically significant empirical support for the theory that companies pass savings from their use of arbitration clauses onto consumers.<sup>35</sup>

It is important to note certain limitations of our model. First, our model assumes that our control variables encompassed any differences between the issuers in our treatment group, on the one hand, and the issuers in our control group, on the other hand. It is theoretically possible, however, that *Ross* settlers in our treatment group somehow self-selected, so that they had

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<sup>34</sup> In some of the regressions for different time windows and other specifications that the Bureau analyzed, however, there were statistically significant increases in some *components* of the TCC over some periods, such as APR or annual fees. Considering TCC overall, however, there are no such results. Statistically significant positive results for price sub-components are as follows. APR 24 months after account opening increase of 1.87 (*p*-value = 0.043) for consumers with credit scores <660. Average net annual fee 24 months after account opening increase of 6.38 (*p*-value = 0.017) for all consumers. Average net annual fee 24 months after account opening increase of 4.31 (*p*-value = 0.031) for consumers with credit scores ≥660. These results are not surprising and in no sense contradict the lack of a discernible overall price effect. The Bureau ran dozens of regressions on various dependent variables, for different market segments, and different time windows. Given the number of regressions run, it was likely that at least one of the trials would produce statistically significant coefficients simply by chance.

<sup>35</sup> Of the individual controls that were utilized, almost none of the coefficients in isolation were statistically significant in the regression using the primary window of analysis with TCC as the dependent variable. The two exceptions were the control variables for the months of May and August, meaning that TCC, for some reason, differed in a statistically significant way for accounts opened in those two months, as opposed to accounts opened in the other ten months of the year.

We utilized numerous simultaneous controls for credit scores and borrower income (for example, the credit score, credit score squared, log of credit score, the refreshed credit score, the refreshed credit score squared, and the log of the refreshed credit score). Thus, the lack of statistical significance of any one of these individual coefficients within one of the groups of highly-correlated controls should not be interpreted as indicating a lack of statistical significance of the value represented by the group as a whole — credit scores, generally, or borrower income, generally.

characteristics that would make their pricing different after clause removal, as compared to non-settlers. We have controlled for many possible confounding factors, both through the use of difference-in-differences analysis and numerous independent variables. While we cannot definitively exclude the possibility that selection bias affects the findings here, we have identified no reason to believe that to be the case.

Second, while we have no reason to believe that small issuers would be more likely to see cost savings from the use of arbitration clauses (or to then pass any such cost savings along to consumers), we have not specifically isolated and studied the effect of removing arbitration clauses on the pricing of smaller issuers.

Third, as described earlier, our analysis cannot be interpreted as establishing that companies did not save money from their use of pre-dispute arbitration clauses. It is possible that is the case. It is also possible that companies that stopped using arbitration provisions did, in fact, incur higher costs, but opted against passing those costs to consumers in the form of higher prices. Any such failure to pass costs along could be attributable to different shapes of individual creditors' demand curves or the specifics of the competitive structure of the credit card market.<sup>36</sup>

It is also possible that any cost increase from the removal of pre-dispute arbitration clauses could be an increase in fixed costs, as opposed to an increase in marginal costs. In that case, economic theory suggests that consumers should not see any effects, with the issuers absorbing all of the cost increase. This could be the case if, for example, each issuer within the treatment group implemented a major one-time compliance, customer service, or legal policy restructuring after the settlement, while not changing the amount of resources spent on the marginal consumer.

The lack of a statistically significant effect does not mean there was no effect. It simply means that none of our regressions identified a statistically significant correlation between output and changes to dispute resolution terms. Ultimately, however, we did not find statistically significant

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<sup>36</sup> See Lawrence Ausubel, *The Failure of Competition in the Credit Card Market*, 81 Am. Econ. Rev. 50 (1991); see also Sumit Agarwal, Souphala Chomsisengphet, Neale Mahoney, & Johannes Stroebel, *Regulating Consumer Financial Products: Evidence from Credit Cards*, SSRN Working Paper 2330942 (2014); Glen Weyl & Michal Fabinger, *Pass-Through as an Economic Tool: Principles of Incidence under Imperfect Competition*, 121 J. Pol. Econ. 528 (2013).

evidence to support the hypothesis that companies realize and pass cost savings relating to their use of pre-dispute arbitration clauses to consumers in the form of lower prices.

## 10.4 Output inquiry

We used the same difference-in-differences analysis to investigate whether cost savings were instead passed along by the treatment group through increased “quantity” (*i.e.*, increased availability of credit to consumers). Our analysis of quantity effects, however, is necessarily more limited than our analysis of price effects. Although price has many different components for a product like a credit card, it is possible to devise a single price metric to capture all those components. That is what TCC represents. There is no apparent equivalent for “output” measures. It is possible to identify a relatively large number of metrics for the amount of credit made available by credit card issuers, such as credit line (also known as “credit limit”), purchase volume, credit card loans outstanding (also known as “outstandings”), number of accounts, approval rates, and so on. A related issue with output metrics is that “[d]ifferentiating between the willingness of creditors to extend credit and the desire of consumers to avail themselves of credit is challenging.”<sup>37</sup> As noted in the CARD Act report:

*Assessing credit availability is a challenging task. The most readily available measures – such as the total amount of credit line on credit card accounts, the total number of accounts, or the total of new accounts originated – conflate the willingness of issuers to make credit available to consumers (supply) and the willingness of consumers to avail themselves of the credit that issuers are willing to extend (demand). Even measures of marketing activity, such as mail solicitations volume, are impacted by demand as well as supply since marketing is likely to fall when there is weak demand.*<sup>38</sup>

For our output analysis in this report, we focused on two metrics. The first was initial credit line, which is the “credit limit” that the issuer sets on new accounts.

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<sup>37</sup> Card Act Report at 6, [http://files.consumerfinance.gov/f/201309\\_cfpb\\_card-act-report.pdf](http://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf) (last visited Mar. 6, 2015).

<sup>38</sup> Card Act Report at 38.



We used initial credit line because issuers have more direct control over credit limits than they do over some other measures of output. Although consumer behavior may influence how much credit an issuer makes available, the resulting credit limit is still directly set by the issuer. It therefore reflects a direct company decision on credit availability.<sup>39</sup> This is in contrast to the amount of the available credit line that consumers choose to use (purchase volume) or the amount of the account balance that consumers carry over from one month to another (outstandings). These other output measures are in some significant part the result of consumer decisions.<sup>40</sup>

Using initial credit line, we did not find a statistically significant change in credit limit size: The *p*-value relating to the credit line inquiry was 0.68.<sup>41</sup> This analysis used the same control variables as we used for the price analysis. It is also subject to the same limitations. As with our findings regarding price, the lack of a statistically significant effect does not mean there was no effect. It simply means that none of our regressions identified a statistically significant correlation between output and changes to dispute resolution terms.

The output analysis is subject to an additional limitation. If issuers maintained the same amount of credit line to new accounts, and instead cut back on new accounts issued, output would be

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<sup>39</sup> Mail solicitation volume is another metric used to proxy output that is also within the direct control of issuers. We did not use it in this analysis, however, because it is a relatively crude measure. As the CARD Act Report explained: “It is not the case that issuers regularly mail all of the prospects that would be eligible for credit if they were to apply. Thus, mail volume is not necessarily a good indicator of the number of consumers to whom an issuer is willing to extend credit, and changes in mail volume may be attributable to factors wholly unrelated to changes in credit availability such, as for example, increases in postage cost or the development of new marketing channels such as social media.” CARD Act Report, at 39.

<sup>40</sup> To be sure, available credit balance and outstandings are also heavily impacted by issuer decision-making. Issuers set line, interest rates and rewards, all of which will impact the use of these accounts, for revolving loans or otherwise.

<sup>41</sup> Given the similarity of the results for different time windows for the TCC regressions, we used only the initial time window when studying credit line and new subprime account origination, which excluded the months of November and December 2009. Moreover, while TCC can be calculated over any time period (such as 24 and 12 months that we have used), there is just one credit limit when the account opens. Thus, where the TCC inquiry involved numerous regressions, there was just one regression with credit line as the dependent variable. The same is true for the analysis of the number of the new subprime accounts opened.

impacted in a manner that our analysis would not detect.<sup>42</sup> To address this possibility, we used a second variable: new subprime account issuance.<sup>43</sup> The recession hit subprime issuance particularly hard, and we wanted to see if we could identify any differential effect on that population.<sup>44</sup> Accordingly, we conducted a difference-in-differences analysis looking for relative changes in the difference of new subprime accounts opened per issuer per month by our treatment and control groups. We used the same controls as for our prior analyses. We found a statistically significant increase in volume for the treatment group (with a *p*-value of less than 0.01), indicating that once issuers ceased using arbitration provisions they originated *more* subprime accounts. The relatively low number of subprime issuers in our sample, however, made it unlikely that any effect on new subprime account issuance would be probative. In that regard, our inquiry into new subprime account issuance focused on issuer-level data, as opposed to the TCC or credit line inquiries, which focused on account-level data. As a result, although we did not identify statistically significant empirical support for the claim that companies pass cost savings relating to their use of pre-dispute arbitration clauses to consumers in the form of changes to credit availability, our output inquiry is much less conclusive — even within this particular set of facts — than our price analysis.

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<sup>42</sup> Theoretically, the same limitation would apply to our price analysis. The analogy in that case would be that issuers hypothetically *would* have raised prices on a set of accounts, but those accounts were never opened.

For this scenario to have occurred, however, the price increase would have to have affected only a *whole* group of “accounts” that were in fact never opened. Otherwise our model would have identified the price increase in any surviving accounts. Our model did not identify any missing sets of accounts in the “after” period. Accordingly, any such set would have to have been defined by characteristics independent of our control variables.

<sup>43</sup> We maintained our focus on new accounts, rather than existing accounts, for the reasons stated in Section 10.2.1 above. Output impacts on existing accounts, therefore, would not be captured by our analysis. Furthermore, new account issuance, of course, is an “imperfect measure” of company behavior because issuers can only issue to consumers who apply. *See* CARD Act Report at 41.

<sup>44</sup> *See also* Christopher R. Drahozal and Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. Empirical Leg. Stud. 3, 536–66 (2012) (suggesting that “high-risk” consumers are particularly likely to be adversely affected if issuers reduce the supply of credit due to arbitration becoming unavailable).

# Appendix A

2013 Preliminary Results



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# 1. Introduction

In section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress instructs the Consumer Financial Protection Bureau (the “Bureau”) to study the use of pre-dispute arbitration contract provisions in connection with the offering or providing of consumer financial products or services, and to provide a report to Congress on the same topic. The Bureau is in the process of conducting that study. This document presents preliminary results reached in the Bureau’s study to date. These results are subject to revision when the Bureau submits its statutorily-mandated report to Congress if further analysis so warrants. Furthermore, the Bureau’s report to Congress will contain additional analyses that the Bureau is planning to conduct but for which the Bureau does not yet have even preliminary results. A concluding section identifies work that the Bureau may or expects to cover in later stages of its study that will also inform its report to Congress.

## 1.1 What is a pre-dispute arbitration clause?

Companies provide almost all consumer financial products and services subject to the terms of a written contract.<sup>1</sup> Whenever a consumer obtains a consumer financial product such as a credit card, a checking account, or a payday loan, he or she typically receives the company’s standard-form, written legal contract.

In addition to being governed by such contracts, the relationship between a consumer and a financial service provider will generally be governed by one or more federal consumer protection

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<sup>1</sup> Section 1002(5) of the Dodd-Frank Act defines “consumer financial product[s] or service[s].” *See* 12 U.S.C. § 5481(5).

laws and often by state consumer protection laws. These laws create legal rights for consumers and impose duties on financial service providers. Absent an agreement to the contrary, if a dispute arises between a consumer and a company as to whether one side or the other is adhering to its contractual or statutory duties, the aggrieved party generally has the right to seek resolution of the dispute in a court of law (although some state and federal laws provide only for public, and not private enforcement). Furthermore, the federal court system and most state court systems provide for a class action process in which, in defined circumstances, one or more plaintiffs may file suit on behalf of similarly-situated individuals. If such an action is certified by the court as meeting the criteria for a class action and plaintiffs prevail or secure a settlement, all members of the class—for example, customers of a company who have been adversely affected by a particular practice—may be eligible to obtain relief without initiating their own lawsuits. Conversely, if the defendant prevails in a certified class action, all members of the class may be bound by the decision and thereby precluded from initiating their own lawsuits with respect to the claims at issue in the class case.

As a general rule, the parties to a contract can agree to an alternative means of resolving any disputes that arise between the parties, including both contractual disputes and disputes under state or federal law. The most common form of alternative dispute resolution is final and binding arbitration in which a privately-appointed individual—an arbitrator—is empowered to resolve claims that arise between the parties.<sup>2</sup>

As discussed in detail in section 3, contract clauses that provide for pre-dispute arbitration appear to be a common, but not a universal, feature of consumer financial contracts. These arbitration clauses are sometimes described as “mandatory.” Under the terms of such agreements, either side can mandate that a dispute that arises between the parties be resolved in binding arbitration.<sup>3</sup> The clauses are described as “pre-dispute” because they commit the parties to this arrangement before there is a dispute between them.

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<sup>2</sup> In some cases, more than one arbitrator may be involved in resolving a dispute.

<sup>3</sup> Alternatively, the term “mandatory,” when used to describe arbitration clauses in the consumer context, may derive from the nature of consumer contracts. When a consumer uses a consumer financial product, he or she is usually bound by the terms of a consumer contract. The terms of that contract are not generally open to negotiation by the consumer, but are instead offered on a take-it-or-leave-it basis, meaning that the consumer either accepts those terms or instead shops for another product with different standard-form terms. In legal terms, the contract is one of

These arbitration clauses generally give each party to the contract two distinct contractual rights. First, either side can file claims against the other in arbitration and obtain a binding decision from the arbitrator. Second, if one side sues the other in court, the party that has been sued in court can invoke the arbitration clause to require that the party that went to court instead proceed, if at all, in arbitration.

Arbitration clauses almost always specify the private arbitration organization that will administer the dispute if and when the clause is invoked by the consumer or the company. The American Arbitration Association (or “AAA”) is one such “arbitration administrator”; JAMS, Inc. is another. For the consumer financial contracts we have reviewed to date, our research shows that the AAA is the most commonly specified organization in such pre-dispute arbitration clauses. We review certain AAA data in section 4 below.<sup>4</sup>

Arbitration clauses may have a number of other features that address where disputes may be adjudicated, the timing for filing disputes, and the remedies that may be awarded. Additionally, arbitration clauses may include limitations on the use of class proceedings and “carve-outs” for small claims court proceedings.<sup>5</sup>

Pre-dispute arbitration has become a contentious legal and policy issue. Following a series of Supreme Court cases interpreting the 1925 Federal Arbitration Act (the “FAA”), courts regularly enforce pre-dispute arbitration clauses in consumer, employment, and other contexts in which the relevant contract is not subject to negotiation between the contracting parties.<sup>6</sup> At least from

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adhesion, making the clause “mandatory” in contrast to the voluntary clauses that may be reached by negotiation between commercial parties. *See, e.g.*, Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1632 n.1 (2005). Other scholars argue that the term “mandatory arbitration” may be better reserved for arbitration that is mandated by statute or regulation. *See, e.g.*, Ian R. Macneil et al., FEDERAL ARBITRATION LAW § 17.1.2.2, at 17:8-17:9 (Supp. 1999).

<sup>4</sup> The AAA is a non-profit organization. It was founded in 1926, following enactment of the Federal Arbitration Act, with the specific goal of helping to implement arbitration as an out-of-court solution to resolving disputes. It describes itself as being dedicated to “the development and widespread use of prompt, effective and economical methods of dispute resolution.” Its mission statement and other information are available at the AAA’s website, [www.adr.org](http://www.adr.org).

<sup>5</sup> We discuss these two features at sections 3.4.2 and 3.4.5.

<sup>6</sup> Chapter 1 of the FAA is codified at 9 U.S.C. §§ 1-16. It provides that an arbitration award is final and binding, with limited grounds available for judicial review. *See* 9 U.S.C. §§ 9-10. There has been an active scholarly and judicial debate over the meaning of the FAA, particularly as it applies to consumer contracts and state court proceedings. *See*



the late 1990s, the inclusion of arbitration clauses in consumer financial contracts appears to have become more common.<sup>7</sup> In 2011, the Supreme Court issued its decision in *AT&T Mobility LLC v. Concepcion*.<sup>8</sup> In that case, the Court held that the FAA preempted state law that would have prohibited the enforcement of a consumer arbitration clause with a “no-class” provision. Prior to that decision, courts were divided on state law challenges to the enforceability of no-class provisions in arbitration clauses.

Some commenters take the view that pre-dispute arbitration clauses contained in standard-form contracts are unfair to consumers. Critics generally focus on three areas. First, they attack arbitration as a dispute resolution process. They contend that it reduces or eliminates procedural protections—such as a right of appeal or access to discovery—that are generally available in court.<sup>9</sup> There are also claims that arbitration may be biased against consumers, and that it may not be as fast or cheap as its proponents claim.<sup>10</sup> Second, especially in the wake of the Supreme Court’s decision in *Concepcion*, critics argue that arbitration clauses may immunize companies from a range of private civil liabilities, such as by reducing the availability of discovery or by eliminating class proceedings.<sup>11</sup> According to this argument, arbitration clauses may undermine deterrence and leave widespread wrongdoing against consumers unaddressed. Finally, critics assert that arbitration, which is almost always conducted in private, undermines

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David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 541-630 (2004); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 393-440 (2004).

<sup>7</sup> For example, a number of large credit card issuers moved to include arbitration clauses in their consumer credit card contracts from the late 1990s. The reasons for this shift are contested and the focus of a court case, *Ross v. Bank of America et al.*, 05-Civ. 7116, which is pending in the United States District Court for the Southern District of New York. We discuss the *Ross* case further in section 3. The detailed timeline for adoption by credit card issuers is discussed, *inter alia*, in the report of the *Ross* defendants’ expert, Professor Kenneth G. Elzinga, dated September 21, 2010. The timeline of adoption for other products may differ, of course, and adoption has not been universal, as we discuss in section 3.2.

<sup>8</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>9</sup> See, e.g., National Association of Consumer Advocates (“NACA”) and National Consumer Law Center (“NCLC”) RFI Comment at 5.

<sup>10</sup> See, e.g., Americans for Financial Reform (“AFR”) RFI Comment at 5.

<sup>11</sup> See, e.g., Public Justice RFI Comment at 4.

benefits inherent in the public nature of the court system, such as transparency and the development of clear precedents.<sup>12</sup>

In contrast, defenders of pre-dispute arbitration clauses take the view that arbitration offers “a faster, more efficient and more cost-effective method of resolving disputes than court litigation.”<sup>13</sup> According to this point of view, arbitration “minimizes the disruption and loss of good will that often results from litigation and ... reduces litigation costs.”<sup>14</sup> Arbitration proponents also claim that these cost savings inure to the benefit of consumers through lower prices and/or expanded access.<sup>15</sup> Finally, while proponents of arbitration clauses may acknowledge the potential impact on class proceedings, many take the view that such proceedings typically are meritless, inefficient, and provide little or no benefit to consumers.<sup>16</sup> They contend that the reduced cost of arbitration together with various provisions of arbitration clauses (including the availability of small claims court as well as contingent minimum awards in arbitration) provide ample opportunity for consumers to obtain redress for asserted wrongs that involve relatively small amounts of money.

## 1.2 The Bureau’s mandate to study consumer arbitration

Section 1028(a) of the Dodd-Frank Act requires the Bureau to “conduct a study of, and . . . provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services.” “Covered persons” are defined as “any

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<sup>12</sup> See, e.g., NACA & NCLC RFI Comment at 5-6.

<sup>13</sup> American Bankers Association (“ABA”), Consumer Bankers Association (“CBA”), and The Financial Services Roundtable (“FSR”) RFI Comment at 2.

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., American Financial Services Association (“AFSA”), RFI Comment at n.30.

<sup>16</sup> See, e.g., ABA/CBA/FSR RFI Comment at 9 n.16.

person that engages in offering or providing a consumer financial product or service.”<sup>17</sup> Because section 1028(a) specifically addresses the use of pre-dispute arbitration clauses in consumer financial contracts, those “agreements”—and the consumer disputes that may be subject to their terms—have been and will remain the focus of the Bureau’s study.

As a preliminary step in undertaking the study, the Bureau published a Request for Information (the “RFI”) in 2012 that sought comments on the appropriate scope, methods, and data sources for the required study.<sup>18</sup> We received 60 comments in response to the RFI. We refer to a number of those comments in this presentation.<sup>19</sup> Most comments came from trade associations, consumer groups, academics, or law firms. We received almost no comments from individual financial institutions that include arbitration clauses in their standard-form contracts with consumers.

## 1.3 What does this presentation cover?

This presentation includes preliminary results reached in the Bureau’s study to date. As our study effort continues, we will refine and place this work into fuller context. The Bureau is disclosing these preliminary results at this time to provide stakeholders with greater transparency into the work the Bureau has undertaken to date and to provide further detail on the work the Bureau is planning to undertake before issuing its report to Congress.

This presentation has five sections:

- Section 2 is an Executive Summary of the results to date.
- Section 3 addresses our preliminary findings with respect to the incidence of arbitration provisions in the three markets which we have studied thus far: consumer credit card,

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<sup>17</sup> 12 U.S.C. § 5481(6)(A).

<sup>18</sup> See Consumer Financial Protection Bureau, Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements 4 (Apr. 2012) (Docket No. CFPB-2012-0017).

<sup>19</sup> We cite to these using the name of the commenter and the title “RFI Comment.” All such RFI Comments are available on [www.regulations.gov](http://www.regulations.gov), accessible from the Bureau’s website, [www.consumerfinance.gov](http://www.consumerfinance.gov).

checking account, and general purpose reloadable prepaid card agreements. It identifies the extent to which these clauses are included in consumer contracts in these three markets. It also reviews the features of these clauses.

- Section 4 provides a typology of consumer disputes filed with the AAA by consumers and/or companies from January 1, 2010 through to the end of 2012 for two of the markets for which we have studied the incidence of arbitration clauses—the credit card and checking account markets—and also in the payday loan market.<sup>20</sup> We review several data points, such as the number of filings, the legal claims that they cover, claim amounts, initial fee assessments, whether the parties are represented by counsel, and demographic distributions of consumers in these arbitrations. We may expand our analysis of AAA dispute filings to other consumer financial products in the next phase of our work.
- Section 5 reviews filings in small claims courts by consumers and companies in the credit card marketplace. Many arbitration clauses contain small claims court “carve-outs”—generally enabling either the consumer or the company to use small claims courts, rather than arbitration, for claims resolution. This section reviews available data in the states and largest counties that provide electronic access sufficient for these purposes to see how much use consumers and companies make of small claims court.
- Finally, section 6 describes areas that the Bureau expects to cover in the remainder of its study of pre-dispute arbitration provisions.

Because the Bureau’s work on this study is ongoing, any of the findings presented here may be refined or modified when we issue our report to Congress pursuant to section 1028(a). Furthermore, that report will provide additional context to the preliminary results included here in at least the following four respects.

- This presentation focuses on the “front-end” of formal disputes involving consumers: who files these disputes, in what numbers, against whom, and about what. In later work,

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<sup>20</sup> We have identified only four prepaid cases in the data we received from the AAA. We have not provided data specific to that market because there are so few of these filed disputes.

we intend to address the “back-end” of formal disputes: what happens, in how long, and at what cost.

- This presentation also focuses on filings in arbitration and in small claims court. Later work will address consumer cases filed in federal courts and in state courts other than small claims courts.<sup>21</sup> Numerous commenters have said that an informed assessment of arbitration requires some consideration of available alternative forms of formal dispute resolution, especially class and non-class actions in court. We agree.
- This presentation also looks primarily at individual disputes, although it provides some initial data points about the interrelationship between individual and class proceedings. Later work will look further at consumer class actions.
- Finally, this presentation is limited to certain aspects of four specific consumer financial products: consumer credit cards, checking accounts, general purpose reloadable prepaid cards, and payday loans. Later work will cover other aspects of those products, and potentially other consumer financial products as well.

Readers should not interpret this presentation as our assessment, preliminary or otherwise, of the relative importance of different areas to be covered in the statutory report to Congress. Rather, the subjects addressed here are those as to which we already have been able to obtain and analyze sufficient data in order to make some preliminary findings. When the Bureau issues its report to Congress, we intend to cover arbitration and court proceedings, including class actions—at least to the extent that meaningful comparisons can be made. Only once our work reflects that fuller focus, will we submit the report called for by section 1028(a) of the Dodd-Frank Act.

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<sup>21</sup> As noted by several commenters, state court data are not available from electronic sources on a comprehensive basis.

## 2. Summary of results to date

While our work remains in progress, we have preliminarily reached the following conclusions based on the data that we have reviewed to date:

- In the credit card market, larger bank issuers are more likely to include arbitration clauses than smaller bank issuers and credit unions. As a result, while most issuers do not include such clauses in their consumer credit card contracts, just over 50% of credit card loans outstanding are subject to such clauses. (In 2009 and 2010 several issuers entered into private settlements in which they agreed to remove the arbitration clauses from their credit card consumer contracts for a defined period. If those issuers still included such clauses, some 94% of credit card loans outstanding would now be subject to arbitration.)
- In the checking account market, larger banks tend to include arbitration clauses in their consumer checking contracts, while mid-sized and smaller banks and credit unions do not. We estimate that in the checking account market, which is less concentrated than the credit card market, around 8% of banks, covering 44% of insured deposits, include arbitration clauses in their checking account contracts.
- In our GPR prepaid card sample, for which data are more limited than for our credit and checking account samples, arbitration clauses are included across the market.<sup>22</sup> Some 81% of the cards studied, and all of the cards for which market share data are available, have arbitration clauses in their cardholder contracts.

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<sup>22</sup> “GPR” prepaid cards are general purpose reloadable prepaid cards. *See infra* note 26.

- Nearly all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis. Around 90% of the contracts with arbitration clauses—covering close to 100% of credit card loans outstanding, insured deposits, or prepaid card loads subject to arbitration—include such no-class arbitration provisions. Although these terms effectively preclude all class proceedings, in court or in arbitration, some arbitration clauses also expressly waive the consumer’s ability to participate in class actions in court.
- The AAA is the predominant administrator for consumer arbitration about credit cards, checking accounts, and GPR prepaid cards.
- From 2010 through 2012, there was an annual average of 415 individual AAA cases filed for four product markets combined: credit card, checking account, payday loans, and prepaid cards.<sup>23</sup> The annual average was 344 credit card arbitration filings, 24 checking account arbitration filings, 46 payday loan arbitration filings, and one prepaid arbitration filing. These numbers do not indicate the number of cases in which the filing was “perfected”<sup>24</sup> and the matter proceeded to arbitration. They indicate only the number of filings, deficient or otherwise.
- Not all these arbitration filings were made by consumers. For the three product markets combined, the standard AAA “claim form” records consumers filing an average of under 300 cases each year.<sup>25</sup> The remaining filings are recorded as mutually submitted or made by companies.
- From 2010 through 2012, around half the credit card AAA arbitration filings were debt collection disputes—proceedings initiated by companies to collect debt, initiated by

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<sup>23</sup> Over three years, only four of the filings were prepaid cases.

<sup>24</sup> The AAA views an arbitration filing as “perfected” when all initial fees have been paid, the clause is deemed sufficient under the Due Process Protocol, the submission complies with the AAA’s debt collection moratorium (if applicable), and the matter is otherwise ready to proceed to arbitration. We discuss the debt collection moratorium in section 4.2.2. The Due Process Protocol is discussed at several places, including sections 4.9, and 5.

<sup>25</sup> With prepaid cases included, the average is still under 301 cases each year. The annual average was 235 consumer-filed credit card disputes, 20 consumer-filed checking account disputes, and 44 consumer-filed payday loan disputes.

consumers to challenge the company's claims in court for debt collection, or mutual submissions to the same effect. More than a quarter of these debt collection arbitrations also included non-debt consumer claims. Many of the credit card disputes that we have not formally defined as debt collection arbitrations also include a substantive dispute about the amount of debt owed—or not owed—by the consumer to the company.

- In contrast, very few of the checking account and payday loan AAA arbitration filings from 2010 through 2012 were debt collection arbitrations.
- From 2010 through 2012, a slight majority (53%) of consumers were represented by counsel in the AAA arbitrations that we reviewed for these three product markets. For non-debt collection disputes, 61% of consumers had a lawyer at some point in the arbitration proceeding. For debt collection arbitrations, 42% of consumers had legal representation at some point in the proceeding. Companies were almost always represented by outside or in-house counsel in both debt collection and non-collection arbitrations.
- From 2010 through 2012, almost no AAA arbitration filings for these three product markets had under \$1,000 at issue. This was true for debt collection arbitrations and other arbitrations as well. For these three product markets combined, during the period 2010 through 2012, there were an annual average of seven arbitrations per year filed with the AAA that concerned disputed debt amounts that were at or below \$1,000. For the same products, there were an annual average of under eight AAA arbitrations in which there was no disputed debt amount identified and the affirmative claim amount was at or below \$1,000.
- From 2010 through 2012, for arbitration filings before the AAA involving these three products, the average alleged debt amount in dispute was \$13,418. The median alleged debt amount in dispute was \$8,641. Looking only at filings that did not identify a disputed debt amount, and excluding one high-dollar outlier, the average amount at issue was \$38,726, and the median \$11,805.
- Most arbitration clauses that we reviewed contain small claims court carve-outs. In 2012, consumers in jurisdictions with a combined total population of around 85 million filed fewer than 870 small claims court credit card claims—and most likely far



fewer than that—against issuers representing around 80% of credit card loans outstanding.

- Credit card issuers are significantly more likely to sue consumers in small claims court than the other way around. In the two top-30 counties by population in which small claims court complaints can be directly reviewed by electronic means, there were more than 2,200 suits by issuers against consumers in small claims court and seven suits by consumers against those issuers. (In one of these two counties, companies are not able to or face severe limits to bring collection claims in small claims court, so these numbers reflect company filings in only one of the two counties. The consumer filing numbers, however, are across both counties.)

### 3. Clause incidence and features

A central aspect of the use of arbitration clauses is their incidence—that is, how often they appear in contracts. This section examines how frequently arbitration clauses appear in three types of consumer financial services contracts: cardholder agreements for credit cards, deposit account agreements for checking accounts, and cardholder agreements for general purpose reloadable (GPR) prepaid cards.<sup>26</sup> Next we consider the length and complexity of arbitration clauses relative to the rest of the cardholder agreement. We then look in more detail at provisions included in arbitration clauses, such as whether the clauses permit the consumer to reject the arbitration clause, what arbitration administrators are specified, and whether they preclude class proceedings. Finally, we present data on changes over time in the use of arbitration clauses and selected clause features. We look, in particular, at how clauses have changed since the Supreme Court’s 2011 decision in *Concepcion*.

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<sup>26</sup> A general purpose reloadable (GPR) prepaid card is a card that “a consumer can use anywhere that accepts payment from a retail electronic payments network, such as Visa, MasterCard, American Express, or Discover” and to which the consumer can add funds after the card is issued. See Consumer Financial Protection Bureau, Advance Notice of Proposed Rulemaking, 77 FED. REG. 30,923, 30,923 (May 24, 2012) (Docket No. CFPB-2012-0019). For purposes of this presentation, we limit our analysis to GPR prepaid cards that consumers can purchase at retail outlets or over the Internet. We do not cover payroll cards or electronic benefit transfer cards, which also can be used over electronic payment networks and can be reloaded at least by the provider of the card.

## 3.1 Prior studies

Several prior studies have examined the use of arbitration clauses in various types of consumer financial services contracts. In 2004, Demaine and Hensler found that 69.2% of the consumer financial contracts in their sample included arbitration clauses.<sup>27</sup> Because they were seeking to determine “the frequency with which the average consumer encounters arbitration clauses,”<sup>28</sup> they included at most five contracts from a broad range of contract types in their sample, rather than investigating any particular type of consumer contract in detail.<sup>29</sup> Other studies focusing specifically on the use of arbitration clauses in credit card contracts have also relied on small samples, typically from the largest credit card issuers.<sup>30</sup> One such study, by Eisenberg, Miller, and Sherwin, found that 76.9% of the consumer contracts studied included arbitration clauses,<sup>31</sup> and that “every consumer contract with an arbitration clause also included a waiver of classwide arbitration.”<sup>32</sup>

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<sup>27</sup> Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 64 (2004). They included tax preparation and investment contracts, along with credit card and banking contracts, as consumer financial contracts. Limiting their results to credit card and banking contracts, 12 of 17 (70.6%) included arbitration clauses. *Id.*

<sup>28</sup> *Id.* at 57.

<sup>29</sup> Their sample included two contracts for general credit cards and five each for airline credit cards, store credit cards, and banking contracts. *See id.* at 64. Demaine and Hensler also examined a number of features of the arbitration clauses they studied, but reported only aggregate findings for all consumer contracts.

<sup>30</sup> *E.g.*, Public Citizen, Forced Arbitration: Unfair and Everywhere 1 (Sept. 24, 2009), <http://www.citizen.org/documents/UnfairAndEverywhere.pdf> (finding that eight of ten “major providers” of credit cards and five of seven major banks used arbitration clauses); Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 145-46 (2010) (reporting that ten of 13 credit card contracts included arbitration clauses).

<sup>31</sup> Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 883 table 2 (2008). Their sample consisted of “26 consumer agreements drafted by 21 companies,” several of which were consumer financial services companies: three commercial banks (five consumer agreements), two credit card issuers (two consumer agreements), and one financial credit company (one consumer agreement). *Id.* at 881.

<sup>32</sup> *Id.* at 884.

Rutledge and Drahozal examined the incidence of arbitration clauses in credit card contracts using a much larger sample made available under the Credit CARD Act of 2009.<sup>33</sup> They found that between 2009 and 2010, “the percentage of [credit card] issuers using arbitration clauses declined from 17.4% ... to 15.0%,” reflecting a net decrease of eight issuers, and that “the percentage of credit card loans subject to arbitration clauses declined from 95.1% to only 48.0%.”<sup>34</sup> This study attributed the decline to two events: (1) the National Arbitration Forum ceasing to administer consumer arbitrations following its settlement of a consumer fraud lawsuit filed by the Minnesota Attorney General; and (2) the settlement of an antitrust class action, *Ross v. Bank of America*, by four large credit card issuers, under which they agreed to remove the arbitration clauses from their credit card contracts for a three-and-one-half-year period.<sup>35</sup> This study also examined the use of various features of credit card arbitration clauses, ranging from arbitration selection terms to class arbitration waivers.<sup>36</sup>

In November 2012, the Pew Charitable Trusts issued a study of the use of arbitration clauses in the checking account contracts used by 100 large financial institutions.<sup>37</sup> The study found that 43% of the institutions in the sample used arbitration clauses, with a “wide disparity” between

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<sup>33</sup> Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1; *see also* Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536 (2012). The relevant statutory provision is Section 204(a) of the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1746 (May 22, 2009).

<sup>34</sup> Rutledge & Drahozal, *Contract and Choice*, *supra* note 33, at 19-20.

<sup>35</sup> *Id.* at 18-19; *see also infra* note 51. The *Ross* case has continued against several other non-settling defendants. The main allegations in *Ross* are that a group of large credit card issuers colluded to include arbitration clauses, including class waivers, in credit card contracts. *See* First Am. Class Action Compl., *Ross v. Bank of America*, No. 05 CV 07116, ¶¶ 96-119 (S.D.N.Y. June 4, 2009), <http://www.arbitration.cfssettlement.com/documents/files/2009-06-04-1st-amended-complaint.pdf>. The case remains pending.

<sup>36</sup> Rutledge & Drahozal, *Contract and Choice*, *supra* note 33, at 21-49.

<sup>37</sup> Pew Charitable Trusts, *Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution* (Nov. 2012), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Pew\\_arbitration\\_report.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_arbitration_report.pdf); *see also* Public Citizen, *supra* note 30, at 10-11 (deposit account agreements); Pew Health Group, *Hidden Risks: The Case for Safe and Transparent Checking Accounts* 18 (Apr. 2011), [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Safe\\_Checking\\_in\\_the\\_Electronic\\_Age/Pew\\_Report\\_HiddenRisks.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Safe_Checking_in_the_Electronic_Age/Pew_Report_HiddenRisks.pdf) (“For 189 of these [265] accounts (representing four out of 10 banks and 71 percent of all accounts), the accountholder had to waive the right to a trial before a judge and agree to have the dispute resolved before a private arbiter of the bank’s choice.”).

the 50 largest (with 56% providing for arbitration) and the remainder of the sample (with 30% providing for arbitration).<sup>38</sup> The study also reported on various other features of the arbitration clauses, finding, for example, that “[o]f the institutions in the top 50 that have arbitration clauses, 81 percent have class action bans,” while “[f]or the next 50 institutions, this number drops to 62 percent.”<sup>39</sup>

No prior study of which we are aware has examined systematically the use of arbitration clauses in GPR prepaid contracts.<sup>40</sup>

## 3.2 Clause incidence

This section presents data on how frequently arbitration clauses are used in credit card contracts, checking account contracts, and GPR prepaid card contracts. The patterns are similar for credit card and checking account contracts: most institutions do not use arbitration clauses, and credit unions typically do not, but larger institutions are more likely to use arbitration clauses than smaller institutions. As a result, a slight majority of credit card loans outstanding within the scope of our contract sample are subject to arbitration. Similarly, we estimate that just under half of insured deposits at banks are subject to arbitration.<sup>41</sup> By comparison, most GPR prepaid card agreements in our sample, covering the substantial majority of the amounts loaded on such cards, use arbitration clauses. For credit cards, however, the impact of the *Ross* settlement is potentially significant.<sup>42</sup> While that settlement only removed four issuers from the

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<sup>38</sup> Pew Charitable Trusts, *supra* note 37, at 3-4.

<sup>39</sup> *Id.* at 5. For other features studied, see *id.* at 4-6 (*e.g.*, opt-outs, carve-outs for small claims court, discovery limits, required qualifications for arbitrators, remedy limitations, and shortened statutes of limitations).

<sup>40</sup> For anecdotal reports on the use of arbitration clauses in GPR prepaid contracts, see, *e.g.*, Pew Charitable Trusts, Loaded with Uncertainty: Are Prepaid Cards a Smart Alternative to Checking Accounts? 29 app. B (Sept. 2012), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Prepaid\\_Checking\\_report.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Prepaid_Checking_report.pdf); Martin Eakes, Are Prepaid Credit Cards Helping or Hurting Consumers? (May 25, 2012), <http://www.responsiblelending.org/credit-cards/policy-legislation/regulators/are-prepaid-credit-cards.html>.

<sup>41</sup> We use the term “insured deposits” to refer to the amount of deposits in accounts less than \$250,000.

<sup>42</sup> The claims at issue in *Ross* were directed at credit card contracts. Neither the claims in the case nor the settlements reached checking account contracts or contracts for any other consumer financial product.

category of arbitration users, those four issuers were responsible for around 43% of credit card loans outstanding as of the end of 2012.

We refer to credit card loans outstanding, insured deposits, and GPR prepaid card load volume as “account values.” In this section, we report incidence both as a percentage of all companies in the samples and as a percentage of all account values in the samples.<sup>43</sup> As we explain more fully in Appendix A, our measurements of account value for credit cards and checking accounts use data from public “call reports” filed with regulators by banks and credit unions.<sup>44</sup> Call reports do not report consumer deposit volume separate from commercial deposit volume. We use “insured deposits,” therefore, as a proxy for consumer deposits.<sup>45</sup> Our account value results for checking accounts should be viewed accordingly.

The scope of the arbitration clauses that are included in consumer contracts for these products tends to be very broad. Typically, the arbitration clause will apply to all disputes arising out of or relating to the contract and account or card, and sometimes it extends to other aspects of the parties’ relationship. Exceptions to the arbitration clause take the form of carve-outs, such as the small claims court carve-out discussed in section 3.4.2, which exclude certain types of claims from arbitration.

### 3.2.1 Credit cards

The contracts in our sample cover almost all consumers in the credit card market. The sample on which the findings reported here are based consists of 393 contracts filed by credit card issuers with the Bureau as of December 31, 2012.<sup>46</sup> Under applicable rules, all credit card issuers

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<sup>43</sup> By comparison, when we describe the features of arbitration clauses, we present our results as the percentage of arbitration clauses (rather than all contracts) in the samples and as a percentage of account values subject to an arbitration clause (rather than all account values) in the samples.

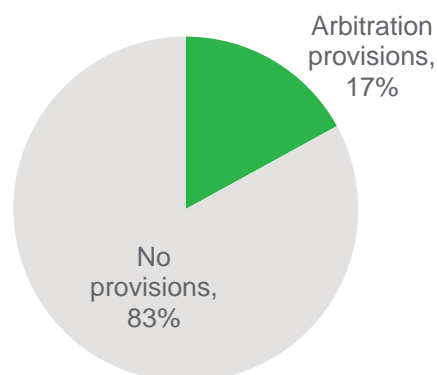
<sup>44</sup> Call reports are available at the website for the Federal Financial Institutions Examination Council. See [www.ffiec.gov](http://www.ffiec.gov).

<sup>45</sup> To the extent that our proxy includes commercial deposits that are not subject to arbitration, we will overstate the amount of insured deposits subject to arbitration clauses. In general, however, we refer to the share of such deposits subject to arbitration, which should minimize the impact of using this proxy. For more information, see Appendix A.

<sup>46</sup> The agreements are available at Consumer Financial Protection Bureau, Credit Card Agreement Database, <http://www.consumerfinance.gov/credit-cards/agreements/>.

are required to file agreements if they have more than 10,000 open credit card accounts.<sup>47</sup> Although many issuers file more than one credit card contract, in almost every case the contracts for a particular issuer contain the same dispute resolution clause. (In the rare cases of inconsistency for a single issuer, we used the predominant form for that issuer as reflected in their filings with the Bureau.) Accordingly, the sample includes one contract per issuer.<sup>48</sup>

**FIGURE 1:** CLAUSE INCIDENCE BY NUMBER OF CREDIT CARD ISSUERS 2012



Of the 393 credit card issuers, 67 issuers (or 17%) included arbitration clauses in their credit card contracts, while 326 issuers (or 83%) did not.<sup>49</sup> Larger issuers (as measured by the dollar value of credit card loans outstanding) and banks (as compared to credit unions) were more likely to use arbitration clauses. Thirteen of the 20 largest bank issuers (or 65%) used arbitration clauses. Of the 50 largest bank issuers, 29 (or 58%) used arbitration clauses, and of the remaining bank issuers in the sample, 25 of 56 (or 44.6%) used them. However, only nine of 275

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<sup>47</sup> See 12 CFR § 1026.58(c)(5)(i). Issuers are not required to provide agreements for a private label credit card program with less than 10,000 open accounts. See *id.* § 1026.58(c)(6)(i). (A private label credit card is a credit card issued or managed by a financial institution on behalf of a merchant for use only to make purchases at that merchant—for example, a department store credit card.)

<sup>48</sup> For additional description of the sample, see Appendix A.

<sup>49</sup> One issuer provided for arbitration only of disputes involving its credit card rewards program and another only for disputes arising out of credit insurance for credit card loans. Because the agreements did not include a generally applicable arbitration clause, they were coded as not providing for arbitration.

credit union issuers (or 3.3%) used arbitration clauses.<sup>50</sup> These results are summarized below in Table 1.

**TABLE 1: CLAUSE INCIDENCE IN CREDIT CARD CONTRACTS BY TYPE OF ISSUER 2012**

	Arbitration clause		No arbitration clause	
	# of contracts	% of credit card loans outstanding	# of contracts	% of credit card loans outstanding
50 largest bank issuers	29 (58.0%)	52.2%	21 (42.0%)	47.8%
Other bank issuers	25 (44.6%)	31.1%	31 (55.4%)	68.9%
Credit unions	9 (3.3%)	2.5%	266 (96.7%)	97.5%
Other issuers	4 (33.3%)	Not available	8 (66.7%)	Not available
Total	67 (17.0%)	50.2%	326 (83.0%)	49.8%

Overall, for the issuers in our sample, 50.2% of credit card loans outstanding were subject to contracts with arbitration clauses; 49.8% of credit card loans outstanding were not. For the 50 largest bank issuers, 52.2% of credit card loans outstanding were subject to arbitration clauses. By comparison, for the remaining (*i.e.*, smaller) banks in the sample, 31.1% of credit card loans outstanding were subject to arbitration, while for credit unions, only 2.5% were.

As noted, however, in late 2009, four of the ten largest issuers (Bank of America, Capital One, Chase, and HSBC) settled an antitrust class action by agreeing to remove the arbitration clauses from their credit card contracts for three-and-one-half years from a date specified in the

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<sup>50</sup> Four of 12 other issuers (*e.g.*, retailers and finance companies) used arbitration clauses. Data on credit card loans outstanding are missing for two bank issuers, one of which includes an arbitration clause in its credit card contract. Another nine bank and credit union issuers reported zero credit card loans outstanding as of December 31, 2012. Eight of those nine issuers used arbitration clauses.



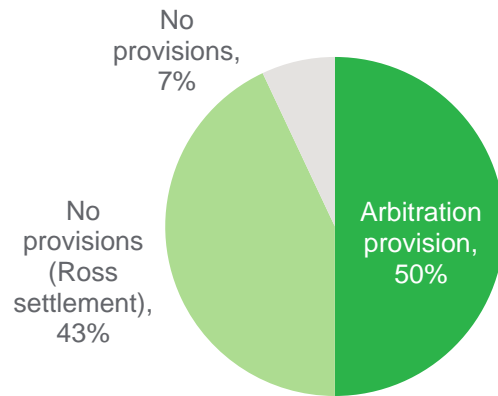
settlement agreement.<sup>51</sup> Those four companies include the three largest credit card issuers that currently do not use arbitration clauses.<sup>52</sup> Collectively, their credit card loans outstanding constitute 86.8% of the outstandings that are not subject to arbitration clauses. Had the settling defendants in *Ross* continued to use arbitration clauses, then nearly 94% of credit card loans outstanding would be subject to arbitration clauses.

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<sup>51</sup> The dates differed among the settling defendants, and ranged from January 1, 2010, to May 1, 2010. The settlement agreements also provided for the period to be extended in the event of a delay in mailing change-of-terms notices to cardholders. See Stipulation and Agreement of Settlement with Bank of America, N.A. (USA) (N/K/A/ FIA Card Services, N.A.) and Bank of America, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-bank-of-america.pdf>; Stipulation and Settlement Agreement with Capital One Bank (USA), N.A. and Capital One, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-capital-one.pdf>; Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and Chase Bank USA, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-chase.pdf>; Stipulation and Agreement of Settlement with HSBC Finance Corp. and HSBC Bank Nevada, N.A., ¶ 3(b), *Ross v. Bank of America, N.A., (USA)*, No. 05-cv-7116 (S.D.N.Y. Feb. 24, 2010), <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-24-stip-and-agreement-with-hsbc.pdf>.

<sup>52</sup> The other issuer, HSBC, sold a substantial portion of its credit card portfolio to Capital One in 2012. See Howard Mustoe, *HSBC Credit Card Sale to Capital One Yields \$2.5 Billion Premium*, Bloomberg.com (May 2, 2012), <http://www.bloomberg.com/news/2012-05-02/hsbc-gets-31-3-billion-in-cash-for-u-s-card-and-retail-sale.html>. As of December 31, 2011, HSBC filed agreements for private label credit cards that included arbitration clauses. Capital One appears to have acquired those accounts as of December 31, 2012, and those cardholder agreements no longer include arbitration clauses.

**FIGURE 2:** CLAUSE INCIDENCE BY CREDIT CARD LOANS OUTSTANDING 2012



### 3.2.2 Checking accounts

Our sample of checking account contracts is also designed to provide an overall view of the checking account market. It consists of available contracts from three sources: (1) the 100 largest banks, measured by insured deposits on a consolidated basis<sup>53</sup> as of December 31, 2012; (2) a random set of 150 mid-sized and small banks, identified using the same consolidated measure; and (3) the 50 largest credit unions, also measured by insured deposits as of December 31, 2012.<sup>54</sup> In a handful of cases, different banks in the same holding company used different dispute resolution clauses; those banks were included separately in the sample, instead of on a

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<sup>53</sup> By consolidated basis, we mean that we calculated total insured deposits for all affiliated institutions, unless an affiliate used a different dispute resolution clause. See Appendix A.

<sup>54</sup> For companies we selected to be in our sample (either because of their size or because they were part of the random selection), we primarily obtained agreements via one of two steps. First, for each credit union and depository subsidiary within the sample, we sought to identify a current web-sourced agreement. (We took the most recent agreement available for the institution’s website, but we did not assume that any web-sourced agreement with an effective date earlier than mid-2011 was current.) When no such agreement was available via that first step, we sent a request for a standard-form checking account contract, pursuant to the Bureau’s market monitoring authority under Section 1022(c)(4) of the Dodd-Frank Act. The response rate to that 1022(c)(4) request was over 95% on a consolidated basis at the time we finalized our data for this publication. We obtained agreements for four bank holding companies via a third step of securing an agreement with no indication of a specific effective date from the applicable website. Ultimately, we obtained agreements for all large banks, 141 out of 150 mid and small-sized banks, and 49 of 50 credit unions. When we present the statutory report, we will include additional data we have secured by that point.

consolidated basis.<sup>55</sup> In addition, for a small number of banks and one credit union that were selected to be in our sample, we were unable to obtain a standard-form contract by the time we aggregated data for this presentation.<sup>56</sup> Overall, our sample of checking account contracts included in this presentation covers 49 credit unions and, on a consolidated basis, 103 large and 141 mid-sized and small banks.

Of the 103 largest banks, 47 (or 45.6%) used arbitration clauses while 56 (or 54.4%) did not. Among the 50 largest banks, the use of arbitration clauses was higher—31 of the 50 largest banks (or 62.0%) used arbitration clauses, while 16 of the remaining 53 large banks (or 30.2%) used arbitration clauses. Overall, accounts representing 58.8% of insured deposits at large banks were subject to arbitration clauses, while accounts representing 41.2% of insured deposits at large banks were not.<sup>57</sup> Taking just the largest 50 banks, accounts representing 61.5% of their insured deposits were covered by arbitration clauses, while accounts representing 38.5% of their insured deposits were not. By comparison, only 10 of the 141 mid-sized and small banks (or 7.1% of the sample), with accounts representing 6.3% of the insured deposits in the sample, used arbitration clauses in their checking account contracts. Finally, 4 of the 49 largest credit unions (or 8.2%), with accounts representing 8.7% of insured deposits at the largest credit unions, used arbitration clauses. These results are summarized in Table 2.

Extrapolating from our random sample and combining it with the large bank data, we can provide an overall estimate of arbitration clause use by the number of banks and by bank insured deposit volume.<sup>58</sup> On that basis, while only 7.7% of banks use arbitration clauses for

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<sup>55</sup> This is why the sample of 100 large banks results in 103 contracts for these institutions.

<sup>56</sup> One small institution responded that it did not offer consumer checking accounts.

<sup>57</sup> Three of the large banks in the sample (with 0.5% of insured deposits) used jury trial waivers but provided for arbitration in the event the jury trial waiver was unenforceable. Because arbitration was not the primary means of dispute resolution, these banks were coded as not using arbitration.

<sup>58</sup> For the largest banks there is no extrapolation since every bank reported. Out of the 6,320 small and mid-sized banks, we used a randomly selected sample. Thus, our extrapolation provides an unbiased estimate. Moreover, with the sample of 141 banks, out of which 10 reported using arbitration clauses, we can approximate the overall incidence utilizing the Central Limit Theorem with the sample mean of  $10/141 = .071$  and the sample variance of  $.071 * (1 - .071) = .066$ . The sum of 6,320 variables has a mean of 448 and a standard deviation of 20.4. Thus, using the normal approximation with a 95% confidence interval, we estimate that between 408 and 488 small and mid-sized banks use arbitration clauses. That equates to a range of between 6.5% and 7.7% of small and mid-sized banks.

their checking account contracts, accounts representing some 44.4% of bank insured deposits are subject to arbitration.<sup>59</sup>

**TABLE 2:** CLAUSE INCIDENCE IN CHECKING ACCOUNT CONTRACTS BY TYPE OF FINANCIAL INSTITUTION 2013

	Arbitration clause		No arbitration clause	
	# of contracts	% of insured deposits	# of contracts	% of insured deposits
50 largest banks	31 (62.0%)	61.5%	19 (38.0%)	38.5%
Other large banks	16 (30.2%)	30.0%	37 (69.8%)	70.0%
Small to mid-sized banks	10 (7.1%)	6.3%	131 (92.9%)	93.7%
50 largest credit unions	4 (8.2%)	8.7%	45 (91.8%)	91.3%

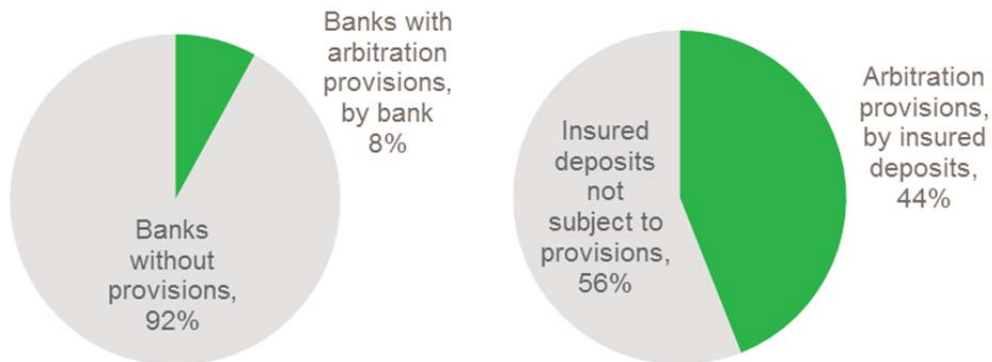
Overall, therefore, we see for checking accounts the same phenomenon we observe for credit cards: clause use is concentrated among large players with larger market shares. Conversely, non-use is concentrated among small players with smaller market shares. And in both markets, credit union use of arbitration clauses is low, by number of issuers and by market share.<sup>60</sup>

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<sup>59</sup> As of December 31, 2012, small and mid-sized banks accounted for \$1,166,216,407,000 in insured deposits. Extrapolating from our sample, for which institutions with arbitration clauses accounted for 6.3% of all insured deposits in the sample, we estimate that \$73,471,633,641 in insured deposits held by small and mid-sized banks are subject to arbitration, and \$1,092,744,773,359 are not so subject. For the largest banks, call report data show that \$1,820,588,262,000 of insured deposits are subject to arbitration, with \$1,274,683,807,000 of insured deposits not so subject. Combining the two sets of data  $((\$73,471,633,641 + \$1,820,588,262,000) / (\$73,471,633,641 + \$1,820,588,262,000 + \$1,092,744,773,359 + \$1,274,683,807,000))$  gives an estimate of 44.4% of insured bank deposits subject to arbitration.

<sup>60</sup> We cannot extrapolate from the sample of checking account contracts for the largest credit unions because it is not random. That sample, however, represents more than 28.3% of all credit union insured deposit volume. Given the low incidence of use among small banks, overall use by credit unions is likely to be even lower than the low share indicated for the largest credit unions.

**FIGURE 3:** CLAUSE INCIDENCE BY BANK AND BANK INSURED DEPOSIT VOLUME 2013



### 3.2.3 GPR prepaid cards

Our data on GPR prepaid card agreements is less complete than for the other types of contracts studied. The sample here consists of 63 GPR prepaid cards that were listed on the Visa, MasterCard, or NerdWallet web pages that list prepaid cards or that were included in several recent studies of the terms of GPR prepaid cards.<sup>61</sup> Three firms—Green Dot, H&R Block, and NetSpend—dominated the market, collectively with over 68% of the dollar amount loaded on cards.<sup>62</sup>

For the sample as a whole, 51 of 63 GPR prepaid card contracts (81.0%) included arbitration clauses. All three of the leading firms, with 68.6% of the market, used arbitration clauses. Indeed, all of the firms for which we have market share data, totaling 82.9% of the dollar

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<sup>61</sup> See Appendix A for more details.

<sup>62</sup> See Aité Group, *The Contenders: Prepaid Debit and Payroll Cards Reach Ubiquity 19* (Nov. 2012). The firms identified in the text are formally not issuers of prepaid cards; the issuers are almost always depository institutions. (GreenDot, however, now owns a bank issuer.) Firms like NetSpend (which has since been acquired by another company, TSYS) are generally referred to as “program managers.” In the GPR prepaid market, the program manager generally plays the dominant role with responsibility for most aspects of a program. Two depository institutions, Bankcorp Bank and MetaBank, serve a large number of GPR program managers. There is no consistent pattern in the cardholder agreements: some cards with the same program manager or the same issuing bank nonetheless have different cardholder agreements.

amount loaded on cards, used arbitration clauses, and the substantial majority of the remaining cards (40 of 52, or 76.9%) used arbitration clauses as well.<sup>63</sup> Thus total load in the pre-paid market subject to arbitration will be over—and likely substantially over—83%. The overall use of arbitration clauses in GPR prepaid card contracts is greater than in either credit card or checking account contracts, and much more uniform across larger and smaller players in the market—*i.e.*, smaller players are much more likely to use arbitration clauses in GPR prepaid card contracts than in credit card or checking account contracts. Consistent with our results for credit unions in the other two markets, the contracts in the sample from two credit union GPR prepaid card programs did not use arbitration clauses, although a third program used by credit unions and small banks does include an arbitration clause in its cardholder agreement.

### 3.3 Clause length and complexity

For credit card contracts with arbitration clauses, we examined various measures of the length and complexity of the arbitration clause.<sup>64</sup> We have not conducted the same analysis for the other two product markets.

The word count for the credit card arbitration clauses ranged from 78 words to 2,410 words. The mean was 1,098 words and the median was 1,074 words. On average, the arbitration clause made up 14.1% of the words in the credit card contract (with the median at 13.1%), ranging from 1.2% to 27.5% of the words in the contract.

Credit card arbitration clauses almost always were more complex and written at a higher grade level than the rest of the credit card contract. The mean Flesch readability score<sup>65</sup> for credit card

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<sup>63</sup> Our market share data comes from the Aité Group report cited in note 62.

<sup>64</sup> Three of the contracts (all from credit unions) incorporated by reference the arbitration clause in the credit union's membership agreement. For purposes of our analysis, we used the arbitration clause from the membership agreement for the two membership agreements we were able to obtain rather than the incorporation-by-reference language in the credit card contract. We treated the arbitration clause for the other credit union (which we were not able to obtain) as missing. Accordingly, the results in this section are based on 66 credit card arbitration clauses.

<sup>65</sup> The Flesch readability score is a widely used standard in plain language analysis. Scores range from 0.0 to 100.0, with a higher number indicating greater readability. The calculation of the score takes into account total words, total sentences, and total syllables.

arbitration clauses—with a higher score indicating greater readability—was 34.5 and the median was 33.7.<sup>66</sup> By comparison, the mean Flesch readability score for the remainder of the contract (*i.e.*, excluding the arbitration clause) was 52.2 and the median was 51.6.<sup>67</sup> The readability score for the remainder of the credit card contract exceeded the readability score for the arbitration clause in every case.<sup>68</sup>

Similarly, the mean Flesch-Kincaid grade level<sup>69</sup>—with a lower grade level indicating greater readability—for credit card arbitration clauses was 14.2 and the median was 14.7.<sup>70</sup> By comparison, the mean Flesch-Kincaid grade level for the remainder of the credit card contract was 10.8 and the median was 11.<sup>71</sup> Of the 66 contracts studied, only in three cases was the Flesch-Kincaid grade level lower for the arbitration clause than for the remainder of the contract.

Arbitration clauses from larger issuers tend to be longer than those from smaller issuers. On average, the arbitration clause used by the 20 largest issuers contained 1,330 words, while for the other issuers the arbitration clause contained 1,051 words. But the arbitration clauses used by the larger issuers fare better on the readability metrics. The Flesch readability score for the arbitration clause used by the 20 largest issuers was 37.1. For the remaining issuers it was 33.5. The Flesch-Kincaid grade level for the arbitration clauses used by the 20 largest issuers was 13.5. For the remaining issuers it was 14.6.<sup>72</sup>

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<sup>66</sup> The low was 18.2; the high, 51.1.

<sup>67</sup> The low was 43.3; the high, 66.9.

<sup>68</sup> On average, the readability score for the contract was 17.7 points higher than the score for the arbitration clause, with the differences ranging from 2.3 to 38.9.

<sup>69</sup> The Flesch-Kincaid Grade level translates readability to the level of education required to understand the text. A lower grade level indicates greater readability.

<sup>70</sup> The low was 9; the high, 20.3.

<sup>71</sup> The low was 6.3; the high, 13.3.

<sup>72</sup> Two of the three largest credit card issuers used two of the three most readable arbitration clauses (by both measures) in their credit card contracts.

## 3.4 Clause features

This section summarizes various provisions that appear in or with arbitration clauses in credit card, checking account, and GPR prepaid card contracts. It examines: (1) whether the clause allows the consumer to reject the arbitration clause for a limited period; (2) whether the clause carves disputes eligible for small claims court out of the obligation to arbitrate; (3) which entity or entities may administer the arbitration and how the arbitrator or arbitrators are to be selected; (4) the extent to which enforceability decisions are delegated to the arbitrator; (5) whether the clause precludes class proceedings; (6) whether the clause limits the recovery of punitive or other damages; (7) whether the clause delimits the time period in which a claim must be brought; (8) whether the clause precludes the disclosure of information about any arbitration; (9) where any in-person hearing is to take place; (10) what the clause provides about the costs of arbitration to the consumer and the company; (11) whether the clause provides for a contingent minimum recovery; and (12) what the clauses disclose about various core characteristics of the arbitration process. For all these variables, we present summary results below.<sup>73</sup>

For several of the features studied, the contract provision can appear either in the arbitration clause itself or elsewhere in the contract. For example, punitive damages or consequential damages waivers sometimes are included in the arbitration clause, but more commonly are a stand-alone provision of the contract. Indeed, such provisions appear not only in contracts with arbitration clauses but also contracts without arbitration clauses. To obtain a meaningful understanding of the incidence of these sorts of provisions requires examining not only the features of arbitration clauses or even the features of consumer financial services contracts with arbitration clauses, but also the features of consumer financial services contracts without arbitration clauses. In the sections in which this type of comparison is appropriate, we report the comparative numbers.

For each feature, we express the incidence of that feature as a percentage of the number of arbitration clauses in the sample for that product. We also state incidence as a percentage of the

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<sup>73</sup> Some of the features described below may be inconsistent with the due process or fairness protocols applied by the AAA and JAMS in administering consumer arbitrations. See *infra* text accompanying note 80. We describe the features here as they appear in the arbitration clauses in the sample, without regard to the AAA's or JAMS's policies.



account values (credit card loans outstanding, insured deposits, amount loaded on prepaid cards) of the market players in the sample subject to arbitration clauses (which, as a shorthand, we refer to as “arbitration-subject” account values). For credit cards, we can infer that the data reflect the overall incidence of these features for all market players who use arbitration clauses.<sup>74</sup> For checking accounts, we can extrapolate from the two samples of banks to obtain an estimate for overall incidence for banks that use arbitration clauses. However, this extrapolation is less stable than it is for incidence overall given the very limited extent to which smaller banks use arbitration clauses at all.<sup>75</sup> For GPR prepaid cards, the market share data are limited as discussed above.<sup>76</sup> As a result, for checking accounts and prepaid cards we do not extrapolate from the sample to estimate overall incidence of clause features.

### 3.4.1 Opt-outs

Some of the arbitration clauses in the sample permitted consumers a defined time period to opt-out of or reject the arbitration clause. To exercise the opt-out, a consumer must follow the stated procedure—which generally requires a signed writing submitted by mail, and may include requirement that all authorized users on the account consent in writing to the opt-out—within the stated time limits.<sup>77</sup>

Just over a quarter of the credit card arbitration clauses in the sample (18 of 66, or 27.3%) and of the checking account arbitration clauses in the sample (16 of 61, or 26.2%) included opt-outs, as did 17.6% (9 of 51) of prepaid card arbitration clauses in the sample. The time allowed for opting out was generally either 30 days or 60 days, typically from when the account was opened or the agreement was mailed, depending on the arbitration clause. No agreements provided for shorter or longer opt-out periods, and very few provided for periods (such as 45 days) between the two ends of this range.

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<sup>74</sup> See *supra* text accompanying note 47.

<sup>75</sup> Because the sample is randomly selected, the extrapolation provides an unbiased estimate. However, given that the sample size for the small and mid-sized banks with arbitration clauses is only ten, it is arguably too small to apply the normal approximation.

<sup>76</sup> See *supra* text accompanying note 61; see also Appendix A.

<sup>77</sup> We are not currently aware of prevailing opt-out rates.

For checking accounts and prepaid cards, larger players tended to be somewhat more likely than smaller ones to permit consumers to opt out of the arbitration clause. Some 38.3% of arbitration-subject insured deposits in the sample had an opt-out feature, as did 26.5% of dollar amounts of arbitration-subject prepaid card loads. For credit cards, 26.0% of arbitration-subject loans outstanding in the sample had an opt-out. These results are summarized in Table 3.

**TABLE 3:** ARBITRATION CLAUSES PERMITTING OPT-OUTS FROM ARBITRATION 2012-13

	Opt-out		No opt-out	
	# of contracts	% of arbitration-subject account values	# of contracts	% of arbitration-subject account values
Credit cards	18 (27.3%)	26.0%	48 (72.7%)	74.0%
Checking accounts	16 (26.2%)	38.3%	45 (73.8%)	61.7%
Prepaid cards	9 (17.6%)	26.5%	42 (82.4%)	73.5%

### 3.4.2 Small claims

While arbitration clauses typically are drafted broadly to cover a wide range of claims and disputes, most of the agreements studied “carved out,” or excluded, certain claims or disputes from arbitration. The most common type of carve-out was for claims that either could be or had been brought in small claims court. A small claims court carve-out is not necessary for parties to use small claims court. What the carve-out typically provides, however, is a contractual right to press a claim in small claims court even if the other side would prefer that the claim be resolved in arbitration.

From 59% (checking) to 62.7% (prepaid card) to 66.7% (credit card) of arbitration clauses in the samples included carve-outs for small claims court, with large institutions more likely to use such carve-outs than small institutions. The 33.3% of credit card issuers that did not use a small claims court carve-out in their arbitration clause made up only 1.0% of arbitration-subject credit card loans outstanding. Although the percentages were not as stark for checking account contracts (41% without a carve-out, comprising 8.5% of arbitration-subject insured deposits in the sample) and prepaid card contracts (37.3% without a carve-out, comprising between 5.6% to 15.3% of arbitration-subject loads in the sample), the pattern was the same.

The small claims court carve-outs in arbitration clauses in checking account contracts and credit card contracts tended to apply to both companies and consumers.<sup>78</sup> Carve-outs for consumer small claims only, however, were the dominant form of carve-out for prepaid cards.<sup>79</sup> These results are summarized in Table 4.

**TABLE 4:** ARBITRATION CLAUSES WITH SMALL CLAIMS COURT CARVE-OUTS 2012-13

	Small claims court carve-out		No small claims court carve-out	
	# of contracts	% of arbitration-subject account values	# of contracts	% of arbitration-subject account values
Credit cards	44 (66.7%)	99.0%	22 (33.3%)	1.0%
Checking accounts	36 (59.0%)	91.5%	25 (41.0%)	8.5%
Prepaid cards	32 (62.7%)	84.7%-94.4%	19 (37.3%)	5.6%-15.3%

### 3.4.3 Administrators and arbitrators

Arbitration clauses commonly specify a firm to administer the arbitration. The administrator is not the arbitrator *per se*, although as discussed below the administrator may select the arbitrator. The administrator generally sets out the procedural rules governing the arbitration. In some cases, these rules may be modified by the terms of the applicable arbitration clause. Some rules, however, may be deemed by the administrator to be not subject to contractual modification. The two main administrators of consumer arbitration in the United States each have due process or minimum procedural fairness protocols, and their respective rules state that

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<sup>78</sup> Some 34.4% of the checking account arbitration clauses in the sample had this feature, representing 74.2% of the arbitration-subject insured deposits in that sample. For credit card arbitration clauses, the numbers were 39.4% of the agreements and 62.2% of the arbitration-subject credit card loans outstanding.

<sup>79</sup> Some 43.1% of prepaid card arbitration clauses in our sample had this feature, accounting for between 84.4% and 94.2% of arbitration-subject loads in our sample. One possible explanation for this difference is that few prepaid cards offer a credit line, with the result that prepaid issuers generally have no small-dollar debts to collect.

they will not administer arbitrations except in accordance with those core provisions.<sup>80</sup> Finally, the administrator provides other administrative services, such as docketing or finding hearing locations.

The arbitration administrator most commonly named in the clauses that we studied was the AAA. Some 55.7% of checking account arbitration clauses in the sample listed AAA as the sole option.<sup>81</sup> One listed JAMS as the sole option. (One also listed the National Arbitration Forum (“NAF”) as the sole option, even though NAF ceased administering consumer arbitrations more than four years ago.<sup>82</sup>) Nearly half (48.5%) of credit card arbitration clauses in the sample listed AAA as the sole option.<sup>83</sup> Three listed JAMS and three listed NAF as sole options. More than a third (37.3%) of prepaid arbitration clauses in the sample listed AAA as a sole option.<sup>84</sup> For prepaid, only one each listed JAMS or NAF as sole options.<sup>85</sup>

Counting clauses in which AAA is at least an option yields 91.8% of checking account arbitration clauses, 83.3% for credit card arbitration clauses, and 94.1% of prepaid card arbitration clauses. The comparable numbers for JAMS are 34.4% for checking accounts, 40.9% for credit cards, and 52.9% for prepaid cards. By market share, the predominance of the AAA was even greater. Over 98% of the relevant account value—whether insured deposits, credit card loans outstanding, or prepaid load—subject to arbitration clauses in the samples listed the AAA as at least one possible administrator. When an arbitration clause listed more than one administrator, it typically permitted the party filing the claim to select among the

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<sup>80</sup> AAA, Consumer Due Process Protocol (Apr. 17, 1998); JAMS, Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness (July 15, 2009).

<sup>81</sup> Counting clauses that listed AAA or NAF (which no longer administers consumer disputes), this share increases to 60.7%.

<sup>82</sup> Consent Judgment, *Minnesota v. National Arbitration Forum, Inc.*, No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009), <http://pubcit.typepad.com/files/nafconsentdecree.pdf>.

<sup>83</sup> This increases to 50% counting clauses that list AAA or NAF.

<sup>84</sup> This increases to 43.1% counting clauses that list AAA or NAF.

<sup>85</sup> Other less well known administrators listed were National Arbitration and Mediation, Dispute Prevention and Resolution, Inc., and the Arbitration Service of Portland, each included in a single arbitration clause from a small institution.

administrators, except for prepaid card arbitration clauses, which commonly permitted the consumer to override the company's choice even when the company was the claimant.<sup>86</sup>

In AAA arbitrations, the AAA selects the arbitrator, subject to possible objections by the parties.<sup>87</sup> In JAMS arbitrations, JAMS may supply a list of arbitrators from which the parties may choose.<sup>88</sup> In either case, however, the default rule is that the administrator determines the pool of prospective arbitrators, even though it does not arbitrate the dispute itself.<sup>89</sup> Most of the clauses within the scope of our review did not attempt to modify these default rules for arbitrator selection. A minority specified that the arbitrator be a retired judge or an experienced lawyer or a lawyer with expertise in the subject matter of the dispute.<sup>90</sup> One clause for a small bank, required "practical working experience in the banking industry." That is the only clause that we identified, however, to use selection criteria that might be seen as an explicit bias to one side of the dispute.<sup>91</sup>

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<sup>86</sup> If prepaid issuers seldom sue consumers, *see supra* note 79, this consumer default may be equivalent to the claimant default rule for checking and credit card.

<sup>87</sup> *See* AAA, Supplementary Procedures for Consumer-Related Disputes, Rule C-4 (rules effective Sept. 15, 2005).

<sup>88</sup> *E.g.*, JAMS, Streamlined Arbitration Rules & Procedures, Rule 12(c) & (d) (effective July 15, 2009).

<sup>89</sup> The administrator's rules and applicable law typically require the arbitrator to disclose conflicts of interest, which may provide a basis for a party to object to the arbitrator's service. *E.g.*, AAA, Commercial Arbitration Rules and Mediation Procedures, Rules R-17 & R-18 (Oct. 1, 2013); JAMS, Streamlined Arbitration Rules & Procedures, *supra* note 88, Rule 12(i) & (j).

<sup>90</sup> The two most common formulations required either that the arbitrator be a lawyer with at least ten years' experience or a retired judge (18.0% of checking account arbitration clauses, covering 16.8% of arbitration-subject insured deposits; 30.3% of credit card arbitration clauses, covering 36.1% of arbitration-subject credit card loans outstanding; and 3.9% of prepaid card arbitration clauses, covering 30.9% of arbitration-subject card loads), or that the arbitrator be a practicing lawyer where the arbitration is held and have expertise in the applicable substantive law (3.3% of checking account arbitration clauses, covering 26.7% of arbitration-subject insured deposits; 4.5% of credit card arbitration clauses, covering 7.4% of arbitration-subject credit card loans outstanding; and 2.0% of prepaid card arbitration clauses; no load data).

<sup>91</sup> *Compare Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 924-25 (9th Cir. 2013) (clause providing for each party to identify three candidates to serve as arbitrator; parties, beginning with respondent, take turns striking candidates; last remaining candidate, who presumably had been initially identified by respondent, to serve as arbitrator) *with Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999) (clause giving employer unilateral control of pool from which arbitrators selected).

### 3.4.4 Delegation

The Federal Arbitration Act allocates authority between courts and arbitrators to decide certain legal challenges to the enforceability of arbitration clauses. As a general rule, only an arbitrator can decide challenges to the legal validity of the overall contract that contains the clause. Courts, however, may decide challenges to the enforceability of the arbitration clause itself, and they can also decide whether a party assented to the contract that includes the clause.<sup>92</sup> In *Rent-A-Center West, Inc. v. Jackson*, however, the Supreme Court ruled that parties could delegate to the arbitrator at least some issues that otherwise would be for the court to decide.<sup>93</sup> In that case, the Court concluded that based on the terms of the parties' agreement, the arbitrator—not the courts—should properly decide whether the arbitration clause was unconscionable.<sup>94</sup> The effect of such delegation clauses is to reduce substantially the role of courts in policing the fairness of arbitration clauses when they are included in a contract.

Although none of the arbitration clauses in the samples directly track the language used by the clause in *Rent-A-Center*, a majority of these clauses delegated to the arbitrator exclusive authority to make decisions about the enforceability of the arbitration clause.<sup>95</sup> The share ranged from 39.3% of arbitration clauses in the checking account sample, to 51.5% of credit card clauses, to 60.8% of prepaid card clauses.<sup>96</sup> A number of clauses, however, did the opposite: they reserved such authority to the court through an “anti-delegation clause.” For checking accounts, 26.2% of the clauses in the sample have this feature. The numbers for credit cards and prepaid cards are 13.6% and 7.8% respectively.

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<sup>92</sup> See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (fraudulent inducement of main contract for arbitrator to decide); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (illegality of main contract for arbitrator to decide).

<sup>93</sup> 130 S. Ct. 2772 (2010).

<sup>94</sup> *Id.* at 2778-79.

<sup>95</sup> *Id.* at 2777 (“[T]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the ... enforceability ... of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.”).

<sup>96</sup> For arbitration-subject account values, the shares are 51.6%, 46.0% and 42.6% for checking, credit cards, and prepaid cards respectively.

These data points actually understate the extent of delegation to the arbitrator for two reasons. First, an additional category of arbitration clauses delegated most enforceability issues to the arbitrator, but expressly reserved to the court the exclusive authority to decide the enforceability of any contractual limitations on class proceedings. This category appeared in 8.2% of the checking account clauses, 25.8% of the credit card clauses, and 13.7% of the prepaid card clauses. Second, most courts hold that language on arbitrator authority typically included in arbitration rules promulgated by administrators has the same effect as a delegation clause (although of course express delegation language in an arbitration clause overrides the administrator rule).<sup>97</sup> Because almost all of the arbitration clauses in the sample without delegation clauses (ranging from 9.1% of credit card arbitration clauses to 17.6% of prepaid card arbitration clauses to 26.2% of checking account arbitration clauses) nonetheless selected an administrator, those clauses effectively also contained a delegation clause, at least under current court decisions.<sup>98</sup>

### 3.4.5 Class action terms

Almost all of the arbitration clauses studied contained terms limiting class proceedings. Thus, 93.9% of the clauses in our credit card sample, 88.5% of arbitration clauses in our checking account sample, and 96.1% of clauses in our prepaid sample did not allow arbitration to proceed on a class basis. The handful of clauses that did not include such no-class-arbitration terms tended to be from very small institutions. Thus, in our samples, class arbitration was unavailable for 99.9% of arbitration-subject credit card loans outstanding, 97.1% of arbitration-subject insured deposits, and essentially 100.0% of arbitration-subject dollar amounts loaded on prepaid cards. An arbitration clause that does not allow class arbitration precludes any dispute subject to arbitration from proceeding as a class action—either in court or in arbitration. These results are summarized in Table 5.

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<sup>97</sup> See, e.g., *Oracle Am., Inc. v. Myriad Group, A.G.*, 724 F.3d 1069, 1074 (9th Cir. 2013) (“Virtually every circuit to have considered the issue has determined that incorporation of the American Arbitration Association’s (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.”).

<sup>98</sup> Fifteen of the 16 checking account arbitration clauses without delegation clauses specified an administrator (almost always the AAA). Five of the six credit card arbitration clauses and eight of the nine prepaid card arbitration clauses without delegation clauses likewise specified an administrator (again, most commonly the AAA, either by itself or with JAMS).

**TABLE 5: ARBITRATION CLAUSES WITH NO-CLASS-ARBITRATION PROVISIONS 2012-13**

	No class arbitration		No provision on class arbitration	
	# of contracts	% of arbitration-subject account values	# of contracts	% of arbitration-subject account values
Credit cards	62 (93.9%)	99.9%	4 (6.1%)	0.1%
Checking accounts	54 (88.5%)	97.1%	7 (11.5%)	2.9%
Prepaid cards	49 (96.1%)	100.0%	2 (3.9%)	0.0%

Some contracts with arbitration clauses also included provisions waiving the right to participate in a class action in court, either as a named plaintiff or a member of the class, or otherwise precluding the case from proceeding as a class action, for cases *not subject to arbitration*. Just over 30% (19 of 61, covering 10.1% of arbitration-subject insured deposits) of checking account arbitration clauses, 13.6% (9 of 66, covering 9.7% of arbitration-subject credit card loans outstanding) of credit card arbitration clauses, and 5.9% (3 of 51; no load data) of prepaid arbitration clauses included such provisions.<sup>99</sup> By comparison, two checking account contracts without arbitration clauses from the large bank sample and three from the mid-sized to small bank sample included provisions directly waiving class actions in court. One credit card contract without an arbitration clause and no prepaid card contracts without arbitration clauses included such class action waivers.

Most of the checking and credit card arbitration clauses in the samples also contained an “anti-severability provision,” stating that if the no-class-arbitration terms are held unenforceable, the

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<sup>99</sup> A number of these class litigation provisions appeared outside the arbitration clause. This was the case for 13 of the 19 checking account contracts with arbitration clauses, and one of the nine credit card contracts with arbitration clauses. The remainder appeared only within the arbitration clause. Class litigation provisions within the arbitration clause are generally more ambiguous. They can be seen as waiving class actions in cases not subject to arbitration, but they might instead be seen simply as stating the consequences of the arbitration clause.



entire arbitration clause is thereby rendered unenforceable as well.<sup>100</sup> Absent that provision, a court might hold a no-class-arbitration term unenforceable but the rest of the arbitration clause enforceable, meaning that the dispute might then proceed as a class arbitration. With an anti-severability provision, however, if a court held the no-class-arbitration terms unenforceable the arbitration clause would become unenforceable as well, and the case might proceed as a class action in court rather than as a class arbitration. Close to a majority of the checking account arbitration clauses (49.2%, covering 83.2% of arbitration-subject insured deposits) and a slight majority of credit card arbitration clauses in the sample (54.5%, covering 66.3% of arbitration-subject credit card loans outstanding) included such anti-severability provisions, with their use being more likely by larger banks and issuers. But only 29.4% of prepaid card arbitration clauses (covering 26.7% of arbitration-subject prepaid loads) had an anti-severability provision.

### 3.4.6 Relief limits

There is wide variation in the markets we have studied to date with respect to the inclusion in contracts with arbitration clauses of provisions to limit damages—most commonly punitive and consequential damages. Just over 15% of credit card contracts with arbitration clauses in the sample, covering less than 9% of arbitration-subject credit card loans, included damage limitations. A slight majority of the damage limitations in these credit card contracts precluded the award of punitive damages or consequential damages or both. But many were not absolute prohibitions, instead either requiring arbitrators to follow constitutional standards for the award of punitive damages<sup>101</sup> or setting out special procedures to be followed in the case of an award of punitive damages.<sup>102</sup>

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<sup>100</sup> A severability clause generally states that if a contract provision is unenforceable that provision will be treated as severable from the rest of the contract so that the rest of the contract remains enforceable. An anti-severability term does the opposite—it makes one or more provisions not severable from the contract or, in this case, from the arbitration clause.

<sup>101</sup> Because courts usually hold that arbitration does not constitute state action, constitutional limitations on the award of punitive damages might not otherwise apply. *See, e.g., MedValUSA Health Programs, Inc. v. MemberWorks, Inc.*, 872 A.2d 423 (Conn. 2005); *Mave Enter., Inc. v. Travelers Indem. Co. of Conn.*, 2013 WL 5740159 (Cal. Ct. App. Oct. 23, 2013). For an example of such a constitutional limitation see *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (holding that punitive damages award violated due process based on consideration of “the degree of reprehensibility of the [conduct], the disparity between the harm or potential harm suffered by [the

By comparison, over 60% of checking account contracts with arbitration clauses in the sample, covering almost 80% of arbitration-subject insured deposits, included some damages limitation.<sup>103</sup> (Prepaid card contracts were closer to credit card contracts in frequency.) In most checking account contracts, the damages limitation was not in the arbitration clause but elsewhere in the contract. Provisions precluding the award of punitive damages, consequential damages, or both consequential damages and punitive damages, appeared in 52.5% of the contracts (covering 69.0% of arbitration-subject insured deposits). Like the credit card contracts, some checking account contracts (8 of 61, Or 13.1%; 9.2% of arbitration-subject insured deposits) made constitutional standards for the award of punitive damages applicable in arbitration.<sup>104</sup>

A review of contracts without arbitration clauses reveals a roughly similar pattern, albeit with damages limitations somewhat less common. Just over 35% of large bank checking account contracts without arbitration clauses included either a consequential damages waiver or a consequential damages waiver and a punitive damages waiver. For small to mid-sized banks, 6.1% of checking account contracts without arbitration clauses included such damages limitations. A third of the prepaid card contracts without arbitration clauses included a consequential damages waiver or a punitive damages waiver or both. Only one of the credit card agreements without arbitration clauses limited the recovery of either punitive or consequential damages.

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plaintiff] and his punitive damages award, and the difference between the remedy and the civil penalties authorized or imposed in comparable cases”).

<sup>102</sup> The constitutional limit appears in three of 66 credit card arbitration clauses in our sample, representing 2.2% of arbitration-subject loans outstanding. One clause, representing 4.7% of arbitration-subject credit card loans outstanding, requires the arbitrator to follow specific procedures before making an award of punitive damages. The required procedures include issuing a reasoned award and conducting a post-award review of punitive damages, comparable to what would occur in court.

<sup>103</sup> This share does not include provisions dealing with the award of consequential damages for specific types of actions by banks, such as wrongful dishonor or errors in processing wire transfers, which are addressed specifically in the Uniform Commercial Code. UCC §§ 4-402(b), 4A-305(c).

<sup>104</sup> A handful of clauses purported to preclude the award of punitive damages while also authorizing the arbitrator to award punitive damages subject to constitutional standards.

### 3.4.7 Time limits

Few credit card and prepaid card contracts with arbitration clauses set time limits for consumers to file claims in arbitration. Two prepaid card contracts with an arbitration clause set a time limit of two years from when the consumer's claim arose for the consumer to file a claim in arbitration. (One of them applied the same time limit to company claims.) Four credit card arbitration clauses, all from small issuers, specified time limits for consumer claims, most commonly one year from when the claim arose. One of these issuers, however, required both the issuer and the consumer to give the other notice of any claim within 90 days of the claim arising.<sup>105</sup>

A greater number of checking account contracts with arbitration clauses set time limits on consumers filing claims in arbitration, although the time limits themselves were not included in the arbitration clause. Around 13% of the checking account contracts in the sample had such provisions, representing 28.4% of arbitration-subject insured deposits. These generally ranged from one to two years from when the consumer's claim arose. Again, however, one included a 90-day notice of claim requirement for both the bank and the consumer.

Overall, the pattern was generally similar for contracts without arbitration clauses. For large banks, 10.7% of checking account agreements without arbitration clauses had one-year time limits for consumer claims; of the small and mid-sized banks, 1.5% had such limits. Of credit card contracts without arbitration clauses, 2.5% had time limits, again requiring consumers to bring claims within a year of the claim arising. Only one of the prepaid cards without arbitration clauses had a time limit.

### 3.4.8 Confidentiality and nondisclosure

Unlike a judicial proceeding, arbitration as a general matter is a private process: filings are not publicly available and hearings are not open to the public. Arbitration rules typically do not impose express confidentiality or nondisclosure obligations on parties to the dispute, although

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<sup>105</sup> The provision added that the sending of a monthly billing statement by the issuer satisfied the issuer's notice obligations.

arbitrator ethics rules do impose confidentiality obligations on the arbitrator.<sup>106</sup> Most arbitration clauses in the sample were silent on confidentiality and did not impose any nondisclosure obligation on the parties. Only one prepaid card arbitration clause (2.0% of clauses; no load data) and two credit card arbitration clauses (3.0% of clauses, covering 7.3% of arbitration-subject credit card loans outstanding) precluded the parties from making disclosures about the arbitration proceeding, including its existence and outcome. Non-disclosure provisions were more common in checking account arbitration clauses, where they appeared in 11.5% of clauses covering 28.0% of arbitration-subject insured deposits. By comparison, none of the contracts without arbitration clauses imposed non-disclosure obligations on the parties to a dispute.

### 3.4.9 Hearing location

The arbitration clauses in the samples generally addressed the location of in-person hearings.<sup>107</sup> All but five prepaid card arbitration clauses (covering almost all arbitration-subject load volume) and all but nine credit card arbitration clauses (covering 92.6% of arbitration-subject credit card loans outstanding) addressed the issue. This feature was less common for checking accounts, but even there 63.1% of the arbitration-subject insured deposits in the sample addressed the hearing location.

The clauses specified a range of locations. The most common was that the hearing would be held in the federal judicial district of the consumer's residence. A common variation was for the hearing to be held in the same city as the U.S. District Court closest to the consumer.<sup>108</sup> Other

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<sup>106</sup> American Bar Association & American Arbitration Association, Code of Ethics for Arbitrators in Commercial Disputes, Canon VI(B) (Feb. 9, 2004), [http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial\\_disputes.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf) (“The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.”).

<sup>107</sup> Under the AAA's Supplementary Procedures, the default is for disputes under \$10,000 to be resolved on the basis of document submissions (which is known as a “desk hearing”), although either party may request an in-person or telephonic hearing. AAA, Supplementary Procedures for Consumer-Related Disputes, Rule C-5 (Effective Sept. 15, 2005). For disputes over \$10,000, “the arbitrator will conduct a hearing unless the parties agree not to have one.” *Id.* Rule C-6.

<sup>108</sup> A much less common variation, used by four small credit card issuers and one small bank in its checking account contract called for the hearing to be held in the “federal judicial circuit” of the consumer's residence.

clauses identified the consumer's state or county as the site of the hearing. Depending on the product market, between 3.9% to 18.0% of the clauses in the samples provided that any arbitration hearing would be at a location "reasonably convenient" for the customer. A handful of arbitration clauses—all associated with small institutions—identified specific cities or states in which hearings were to be held. Similarly, two arbitration clauses in checking account contracts, both from small banks, identified the place where the account was opened as the location of the hearing.

Contracts without arbitration clauses also specified hearing locations using choice-of-court clauses mandating an exclusive forum for any court case, but did so less frequently than contracts with arbitration clauses. Of the large banks using checking agreements without arbitration clauses, 21.4% specified the location of any court proceeding (most commonly, the state where the account is located); 4.6% of checking account agreements without arbitration clauses for small and mid-sized banks specified the location of any court proceeding (most commonly the city where the contract was signed or a specific state and federal court). Only 3.7% of the credit card contracts without arbitration clauses specified the location of any court proceeding, while 33.3% of prepaid card contracts without arbitration clauses did so.

### 3.4.10 Costs

In court systems, the government pays the salaries of judges and much of the cost of administering cases, although the filing fees required when initiating a case may defray a part of these costs. In arbitration, by contrast, the parties pay all the costs of arbitrating the dispute. As a result, the total up-front cost of filing a claim in arbitration—at least for the parties combined—is typically higher than the up-front cost of filing a lawsuit in court. Under the rules adopted by the AAA and JAMS, procedural costs are generally allocated to the parties at one or both of two stages. First, the rules set fees to be paid at the time a claim or counterclaim is filed (and sometimes at later points in the process, such as for a hearing). Second, the rules provide that the arbitrator may reallocate the fees between the parties in the arbitral award. The fees covered by the arbitration rules include both fees to be paid to the administrator and fees to be paid to the arbitrator. The parties also may incur attorneys' fees.

In addition, the terms of an arbitration clause may address—beyond simply incorporating the cost rules of the administrator—how these different costs will be allocated between the parties. The arbitration clauses we studied contained three different types of cost provisions: first, provisions addressing the initial allocation of arbitration fees; second, provisions addressing the

allocation of arbitration fees in the award; and third, provisions addressing the award of attorneys' fees.

Some contractual allocation of costs—beyond the default rules of the administrator—was the norm in the clauses we studied. Only seven credit card clauses (10.6%, all from small issuers and covering a negligible market share), 14 checking account arbitration clauses (23.0%, covering 2.4% of arbitration-subject insured deposits), and five prepaid card arbitration clauses (9.8%, all from cards for which load data are not available) did not contain provisions altering the default arbitration cost provisions in the administrator's governing rules.

Many of the contracts, and in particular the checking account contracts, included general provisions on the allocation of costs and expenses that were *not* specific to arbitration costs. This document does *not* address such provisions or how they may interact with provisions specifically addressing arbitration costs.

#### **PROVISIONS ADDRESSING THE INITIAL PAYMENT OF ARBITRATION FEES**

In consumer arbitration, administrative and arbitrator fees are first assessed to the parties at filing. We refer to this as the “initial fee” allocation. Under the consumer arbitration rules of the AAA and JAMS, initial fees are predominantly allocated to the business rather than the consumer.<sup>109</sup> (We discuss the AAA's allocation in more detail in section 4.9.1.) In addition, the administrator's rules may bar the parties from contractually allocating a greater share of fees to the consumer. The AAA's rules, for example, do not permit it to administer a case in which the consumer is required by the applicable arbitration clause to pay more at filing than the maximum amounts stated in the AAA's consumer fee schedule.

Some credit card arbitration clauses provided that the issuer would pay at least some of the initial fees otherwise allocated to the consumer under the governing rules. This was true for 22 clauses (33.3%) representing 46.4% of arbitration-subject credit card loans outstanding. These clauses provided that the issuer would pay the fees either unconditionally, for good cause, or only if the administrator did not waive the fees, with the amount of the payment varying and sometimes limited to amounts in excess of court fees. A slightly smaller proportion of the credit

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<sup>109</sup> *E.g.*, AAA, Supplementary Procedures for Consumer-Related Disputes, Rule C-8 (“Costs of Arbitration”) (Rules Effective Sept. 15, 2005; Fees Effective March 1, 2013); JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses, Minimum Standards of Procedural Fairness ¶ 7 (effective July 15, 2009).

card clauses (15 clauses, or 22.7%, covering 43.2% of arbitration-subject outstandings) stated that the issuer would advance at least some portion of the consumer’s arbitration fees under specified circumstances. Finally, eleven clauses used by small issuers (16.7% of clauses, covering a negligible share of outstandings) indicated that the issuer would consider paying or advancing the consumer’s arbitration fees, either on request or if the administrator does not waive the fees. These results are summarized in Table 6.

**TABLE 6:** ARBITRATION CLAUSE PROVISIONS ADDRESSING THE INITIAL PAYMENT OF ARBITRATION FEES 2012-13

	# of contracts	% of arbitration-subject account values
<b>Company will pay some or all fees</b>		
Credit cards	22 (33.3%)	46.4%
Checking accounts	27 (44.3%)	43.7%
Prepaid cards	18 (35.3%)	32.0%-41.8%
<b>Company will advance some or all fees</b>		
Credit cards	15 (22.7%)	43.2%
Checking accounts	8 (13.1%)	16.0%
Prepaid cards	7 (13.7%)	31.2%
<b>Company will consider or advancing paying some or all fees</b>		
Credit cards	11 (16.7%)	0.2%
Checking accounts	2 (3.3%)	0.4%
Prepaid cards	17 (33.3%)	27.0%-36.8%

Similarly, 44.3% of checking account arbitration clauses (43.7% of arbitration-subject insured deposits) provided that the institution would pay or reimburse some portion of the consumer’s share of the initial arbitration fees. Again, the prerequisites and amounts varied, with some contracts requiring good cause or that the administrator not waive the fees, and some only paying the amount in excess of court filing fees. A smaller number (8 clauses, or 13.1%, covering

16.0% of arbitration-subject insured deposits) provided that the institution would advance the arbitration fees under the specified circumstances. Two clauses (3.3%; 0.4% of arbitration-subject insured deposits) stated that the institution would consider paying the fees. These results are summarized above in Table 6.

Prepaid card arbitration clauses most commonly provided that the institution would consider advancing the consumer's share of arbitration fees (17 clauses, or 33.3%, covering between 27% and 36.8% of card loads); would advance the consumer's arbitration fees (7 clauses, or 13.7%, covering 31.2% of card loads); or would simply pay the consumer's arbitration fees, either in their entirety (14 clauses, or 27.5%, covering between 5.6% and 15.3% of card loads), to the extent the fees exceed filing fees in court (1 clause, 2.0%; no data on loads), up to \$500 (1 clause, 2.0%; no data on loads), or for claims under \$50,000 to \$75,000 (2 clauses, or 3.9%, covering 26.5% of card loads). These results are also summarized above in Table 6.

#### **PROVISIONS ADDRESSING THE ALLOCATION OF ARBITRATION FEES IN THE AWARD**

The rules of arbitration administrators may permit the arbitrator to allocate all arbitration fees between the parties in the award, including reallocating initial fees from one party to the other. As we explain further in section 4.9.1, prior to March 1, 2013, the default AAA rules provided for such reallocation. (From that date, however, the AAA rules restrict reallocation.<sup>110</sup>) The JAMS Streamlined Arbitration Rules also allow for such reallocation, and the JAMS Minimum Standards of Procedural Fairness for consumer arbitrations do not appear to restrict the practice, except for cases in which California law so requires.<sup>111</sup> Our review in this section uses the situation under the JAMS rules and the AAA rules in force from 2010 through 2012 as the baseline for comparison.

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<sup>110</sup> The new fee schedule, effective March 1, 2013, provides that “[a]rbitrator compensation ... and administrative fees (which include Filing and Hearing Fees) are not subject to reallocation by the arbitrator(s) except pursuant to applicable law or upon the arbitrator’s determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.” AAA, Supplementary Procedures for Consumer-Related Disputes, Rule C-8. The credit card contracts studied all predate the revision to the AAA rules. The checking account and prepaid card contracts also may not reflect the revision to the rules.

<sup>111</sup> JAMS Streamlined Arbitration Rules & Procedures, *supra* note 88, Rule 19(e); JAMS Minimum Standards of Procedural Fairness, *supra* note 109, ¶ 8 (“In California, the arbitration provision may not require the consumer to pay the fees and costs incurred by the opposing party if the consumer does not prevail.”).



Arbitration clauses took noticeably different approaches to the allocation of arbitration fees in the arbitrator's award.<sup>112</sup> First, a number of credit card arbitration clauses (23 clauses, or 34.8%, covering 21.8% of arbitration-subject credit card loans outstanding) expressly permitted the arbitrator to shift the payment of arbitration fees from the issuer to the consumer, as the default AAA and JAMS rules already allowed.<sup>113</sup> All but one of the clauses permitted the converse as well—shifting fees from the consumer to the issuer. Second, a smaller number (5 clauses, or 7.6%; 17.0% of arbitration-subject credit card loans outstanding) expressly precluded such shifting arbitration fees from the issuer to the consumer. Third, others (18 clauses, or 27.3%; 51.5% of arbitration-subject credit card loans outstanding) affirmatively permitted the consumer to recover arbitration fees from the issuer. Five of these clauses (covering 4.3% of arbitration subject credit card loans outstanding) also precluded cost-shifting to the consumer, while the rest were silent on reallocation to the consumer. While clauses in all three categories would allow the arbitrator to shift fees from the consumer to the company, only clauses in the second category (and five of the clauses in the third category) offer the consumer any contractual protection against the possibility of an adverse reallocation of costs at the award stage.

Checking account arbitration clauses contained similar provisions. Almost 25% of the clauses (15 of 61, covering 16.9% of arbitration-subject insured deposits) expressly permitted the arbitrator to shift arbitration costs to the consumer (and the converse as well), in line with the default rules. Just over 11% of the clauses (7 of 61, covering 7.9% of arbitration-subject insured deposits) precluded cost-shifting back to the consumer. Finally, 14.8% of clauses (9 of 61, but covering 28.0% of arbitration-subject insured deposits) expressly permitted the consumer to recover arbitration fees from the institution, but only one such clause (covering 0.4% of arbitration-subject insured deposits) precluded the arbitrator from shifting costs to the consumer.

The pattern also was similar for prepaid cards. Nine prepaid card arbitration clauses (17.6%; no data on card loads) permitted fees to be shifted to consumers (with all but one permitting the converse as well), while three clauses (5.9%; 26.5% of arbitration-subject prepaid card loads)

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<sup>112</sup> Some clauses clearly covered both the administrator's fees and the arbitrator's fees, but most were ambiguous about whether both types of fees are covered or only the administrator's fee.

<sup>113</sup> Only one such clause (for a small issuer) requires that a losing consumer pay the issuer's arbitration costs. The rest permitted the arbitrator to so decide but do not require the arbitrator to do so.

precluded such fee shifting. Many more prepaid arbitration clauses (22 clauses, or 43.1%; 57.9%-67.7% of arbitration-subject prepaid card loads) affirmatively permitted prevailing consumers to recover their arbitration fees, although without precluding cost-shifting back to the consumer. These results are summarized in Table 7.

**TABLE 7: ARBITRATION CLAUSE PROVISIONS ADDRESSING ALLOCATION OF ARBITRATION FEES IN THE AWARD 2012-13**

	# of contracts	% of arbitration-subject account values
<b>Permits shifting issuer fees to consumer</b>		
Credit cards	23 (34.8%)	21.8%
Checking accounts	15 (24.6%)	16.9%
Prepaid cards	9 (17.6%)	No data
<b>Bars shifting issuer fees to consumer</b>		
Credit cards	5 (7.6%)	17.0%
Checking accounts	7 (11.5%)	7.9%
Prepaid cards	3 (5.9%)	26.5%
<b>Permits shifting consumer fees to issuer</b>		
Credit cards <sup>114</sup>	18 (27.3%)	51.5%
Checking accounts <sup>115</sup>	9 (14.8%)	28.0%
Prepaid cards <sup>116</sup>	22 (43.1%)	57.9%-67.7%

<sup>114</sup> Five of these credit card arbitration clauses, covering 4.3% of arbitration-subject credit card loans outstanding, also precluded shifting the issuer's arbitration fees to the consumer.

<sup>115</sup> One of these checking account arbitration clauses, covering 0.4% of arbitration-subject insured deposits, also precluded shifting the issuer's arbitration fees to the consumer.

<sup>116</sup> None of these prepaid card arbitration clauses precluded shifting the issuer's arbitration fees to the consumer.

## PROVISIONS ADDRESSING THE AWARD OF ATTORNEYS' FEES

A significant share of credit card arbitration clauses directed that the parties bear their own attorneys' fees unless the law requires otherwise (22 clauses, or 33.3%; 45.5% of credit card loans outstanding). This was also true for a smaller share of checking account contracts (9 clauses, or 14.8%; but 37.6% of arbitration-subject insured deposits) and prepaid card contracts (3 clauses, or 5.9%; no load data). One prepaid card (which covers 26.5% of arbitration-subject card loads in our sample) waived any right of the company to recover attorneys' fees from the consumer.

Significant shares of arbitration clauses across all three markets, however, did not address attorneys' fees. This was true for 18 credit card clauses (27.3%, covering 21.4% of arbitration-subject credit card loans outstanding), 22 checking account clauses (36.1%, covering 27.2% of arbitration-subject insured deposits), and 35 prepaid clauses (68.6%, covering 73.3% of arbitration-subject card loads). When the arbitration clause does not address the issue, the arbitrator may award attorney's fees when permitted by the agreement or applicable law.<sup>117</sup>

Five credit card arbitration clauses (7.6%, from small issuers representing a negligible market share) directed or permitted the arbitrator to award attorneys' fees to the prevailing party, which presumably would have permitted the issuer to recover its attorneys' fees from the consumer when it prevailed, and also would have permitted a prevailing consumer to recover his or her attorneys' fees. Five prepaid arbitration clauses (9.8%; no load data) permitted an award to a prevailing party, either the consumer or the company. Three checking account clauses (4.9%; 1.0% of arbitration-subject insured deposits) would have permitted an award to the prevailing party, consumer or company.

A number of the remaining clauses permitted or directed the award of attorneys' fees to a prevailing consumer. Five credit card clauses (7.6%, covering 10.2% of arbitration-subject credit card loans outstanding) directed the issuer to pay the consumer's attorneys' fees if the consumer prevails. Other credit card clauses expressly authorized (but did not require) the arbitrator to award attorneys' fees to consumers, either if the consumer prevailed (1 clause, or 1.5%; 15.1% of arbitration-subject credit card loans outstanding), if the amount awarded was greater than the

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<sup>117</sup> AAA, Commercial Arbitration Rules, Rule R-43(d) (ii) (effective June 1, 2009); JAMS Streamlined Arbitration Rules, *supra* note 88, Rule 19(f).

issuer's last settlement offer (1 clause, or 1.5%; 0.0% of arbitration-subject credit card loans outstanding), or if the arbitrator so determined (1 clause, or 1.5%; 0.2% of arbitration-subject credit card loans outstanding).

Eleven checking account clauses (18.0% of clauses; 18.1% of arbitration-subject insured deposits) provided that the arbitrator would award, and another two clauses (3.3% of clauses; 2.4% of arbitration-subject insured deposits) might award attorneys' fees to a prevailing consumer. An additional three checking account clauses directed (4.9%; 2.5% of arbitration-subject insured deposits), and another permitted (1.6%; 0.5% of arbitration-subject insured deposits), the arbitrator to award the consumer attorneys' fees if the award exceeded the institution's last written settlement offer, while another directed the award of double attorneys' fees under those circumstances (1.6%; 0.2% of arbitration-subject insured deposits). One prepaid clause (no load data) permitted the arbitrator to award attorneys' fees to the consumer.

**TABLE 8: ARBITRATION CLAUSE PROVISIONS ADDRESSING THE AWARD OF ATTORNEYS' FEES IN THE AWARD 2012-13**

	# of contracts	% of arbitration-subject account values
<b>Parties bear own attorneys' fees</b>		
Credit cards	22 (33.3%)	45.5%
Checking accounts	9 (14.8%)	37.6%
Prepaid cards	3 (5.9%)	No load data
<b>Attorneys' fees to prevailing party</b>		
Credit cards	5 (7.6%)	0.0%
Checking accounts	3 (4.9%)	1.0%
Prepaid cards	5 (9.8%)	No load data
<b>Attorneys' fees to prevailing consumer</b>		
Credit cards	8 (12.1%)	25.5%
Checking accounts	18 (29.5%)	23.7%
Prepaid cards	1 (2.0%)	No load data

No provision		
Credit cards	18 (27.3%)	21.4%
Checking accounts	22 (36.1%)	27.2%
Prepaid cards	35 (68.6%)	73.3%

### 3.4.11 Contingent minimum award recoveries

The AT&T arbitration clause at issue in *Concepcion* provided that a customer would receive a minimum recovery of \$10,000 if the customer was awarded more in arbitration than the amount of the last written settlement offer made by AT&T.<sup>118</sup> Contingent minimum recovery provisions were uncommon in the arbitration clauses that we studied, although they occurred more often in checking account arbitration clauses than in credit card or prepaid card arbitration clauses. We did not identify any such terms in contracts without arbitration clauses.

None of the arbitration clauses in the prepaid card contracts in the sample included a contingent minimum recovery provision. Only three (4.5%) of the credit card arbitration clauses studied—representing 2.3% of arbitration-subject credit card loans outstanding in the sample—included such a provision, with the contingent amount ranging from \$5,100 to \$7,500. By comparison, ten arbitration clauses (16.4%) in the checking account sample—representing 10.5% of arbitration-subject insured deposits in the sample—included such a provision. For these ten checking account contracts, the contingent minimum recoveries generally ranged from \$2,500 to \$10,000.<sup>119</sup>

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<sup>118</sup> See 131 S. Ct. at 1744 & n.3.

<sup>119</sup> Most of the provisions that we identified make the minimum recovery contingent on the arbitrator awarding the consumer the relief sought, or greater relief, after the institution refuses to provide such relief. A smaller share use a different contingency: whether the arbitrator awards relief equal or in excess of the value of the company's last settlement offer.

### 3.4.12 Disclosures

Most of the arbitration clauses described certain differences between arbitration and litigation in court. They typically highlighted some combination of four differences. First, no jury trial is available in arbitration. Second, discovery typically is more limited in arbitration than in civil court litigation. Third, appeal rights are more limited in arbitration than for decisions of trial court judges in civil court cases. Fourth, when parties have agreed to arbitrate, they cannot participate in class actions in court.<sup>120</sup> Often this descriptive language was capitalized or in boldfaced type.

Of the credit card arbitration clauses studied, 49.3% (covering 40.8% of arbitration-subject credit card loans outstanding) identified all four procedural differences; only a number of small issuers identified none. Almost every credit card arbitration clause indicated that the consumer would not have a right to a jury trial in arbitration (92.5% of clauses, covering 99.7% of arbitration-subject credit card loans), and slightly more (94.0% of clauses, covering 99.9% of arbitration-subject credit card loans) stated that for claims subject to arbitration the consumer could not be party to a class action in court. Over half of the clauses mentioned more limited rights to discovery and appeal.

The checking account arbitration clauses studied contained fewer disclosures. Only 27.9% of clauses (covering 19.0% of arbitration-subject insured deposits) identified all four procedural differences, while 24.6% of clauses (although again covering smaller issuers) identified none. The most common difference disclosed was the lack of a jury trial (75.4% of clauses, covering 98.1% of arbitration-subject secured deposits). The majority (60.7%, covering 67.5% of arbitration-subject insured deposits) stated that for claims subject to arbitration, the consumer could not be part of a class action in court. Around 40% noted limited discovery and appeal rights.

The disclosures in the prepaid card arbitration clauses were more like those in credit card clauses, with 41.2% (covering from 27.0% to 36.8% of arbitration-subject card loads) disclosing

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<sup>120</sup> The type of disclosure provisions discussed here are not the same as the no-class-arbitration provisions examined earlier. See section 3.4.5. The disclosure provision explains to the consumer that by agreeing to arbitration, the consumer will not be able to participate in a class action in court. The no-class-arbitration provision provides that any arbitration proceeding will be conducted on an individual basis and not a class basis. Most contracts included both, but a few contracts with no-class-arbitration provisions did not make the type of disclosure considered here.

all four procedural differences and only 7.8% (with no card load data available) disclosing none. Almost all (92.2% of clauses; 100% of arbitration-subject card loads) stated that no jury trial was available, most (88.2% of clauses; 100% of arbitration-subject card loads) noted the inability to participate in a class action in court, and many highlighted limited discovery (66.7% of clauses; 42.3% of arbitration-subject card loads) and limited appeal rights (47.1% of clauses; 57.9%-67.7% of arbitration-subject card loads).

## 3.5 Clause changes

The data presented so far are for arbitration clauses as of the end of 2012 (for credit card contracts) or as of the third quarter of 2013 (for checking account and GPR prepaid card contracts). This section examines whether the inclusion of arbitration clauses in consumer financial services contracts has changed since December 31, 2010, shortly before the Supreme Court's April 2011 decision in *Concepcion*.<sup>121</sup> In *Concepcion*, the Court upheld a no-class-arbitration provision in an arbitration clause against a state law unconscionability challenge, overriding a number of state and federal court decisions upholding state laws that had invalidated such provisions.<sup>122</sup> Following *Concepcion*, several scholars and commenters suggested that companies would inevitably include arbitration clauses with no-class-arbitration provisions in all their consumer contracts<sup>123</sup> or would revise their arbitration clauses in line with

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<sup>121</sup> See 131 S. Ct. at 1753.

<sup>122</sup> See, e.g., *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007); *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 912 A.2d 88 (N.J. 2006).

<sup>123</sup> E.g., Ian Millhiser, *Supreme Court Nukes Consumers' Rights In Most Pro-Corporate Decision Since Citizens United*, ThinkProgress: Justice (Apr. 27, 2011) ("After *Concepcion*, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action.") <http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers>. But see Peter B. Rutledge & Christopher R. Drahozal, "Sticky" Arbitration Clauses?: *The Use of Arbitration Clauses After Concepcion and Amex*, 67 VAND. L. REV. \_\_\_\_ (forthcoming 2014) (finding that most franchisors have not switched to arbitration after *Concepcion* and explaining that "[b]y using an arbitration clause, businesses do more than simply contract out of class actions: they contract for a bundle of dispute resolution services, including, for example, a very limited right to appeal. For businesses that perceive themselves as unlikely to be sued in a class action (and hence to receive little benefit from an arbitral class waiver), the other services bundled with the waiver of class actions ... may discourage

the case.<sup>124</sup> We focus on changes in the incidence in contracts of arbitration clauses or clause features; we do not address changes in the manner and frequency with which clauses are applied that may result from intervening legal decisions such as *Concepcion* or *Rent-A-Center*.

Because of data availability, we focus here on changes in the inclusion of arbitration clauses in credit card contracts. Only limited data on changes in checking account contracts since *Concepcion* are available, but those data reveal a noticeable increase in the inclusion of arbitration clauses among large banks since mid-2012. We have no data on changes in the inclusion of arbitration clauses in prepaid card contracts since *Concepcion*.

We also note that many companies—particularly smaller entities—use standard forms acquired from a form provider, rather than preparing their own customized form. At least 83 of the 141 small to mid-sized banks (58.9%) in the checking account sample used some version of a standard form prepared by a single form provider. At present, that standard form does not include an arbitration clause, although the form company does offer an optional free-standing arbitration clause.

### 3.5.1 Credit cards

The incidence of arbitration clauses in credit card contracts has increased since *Concepcion*, but only slightly. Examining the issuers in our sample that have agreements available for the entire period from 2010-2012, the number of issuers using arbitration clauses increased from 57 as of year-end 2010, to 58 as of year-end 2011, to 59 as of year-end 2012.<sup>125</sup> A total of five credit card issuers in our sample have adopted arbitration clauses since *Concepcion*, while three issuers that previously used arbitration clauses stopped using them, for a net increase of two. The dollar amount of credit card loans outstanding subject to arbitration clauses has increased somewhat more—from 47.2% of credit card loans outstanding as of year-end 2010 to 50.1% as of year-end

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them from using an arbitration clause. In addition, even standard form contracts might be sticky—i.e., resistant to change even if change might be in the business’s best interest.”).

<sup>124</sup> See Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825, 844-45 (2012).

<sup>125</sup> A review of the credit card contracts available on the CFPB web page reveals no additional issuers switching to arbitration between December 31, 2012, and June 30, 2013. We have not yet reviewed the clauses for changes in features over this period.



2012.<sup>126</sup> Of course, 86.8% of credit card loans outstanding without arbitration clauses were subject to the *Ross* settlement during this period, which limited the extent of any shift toward arbitration after *Concepcion*.<sup>127</sup> Of the five issuers that have switched to arbitration since *Concepcion*, all included no-class-arbitration provisions, four of five included delegation clauses (the other excepted class issues from its delegation clause), and none had a minimum recovery provision.

Of the issuers that have used arbitration clauses for the entire period from 2010-2012, only a small number have changed provisions in their clauses since *Concepcion*. The only change in the inclusion of no-class-arbitration terms by those issuers was the deletion by one issuer of language that excluded California accounts from its class waiver. The inclusion of anti-delegation clauses by those issuers increased from 33.6% of arbitration-subject credit card loans outstanding as of December 31, 2010, to 42.6% as of December 31, 2012.<sup>128</sup> Finally, in 2012, two of these issuers added contingent minimum recovery provisions to their existing arbitration clauses that were similar to those in the clause at issue in *Concepcion*. Even so, the market share covered by such provisions—some 2.3% of arbitration-subject credit cards loans outstanding—remains small.

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<sup>126</sup> The five issuers switching to arbitration contributed only a marginal amount to the increase, accounting for 0.2% of credit card loans outstanding. Changes in the amount of credit card loans outstanding of existing users of arbitration clauses explain almost all of the increase.

<sup>127</sup> See *supra* text accompanying notes 51 to 52. It is possible, of course, that one or more of the settling defendants in *Ross* might have removed their credit card arbitration clauses even absent *Ross*. The *Ross* allegations did not apply to checking accounts, but Bank of America removed its arbitration clause from checking accounts in August 2009. See Jonathan Stempel, *Bank of America ends arbitration of card disputes*, REUTERS.COM (Aug. 14, 2009), <http://www.reuters.com/article/2009/08/14/us-bankofamerica-arbitration-sb-idUSTRE57D03E20090814>. On the other hand, two issuer defendants did not agree to settle *Ross*, maintained their clauses, and together with another issuer in a parallel proceeding, took the matter through trial. As this presentation was being finalized, the case remained pending against all three issuers.

<sup>128</sup> Two issuers replaced their delegation clauses with anti-delegation clauses, two replaced class exceptions with anti-delegation clauses, one removed the class exception from its delegation clause, while one added a new delegation clause, though it was still subject to a class exception.

### 3.5.2 Checking accounts

By comparison to credit card contracts, only limited data are available on changes in checking account contracts since *Concepcion*. We compare the contracts used in the Pew Charitable Trusts study of checking account contracts—collected from June to August 2012—to the contracts we collected just over a year later – from August to September 2013.<sup>129</sup> Thus, the data cover only a portion of the period since *Concepcion*. Any changes to checking account contracts prior to summer 2012 will not be reflected in the findings described below.<sup>130</sup>

The sample consists of 88 large financial institutions (banks and credit unions) as to which the sample in the Pew study overlaps with the sample used by the Bureau.<sup>131</sup> As of summer 2012, 35 of the 88 institutions (39.8%) used arbitration clauses in their checking account contracts. As of summer 2013, one year later, 42 of 88 (47.7%) used arbitration clauses. Eight banks and one credit union switched to arbitration during that one-year period, while two banks switched away from arbitration. The eight banks switching to arbitration constituted 9.2% of all arbitration-subject insured deposits in the large bank sample. The credit union became the largest credit union using an arbitration clause, accounting for over one-third of all arbitration-subject insured deposits at credit unions in the sample as of year-end 2012. Of the institutions that switched to arbitration within the past year, six included delegation clauses, two had anti-delegation provisions, and one had neither an anti-delegation nor delegation provision; all but one had a no-class-arbitration provision; and none had a contingent minimum recovery provision.

As with credit card contracts, only a small number of institutions have changed the terms of their existing arbitration clause within the past year. Of the institutions that had arbitration clauses in both 2012 and 2013, one adopted a delegation clause, one adopted an anti-delegation clause, and a third added language that delegates most issues of enforceability to the arbitrators;

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<sup>129</sup> Pew Charitable Trusts, *supra* note 37, at 14. We describe our sourcing of checking account contracts in Appendix A.

<sup>130</sup> For example, press reports indicate that Umpqua Bank adopted an arbitration clause in January 2012, prior to the period for which we have data here. See Brent Hunsberger, *Umpqua Bank Joins Wells Fargo and Chase in Requiring Customers to Arbitrate Disputes, Barring Class Actions*, THE OREGONIAN (Jan. 23, 2012), [http://www.oregonlive.com/business/index.ssf/2012/01/umpqua\\_bank\\_joins\\_wells\\_fargo\\_1.html](http://www.oregonlive.com/business/index.ssf/2012/01/umpqua_bank_joins_wells_fargo_1.html).

<sup>131</sup> Pew was unable to obtain agreements for eight banks in its sample, while four of the banks in the Pew sample (based on total deposits) are not in the sample used here (based on total insured deposits).

its clause previously stated only that class issues were to be decided by a court and was silent on the other issues. Two of those institutions adopted no-class-arbitration provisions, and one added a contingent minimum recovery provision to its arbitration clause.

## 4. Incidence and typology of consumer arbitration filings

This section presents preliminary results from our review of 1,241 credit card, checking and payday loan consumer disputes filed with the American Arbitration Association (“AAA”) from the start of 2010 through the end of 2012.<sup>132</sup> Based on our review of AAA consumer arbitration files, these were the only consumer disputes about any of these three products filed with the AAA during that period.

### 4.1 Data sources

#### 4.1.1 AAA case data

Our review used electronic case records that the AAA voluntarily provided to the Bureau (the “AAA Data”). The AAA began using its electronic case record system from the beginning of 2010 for all filings administered as consumer arbitrations. Under the AAA rules—in this case the AAA Supplementary Procedures for Resolution of Consumer-Related Disputes—a dispute between a consumer and a company is administered as a consumer arbitration if it meets a number of criteria. First, the business must have a “standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices.” Second, the product at issue must be for personal or

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<sup>132</sup> We identified four filings relating to prepaid or gift cards. They are not included in the 1,241 because we considered that number of cases too small to include as a separate product market in this presentation.

household use.”<sup>133</sup> (If there is no applicable arbitration clause in the contract between the consumer and company, the consumer arbitration rules may still apply if the parties agree to submit the dispute to AAA.<sup>134</sup>) As a result, an AAA “consumer arbitration” is not necessarily one filed by a consumer. So long as the criteria described above apply, companies can file consumer arbitrations against consumers.

The AAA agreed to provide to the Bureau all case files from its electronic case record system for consumer arbitrations filed from January 1, 2010 through the end of 2012. The material volunteered by the AAA covers class arbitrations and non-class arbitrations; filings that went no further than an initial filing, as well as those that did advance to formal initiation by the AAA and beyond; and all arbitration filings that were submitted as consumer arbitrations regardless of subject matter.

To date, our review of the AAA Data has: (1) identified consumer arbitration filings that cover credit card, checking account, payday loan, or prepaid disputes; and (2) extracted data points for the first three of these categories. This presentation, therefore, does not cover data about AAA consumer arbitrations outside of these particular product markets. We refer to the AAA Data that covers these three product markets for filings between January 1, 2010 and December 31, 2012, as the “AAA Case Data.”

Our review to this point was limited to AAA files. This is because we have not secured data from JAMS and, indeed, JAMS may not have data of the same duration as the AAA. Although we intend to continue to explore with JAMS the possibility of obtaining its data, we do not view the absence of such data as materially impacting our analysis because, during the 2010-12 period under review, the AAA was and remains the largest administrator of consumer arbitration in the United States.<sup>135</sup> JAMS, the other leading consumer arbitration administrator, has reported that

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<sup>133</sup> AAA, Consumer-Related Disputes Supplementary Procedures C-1(a) (effective Sept. 15, 2005). The AAA reserves discretion whether or not to apply the consumer arbitration rules, with the parties being free to raise disputes about their application directly to the arbitrator. *See id.*

<sup>134</sup> *See id.* Rule C-3 (effective Sept. 15, 2005).

<sup>135</sup> That was not true until July 2009, when the National Arbitration Forum (“NAF”) settled a consumer fraud suit brought by Minnesota Attorney General Lori Swanson. Until that point, NAF was almost certainly administered the largest caseload of consumer arbitrations in the U.S. In the settlement, however, it agreed to stop administering new consumer arbitrations and exited the consumer arbitration business altogether.

it handles “at most” a few hundred consumer cases every year.<sup>136</sup> In contrast, the AAA Data contain approximately 7,000 consumer arbitration filings over three years. (This number is not limited to consumer financial matters.<sup>137</sup>) Although many of these cases were outside the scope of our review, these numbers provide some indication of the relative roles of the AAA and JAMS.

Moreover, during the time period under study, the AAA was the largest provider of consumer arbitration services with respect to consumer financial disputes within the scope of our current review. As discussed in section 3.4.3 above, almost all the credit card arbitration clauses studied provide for arbitration before the AAA alone (48.5%) or before a choice of the AAA and other administrators (a further 34.8%). For checking accounts, the picture is the same. Banks with an arbitration clause either specify (91.8%) or require (55.7%) the AAA to be used if arbitration were elected by either party. While JAMS is a permitted option for 40.1% of credit card agreements and for 34.4% of checking account agreements, it is only once the sole option for checking account agreements and only three times the sole option for credit card agreements.<sup>138</sup>

## 4.1.2 Existing empirical studies and data

Although a relatively large number of empirical studies have examined employment and securities arbitration, relatively few such studies have examined consumer arbitration in detail.<sup>139</sup> Drahozal and Zyontz reviewed AAA consumer arbitrations that resulted in an

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<sup>136</sup> See Jean Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 SW. U. L. REV. 87, 99 n.68 (2012) (“*Mandatory Binding Arbitration Clauses*”) (citing Jay Welsh, JAMS Executive Vice President and General Counsel.) There is general agreement that the AAA and JAMS are the leading consumer arbitration administrators. See, e.g., ABA, CBA, & FSR RFI Comment at 3.

<sup>137</sup> It covers all consumer arbitration filings, regardless of subject matter. It also includes filings that were not perfected for one or more of the reasons discussed at section 4.2.1 below. Approximately one-third of the filings were not perfected.

<sup>138</sup> By market volume subject to arbitration, the AAA is specified still more frequently. See section 3.4.3.

<sup>139</sup> Part of the reason may be that “all arbitration awards in the securities industry are publicly available.” David B. Lipsky et al., *The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Securities Industry*, 52 INDUSTRIAL RELATIONS: A JOURNAL OF ECONOMY AND SOCIETY 314, 317 (2013). Securities industry arbitration encompasses claims involving customers and brokers as well as employment claims involving employees and brokerage firms. These arbitrations are administered by the Financial Industry Regulatory Authority (“FINRA”). See *id.* at 322.

arbitrator's "award" during nine months of 2007.<sup>140</sup> The AAA Case Data available to us is significantly broader than the data covered by this earlier study. It covers a much longer period, and it is not limited to case files for awarded cases. A number of summary reviews published by the AAA covered all administered AAA consumer arbitrations from 2006 and a sample from 2007.<sup>141</sup>

Empirical review of non-AAA consumer arbitrations has generally used NAF data. A number of studies have used public data in California for NAF consumer arbitrations from 2003 through early 2007.<sup>142</sup> Public Citizen identified a set of roughly 34,000 NAF arbitrations for this period, all but 118 of which companies filed against consumers, rather than the other way around.<sup>143</sup> Almost all the cases were described by NAF as "collection" cases. Ernst & Young carried out a review of a sample of NAF consumer-filed arbitrations from 2000 through 2003.<sup>144</sup> NAF also

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<sup>140</sup> See Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25:4 OHIO ST. J. ON DISP. RES. 843, 845 (2010) ("*Empirical Study*") (noting relative lack of studies of consumer arbitration). This study presented results primarily from analyzing 301 consumer arbitrations closed by an award between April 2007 and December 2007. See *id.* at 867-71 (describing data and methodology). This study was part of a broader research project supported by the Searle Civil Justice Institute, which was then associated with Northwestern University School of Law. Drahozal and Zyontz used the same AAA data for a follow-on study that compared debt collection claims by companies in AAA consumer arbitrations with debt collection claims in federal court and in state court proceedings in certain Virginia and Oklahoma jurisdictions. See Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L. J. 77 (2011) ("*Creditor Claims*").

<sup>141</sup> See AAA, Statement of the AAA Before the Constitution Subcomm. of the Senate Comm. on the Judiciary (2007) and Analysis of the AAA's Consumer Arbitration Caseload (2007), both available at the AAA's website, [www.adr.org](http://www.adr.org).

<sup>142</sup> Pursuant to section 1281.96 of the California Code of Civil Procedure law, arbitration providers are required to disclose a number of data points about consumer and employment arbitrations in California. See Cal. Civ. Proc. Code § 1281.96. A number of other jurisdictions now have similar requirements. The AAA does not limit its public disclosures to California arbitrations, but discloses information on consumer arbitrations throughout the United States. Because we have access to AAA electronic case records, however, we have not relied for our review on these public data. In addition, as discussed in section 4.2 below, our review covers all consumer arbitration filings with the AAA, whereas the publicly available data only reaches disputes that the AAA actually processes.

<sup>143</sup> Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers* (Sept. 2007), <http://www.citizen.org/documents/ArbitrationTrap.pdf>.

<sup>144</sup> Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* (2004), <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005ErnstAndYoung.pdf>. This study also briefly reviewed certain public data on AAA arbitrations available in California.

published at least one review of its own case data.<sup>145</sup> Finally, data about consumer arbitration can sometimes be obtained from public litigation proceedings. In a number of court cases, companies or other parties have proffered evidence about arbitration.

## 4.2 Case incidence

### 4.2.1 Overall

For 2010 through 2012, excluding class cases, we identified 1,241 AAA non-class consumer arbitration filings about credit cards, checking account, and payday loans.<sup>146</sup> The cases covered the entire range of arbitral procedure, from cases filed with the AAA but never processed (for one of the reasons noted below) to cases decided by the arbitrator in a written award.<sup>147</sup>

There are several reasons for an AAA consumer arbitration to proceed no further than filing. First, there may be no pre-dispute arbitration clause between the parties, and one or other party may not agree to arbitrate post-dispute. Second, the parties may settle the dispute before the matter proceeds further. Third, the filing party may abandon the claim before the matter proceeds further. Fourth, the AAA may refuse to accept the dispute for one of a number of reasons: if the case is inconsistent with the terms of its moratorium on certain debt collection disputes, which we describe more fully below; if the company fails to comply with the AAA's Due

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<sup>145</sup> Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, METRO. CORP. COUNSEL (July 2006) (covering NAF cases from 2003 and 2004), <http://www.metrocorp.counsel.com/articles/6988/same-result-court-more-efficiently-comparing-arbitration-and-court-litigation-outcomes>.

<sup>146</sup> In this time period, there were only two class arbitration filings before the AAA for these three product markets. (Claimants in these two cases sought to represent “thousands” of consumers.) One reason for the lack of class arbitration filings may be that the applicable credit card and checking account arbitration clauses almost universally prohibit class arbitration, as described in section 3.4.5. (That may also be the case for payday lenders, but we do not yet have significant data on the point. The Bureau is not aware, however, of any arbitration clause in the consumer financial area that expressly permits class arbitration.) This presentation only reviews non-class arbitration filings.

<sup>147</sup> While our focus in this presentation is on the number and type of consumer disputes filed with the AAA, we will necessarily be looking at a smaller set of disputes when we later examine awards in arbitrated disputes. We will also look to see whether particular types of cases tend to end at specific stages, and comparing that to disposition in the court system.



Protocol by failing to pay the required filing and administrative fees; if the arbitration clause violates the terms of the Due Process Protocol, and the company is not willing to waive the violative terms for purposes of the arbitration; if the company has previously refused to comply with the Due Process Protocol; or for a claimant's failure to meet other filing requirements.

The Bureau recognizes that the number of filed arbitrations is not a metric that can be looked at in isolation. We do not know the numbers of credit cardholders, checking account holders, or payday borrowers with potentially viable legal claims. With the exceptions noted below, we do not yet know the number of claims filed in court proceedings.<sup>148</sup> Plainly, the number of arbitrations was low relative to the total populations using these products. Using the Bureau's Consumer Credit Panel, which provides a nationally representative, random sample of de-identified credit records procured from a large, national consumer reporting agency, we estimate that, as of the end of 2012, there were approximately 160 million credit cardholders in the United States. On the assumption that the number of cardholders and the volume of credit card loans outstanding are proportionate, when combined with our incidence data from section 3.2.1, this data indicate that around 80 million cardholders were subject to arbitration clauses as of the end of 2012. Data from the Census and from the Survey of Consumer Finance collectively suggest that in 2010 about 108 million U.S. households held one or more transaction accounts, a category that includes consumer checking accounts.<sup>149</sup> Combining data from the Census and the FDIC's National Survey of Unbanked and Underbanked Households suggests that in 2011, around 105.1 million households had at least one checking or savings account.<sup>150</sup> Again on the assumption that the number of checking accounts is proportionate to the volume of insured

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<sup>148</sup> Of course, the litigation numbers may be impacted up or down by the presence of arbitration clauses, making a direct comparison hard. In addition, there are limits on the availability of state court case records.

<sup>149</sup> According to the Survey of Consumer Finances, 92.5% of families had at least one transaction account in 2010. See Jesse Bricker, Arthur B. Kennickell, Kevin B. Moore, and John Sabelhaus, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances*, Federal Reserve Bulletin, vol. 98, no 2 (Feb. 2012), Table 6B at page 28. In this study, "family" is comparable to the Census definition of "household." *Id.* at 3. According to the Census, there were 116,716,331 U.S. households in 2010, which means that approximately 108 million households had at least one transaction account in that year. See U.S. Census Bureau; 2010 Demographic Profile Data, Profile of General Population and Housing Characteristics: 2010, Table DP-1.

<sup>150</sup> In 2011, according to the FDIC's survey, there were 9.9 million households without either a checking or a savings account. See Federal Deposit Insurance Corporation, *2011 FDIC National Survey of Unbanked and Underbanked Households* at 510 (2012). The Census identifies 115 million households in that year. See U.S. Census Bureau; 2011 American Community Survey 1 Year Estimates, Population and Housing Narrative Profile: 2011, Table NP01.

deposits, it appears that tens of millions of households are subject to arbitration on one or more checking accounts.<sup>151</sup> Finally, the FDIC also estimates that around 2 million households use payday loans annually.<sup>152</sup>

**FIGURE 4:** NUMBER OF AAA CONSUMER ARBITRATIONS BY PRODUCT 2010-12

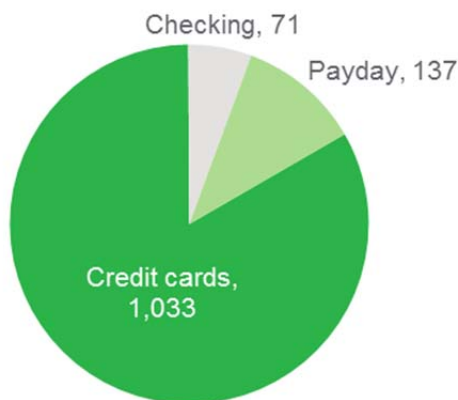


Figure 4 summarizes the breakdown of the 1,241 filings by product market: 1,033 were credit card disputes; 71 were checking account disputes; and 137 were payday loan disputes.<sup>153</sup> The

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<sup>151</sup> We do not offer a more specific estimate for checking accounts because: (a) these account data cover savings and other transaction accounts; (b) our overall incidence estimate from section 3.2.2 is specific to bank use of arbitration clauses for checking accounts, and thus does not reflect the incidence of credit union use; and (c) the section 3.2.2 incidence estimate uses 2012 and 2013 data, whereas the account data offered here is for 2010 and 2011.

<sup>152</sup> Federal Deposit Insurance Corporation, *Addendum to the 2011 FDIC National Survey of Unbanked and Underbanked Households Use of Alternative Financial Services* (2013) 48. The Pew Charitable Trusts recently estimated that around 12 million individuals use payday loans every year. See Pew Charitable Trusts, *Who Borrows, Where They Borrow, and Why: Payday Lending in America* (2012) 4.

<sup>153</sup> For purposes of this analysis, we have included in the category of “payday loan” cases a number of arbitration filings involving credit service organizations (“CSOs”). Approximately 23 states allow credit service organizations (CSOs) to broker loans. See <http://www.responsiblelending.org/payday-lending/policy-legislation/states/CRL-CSO-Issue-Brief-FINAL.pdf>. In some of these states, CSOs can charge unlimited fees to broker loans. See [http://forabettertexas.org/images/EO\\_2013\\_09\\_StateofPayday.pdf](http://forabettertexas.org/images/EO_2013_09_StateofPayday.pdf). Although CSO statutes generally contemplate that a CSO will broker a loan with a third party lender, there are claims that payday lenders pose as CSOs to evade state interest rate caps and make a larger profit on each loan. See <http://www.responsiblelending.org/payday-lending/policy-legislation/states/CRL-CSO-Issue-Brief-FINAL.pdf>. To account for this possibility, arbitration

average annual number of disputes, therefore, was 344 for credit card, 24 for checking account, and 46 for payday loans.

## 4.2.2 Types of consumer arbitration filings

Prior analyses of arbitration cases have distinguished company-filed and consumer-filed cases. Company-filed cases were generally debt collections arbitrations in which the company sought to collect debt or alleged debt from consumers. At least for some creditors for some period of time, debt collection arbitration took the place of debt collection litigation. The available data indicates that company-filed debt collection actions were the predominant form of consumer arbitration cases prior to 2010, with a number of specific credit card issuers making significant use of debt collection arbitration before NAF.<sup>154</sup>

Our analysis of the AAA records persuades us that it is important to identify debt collection arbitrations, but that the category of debt collection arbitrations now encompasses more than company-initiated arbitrations.<sup>155</sup> In 2009, prior to the period for which we have studied AAA case records, the AAA adopted a moratorium on the filing of debt collection actions. The moratorium continued throughout the study period, and continues to this day.<sup>156</sup> It generally bars consumer financial companies from filing arbitrations with the AAA to collect debt from

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demands filed against CSOs were included in the study when consumers alleged that the CSO originated any loan except for an auto-title loan.

<sup>154</sup> NAF reported that in 2006 alone it administered 214,000 debt collection cases. See Drahozal & Zyontz, *Creditor Claims*, *supra* note 140, at 77 (noting that it used to be generally accepted that “the vast majority of disputes between businesses and consumers, *both in arbitration and in litigation*, involve claims by creditors seeking to recover amounts allegedly owed by the consumers” (emphasis added)). In July 2009, however, as a result of its settlement with the Minnesota Attorney General, NAF agreed permanently to cease administering most consumer arbitrations, including debt collection arbitrations. The Attorney General based the suit, in part, on allegations that NAF shared common ownership with a number of firms that filed debt collection claims before NAF. The demise of NAF has been extensively covered. See, e.g., Nancy A. Welsh, *What is “(Im)partial Enough” in a World of Embedded Neutrals?*, 52 ARIZ. L. REV. 391, 427-31 (2010).

<sup>155</sup> Our review procedures for AAA case records are discussed in detail in Appendix B.

<sup>156</sup> The AAA announced its moratorium on debt collection arbitration on July 23, 2009. See AAA Press Release, [www.adr.org](http://www.adr.org). Its terms are also stated by the AAA in a Notice on Consumer Debt Collection Arbitrations (Oct. 19, 2010), available on the same website. The AAA put the moratorium in place after it identified, by its own account, a number of potential due process and fairness concerns with debt collection arbitration. See *Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts*: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight, 111th Cong. (July 22, 2009) (testimony of Richard W. Naimark on behalf of the American Arbitration Association).

consumers, but it allows for two exceptions to this general rule. First, such companies may file such debt collections if a court orders the case to arbitration. Second, companies can file debt collection arbitrations if the consumer affirmatively consents in writing to the arbitration after the dispute arises, in which case the arbitration is a “mutual submission.” Furthermore, the moratorium does not apply at all to arbitrations filed by the consumer alone.<sup>157</sup>

Following the moratorium, there are still company-filed AAA arbitrations that seek to collect debt. As noted, these must now follow a court proceeding sufficient to generate a court order in favor of arbitration. We included these cases in our debt collection arbitration category. But in addition to company-filed debt collection cases there also can be mutual submissions or consumer filings.<sup>158</sup> To capture all of these categories, we defined “debt collection arbitrations” to mean not only collection actions filed by the company, but also those arbitrations filed mutually or by the consumer in which the parties are contesting an alleged debt claimed by the company in a preceding action in court.

More specifically, we counted mutual submissions and consumer-filed disputes as debt collection arbitrations when the case included a substantive debt dispute and the arbitration record shows that there was a prior court proceeding as to which the consumer invoked arbitration.<sup>159</sup> We recognize that an invocation of arbitration can take several forms. In some cases, the record may show that the consumer moved to compel arbitration in a prior court collection action. In others, the invocation may consist of filing a demand for arbitration in lieu of filing an answer in court to the company’s collection litigation in court. In others, the consumer may simply inform the company that he or she is invoking the arbitration clause in order to end the collection action in court. Although in some of these cases the consumer may also raise non-debt, affirmative claims, we think it is appropriate to describe such disputes as

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<sup>157</sup> We have not reviewed the AAA filings for compliance with the AAA moratorium. Based on our review to date, however, we have no reason to believe the AAA is not following its stated terms.

<sup>158</sup> For purposes of this presentation, we categorize a claim as consumer-filed, company-filed, or mutually submitted based on what the AAA claim form records. Further details are in Appendix B.

<sup>159</sup> We do not count a procedural challenge to debt collection, without more, as a substantive debt dispute. So a claim under the Fair Debt Collection Practices Act that covers only the *manner* in which debt is being collected would not be considered a substantive debt dispute. We use that term for disputes that cover claims about what amount of money is owed (or not owed) to the company by the consumer.

debt collection arbitrations.<sup>160</sup> Collection claims were previously at issue in court, and the amount of debt subject to collection is at issue in the arbitration.

We recognize that this approach works an expansion of the traditional understanding of debt collections as company-filed disputes.<sup>161</sup> There were a number of pleading formats in consumer-filed and mutually submitted AAA arbitrations, however, that persuaded us that the debt collection category needs to be broadened in this way. In some cases, for example, the consumer may affirmatively state that he or she has no claims but wants the arbitrator to resolve the merits of the company's underlying debt collection claim. In others, the consumer states that he or she is filing the arbitration demand instead of filing an answer to a collection claim in court, or the consumer may file an arbitration for a declaratory judgment that he or she does not owe the amount claimed by the company. At least where there is evidence of prior proceedings in court, we think it is appropriate to recognize these as debt collection arbitrations, even though in some cases they may contain other consumer claims as well.<sup>162</sup>

In some respects, however, we may have undercounted debt collection arbitrations in our total pool of cases. Our definition relies on an indication in the arbitration record of prior court proceedings. The arbitration record may not contain that indication, even when there was, in fact, a prior collection action in court. In addition, even when a company has not yet sued in court to collect debt, it is possible that some consumers are preemptively filing arbitrations to

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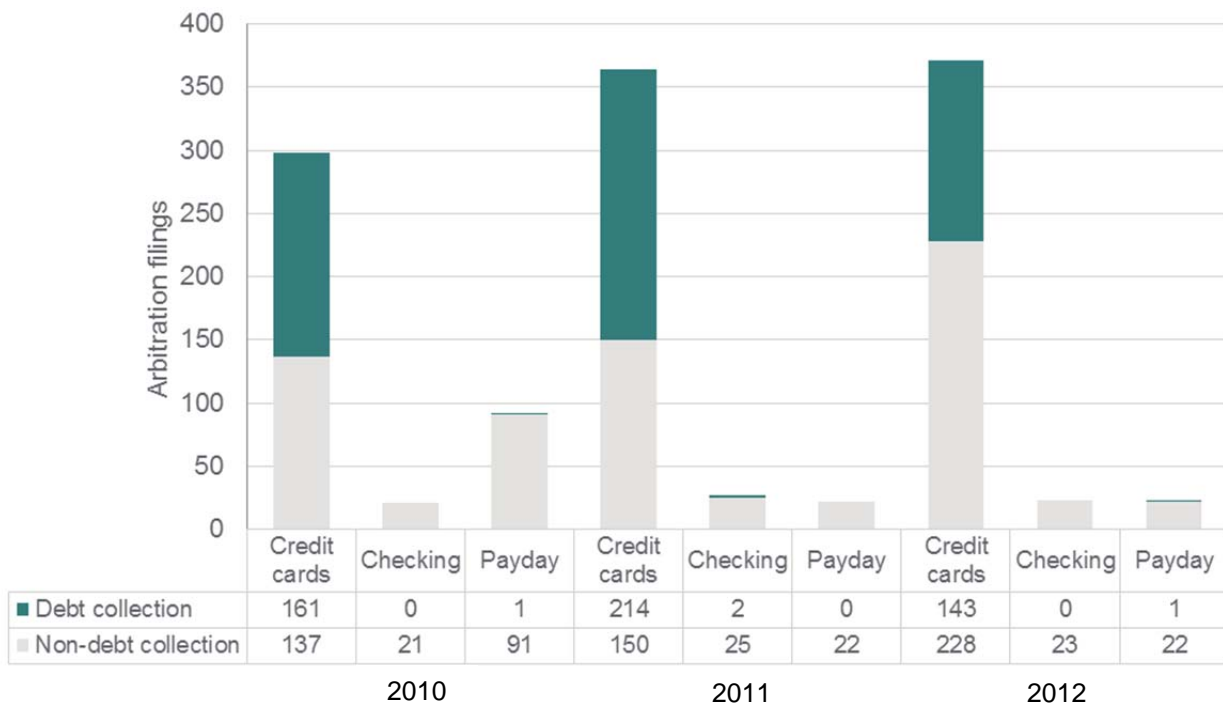
<sup>160</sup> We provide information about the affirmative claims made by consumers in debt collection arbitrations in section 4.6.2 below.

<sup>161</sup> There may be a precedent in some of the NAF data. In 2007, Public Citizen published results from its review of the nearly 34,000 consumer arbitrations that NAF disclosed as occurring in California between the beginning of 2003 and March 2007. Consumers filed 118 of these arbitrations. All but 15 of the 118 consumer-filed cases, however, were described by NAF as "collection" cases. *See* Public Citizen, *supra* note 143, at 1-2. Drahozal & Zyontz did not identify any consumer-filed cases as debt collection arbitrations in their review of 2007 AAA consumer case records. It is possible, however, that their study would not have identified such cases because their sample of case records was limited to *awarded* cases. To the extent that consumer-filed debt collection cases tend to settle out or are withdrawn or otherwise closed pre-award, they will not show up in awarded cases. Alternatively, these cases may have become more common since 2007.

<sup>162</sup> Overall, most of the consumer- and mutually-filed debt collection submissions encompass only a substantive dispute about the amount of debt owed. Fewer than half include non-debt claims as well. *See* section 4.6.1.

challenge the company’s pre-judicial assertion of a debt.<sup>163</sup> In fact, a substantial number of the “non-debt collection” credit card arbitrations in our review appeared to involve only a substantive debt dispute and no non-debt claims at all, even though the arbitration may be filed by a consumer. Ultimately, though, we opted to use objective rules to define debt collection arbitrations, rather than trying to assess whether the weight of the arbitration record indicated that collection activity was already underway before a substantive debt dispute reached arbitration. But it is important to bear in mind that our “non-debt collection category” included a large number of cases in which debt was at issue.<sup>164</sup>

**FIGURE 5:** ARBITRATION FILINGS BY TYPE AND PRODUCT



<sup>163</sup> Cf. Sternlight, *Mandatory Binding Arbitration Clauses*, *supra* note 136, at 99 & n.69 (noting statement by JAMS General Counsel that most consumer arbitrations filed before JAMS “are from claims alleging that certain credit card companies violated federal collection statutes, asserted to fend off potential collections actions by those companies.”).

<sup>164</sup> We considered relying only on the subject matter of the claims at issue in arbitration to differentiate “debt arbitrations” from “non-debt arbitrations.” Our subject-matter typology for disputes, which we discuss in sections 4.5.2 and 4.6.2, identifies when arbitrations include substantive claims about the amount of debt owed. We determined, however, not to rely on that debt dispute tag alone.

Figure 5 shows the breakdown between debt collection arbitrations and non-debt collection arbitrations by product market for the three years covered by the AAA Case Data. Overall, there were 522 debt collection arbitrations and 719 non-debt collection arbitrations for all three years combined for our product markets. For checking account and payday loan arbitrations, the norm was non-collection. For credit card, by contrast, debt collection arbitrations were a slight majority of the disputes. All but four debt collection arbitrations were credit card disputes.

At least in the period of our review, parties initiated AAA consumer arbitrations by filing a standard one-page “claim form.” The claim form asks whether the arbitration is submitted at the request of the consumer, at the request of the company, or by “mutual agreement,” meaning that the arbitration is submitted by both parties.<sup>165</sup> We recorded the identity of the filing party based on the indicated response to this question.<sup>166</sup> Claim forms recorded 146 (or 28%) of the debt collection arbitrations in the AAA Case Data as company-filed. Another 47 (or 9%) of debt collection arbitrations were mutual submissions. Finally, 329 (or 63%) were consumer submissions. On the non-collection side, 569 (or 79%) of the filings were by consumers. There were smaller shares of mutual submissions (132 filings or 18%) and company-filed (18 filings or 3%) non-collection claims.

We discuss debt collection arbitrations and non-collection arbitrations in more detail in sections 4.5 and 4.6.

### 4.2.3 Credit card federal court filings

Although we have not completed our litigation review of court filings raising disputes about these same three products, we have obtained some results. For comparative purposes, we provide those results here. Our methodology to identify these cases is provided in Appendix C.

For the 2010 through 2012 period, we have preliminarily identified 3,054 credit card cases filed in federal court. This breaks down into 1,033 cases in 2010, 883 cases in 2011; and 1,138 cases in

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<sup>165</sup> The claim form first asks: “How is this claim being filed?” Parties are instructed to check only one option. In addition to “By request of the consumer,” and “By request of the company,” the form offers “By mutual agreement (“submission”).”

<sup>166</sup> We have not attempted to verify whether that recording was accurate. At least in some cases, we have noted that there is no apparent signature from the identified claimant in the record we have reviewed.

2012. All but four cases were filed by consumers, which means that consumers filed more than four times as many federal court credit card disputes as AAA credit card arbitrations over this time period.<sup>167</sup> There were jury demands in 2,739 of these federal filings. Some 418 of the cases were filed as purported class actions. Of these, 156 were filed in 2010, 121 were filed in 2011, and 141 were filed in 2012.

## 4.3 Representation

### 4.3.1 Prior research

Prior research has studied representation rates, and their potential impact, in AAA consumer arbitrations. In their study of 301 AAA consumer arbitrations that resulted in an award in 2007, Drahozal & Zyontz found that consumers proceeded without an attorney in almost half the cases.<sup>168</sup> Consumers were significantly more likely to have counsel when they were the claimant in arbitration (55.4%) than when they were responding to company claims in arbitration (29.5%). Some studies also report high rates of employee representation by counsel in AAA employment arbitration.<sup>169</sup>

### 4.3.2 Data

The following four figures show representation rates in the AAA Case Data, for consumers and companies, for all three product markets, and by debt collection and non-collection arbitrations. These data may understate company representation rates. It was straightforward from the AAA Case Data to identify the presence of outside counsel acting for the consumer or the company. It

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<sup>167</sup> Over three years, some 705 of the AAA filings were credit card disputes that the claim form recorded as being filed by consumers. None of the class arbitration filings were credit card disputes.

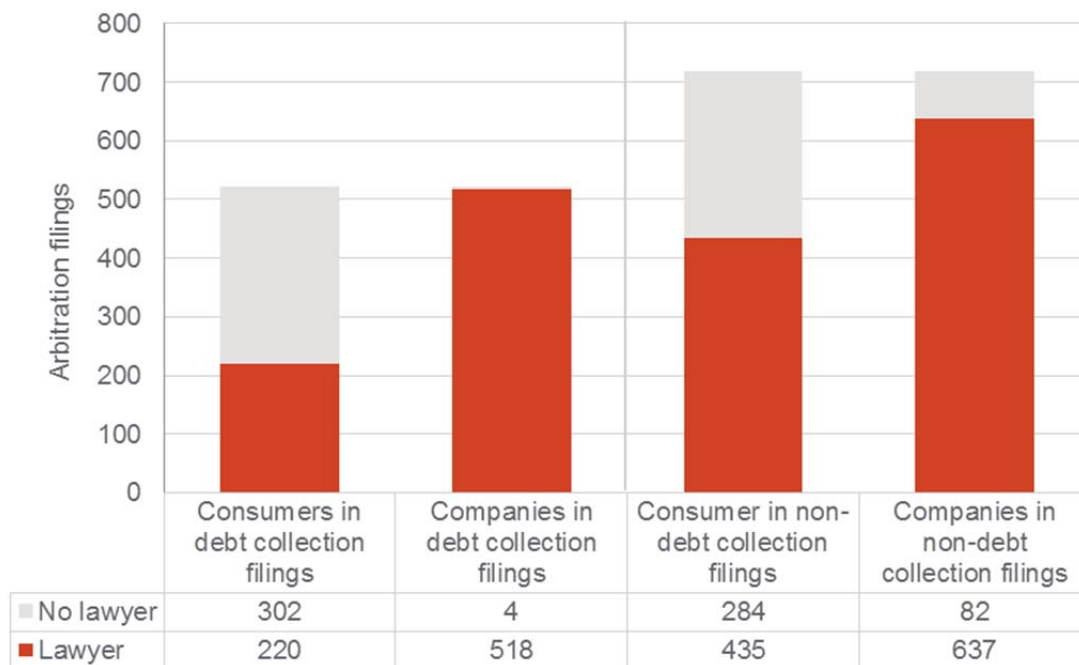
<sup>168</sup> Drahozal & Zyontz, *Empirical Study*, *supra* note 140, at 903.

<sup>169</sup> See Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8:1 J. EMP. LEG. STUD. 1 (March 2011) at 16-17; see also Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RES. 777, 800 n.93 (2003) (for a sample of awarded AAA employment arbitrations, employees subject to a mandatory arbitration clause proceeded pro se in one-third of the cases).

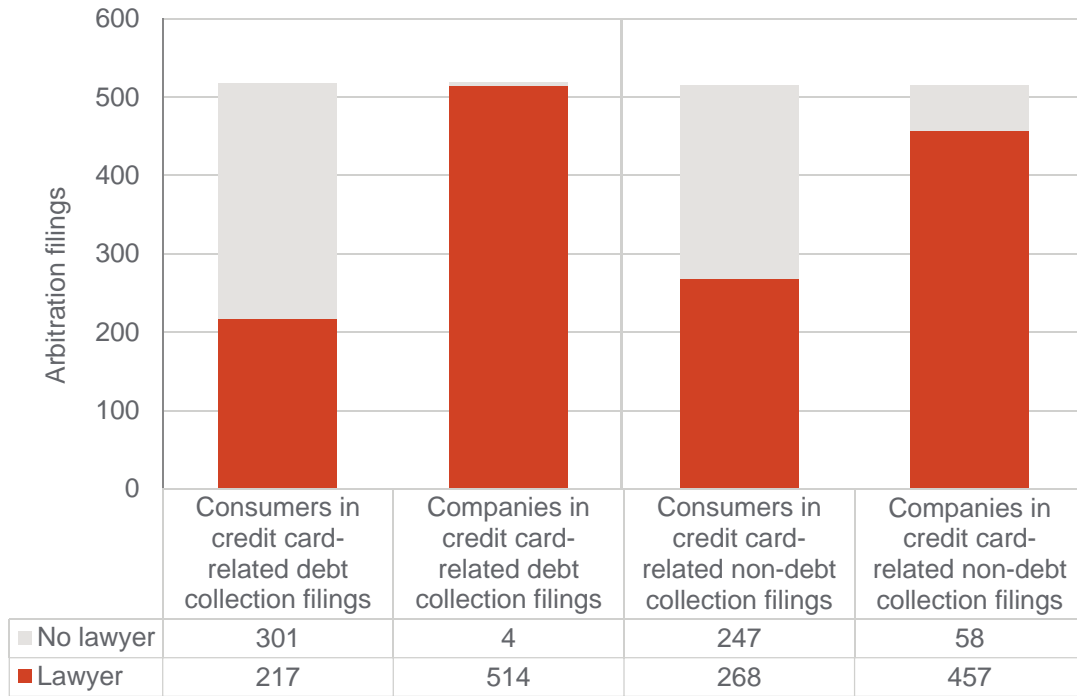


was hard to tell, however, whether an internal company representative was a lawyer. Except where we could reliably identify outside or in-house counsel, therefore, we assumed that companies were unrepresented.

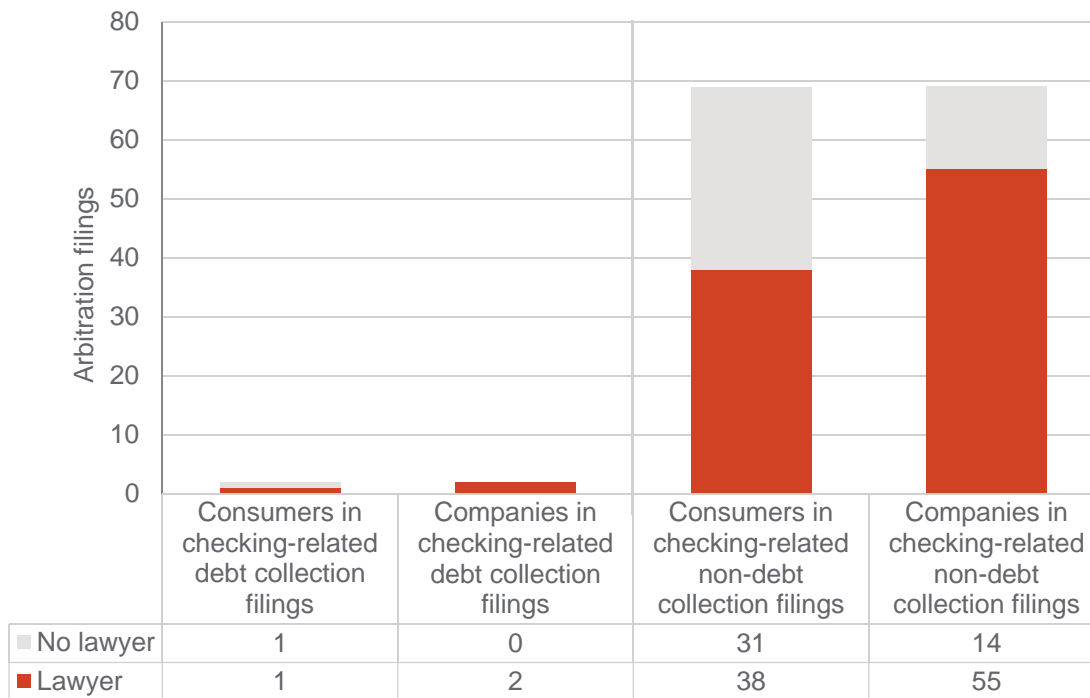
**FIGURE 6:** OVERALL REPRESENTATION RATES BY ARBITRATION TYPE 2010-12



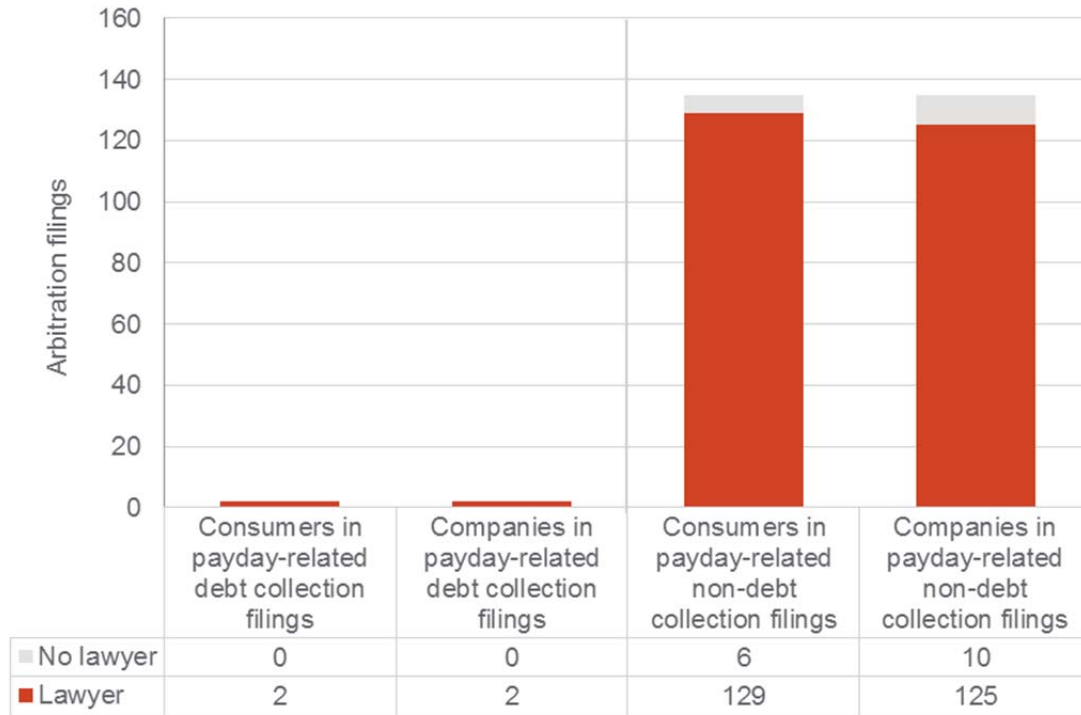
**FIGURE 7: CREDIT CARD ARBITRATION REPRESENTATION RATES 2010-12**



**FIGURE 8: CHECKING ACCOUNT ARBITRATION REPRESENTATION RATES 2010-12**



**FIGURE 9:** PAYDAY ARBITRATION REPRESENTATION RATES 2010-12



The AAA Case Data show that companies rarely participated in consumer arbitration about these three products without counsel. It should be noted, however, that at least some jurisdictions have unauthorized practice rules that may require companies to be represented in arbitration.<sup>170</sup> Whatever the reason, companies were overwhelmingly represented by counsel, both in debt collection and non-debt collection arbitrations, and across all three product markets we examined.

Furthermore, the data are consistent with the notion that a significant share of the consumers who are in arbitration see it as being in their interest to have counsel as well. Overall, nearly 53% of consumers in these arbitrations had counsel. In non-collection cases, consumers were generally more likely (61%) to be represented by counsel than to proceed without counsel

<sup>170</sup> See, e.g., *Nisha, LLC v. TriBuilt Const. Group, LLC*, 388 S.W.3d 444 (Ark. 2012).

(39%).<sup>171</sup> (The rate of representation, moreover, did not vary to any extent between non-collection cases that included debt disputes and those that did not.) In debt collection arbitrations, consumer representation was somewhat lower at 42% of the disputes filed.

### 4.3.3 Repeat counsel

Another feature of representation in these consumer arbitrations was the presence of “repeat counsel,” meaning counsel who appeared in more than one case in our dataset. There were several firms that showed up repeatedly across the cases in which there was representation.

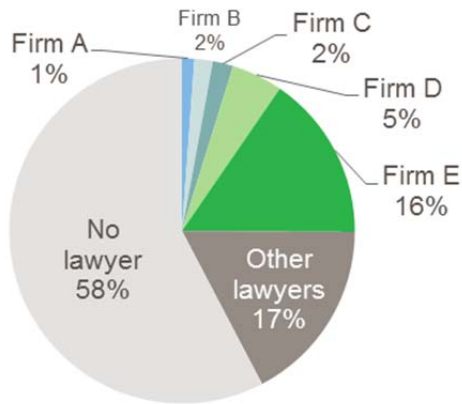
This phenomenon was similar for consumer representation in debt collection and non-collection cases. Of consumers represented in debt collection arbitrations, 71% were represented by repeat counsel, and 59% were represented by one of only five repeat firms.<sup>172</sup> Of consumers represented in non-collection disputes, 77% of represented consumers had a repeat counsel. In this case, however, one firm accounted for 29% of the non-collection cases in which consumers had repeat counsel. Overall representation data, including repeat representation data, are depicted in Figures 10 and 11. (The shares depicted in Figures 10 and 11 are for consumers overall. In contrast, the numbers above use represented consumers as the denominator.)

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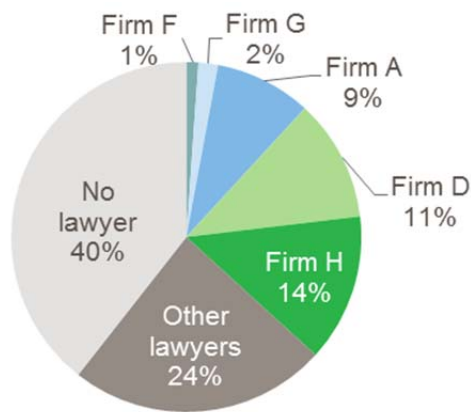
<sup>171</sup> Absent one counsel, who represented consumers in 18 effectively identical payday arbitrations in 2010 alone, this number would fall. These cases were all follow-on filings from a single court case in which the same counsel represented a total of 19 consumers.

<sup>172</sup> Scholars who have attempted to study whether there is a “repeat player” impact on arbitration outcomes debate whether or not to count the first instance of a “play” by a counsel or party that then becomes a repeat player. *See, e.g.,* Colvin, *supra* note 169, at 13. For present purposes, we have counted the first play visible to us in the AAA Case Data.

**FIGURE 10:** CONSUMER REPRESENTATION IN DEBT COLLECTION ARBITRATIONS 2010-12



**FIGURE 11:** CONSUMER REPRESENTATION IN NON-COLLECTION ARBITRATIONS 2010-12



Repeat counsel players also featured on the company side of these disputes, as might be expected given that companies were themselves repeat players. Repeat outside counsel figures in 78% of non-collection cases in which companies were represented. Five repeat players accounted for 22% of the non-collection cases in which companies were represented. Repeat outside counsel were more prevalent in debt collection cases. Some 90% of the debt collection cases in which companies were represented featured repeat counsel. Five repeat outside counsel accounted for 45% of the debt collection cases in which companies were represented.

## 4.4 Amounts at issue

### 4.4.1 Prior research

Some earlier empirical work makes claims for the effectiveness of consumer arbitration in handling individual small-dollar disputes. Ernst & Young reported in a 2004 study of consumer arbitration that 73% of the 226 “lending-related” arbitration claims that consumers filed before NAF between January 2000 and January 2004 were for “small claims.” Ernst & Young used this term to describe consumer claims up to \$15,000. The study distinguished “small” claims from “medium” claims—ranging from \$15,000 to \$75,000—and from “large” claims—those above \$75,000.<sup>173</sup>

Other studies have described amounts at issue in consumer arbitration, though without claiming that consumer arbitration is effective at handling small claims.<sup>174</sup> Using case records from a nine-month sample of AAA consumer arbitrations that reached awards in 2007, Drahozal and Zyontz found that 91.5% of consumer claimants brought compensatory claims for \$75,000 or less, and 39.1% of consumer claimants brought claims seeking less than \$10,000.<sup>175</sup> The average consumer claim was for \$46,131, with most consumer claims under \$70,756, although there were a small number of very high consumer claims.<sup>176</sup> They also noted that the proportion of business claims under \$75,000 was higher than the proportion of consumer claims, although the number of consumer claims under \$75,000 was much greater.<sup>177</sup>

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<sup>173</sup> Ernst & Young, *supra* note 144, at 8.

<sup>174</sup> See Drahozal & Zyontz, *Empirical Research*, *supra* note 140, at 875.

<sup>175</sup> See *id.*

<sup>176</sup> See *id.*; see also *id.* at 876 (graph showing distribution of amounts claimed by consumers and businesses). For arbitrations that closed without reaching an award (for example, because they were settled, withdrawn, or otherwise closed), the study noted that the average consumer claim amounts for those cases increased to \$66,367. See *id.* at 877.

<sup>177</sup> Some 94.5% of company claims were for under that threshold, and company claims averaged \$22,037. See *id.* In a related study, Drahozal and Zyontz also reviewed submitted individual AAA debt collection cases closed between April and December of 2007, and found the average amount sought by creditors was \$20,445. See Drahozal & Zyontz, *Creditor Claims*, *supra* note 140, at 84. The sample for this later study consisted of 61 awarded cases and 406 non-awarded cases. The later study also noted that average claim amounts fell to \$1,172 in cases awarded under an AAA-

## 4.4.2 Metrics

To identify amounts at issue, we have thus far captured data on amounts at issue at two main points. The standard one-page AAA consumer arbitration “claim form” includes brief instructions to consumer and company claimants about how to submit a dispute using the form.<sup>178</sup> It asks the submitting party to “briefly explain the dispute.” It then asks: “Do you believe there is any money owing to you? If yes, how much?” Our first claim amount data point is the amount stated on the claim form.<sup>179</sup> We refer to this as the “claim form amount.”

Second, if the filing revealed a substantive debt dispute, we separately recorded the disputed debt amount, where that information was available.<sup>180</sup> Some such arbitrations involve not only the disputed debt amount, but other affirmative, non-debt claims. In cases that contain a disputed debt amount and such affirmative consumer claims, the amount at issue is open to some interpretation. The consumer may mean to dispute the debt and seek damages for the full amount of the affirmative claims, but it is also possible that the affirmative claims may not fully represent a separate amount at issue.<sup>181</sup> For these cases, at least for the time being, we provide

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administered program of debt collection arbitrations filed by a single debt purchaser. The AAA administered this program between September 2007 and June 2009. *See id.* at 85. (To the Bureau’s knowledge, the AAA has not restarted the program.)

<sup>178</sup> The claim form was in consistent use by the AAA for the consumer arbitrations that we studied. In some cases, it represents the full initial statement of the claims at issue. In others, there may be further pleadings attached, such as a demand for arbitration or a copy of an underlying court complaint.

<sup>179</sup> Sometimes claim amounts are expressed as a range (“\$10,000 to \$75,000”) or as a bounded inequality (“up to \$75,000” or “at least 30,000”). There are a number of different ways to treat these. Our approach here is the same method used by Drahozal and Zyontz in their 2010 study. *See Drahozal & Zyontz, Empirical Study, supra* note 140, at 874. We take the mid-point of ranges, and the base amount for any bounded inequality. Thus, a range of “\$10,000 to \$75,000” is treated as a claim for \$42,500.” A claim for “up to \$10,000” or for “at least \$10,000” would be treated the same: as a claim for \$10,000.

<sup>180</sup> We include in the disputed debt amount all components of the alleged debt—principal, fees, and other costs. In some cases, there is a specific indication in the record that the consumer disputes the full amount of the debt. In others, there is no such qualifier or an explicit statement that the full amount of the debt is at issue; in these cases, we record the full amount of the alleged debt as the disputed debt amount. If the consumer only takes issue with a specific portion of the debt, however, we use that stated amount as the debt in issue amount.

<sup>181</sup> We recognize that at least in some arbitrations involving disputed debt amounts, the additional consumer claims may primarily reflect the consumer’s effort to defeat the company’s effort to collect an alleged debt, which raises the possibility that at least in some such cases the disputed debt amount alone may most accurately reflect the “true” amount at issue. An alternative view, however, is that even if the debt dispute and the affirmative claims are related, the sum of the disputed debt amount and the affirmative claim amounts reflects the size of the range between the

data only on the debt amount at issue, but acknowledge that this may under-report the full amount at issue for this set of cases.

We have also begun to record the latest statement of the affirmative claim amount that we were able to find prior to claim resolution, but have not completed that review. (Parties may change or clarify a claim amount for a number of reasons. They may develop a different valuation based on evidence. Their awareness of fees may also change claim amounts.<sup>182</sup>) We also attempted to record punitive damage claims, but we found such claims so seldom quantified that we do not think we will be able to offer any assessment of punitive damage claims. (Where punitive damage claims were separately identified, we did not include them in the claim form amounts.)

### 4.4.3 Data

Figure 12 shows the distribution of discernible disputed debt amounts in debt collection arbitrations in the AAA Case Data. Across 492 disputes, the average was \$15,725, with a median of \$10,266.<sup>183</sup> Across 141 disputes, company-filed debt collection arbitrations had an average disputed debt amount of \$19,619 with a median of \$11,303.<sup>184</sup> Across 351 disputes, consumer- and mutually-filed debt collection arbitrations had an average disputed debt amount of \$14,161, with a median of \$10,000.<sup>185</sup>

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outcomes requested by each side. For example, if a consumer sues for \$12,000 and a company counterclaims for \$5,000, the range of possible outcomes is between the consumer losing \$5,000 (and not winning the affirmative claims) and the consumer winning \$12,000 in damages on the affirmative claims (and not losing on the debt claim). The difference between these two outcomes—and therefore the amount in dispute—is \$17,000, which is the sum of the disputed debt and the affirmative claim amounts.

<sup>182</sup> As explained in section 4.9 below, until March of 2013, claim amounts had a direct impact on fee levels for consumers and companies in arbitrations covered by the AAA Supplementary Procedures for Consumer Arbitration. From March 2013, that is no longer the case. *See* section 4.9.

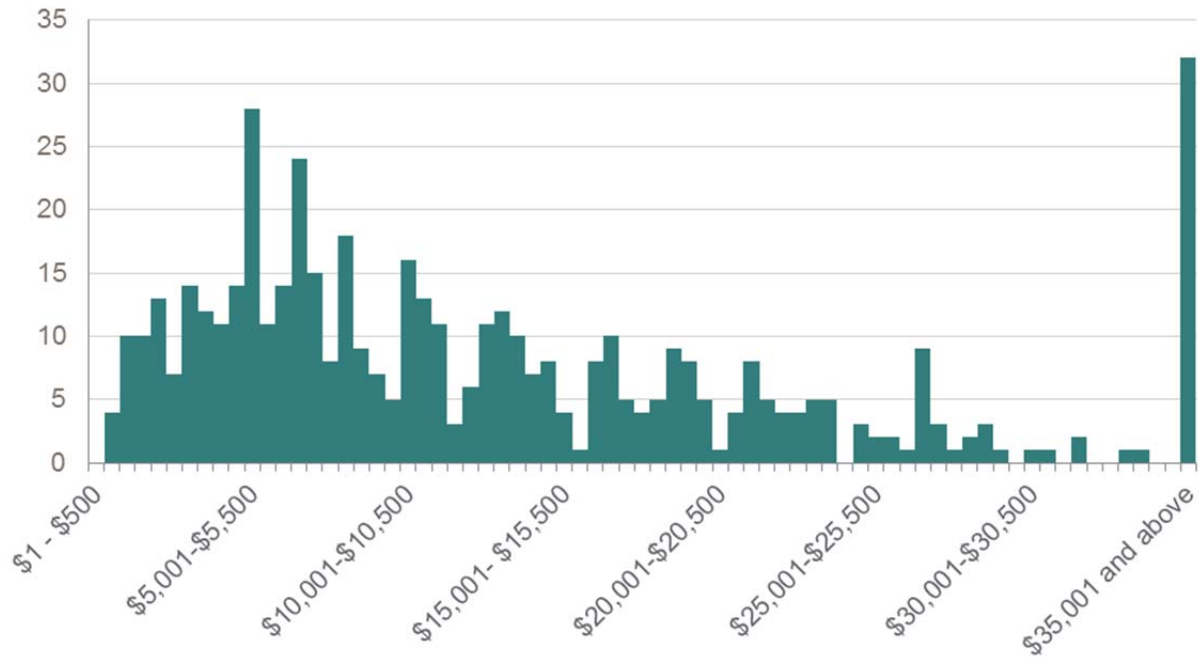
<sup>183</sup> This excludes 30 debt collection cases in which the disputed debt amount was not apparent from the arbitration record.

<sup>184</sup> This excludes five cases in which the disputed debt amount was not identified.

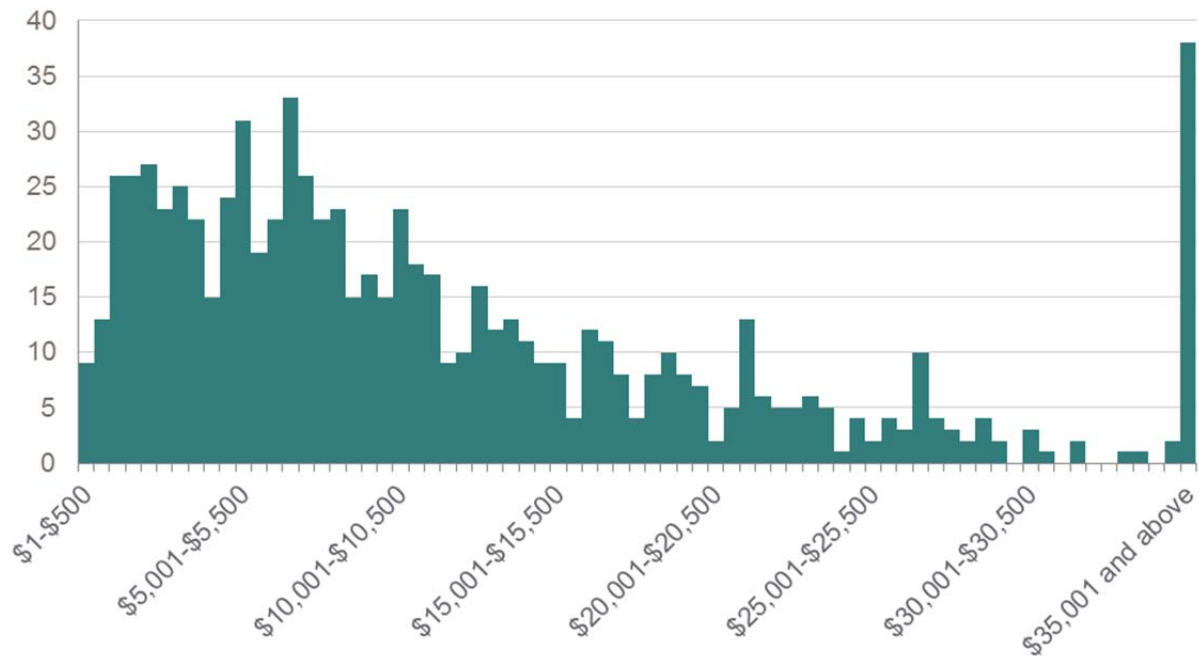
<sup>185</sup> This excludes 25 cases in which the disputed debt amount was not identified.



**FIGURE 12:** DEBT AMOUNTS IN DISPUTE IN DEBT COLLECTION ARBITRATIONS 2010-12



**FIGURE 13:** DEBT AMOUNTS IN DISPUTE IN ALL ARBITRATIONS 2010-12



As noted, disputed debt amounts were also at issue in non-debt collection arbitrations. These were arbitrations in which there was a substantive debt dispute, but where we lacked one or more of the objective criteria we used to identify debt collection arbitrations. Figure 13, therefore, shows the distribution of discernible disputed debt amounts across debt collection and non-collection cases. For the 787 total disputes in which we could identify a disputed debt amount, the average debt amount was \$13,418 and the median was \$8,641. Over three years, there were 21 cases in which the disputed debt amount was at or below \$1,000, or an average of seven such disputes a year. In total, we saw approximately \$10.6 million in debt amounts disputed in AAA arbitrations for these product markets from 2010 through 2012.

Figure 14 shows the consumer claim form amount in all cases in which we could identify a claim form amount but could not identify a disputed debt amount.<sup>186</sup> Across these 326 cases, the average consumer claim amount was \$38,726, and the median was \$11,805. Overall, we identified just under \$15 million in claim form amounts in these cases for these product markets over this period. The breakdown by product was as follows: 146 credit card cases<sup>187</sup> had an average claim amount of \$26,187 and a median of \$8,945; 61 checking account cases<sup>188</sup> had an average of \$66,577 and a median of \$15,000; and 119 payday loan cases<sup>189</sup> had an average of \$39,834 and a median of \$42,500.

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<sup>186</sup> We have excluded one claim for \$100,000,000, both from the figure and from the calculation of the mean and the median. We have included in the calculation of the mean and median two higher claims, for \$500,000 and \$1,314,965, but we have not shown them in the depicted figure. The data showed some clumping of claims at \$10,000, \$42,500 and \$75,000, presumably because consumers may align claim amounts to the thresholds at which filing fees change. See section 4.9 for more details on how the fee schedules applicable during the period of our review varied by claim amount. Finally, this calculation excludes cases in which no specific claim amount was identifiable.

<sup>187</sup> This excludes 64 cases for which no specific claim amount was identifiable.

<sup>188</sup> This excludes 4 cases for which no specific claim amount was identifiable.

<sup>189</sup> This excludes 3 cases for which no specific claim amount was identifiable.

**FIGURE 14:** CLAIM AMOUNTS IN CASES WITHOUT DISPUTED DEBT AMOUNTS 2010-12

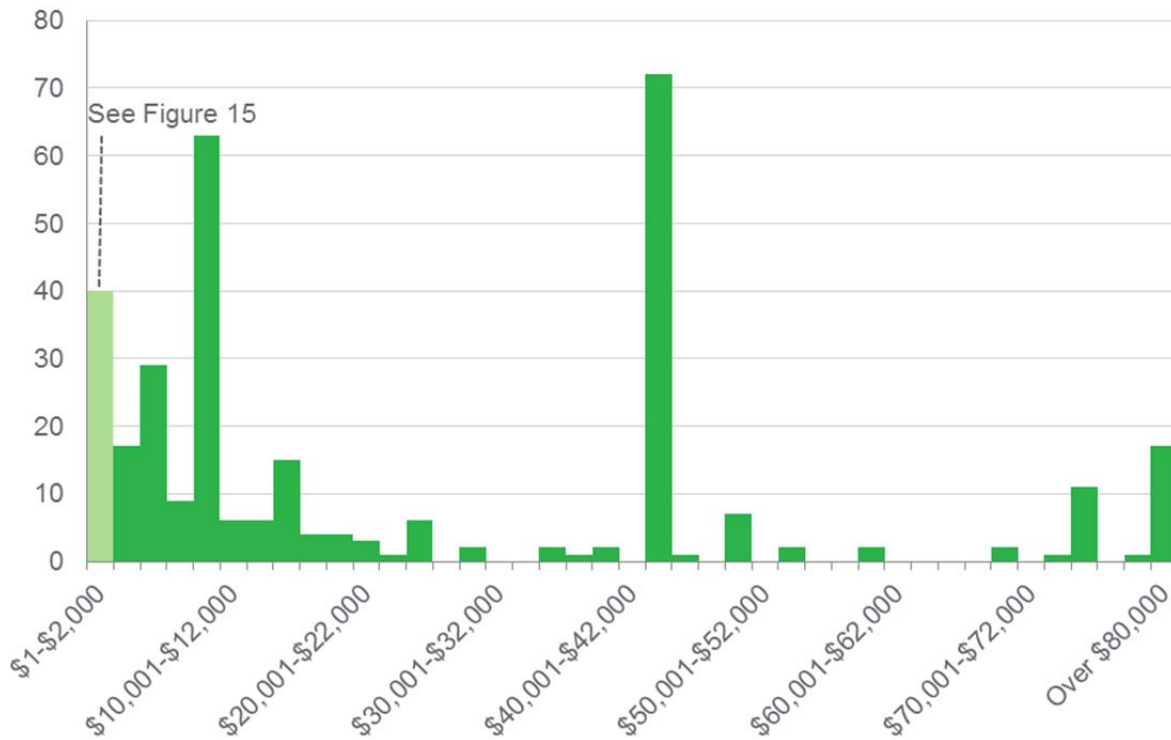
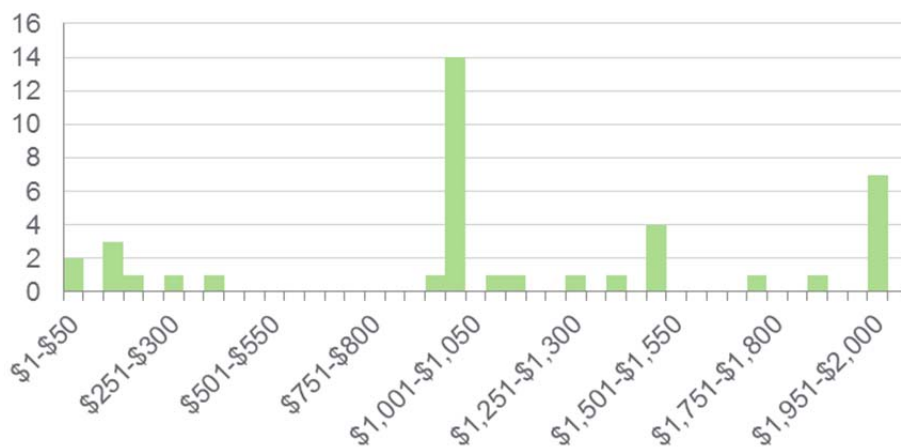


Figure 15 shows a more detailed breakdown for the claims in Figure 14 at the lower end of this range. Over three years, therefore, there were 23 claims seeking damages of \$1,000 or less, for an annual average of just over eight such claims. Of these 23, some 14 were for exactly \$1,000, meaning that there were nine such cases over three years seeking under \$1,000.

**FIGURE 15:** SMALLER CLAIM AMOUNTS IN CASES WITHOUT DISPUTED DEBT AMOUNTS 2010-12



The Chamber of Commerce, citing Justice Breyer, offers one possible basis for a “small-dollar” threshold: an example of a “small damage claim” would be “the value of only a defective refrigerator or television set.”<sup>190</sup> The average price of a TV set purchased in Q2 2012 was \$1,224.<sup>191</sup> Using that number as a threshold for “small-dollar” claims, there were under 19 cases on average each year in which there was a “small dollar” debt dispute. Looking only at cases without disputed debt amounts, but only affirmative claim amounts, there were just over 8 cases each year on average that were “small dollar.”

## 4.5 Non-collection arbitrations

### 4.5.1 Incidence by company

The figures below show the total and annual number of non-collection cases for the most frequently named companies in these arbitrations. For each of the three markets, we have included the ten most frequently named companies.<sup>192</sup> In some cases, the same company shows up in more than one figure. These data reflect arbitration filings only; they do not represent resolved arbitrations or arbitration awards. Given the overall count of these disputes relative to the customer populations of the various companies, the differences among the companies in terms of numbers of arbitrations may not be statistically significant. We provide the data in order to show the number of disputes faced by the companies that are most often parties to these disputes.

Figure 16 provides data that covers 469 individual credit card arbitration filings over three years. Company 1 was named in 183 of these; at least one of companies 2 through 10 was named in the remaining 286. The same ten companies were parties in more than 350 federal court

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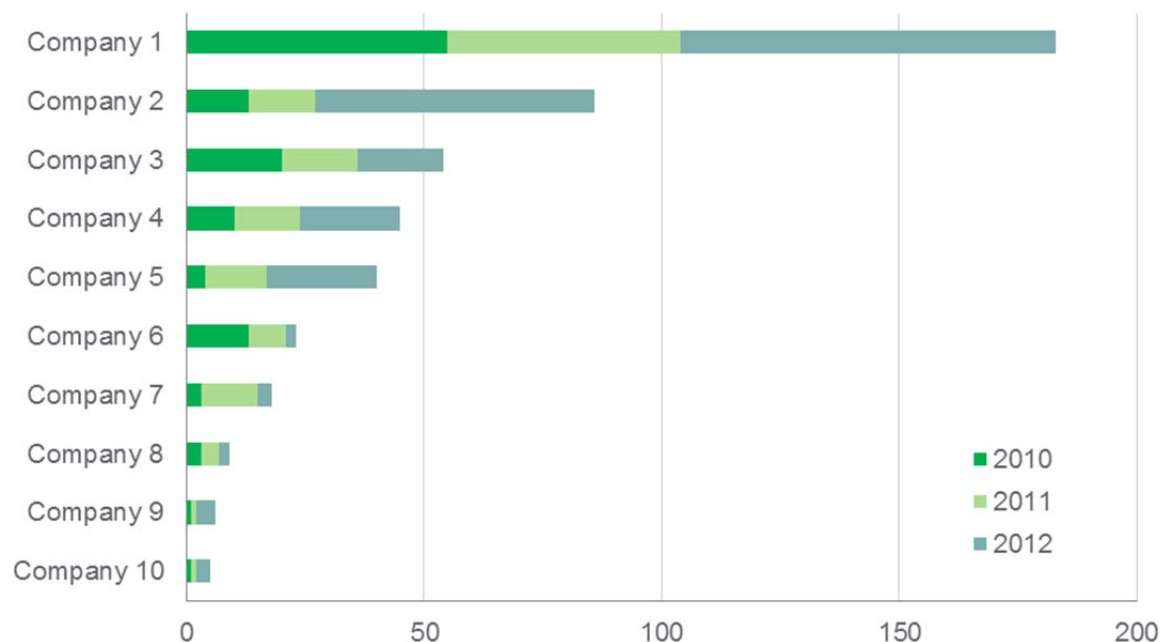
<sup>190</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995), cited in Chamber RFI Comment at 11-12.

<sup>191</sup> Time reported that in Q2 2012, the average price paid for a new TV in the US was \$1,224. See <http://business.time.com/2012/08/01/tv-prices-shrink-yet-average-tv-purchase-costs-more>.

<sup>192</sup> We have counted all disputes naming a member of the relevant corporate family.

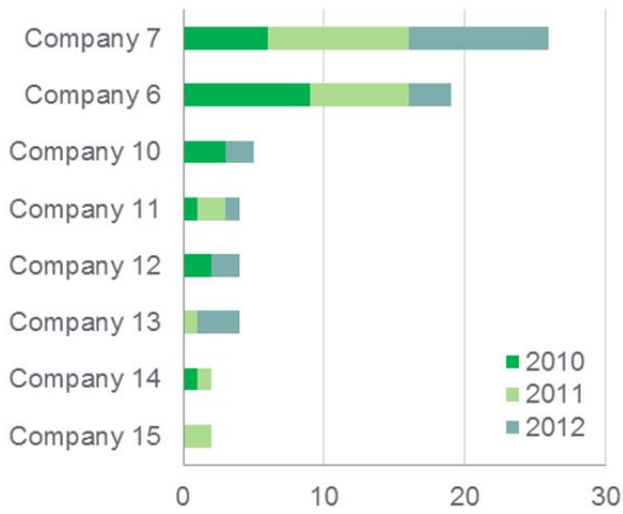
credit card filings for the same time period, of which more than 50 were class action filings.<sup>193</sup> Company 1 accounted for less than 15% of the federal court filings, although it faced a number of class filings in court and no class filings in arbitration. The other nine companies, however, were parties in more federal court filings than in AAA non-debt collection arbitration filings for this product market.

**FIGURE 16:** NON-COLLECTION CREDIT CARD ARBITRATIONS BY COMPANY 2010-12

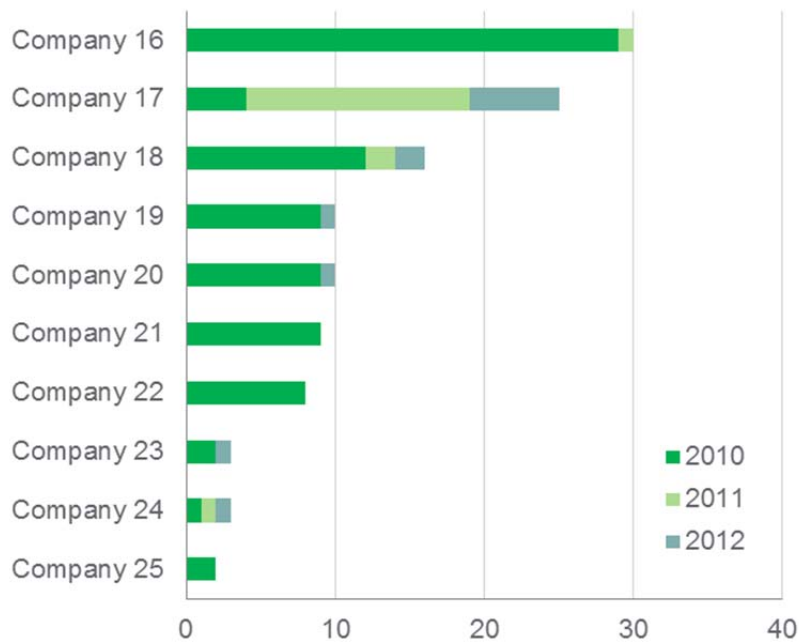


<sup>193</sup> See section 4.2.3.

**FIGURE 17:** NON-COLLECTION CHECKING ACCOUNT ARBITRATIONS BY COMPANY 2010-12



**FIGURE 18:** NON-COLLECTION PAYDAY ARBITRATIONS BY COMPANY 2010-12



### 4.5.2 Claim types and claim subject matters

To date, there has been relatively little data available about the kinds of claims that consumers bring in arbitrations. Some public data give some disaggregation by subject matter of consumer arbitrations generally, but there is nothing available that would let a reviewer isolate cases in

particular consumer financial product markets, let alone disaggregate those cases into different types.

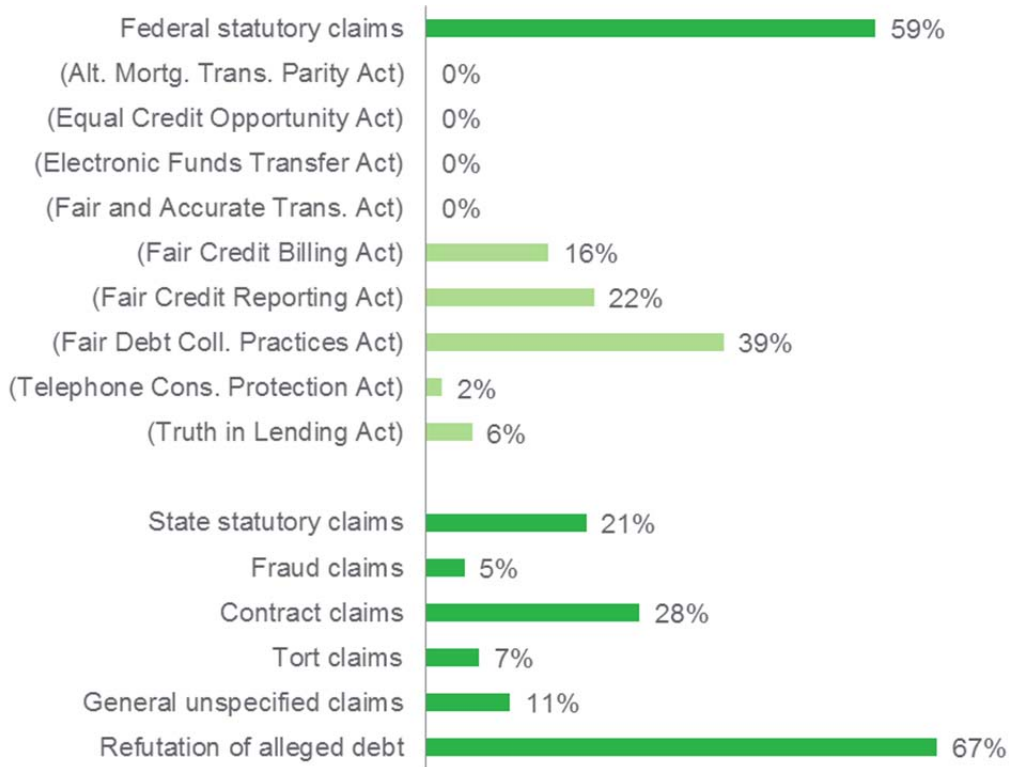
Within each product market, we used a number of different data fields to capture the type of claims involved and their subject matter (or matters). For all arbitrations, we allowed for an identification of the basic claim type(s) involved, such as contract law claims, federal statutory claims, state statutory claims, fraud, and tort.<sup>194</sup> This data is shown in Figures 19 through 21. If a case involved claims under a federal statute, we also recorded the specific statute involved.<sup>195</sup> This data, too, is shown in Figures 19 through 21. Each case may have raised more than one type of claim, but no single case was counted twice in any specific claim category. (Thus, a case that raised two FDCPA claims and one FCRA claim would show up once in the federal statutory count, once in the FDCPA count, and once in the FCRA count.) Thus, the percentages shown for the different claim types do not sum to 100% for any given product.

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<sup>194</sup> We do not double-count common law fraud under tort as well. “Tort” as used here excludes fraud claims.

<sup>195</sup> The federal statutes listed in the credit card cases are the Fair Debt Collection Practices Act (“FDCPA”), the Fair Credit Reporting Act (“FCRA”), the Fair Credit Billing Act (“FCBA”), the Fair and Accurate Transactions Act (“FACTA”), the Equal Credit Opportunity Act (“ECOA”), the Communications Act, the Alternative Mortgage Transactions Parity Act (“AMTPA”), the Telephone Communications Privacy Act (“TCPA”), the Truth in Lending Act (“TILA”) and the Electronic Financial Transactions Act (“EFTA”). The FCBA is actually codified as part of TILA, but for clarity we listed FCBA claims separately from other TILA claims. The checking account cases do not add any new statutes. The payday cases add the Credit Repair Organizations Act (“CROA”).

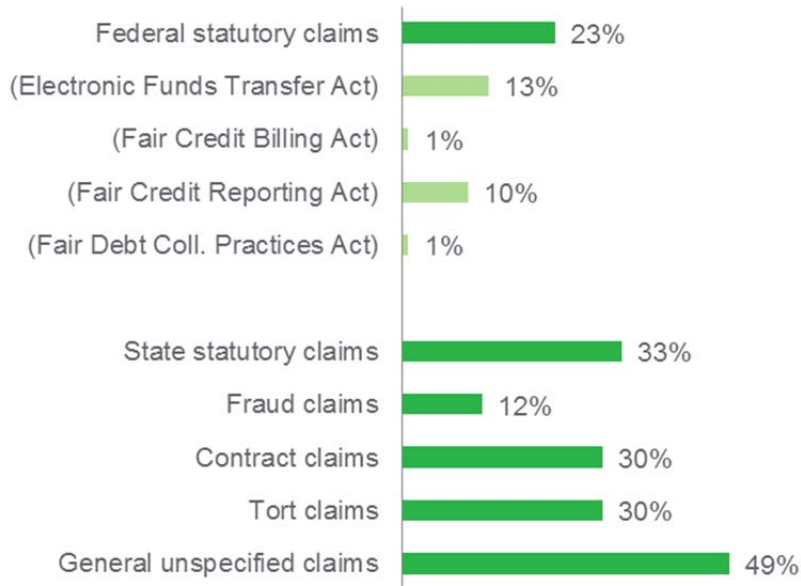
**FIGURE 19:** CONSUMER CLAIM TYPES IN NON-COLLECTION CREDIT CARD ARBITRATIONS 2010-12



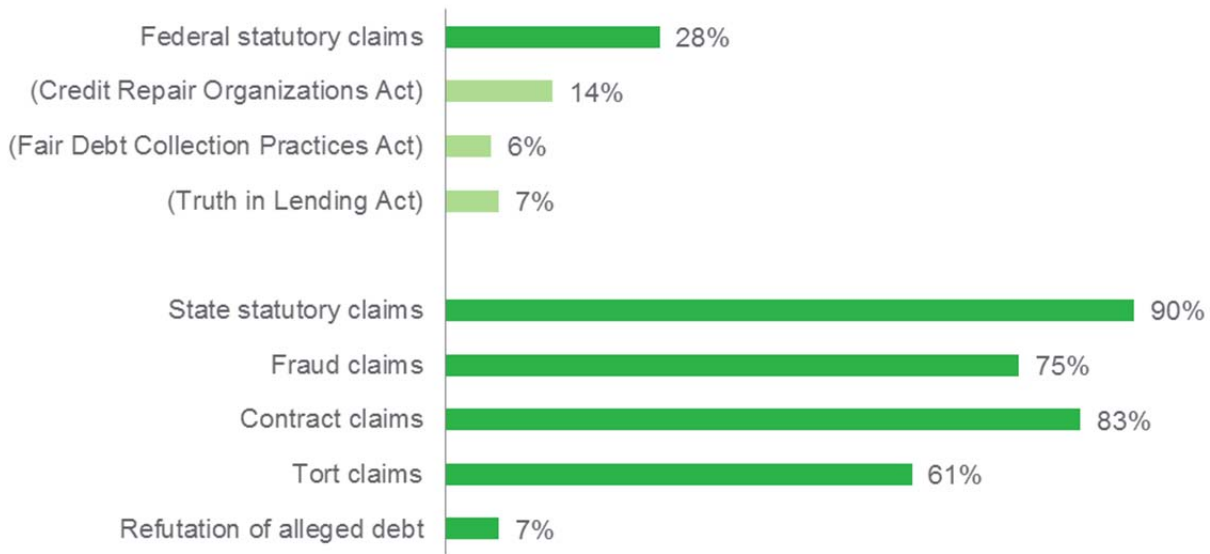
**Note:** 0% entries in Figure 19 reflect a single instance of the claim.



**FIGURE 20:** CONSUMER CLAIM TYPES IN NON-COLLECTION CHECKING ACCOUNT ARBITRATIONS 2010-12



**FIGURE 21:** CONSUMER CLAIM TYPES IN NON-COLLECTION PAYDAY ARBITRATIONS 2010-12



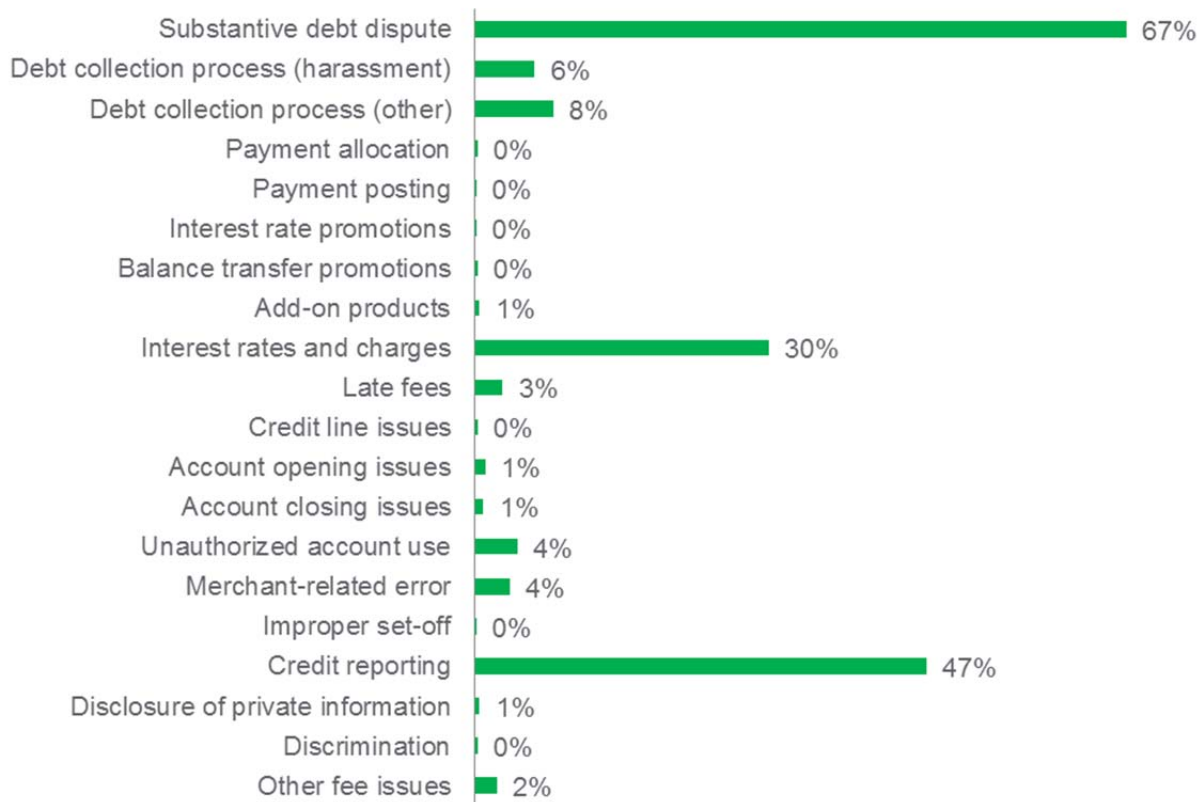
Finally, we also attempted to characterize each dispute by the core subject matter of its claims. We used a maximum of three such subject matter fields for each dispute. Our intention was to capture the essence of the dispute, within an objectively applied dispute typology.<sup>196</sup> The typologies were not identical for each product market. This data is shown in Figures 22 through 24. (In addition to the subject matter fields we defined, we also used two residual categories for each product market: “other” and “not enough information.”)

For credit card disputes, the listed subject matters in Figure 22 are: substantive debt dispute; debt collection process (harassment); debt collection process (other); payment allocation; payment posting; interest rate promotions; balance transfer promotions; add-on products; interest rates/charges; late fees; account opening issues; account closing issues; credit line issues; unauthorized account use; merchant-related error; credit reporting; disclosure of private information; discrimination; improper set off; and other fee issues. As discussed in Appendix B, our subject matter typology for credit card cases is broader than this, but these were the core subject areas within that typology that were raised by these cases. It is notable that while these cases did not meet our formal ‘debt collection’ definition, the clear majority (346 out of 515, or 67%) still included substantive disputes over the amount of debt owing. In fact, although almost all non-collection credit card disputes were filed by consumers or as mutual submissions, a substantial share (131 out of 515, or more than 25%) of these disputes raised *only* substantive debt issues—and no non-debt claims at all. (As noted above, therefore, our formal definition of debt collection arbitrations may have resulted in our undercounting the true number of such arbitrations.)

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<sup>196</sup> Our subject matter categories are to some extent subjective. Clearly, it is possible to devise other typologies that are more or less disaggregated. We derived ours from a review of complaints filed on electronic litigation databases and by consultation with Bureau experts in specific fields. Our methodology is explained in greater detail in Appendix B.

**FIGURE 22:** CREDIT CARD NON-COLLECTION ARBITRATION SUBJECT MATTERS 2010-12



**Notes on Figure 22:**

1. Entries showing 0% reflect either one or two cases.
2. In 17 of the 32 “Debt collection process (harassment)” disputes, the consumer also brought claims refuting the amount of debt claimed, but that information is not reflected in the substantive debt dispute entry. Similarly, in 37 of 42 “Debt collection process (other)” disputes, the consumer also brought claims refuting the amount of debt claimed, and that information is not reflected in the substantive debt dispute entry. These records were not characterized as substantive debt disputes due to process limitations.

For checking account disputes, the listed subject matters in Figure 23 are: debt collection process (harassment); overdraft ordering/timing; other overdraft issues; account closing issues; account opening/reopening issues; deposits—process issues; deposits—other errors; authorized payments—process issues; authorized payments—other errors; improper set-off; unauthorized recurring payments; disclosure of private information; other unauthorized use; credit reporting; and discrimination. As with credit card, our typology was broader than this, but these were the core subject areas raised by these cases.

**FIGURE 23:** CHECKING ACCOUNT NON-COLLECTION ARBITRATION SUBJECT MATTERS 2010-12



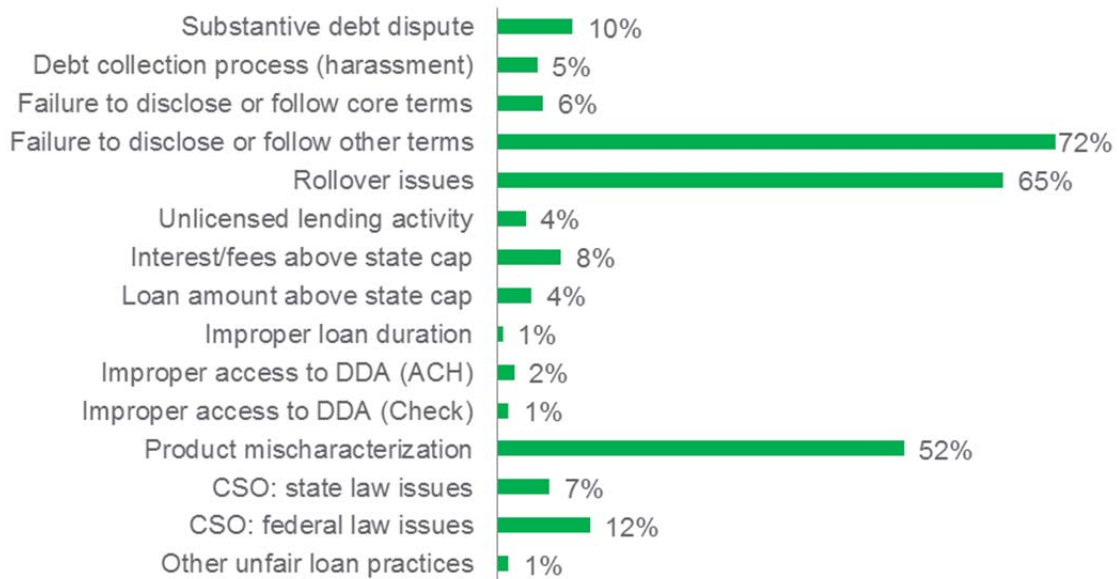
For payday loan disputes, the listed subjects in Figure 24 are: substantive debt dispute; debt collection process (harassment); rollover issues; improper loan duration; failure to disclose/follow core terms;<sup>197</sup> failure to disclose/follow other terms; unlicensed lending activity; interest/fees above state cap; loan amount above state cap; improper access to DDA (ACH); improper access to DDA (check); product mischaracterization; other unfair loan practices; Credit Service Organizations (CSO)—state law issues; and CSO—federal law issues. Once again, our typology was broader than this, but these were the core subject areas raised by these cases.

For non-collection arbitrations that did not raise substantive debt disputes, we have not generally identified recurring pleading forms across cases. We have identified 18 payday disputes that were essentially the same, each involving the same consumer counsel in 2010. These cases were previously all joined in a single court action that was dismissed in favor of arbitration upon the defendant’s motion. They were then refiled in arbitration.

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<sup>197</sup> We defined core terms to be finance charge and loan duration.

**FIGURE 24:** PAYDAY LOAN NON-COLLECTION ARBITRATION SUBJECT MATTERS 2010-12



**Note:** In six of the seven “debt collection process (harassment)” disputes, the consumer also brought claims refuting the amount of debt claimed, but that information is not reflected in the substantive debt dispute entry because of limitations in our coding hierarchy.

For non-collection arbitrations that included substantive debt disputes (a category overwhelmingly made up of credit card cases<sup>198</sup>), we have not yet identified recurring patterns in the cases that raise only debt issues. In the cases that raised debt disputes and non-debt affirmative claims, however, we did see some recurring pleading forms used by consumer counsel across some of those cases.

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<sup>198</sup> There are 359 non-collection arbitrations that include substantive debt disputes. Thirteen of these are payday cases. The remaining 346 are credit card cases.

## 4.6 Debt collection arbitrations

### 4.6.1 Incidence

In light of NAF’s demise and the AAA’s continuing moratorium on company-filed debt collection arbitrations, the Bureau noted in its 2012 RFI that we were unaware of recent practice by covered persons to bring claims—and in particular debt collection claims—against consumers in arbitration. No RFI commenter specifically disputed this observation.<sup>199</sup> The number of company-filed debt collection claims—an annual average of 49—in the AAA Case Data was consistent with the Bureau’s view.<sup>200</sup> Adding consumer-filed and mutually-submitted debt collection arbitrations to the total count, we identified 522 debt collection arbitrations across three years, or an annual average of 174 such filings. Across three years, all but four of these were credit card disputes, meaning that there were an annual average of 173 credit card debt collection disputes.

Although the 518 credit card debt collection disputes were the biggest single category in the AAA Case Data, they represented a negligible share of credit card debt collection activity overall. Although comprehensive national data on credit card collection litigation is not generally available, our review of small claims court cases offers some indication of how rare debt collection arbitration is at this point. In Philadelphia County, in 2012, in small claims court, and focusing only on a group of 10 issuers (rather than all issuers and debt buyers of credit card debt), we identified more than 2,200 collection cases, more than four times as many credit card debt collection disputes as there were in AAA debt arbitration for the entire country over three

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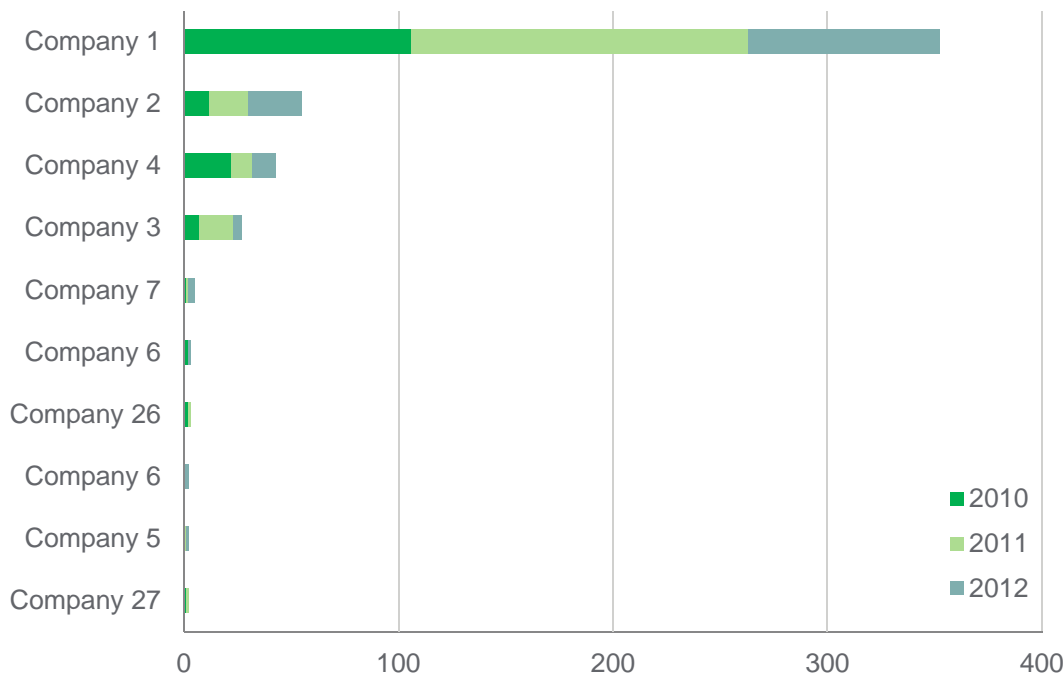
<sup>199</sup> The American Bar Association, the Consumer Bankers’ Association, and the Financial Services Roundtable confirmed that “since July 2009 arbitration has not been used on a large scale for consumer debt collections initiated by companies.” ABA/CBA/FSR RFI Comment at 7, 16.

<sup>200</sup> Almost all company-filed claims were debt collection arbitrations. For credit card disputes, 145 out of 153 company-filed cases were debt collection arbitrations. This was consistent with prior research concluding that company claims in arbitration seek payment for goods delivered or services rendered and for “usually very little else.” Drahozal & Zyontz, *Empirical Study*, *supra* note 140, at 872; *see also* Drahozal & Zyontz, *Creditor Claims*, *supra* note 140, at 84 (noting that of the 61 company-filed consumer arbitrations to reach an award in their sample, only 3 were likely not classifiable as debt collection cases).

years.<sup>201</sup> Despite the relative rarity of debt collection arbitration, however, a slight majority of the credit card disputes in the AAA Case Data were debt collection arbitrations.

Figure 25 shows the number of credit card debt collection arbitrations, broken out by the ten companies that recur most frequently in the AAA debt cases that we reviewed.<sup>202</sup> As with the company data on non-collection arbitration filings, the variation here may not have been significant in light of the size of the overall product markets. One company, however, accounted for more than two and a half times the arbitration proceedings of the other nine companies, averaging 118 debt collection arbitrations per year. The drop-off to the remaining companies was precipitous: the fifth company on the list averaged only two debt collection arbitrations per year, and every company after that averaged only one.

**FIGURE 25:** CREDIT CARD DEBT COLLECTION ARBITRATIONS BY COMPANY 2010-12



<sup>201</sup> See section 5.3 for detailed data on Philadelphia County small claims court cases.

<sup>202</sup> We have not included checking account or payday debt collection cases because there are only four across the three years.

We also note that a relatively high share of the debt collection cases were recorded on claim forms as being filed by consumers or mutually submitted. Of the 518 credit card debt collection arbitrations, more than 72% showed as mutually submitted or consumer-filed. (Most of these were consumer-filings, but nearly 9% were recorded as mutual submissions.<sup>203</sup>) In addition, more than 64% of the credit card debt collection cases recorded as filed by consumers or mutually submitted (237 out of 373) raised *only* substantive debt collection issues, and no non-debt claims at all.

To our knowledge, prior studies covering consumer-filed AAA arbitrations have not previously noted consumers bringing debt collection disputes to arbitration. We may look further into possible explanations for this apparent phenomenon. How and when such cases are resolved may provide us with additional information. We may also confer with some of the counsel involved. As we note below, some firms that represent consumers in these cases show a pattern of using common pleading forms across cases.

## 4.6.2 Subject matter and claims

Figure 26 shows the distribution of claim types made by consumers in the debt-collection cases. It follows the same format as Figures 19 through 21. Any one case may have given rise to more than one claim, but no case recorded the same type of claim twice. We limited this to credit card cases only because there were so few debt collection cases for the other two products.

As noted above, some debt collection arbitrations contained consumer claims or counterclaims that went beyond disputing the substance of the alleged debt. Over a quarter of the credit card debt collection arbitrations included non-debt affirmative consumer claims. Almost all of these non-debt claims were made in debt collection disputes filed by consumers or that were mutual submissions.<sup>204</sup>

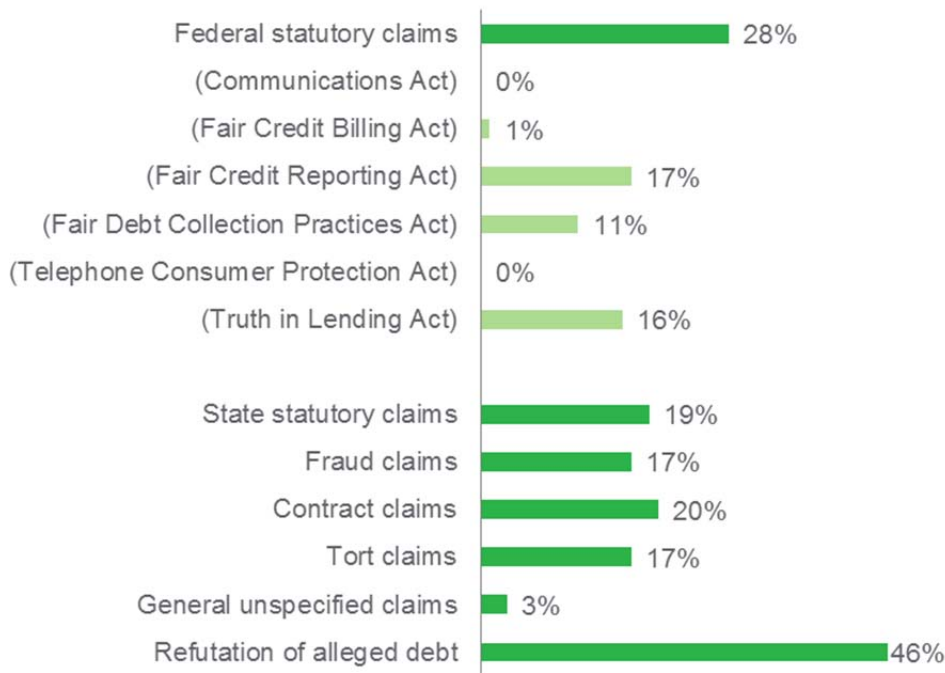
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<sup>203</sup> Consumers were recorded as filing 67% of the credit card non-collection cases that include substantive debt disputes. The remaining 33% of this same category were recorded as mutual submissions.

<sup>204</sup> Consumers made non-debt counterclaims in only around 3% of company-filed debt collection arbitrations. By contrast, they made non-debt claims in 36% of the consumer-filed debt collection arbitrations and in 42% of mutually submitted debt collection arbitrations.



**FIGURE 26:** CONSUMER CLAIM TYPES IN CREDIT CARD DEBT COLLECTION ARBITRATIONS 2010-12



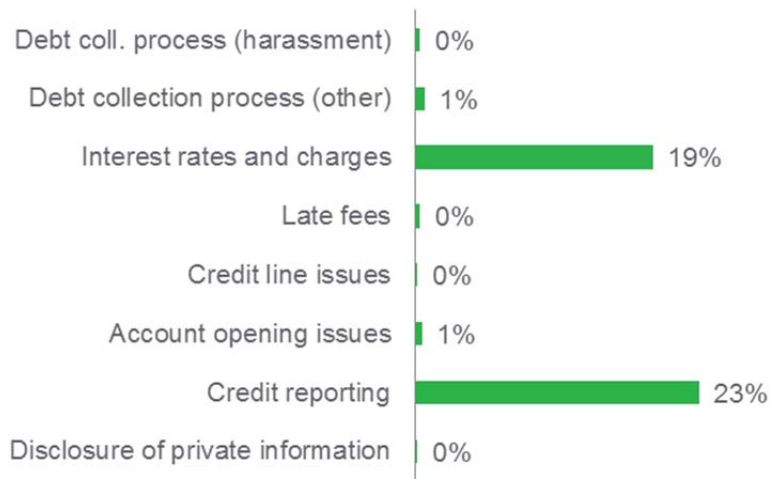
**Note:** 0% entries in Figure 26 reflect a single instance of the claim.

Figure 27 shows the subject matter of non-debt claims for credit cards.<sup>205</sup> (We excluded substantive debt disputes from Figure 27 because, by definition, they were present in all these cases. In addition, we do not provide a separate break-out for payday and checking account disputes because almost all the debt collection arbitrations concerned credit cards.) In collection cases that raised affirmative non-debt claims as well as substantive debt disputes, we saw some recurring pleading forms used by consumer counsel across a share of those cases, just as we did for non-collection cases raising debt and non-debt disputes. There were more limited indications of common patterns across the debt collection cases in which the only claims concern the amount of debt owed.

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<sup>205</sup> We use “non-debt claims” expansively to include all affirmative claims made by the consumer. That includes FDCPA claims, unless the only basis of the FDCPA claim is that the amount of debt claimed is incorrect. If we identified a consumer FDCPA claim that lacked any further specification of the nature of the claim, we assumed for purposes of the subject matter typology that the claim related to the amount of debt asserted and did not otherwise challenge the process of collection. Absent that assumption, the debt collection subject categories in Figure 27 (and the debt collection process categories in Figure 22) would be larger.

**FIGURE 27:** CREDIT CARD DEBT COLLECTION ARBITRATION SUBJECT MATTERS 2010-12



**Note:** Entries showing 0% reflect either one or two cases.

## 4.7 Which consumers bring arbitrations?

We are not aware of scholarship attempting to characterize the demographics of consumers involved in consumer arbitrations. In the area of employment arbitration, however, scholars have addressed demographic issues in a number of ways. There has been some work to try and determine the income level of employee claimants in arbitration.<sup>206</sup> There has also been work to address outcome variations across arbitrations filed by highly paid employees and lower paid employees.<sup>207</sup> A number of studies have found significant variations in employment arbitration

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<sup>206</sup> See Hill, *Due Process at Low Cost*, *supra* note 169, at 794 (estimating that 43.5 % of employee claimants in an AAA sample of 200 awarded cases earned between \$14,000 and \$60,000).

<sup>207</sup> See Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, *DISP. RES. J.*, Nov. 2003-Jan. 2004, at 48 (noting an employee “win rate” of 64.9% in AAA employment arbitrations that involve higher paid employees, and 39.6% in those involving lower paid employees). Building on this work, Choi and Eisenberg note that securities arbitration claimants have win rates between these levels. As an issue for future research, they comment that “this pattern may suggest that increased resources are associated with claimant arbitration success.” Stephen Choi & Theodore Eisenberg, *PUNITIVE DAMAGES IN SECURITIES ARBITRATION: AN EMPIRICAL STUDY* 535 (2010). Alexander Colvin has identified a 19.7% employee win rate in a data set of AAA employment arbitrations for which the “large majority” did not involve highly paid employees. See Alexander Colvin,

outcome according to whether the employee claimants were relying on arbitration clauses in individually negotiated contracts—which was likely to be the case when the claimant was a manager or executive—or instead on clauses in personnel manuals—which was likely to be the case for other employees.<sup>208</sup> More recently, some work has asserted that a claimant’s gender makes a difference to employment arbitration outcomes.<sup>209</sup> These various studies suggest that there may be value in trying to understand which consumers bring arbitrations in the consumer financial area.

To address this issue, we constructed a location-based income profile of U.S. credit cardholders.<sup>210</sup> To do this, we identified census tract data from a representative sample of U.S. credit cardholders using data from the Bureau’s Consumer Credit Panel, which provides a nationally representative, random sample of de-identified credit records procured from a large, national consumer reporting agency. Using the Census, we then obtained median income data for all the census tracts involved.<sup>211</sup> (We do not have actual income data for any individual from the credit panel.) This provides an estimate for the percentage of U.S. credit cardholders that live in census tracts within certain median income ranges. This background income profile is shown in the darker green columns in Figure 28.

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*Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPLOYEE RIGHTS & EMPLOYMENT POL’Y J. 418-19 (2007). A later Colvin study shows a similar win rate for analogous AAA employment arbitrations at 21.4%. *See Colvin, supra* note 169, at 6. This later study also shows win rates increasing with salary levels. For employees with salaries below \$100,000, win rates were 22.7%. They rose to 31.4% for employees with salaries between \$100,000 and \$150,000. For employees salaried at above \$150,000, win rates were 42.9%. *See id.* at 10-11.

<sup>208</sup> *See Lisa B. Bingham, An Overview of Employment Arbitration in the United States*, N. Z. J. INDUS. RELS. at 13, 16 (June 1998). The AAA classifies employee arbitrations according to the type of underlying agreement: individually negotiated or in employer promulgated agreements. *See Colvin, supra* note 207, at 415. Bingham’s results were that employees won 68.8% of the former type of arbitrations, but only 21.3% of the latter type. *See id.*

<sup>209</sup> *See Lipsky et al., supra* note 139. This study reports that the gender of the claimant and the claimant’s counsel had a “significant effect” on award size. The gender of the arbitrator did not. *See id.* at 314. The authors acknowledge that numerous explanations are possible for this observed effect, including discrepant settlement rates, lower seniority of female claimants, and greater seniority of male counsel. *See id.* at 320-22.

<sup>210</sup> Appendix B provides more detail about our methodology.

<sup>211</sup> For 309 Census tracts, covering around 0.12% of the data relating to the overall credit card population, we had no reported median income.

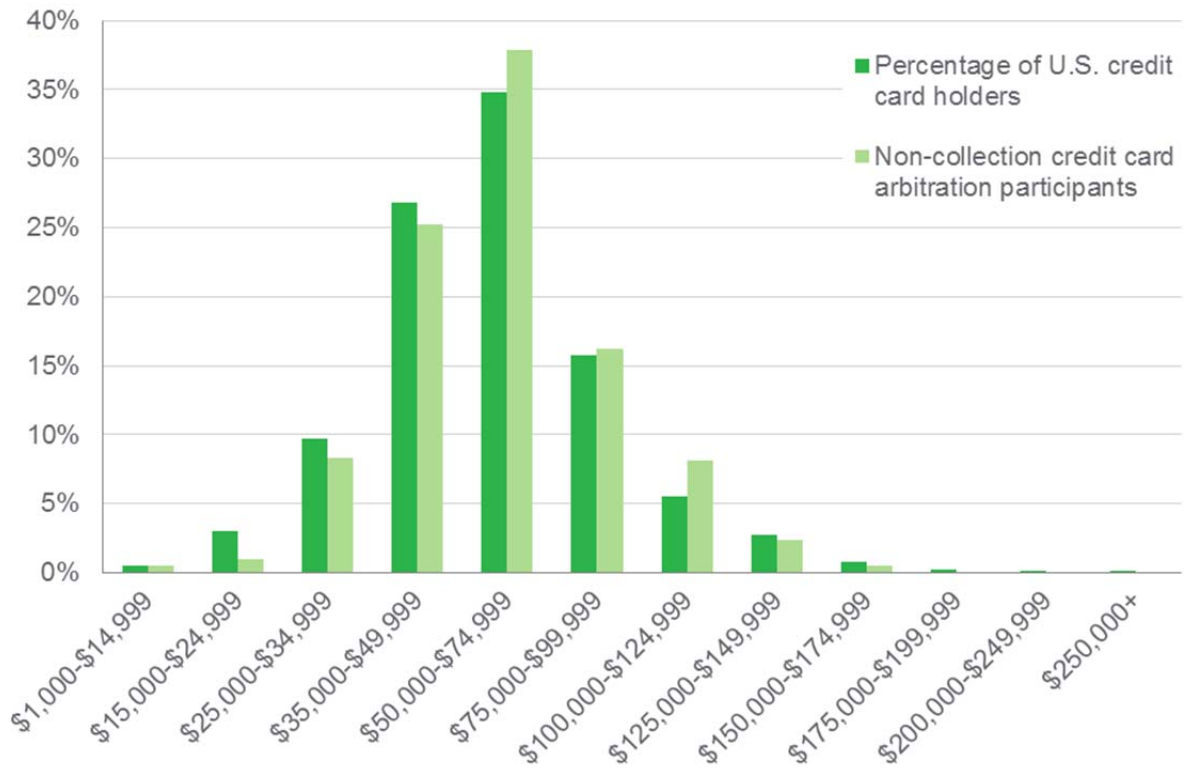
We then constructed a location-based income profile of 420 consumers in non-debt collection credit card arbitrations.<sup>212</sup> (We focused, first, on non-debt collection cases, but, as we discuss below, we also covered debt collection cases.) To build this profile, we determined a census tract location for filing consumers. Once again, we then used the Census to determine median income for that census tract. As a result, we do not have any actual income data for any consumer that filed an AAA arbitration. We show this information in the lighter green columns in Figure 28.

By plotting one distribution against the other, we were able to compare the median income of the locations involved in consumer arbitrations in the AAA Case Data with the median income of the locations of credit cardholders generally. Figure 29 shows the difference between the two distributions. Overall, we saw that locations with incomes below \$50,000 were less likely to account for credit card arbitrations than for credit cardholding overall. Locations with incomes above that level sometimes accounted for more credit card arbitrations than for credit cardholding overall, but not consistently so.

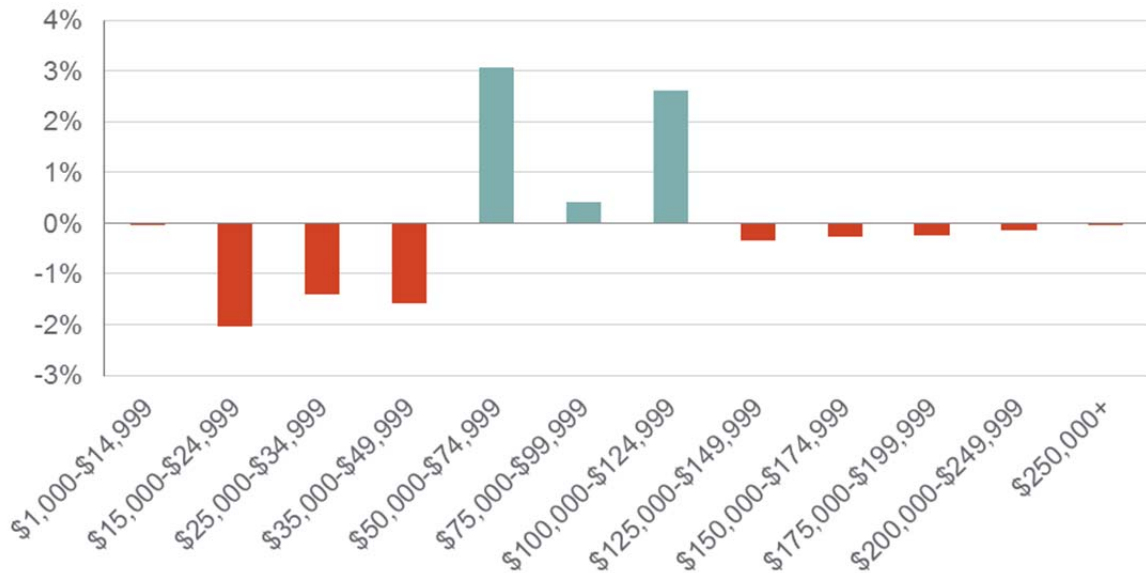
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<sup>212</sup> We were not able to associate census tract-based median income information for all of the 515 credit card non-debt collection cases. In some cases, the AAA case records did not provide sufficient location information. The analysis here, therefore, covers the 420 cases for which we were able to obtain such information.

**FIGURE 28:** MEDIAN INCOME OF CREDIT CARDHOLDER LOCATIONS AND LOCATIONS OF CONSUMERS INVOLVED IN NON-COLLECTION CREDIT CARD CONSUMER ARBITRATIONS 2010-12



**FIGURE 29:** PERCENTAGE DIFFERENCES BETWEEN DISTRIBUTIONS IN FIGURE 28



We also reviewed all credit card arbitrations, including debt collection arbitrations. Such disputes might be expected to originate in poorer locations relative to the distribution of credit cardholders overall. But even including all credit card arbitration filings in this analysis—which are primarily debt collection disputes—we see a similar pattern. Consumers in such arbitrations—even when the disputes involve debt claims—were, relative to the cardholding population overall, disproportionately located in areas above \$35,000 in average income. Locations with incomes above that level sometimes account for more credit card arbitrations than for credit cardholding overall, but not consistently so. We show this analysis in Appendix D.

We were not able to follow this same approach for checking account and payday loan arbitrations because we do not have data that provides a proxy for the income level of users of these products by geographic distribution. We can construct distributions for the income level of areas that originate such arbitrations, but we can only compare these to the background distribution of income levels for all areas. As a result, we cannot control for the income level of the consumers that use these two products in the manner that we can for credit cards.<sup>213</sup>

The AAA Case Data, therefore, may suggest that credit cardholders who arbitrate will tend to exceed a certain income threshold more than credit cardholders generally exceed that same threshold. It is important to note, however, that we cannot tell from our data whether or not the same was true for consumers in litigation.<sup>214</sup> Our data were not sufficient to address the issue comparatively. In addition, as noted in section 4.2.1, we worked from a relatively small set of arbitrations when compared to the overall credit cardholding population, which underscores the need for caution in interpreting this demographic data.

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<sup>213</sup> Appendix D also contains the checking account and payday distributions. As might be expected, payday arbitrations are disproportionately filed from lower-income zip codes, which may reflect that lower-income Americans are the primary users of this product. Conversely, checking account arbitrations are disproportionately filed from zip codes with a median income of \$50,000 to \$74,999 in average income, which may reflect the higher income level of checking account users. (As discussed in the appendix, however, the distribution regarding checking account arbitrations contained the least number of data points—56.)

<sup>214</sup> Class litigation that results in an automatic distribution of relief to affected consumers, however, stands to provide some benefit to all income and demographic segments represented in the affected customer base.

## 4.8 Prior litigation

In some cases, the case record for a dispute in the AAA Case Data provides a clear indication of prior court proceedings. We discuss the available record on prior court litigation in this section.

### 4.8.1 Individual disputes

In credit card debt collection disputes, we were able to identify evidence of prior court proceedings in 97% of such cases. This is unsurprising given how we have defined debt collection arbitrations. In these cases, prior collection proceedings were the norm; in effect, the debt collection arbitration took the place of the preceding debt collection litigation.

Furthermore, leaving aside the mutually submitted debt collection cases, we have identified only eight debt collection cases in which there was a clear record that the company was the party to invoke arbitration in the prior litigation, indicating that in many of the debt collection cases the consumer was the party ending the litigation in favor of arbitration.<sup>215</sup> Although this may be a common pattern in the AAA Case Data, our Philadelphia County small claims court results gave some indication of how rare this consumer response to collection litigation may be overall.<sup>216</sup> There were more credit card collection cases filed by just two issuers in that county for 2012 alone than for all three years of credit card data in the AAA case records from 2010 through 2012.

In non-collection cases, by contrast, an indication of prior litigation is the exception, not the rule. We were able to identify from the AAA case records only 78 such cases, or 11% of the 718 non-collection arbitrations. In 19 of these 78 cases, the consumer appeared to have been the party to invoke arbitration as to the prior court proceeding. In the remaining 59 cases, the available indications were that the company was the party invoking arbitration as to the court proceeding.

It is important to note, however, that these results were based only on a review of the AAA electronic case record. We have not attempted to identify a preceding federal or state court case

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<sup>215</sup> It is possible that in the absence of the moratorium, the company might have filed such disputes in arbitration directly.

<sup>216</sup> See section 5.3.

using electronic litigation case data.<sup>217</sup> Our data, therefore, may show false negatives on this point: there could be additional court proceedings that were not viewable from the arbitration record alone. In addition, we do not know how frequently companies move in court to invoke arbitration in individual proceedings and thus cannot assess the frequency with which such actions by companies lead to consumer-initiated arbitration cases.

## 4.8.2 Class disputes

A number of RFI commenters suggested that the Bureau compare the benefits to consumers from arbitration to the benefits from class action litigation.<sup>218</sup> In fact, the value of such a comparison is an area of relative agreement across RFI commenters, including consumer groups and members of the plaintiffs' bar. Some commenters noted that there is limited empirical data in this area.<sup>219</sup>

The comparison can potentially be made along a number of different metrics, although the lack of small-dollar disputes in the AAA arbitration caseload may mean that at least some “apple to apple” outcome comparisons may not be available. The presence of prior class litigation proceedings, however, provides one point of potential comparison.

In damages class actions, applicable rules generally entitle potential class members to “opt out” of any proposed class.<sup>220</sup> Unless a potential class member opts out, he or she will be bound by the resolution of the dispute. Potential class members, therefore, generally receive individual notice of their potential inclusion in a certified class, and are thereby given the opportunity to opt out.<sup>221</sup>

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<sup>217</sup> As several commenters pointed out, state court records are not consistently available across all state court jurisdictions via electronic means. There is no analog to PACER—the federal court record database—that covers all state courts.

<sup>218</sup> ABA/CBA/FSR RFI Comment at 3-4, 8 (stating that the Bureau should study whether “class actions provide meaningful benefit to individual consumers as compared with individual arbitration”).

<sup>219</sup> ABA/CBA/FSR RFI Comment at 8.

<sup>220</sup> See FED. R. CIV. P. 23(c)(2)-(3).

<sup>221</sup> See *id.*



In many cases, however, notice will not be provided to potential class members until the parties have reached a proposed settlement. As a result, many class action notices will also include notice of a proposed settlement, laying out two broad options. A potential class member can take the offered class settlement terms, which will extinguish his or her right to bring individual proceedings on the settled claims. Alternatively, he or she can opt-out of the class action and the proposed settlement, and thus be free to pursue an individual case if he or she wishes to do so. Such “opt outs” are not bound by the terms of the class settlement releases. They receive no relief from the compensatory terms of the damages settlement. As they are not bound by the releases, they are free to press their own claim individually against the settling company. To preserve that right, courts that approve a class action settlement will typically publish a list of individual opt-outs by name.

Some class action settlements will occur in situations in which the individual consumer who opts out can bring a claim in arbitration.<sup>222</sup> Class proceedings will toll the applicable statute of limitations for putative class members to bring individual actions outside the class litigation.<sup>223</sup> The class proceeding may have brought forward certain evidence bearing on the claims in the case. It may also have identified and tested certain legal theories, and it may have identified certain conduct as potentially actionable. In short, a certain amount of work will already have been done for any consumer who may have a preference for a potential arbitrated outcome over the proposed class settlement outcome.

Using electronic case databases, as well as blogs and websites that track class action settlements, we have identified eight class action damages settlements that meet the following criteria: first, final approval of the settlement took place from the latter half of 2009 or later; second, the contract at issue in the class action contained an arbitration clause that offered AAA as an arbitral forum; and third, the class action involved one of the three products covered by our existing AAA Case Data review. (Other class action settlements may also meet these criteria, but these are the ones we have identified to date.) Our criteria were intended to locate cases for

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<sup>222</sup> This will generally only be the case where, for whatever reason, the defendant has either opted against invoking the arbitration clause in the class action or tried to do so and been unsuccessful in that effort. Had the defendant successfully invoked the arbitration clause as to the class action, there would be no class action settlement in court. In all eight of the cases identified below, one or more defendants attempted to invoke an arbitration clause but were not fully successful in that effort.

<sup>223</sup> See, e.g., *Crown Cork & Seal v. Parker*, 462 U.S. 345, 352 (1983).

which we would be able to tell if consumers opted out and brought a AAA arbitration instead of applying for or receiving benefits under the class action settlement. In addition to the AAA Case Data for 2010 through 2012, we also had some AAA data for 2008, 2009 and 2013 that allowed us to check for potential overlap.<sup>224</sup> Finally, none of the cases we identified involved pre-settlement notice to the class. Had they done so, opt-outs might have filed arbitrations earlier than the period of our review.

For all the cases below, we have looked through all three years of the AAA Case Data as well as the 2013 AAA data to count the number of consumers who opted out and pressed the same claim against one or more of the relevant defendants in arbitration before the AAA. For one case, for which notice was sent in November 2007, we also check AAA data for 2008 and 2009.

Thus far, we have identified three arbitrations in which an opt-out from one of these cases *may* have made the same claim in AAA arbitration against a party within the scope of the applicable settlement.<sup>225</sup> No other opt-out from one of these cases appears to have filed the same dispute before the AAA. A total of 3,605 individuals opted out of these settlements. More than 13 million class members made claims or received payments under these settlements. Total payments or debt relief to the classes are in excess of \$350 million, exclusive of attorneys' fees and the value of injunctive relief. Further details on each of these class cases are provided below.

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<sup>224</sup> Because the detailed AAA Case Data were available from the beginning of 2010, we set late 2009 as the cut-off for final approval. For cases settled on that schedule, opt-outs bringing AAA arbitrations after final approval should generally be visible in the detailed 2010-12 case records.

<sup>225</sup> We cannot be sure that these three opt-outs, in fact, pressed the same claim in arbitration. For two of these opt-outs, the potentially overlapping AAA arbitration was filed before 2010. For that period, we lack detailed case records, but the available AAA data record arbitrating parties matching two opt-outs. In addition, the relevant AAA arbitrations involved companies covered by the scope of the applicable class settlement. For these two opt-outs, therefore, it is possible that they were involved in follow-on AAA arbitration, but we lack the information to say whether that was the case. For the third opt-out, there is a match in the AAA case records and that arbitration involves the company that reached the relevant class settlement. However, even though we have the case record for this arbitration, the consumer's claims are stated only in very general terms. It is possible that these general terms were intended to capture one or more of the claims covered by the prior settlement, but we do not have enough information to say whether that was the case.

## IN RE CURRENCY CONVERSION FEE ANTITRUST LITIGATION

The plaintiffs challenged foreign currency and other foreign transaction action fees imposed on payment card transactions.<sup>226</sup> The defendants were Visa, MasterCard, and a number of large credit card issuers. Notice of the proposed settlement was sent to potential class members in November 2007.<sup>227</sup> The settlement was “claims-made,” meaning that consumers had to submit claims to secure payments under the settlement.<sup>228</sup> More than 10 million consumers submitted claims under the settlement. (Of these, more than 7 million consumers requested a flat fee payment of \$25, which was subsequently reduced to \$18 because of claim volume. Another 3 million consumers submitted more detailed claim materials, which entitled them to a significantly larger recovery.<sup>229</sup>) Overall, the settlement distributed around \$263 million to consumer members of the settlement class.<sup>230</sup> The court entered final approval of the settlement in 2009, at which time the court excluded 2,878 individuals from the damages class.<sup>231</sup> Several of the defendants did not have AAA arbitration clauses during some portion of the relevant period, but most of the defendants had clauses up until the end of 2009, and one had a clause through the entire period. In addition, the settlement released all U.S. Visa and MasterCard members, not just the defendants, so the potential for arbitration was widespread.<sup>232</sup>

## HOOPER V. ADVANCE AMERICA

The plaintiffs alleged violations of Missouri’s Merchandising Practices Act and Missouri’s payday loan statute.<sup>233</sup> An arbitration clause accompanied the payday loan contracts provided by

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<sup>226</sup> *In Re Currency Conversion Fee Antitrust Litig.*, MDL Docket No. 1409 (S.D.N.Y., filed before J.P.M.L. Apr. 13, 2001).

<sup>227</sup> See Decl. of Edward J. Radetich, Jr., CPA Regarding the Dissemination of Notice to the Class ¶ 7 (Jan. 28, 2008).

<sup>228</sup> See Aff. of Edward J. Radetich, Jr., CPA Regarding Claims Administration at 5 (Sept. 14, 2011).

<sup>229</sup> See *id.* at 4, 6.

<sup>230</sup> See *id.* at 21.

<sup>231</sup> See Final Judgment & Order of Dismissal, Ex. A (Nov. 4, 2009).

<sup>232</sup> See *id.* ¶ 9.

<sup>233</sup> *Hooper v. Advance America, Cash Advance Centers of Missouri, Inc.*, No. 08-cv-04045-NKL (W.D. Mo. filed Mar. 10, 2008).

the defendant, and AAA was an arbitral forum offered in the contract. In July 2010, notice of a proposed settlement was mailed to potential class members.<sup>234</sup> The court approved the settlement in November 2010, identifying 316 consumers who opted out of the settlement class.<sup>235</sup> There were approximately 10,400 timely claims submitted. Claimants shared approximately \$520,000 in cash payments, and between \$3.8 million and \$9 million in debt forgiveness.<sup>236</sup>

## HOFFMAN V. CITIBANK

The plaintiffs alleged that Citibank retroactively increased interest rates on certain customers' outstanding credit card balances in violation of several California laws.<sup>237</sup> Citibank administered the settlement, and provided notice of the proposed settlement via statements.<sup>238</sup> The court approved the proposed settlement in December 2010, identifying 140 opt-outs.<sup>239</sup> At that point, the claims period was still open, so we have not been able to identify the final number of claims or the amount paid to class members. Class members were entitled to payments of \$18, subject to *pro rata* decrease if there was sufficient claims volume.<sup>240</sup> At the time of final approval, when the claims period had several months to run, there were 12,500 claims, which suggests that the

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<sup>234</sup> See Decl. of Jennifer M. Keough Regarding Notice Dissemination in Support of Plaintiffs' Unopposed Motion for Final Approval of Class Action Settlement ¶ 3 (Oct. 27, 2010), ECF No. 65.

<sup>235</sup> See Order and Final Judgment, Ex.1 (Oct. 27, 2010), ECF No. 68.

<sup>236</sup> The \$520,000 is an estimate based on the following amounts: a \$2 million cash fund, less \$950,000 in attorney fees and costs, \$2,000 in service fees to class representatives, \$398,800 to *cy pres*, and the fund was offset by \$127,810 for dollar-to-dollar debt forgiveness for one subclass. See *id.* at 8; Memorandum in Support of Motion for *Cy Pres* Disbursement and Notice of Final Accounting at 2 (Dec. 29, 2010), ECF No. 70.

<sup>237</sup> *Hoffman v. Citibank (South Dakota), N.A.*, No. 06-cv-00571-AG-MLG (C.D. Cal. filed Jun. 21, 2006).

<sup>238</sup> See Supp. Decl. of Deborah L. Thompson re Claims Administration in Support of Final Approval of Settlement ¶ 2 (Dec. 15, 2010), ECF No. 86.

<sup>239</sup> See Settlement Order and Final Judgment ¶ 6 (Dec. 22, 2010), ECF No. 95.

<sup>240</sup> See Settlement Agreement at 10 (Apr. 22, 2010), ECF No. 61.

class received over \$225,000.<sup>241</sup> Citibank has maintained an arbitration clause providing for AAA arbitration throughout the relevant period.

### **KUCAN V. ADVANCE AMERICA**

Plaintiffs alleged various violations of North Carolina law by a payday lender. A proposed state class settlement was reached in September 2010.<sup>242</sup> Notice was mailed in November 2010.<sup>243</sup> In early 2011, the court entered final approval of the settlement, identifying 19 opt-outs.<sup>244</sup> Advance America's loan contract included an arbitration clause that permitted AAA-administered arbitration. This was not a claims-made settlement—payments were made automatically to all class members. Approximately 135,000 class members shared approximately \$11.5 million.<sup>245</sup>

### **HAGER V. CHECK INTO CASH**

Paralleling the claims in *Kucan*, plaintiffs alleged various violations of North Carolina law by a payday lender.<sup>246</sup> The arbitration clause at issue allowed AAA to serve as the arbitral forum. A proposed settlement was reached in December 2010.<sup>247</sup> Notice was sent in February 2011.<sup>248</sup> Final approval was entered in April 2011.<sup>249</sup> Ten consumers opted out of the settlement class.<sup>250</sup>

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<sup>241</sup> See Supp. Decl. of Deborah L. Thompson re Claims Administration in Support of Final Approval of Settlement ¶ 3 (Dec. 15, 2010), ECF No. 86.

<sup>242</sup> *Kucan v. Advance America, Cash Advance Centers of North Carolina, Inc.; Advance America, Cash Advance Centers, Inc.; and William M. Webster, IV*, No. 04-CVS-2860 (N.C. Super. filed Jul. 26, 2004).

<sup>243</sup> See Report by Settlement Administrator ¶ 3 (Jan. 18 2011).

<sup>244</sup> See Status Report & Mot. Requesting Entry of Final Judgment ¶ 2 (Jan. 18 2011).

<sup>245</sup> See Aff. of Settlement Administrator ¶¶ 2-3 (Jun. 26, 2013).

<sup>246</sup> *Hager v. Check Into Cash of North Carolina, Inc. et al.*, No. 04-CVS-2859 (N.C. Super. filed Jul. 27, 2004).

<sup>247</sup> See Settlement Agreement (Dec. 10 2010).

<sup>248</sup> Interim Status Report & Mot. Requesting Entry of Final Judgment ¶ 1 (Mar. 10, 2011).

<sup>249</sup> See Settlement Order and Final Judgment (Apr. 15, 2011).

<sup>250</sup> See *id.*, Ex. 1.

As in *Kucan*, there was no claims process and payments were made automatically to class members. Approximately 104,000 consumers shared more than \$7.6 million.<sup>251</sup>

## **IN RE CHECKING ACCOUNT OVERDRAFT LITIGATION**

In a number of cases consolidated in this multidistrict litigation in the Southern District of Florida, plaintiffs have challenged overdraft fees that were allegedly incurred as a result of the order in which the banks processed certain debit transactions.<sup>252</sup> Several banks have separately settled overdraft class actions. Of the defendants to settle so far, Chase, M&I, and Compass each have checking account agreements that provided for AAA arbitration.

Chase reached a proposed settlement in May 2012.<sup>253</sup> Notice was mailed to class members in August 2012.<sup>254</sup> The court gave final approval in December 2012, identifying 173 consumers who opted out.<sup>255</sup> Most class members received automatic payments under the settlement, but class members were also entitled to submit claim forms for periods for which Chase lacked relevant records.<sup>256</sup> The class had more than five million members, who received approximately \$61

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<sup>251</sup> See Aff. of Settlement Administrator ¶ 2 (Jul. 1, 2013).

<sup>252</sup> *In Re: Checking Account Overdraft Litig.*, MDL No. 2036 (S.D. Fla., am. consolidated compl. filed Nov. 9, 2009).

<sup>253</sup> See Pls.' Unopposed Mot. for Prelim. Approval of Class Settlement and for Certification of Settlement Class, Ex. A (May 22, 2012), ECF No. 2710-1.

<sup>254</sup> See Decl. of Shannon R. Wheatman, Ph.D. on Implementation and Adequacy of Notices and Notice Plan ¶ 7 (Oct. 15, 2012), ECF No. 3010-5.

<sup>255</sup> See Final Judgment, Ex. A (Dec. 19, 2012), ECF No. 3135.

<sup>256</sup> See Order of Final Approval of Settlement, Authorizing Service Awards, and Granting Application for Attorneys' Fees at 9-11 (Dec. 19, 2012), ECF. No. 3134.

million in payments.<sup>257</sup> As part of the settlement, Chase also agreed to restrictions on fees for transactions under \$5. The court valued this additional relief at \$52 million.<sup>258</sup>

M&I reached a proposed settlement in September 2012.<sup>259</sup> Notice was mailed in January 2013.<sup>260</sup> The court gave final approval in August 2013, identifying 34 opt-outs.<sup>261</sup> Class members, who numbered around 190,000, did not have to submit a claim form to share in \$2.7 million in cash relief.<sup>262</sup> The settlement also contained limits on charging fees for small overdrafts.<sup>263</sup>

Compass Bank reached a proposed settlement in March 2013.<sup>264</sup> Notice was mailed in April 2013.<sup>265</sup> Notice was sent to approximately 826,000 potential class members.<sup>266</sup> The court

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<sup>257</sup> The \$61 million cash distribution is estimated as follows. The total cash to be distributed was \$110 million. The court awarded class counsel \$48.6 million, which was 30% of the total \$162 million value of the settlement, including injunctive relief. The settlement fund also covered \$309,326.50 for litigation expenses, and \$5,000 or \$2,500 service awards to each named plaintiff. *See* Order of Final Approval of Settlement, Authorizing Service Awards, and Granting Application for Attorneys' Fees at 39 (Dec. 19, 2012), ECF No. 3134.

<sup>258</sup> *See id.* at 12.

<sup>259</sup> Settlement Agreement (Oct. 1, 2012), ECF No.2981-1.

<sup>260</sup> Decl. of Cameron R. Azari on Implementation and Adequacy of Settlement Notice Program ¶ 16 (Oct. 1, 2012), ECF No. 3279-5.

<sup>261</sup> Final Judgment, Ex. A (Aug. 2, 2013), ECF No. 3571.

<sup>262</sup> The \$2.7 million cash distribution is estimated as follows. The court awarded class counsel 30% of the total value of the settlement, which was \$4 million. It also awarded \$67,362.50 for reimbursement of litigation expenses, and \$2,500 service awards to each named plaintiff. *See* Order of Final Approval of Settlement, Authorizing Service Awards, and Granting Application for Attorneys' Fees (Aug. 2, 2013), ECF No. 3570.

<sup>263</sup> *See* Settlement Agreement ¶ 50 (Aug. 2, 2013), ECF No. 3570.

<sup>264</sup> Settlement Agreement, No. 09-md-02036-JLK (S.D. Fla. Mar.12, 2013), ECF No. 3330-1.

<sup>265</sup> *See* Decl. of Cameron R. Azari on Implementation and Adequacy of Settlement Notice Program ¶ 15 (May 16, 2013), ECF No. 3469-5.

<sup>266</sup> *See id.*

entered final approval in August 2013, identifying 35 opt-outs.<sup>267</sup> Class members did not have to submit claim forms to share in approximately \$8 million in cash relief.<sup>268</sup>

With respect to the Compass and M&I settlements, we do not have significant AAA data to review because these settlements were approved so recently. We do, however, have some months of AAA data for the period immediately following class notice and can report that that period at least was insufficient to generate any pertinent AAA arbitrations.

## 4.9 Initial fee allocation

The consumer arbitrations reviewed by the Bureau are subject to the AAA's Due Process Protocol, which requires that arbitration be available to consumers at a reasonable cost.<sup>269</sup> The AAA's Supplementary Procedures for Consumer-Related Disputes are intended to implement this and other requirements of the Protocol. Below we briefly describe the fee schedule that applied to consumer arbitrations filed with the AAA during the period of our review. The AAA changed its fee schedule effective March 1, 2013.<sup>270</sup>

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<sup>267</sup> Final Judgment, Ex. A (Aug. 7, 2013), ECF No. 3586.

<sup>268</sup> The \$8 million cash distribution is estimated as follows. The court awarded class counsel 30% of the total value of the settlement, which was \$11.5 million. It also awarded \$106,300.20 for reimbursement of litigation expenses, and \$5,000 service awards to each named plaintiff. *See* Order of Final Approval of Settlement, Authorizing Service Awards, and Granting Application for Attorneys' Fees (Aug. 7, 2013), ECF No. 3585.

<sup>269</sup> The AAA's Protocol states that: "Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay." Principle 6, AAA Consumer Due Process Protocol (Apr. 17, 1998) at 19, [www.adr.org](http://www.adr.org).

<sup>270</sup> The revised fee schedule is relatively simple. At present, for cases subject to the Supplementary Procedures, consumers pay a non-refundable \$200 filing fee, regardless of who files the claim or of the amount at issue. In cases before one arbitrator, the company pays a partially refundable filing fee of \$1,500, which increases to \$2,000 in cases involving three arbitrators. The company also pays the arbitrator's compensation, which will be \$750 per arbitrator for a desk arbitration, and \$1,500 per arbitrator per day for arbitrations involving an in-person or telephonic hearing. The arbitrator can reallocate initial filing fees, arbitrator compensation, or other expenses to the consumer (or, with respect to the \$200 consumer filing fee, to the company), but only pursuant to applicable law or the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or was patently frivolous. The business pays a number of other fees, including a hearing fee and any hearing room rental fees. The consumer and



### 4.9.1 Initial fee schedule

Aside from attorneys' fees, there were generally two kinds of fees associated with AAA consumer arbitrations filed in the period 2010 through 2012. First, there were administrative fees payable to the AAA itself. Second, there were arbitrator's fees payable to the arbitrator.<sup>271</sup> Some portion of each of these fees was assessed at filing. (We refer to these as the "filing fees.") During the period of our review, all components of filing fees were either administrative fees or deposits towards arbitrator fees.

For the AAA to administer an arbitration case filed in the period of our review, each side was required to meet its initial fee requirements. The amounts and allocation of the filing fees during the applicable period are set out below. These filing fees were based on the amount of compensatory damages claimed or counterclaimed, not the amount of punitive damages, attorney fees, or any other amounts. Note that these are *not* the AAA's current filing fees for consumer arbitrations, which were revised effective March 1, 2013, and therefore did not apply to the cases that we reviewed.<sup>272</sup>

#### **INITIAL FEES IN AAA CONSUMER ARBITRATIONS DURING RELEVANT PERIOD**

##### **Claims up to \$75,000**

Regardless of who filed the arbitration, the consumer's initial filing requirements were up to \$125 for claims under \$10,000 and up to \$375 for claims between \$10,000 and \$75,000.<sup>273</sup> This payment was made as a deposit to cover the consumer's share of the arbitrator fee; none of the payment was for administrative fees. The consumer could be refunded some or all of the

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company must each pay a \$300 abeyance fee if a case is held as inactive for more than a year. Full details of the current fee schedule are available on the AAA's website, [www.adr.org](http://www.adr.org).

<sup>271</sup> California requirements call for publication of data about the amount and allocation of arbitrator fees. *See* Cal. Code Civ. Pro. 1281.96(a).

<sup>272</sup> *See supra* note 270.

<sup>273</sup> Counterclaims that were below \$75,000 had no impact on the filing fees. Above \$75,000, however, they would be subject to the AAA Commercial Rules, as described below.

arbitrator's deposit if it were not to be used—for example, if the case were to settle before an arbitrator was appointed.<sup>274</sup>

The company incurred all administrative fees, which were \$775 for cases up to \$10,000 and \$975 for cases between \$10,000 and \$75,000. If a hearing were held, the company paid an additional administrative fee of \$200 for disputes up to \$10,000, or \$300 for disputes between \$10,000 and \$75,000.<sup>275</sup> The company also paid all remaining arbitrator deposits, which ranged from \$125 for a “desk arbitration” (meaning an arbitration that is resolved on the basis of written submissions alone) or telephonic hearing to \$625 for an in-person hearing.<sup>276</sup> Again, for claims up to \$75,000, these fees did not change with the identity of the filing party.

The company could receive some refund of its administrative fees and arbitrator deposits. Arbitrator deposits were refunded if not used. Administrative fees were refundable pursuant to the Commercial Fee Schedule.<sup>277</sup> This required that \$350 in administrative fees were not refundable to the business, but the remaining administrative fees would be refunded in full if the case were settled or withdrawn within 5 days of filing. For cases settled or withdrawn between 6 and 30 days of filing, the refund was 50%. If the case settled or was withdrawn between 31 and 60 days of filing, the refund was 25%.<sup>278</sup> If a consumer-filed case was withdrawn or settled before the consumer paid his or her initial fee, the company might not incur any fees at all.<sup>279</sup>

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<sup>274</sup> See AAA, Supplementary Procedures C-8 (effective Jan. 1, 2010), “Fees and Deposits to be Paid by the Consumer.”

<sup>275</sup> For claims under \$10,000, the default rule is for the dispute to be resolved without a hearing. However, either party may ask for a hearing, or the arbitrator may independently decide that one is necessary. See AAA Supplementary Procedures C-5. Conversely, if the claim is for over \$10,000, the default is for the dispute to be resolved with a hearing. If both parties request no hearing, however, the arbitrator may waive the hearing requirement. See *id.* C-6.

<sup>276</sup> AAA, Supplementary Procedures (effective Jan. 1, 2010) C-8 “Fees and Deposits to be Paid by the Business.”

<sup>277</sup> See *id.*

<sup>278</sup> AAA, Commercial Arbitration Rules and Mediation Procedures (effective Jan. 1, 2010) Administrative Fee Schedules.

<sup>279</sup> One possible implication of this fee schedule is that it may have provided the consumer with certain forms of leverage. By filing an arbitration in this time period, a consumer that was willing to incur \$125 as an initial—though potentially refundable—fee could cause the company to incur a contingent obligation of up to \$1,725 for claims below

### **Claims above \$75,000**

For consumer-filed claims above \$75,000, the consumer paid all the administrative fees, pursuant to the regular fee schedule in the AAA Commercial Rules, plus half the arbitrator's fee based on the arbitrator's usual rates, with a deposit of half the arbitrator's fee due on filing.<sup>280</sup> (For a \$100,000 claim, for example, the consumer's initial administrative fees would be \$1,850 with an additional administrative fee of \$750 in the event a hearing is scheduled.<sup>281</sup> Arbitrator fees would be in addition to this amount.) The administrative fees were subject to refund per the terms of the Commercial Fee Schedule discussed above.

Conversely, for company-filed claims above \$75,000, the business paid the administrative fees based on the regular fee schedule in the AAA Commercial Rules, plus half the arbitrator's fee based on the arbitrator's usual rates, with a deposit of half the arbitrator's fee due on filing. For mutually submitted claims above \$75,000, the parties were required to allocate the applicable administrative fees between them.

### **Three-Arbitrator Panels**

For the period in our review, the AAA charged a minimum fee of \$2,800 when the arbitration clause provided for a 3-arbitrator panel.<sup>282</sup>

## **WAIVERS AND ADJUSTMENTS**

Although the applicable contract could reallocate initial fee burdens away from the consumer, it could not add to the consumer's initial fee burden without violating the applicable AAA rules,

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\$10,000, and up to \$2,025 for claims between \$10,000 and \$75,000—albeit with the potentially significant caveat that, depending on the terms of the arbitration clause, some or all these company fees ultimately could be reallocated to the consumer at the discretion of the arbitrator. In addition, the consumer had some degree of control over the applicable contingencies. Once he or she paid the initial deposit, the company would incur a partially refundable administrative fee of either \$775 or \$975 and a refundable arbitrator fee of \$125. Up until that point, however, the company would not incur any fee obligation. Once an arbitrator had been appointed, the company would no longer be able to recoup the arbitrator fee and it would face additional costs of between \$825 and \$925 if the consumer successfully pressed for an in-person hearing.

<sup>280</sup> AAA, Supplementary Procedures (effective Jan. 1, 2010) C-8 “Fees and Deposits to be Paid by the Consumer.”

<sup>281</sup> See *id.*

<sup>282</sup> See AAA, Commercial Rules (fees effective June 1, 2010) at 39. We identified two cases in which the AAA made an initial fee assessment of \$2,800 for a 3-arbitrator panel. In one case, the AAA assigned the company the full obligation. In the other, the AAA did not assign the obligation, but sought payment from the parties collectively.

including the Due Process Protocol. Some contracts, therefore, allowed for an advancement of the consumers' fees.<sup>283</sup>

The consumer could apply for a waiver of otherwise applicable fees.<sup>284</sup> In the period of our review, the AAA allowed consumers to apply for a hardship waiver or deferral of any applicable administration fee if their gross annual income was below 200% of the federal poverty guidelines. The AAA rules also recognize California law providing for a waiver of arbitration of fees and costs, exclusive of arbitrator fees, for consumers with a gross monthly income of less than 300% of the federal poverty guidelines.<sup>285</sup> For claims of any value, the consumer was also able to request an arbitrator willing to serve *pro bono*, although the rules did not guarantee that one would be provided.

In addition, as noted above, the arbitrator had discretion to reallocate administrative or arbitrator fees in the award, as he or she might deem appropriate.<sup>286</sup> Unless the contract or applicable law required otherwise, the arbitrator might also reallocate attorneys' fees. The AAA fee schedule did not require any specific allocation of attorneys' fees.

## 4.9.2 Data

For the three product markets covered, Figures 30 and 31 show the fee amounts assessed at the front end of the AAA arbitrations from 2010 through 2012. These initial assessments are typically set out in AAA correspondence to the parties.

We have not determined if the parties paid the initial assessments reflected below. For example, it is possible that claims may have withdrawn or settled before the payment of all these initial

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<sup>283</sup> See section 3.4.10.

<sup>284</sup> See AAA, Commercial Arbitration Rules R-49 (effective June 1, 2009, through October 1, 2013).

<sup>285</sup> See CAL. CODE CIV. P. 1284.3 (cited in AAA, Supplementary Procedures C-8). The California waiver applies to all consumer agreements subject to the California Arbitration Act and to all consumer arbitrations conducted in California.

<sup>286</sup> See Drahozal & Zyontz, *Empirical Study*, *supra* note 140, at 887-88 n.165; AAA, Commercial Arbitration Rules, Administrative Fee Schedule.

fees. In addition, we have not determined how fees were finally allocated in these cases.<sup>287</sup> As discussed above, during the period of our review, the arbitrator had discretion to reallocate fees in the award, and final fee allocations may also address fee advances made at the front-end of the process. The amounts shown aggregate initial fees for each covered dispute. Thus, they may include administrative fees, arbitrator deposits, and any additional initial fees assessed to each party.<sup>288</sup>

**FIGURE 30:** DISTRIBUTION OF INITIAL CONSUMER FEE ASSESSMENTS 2010-12

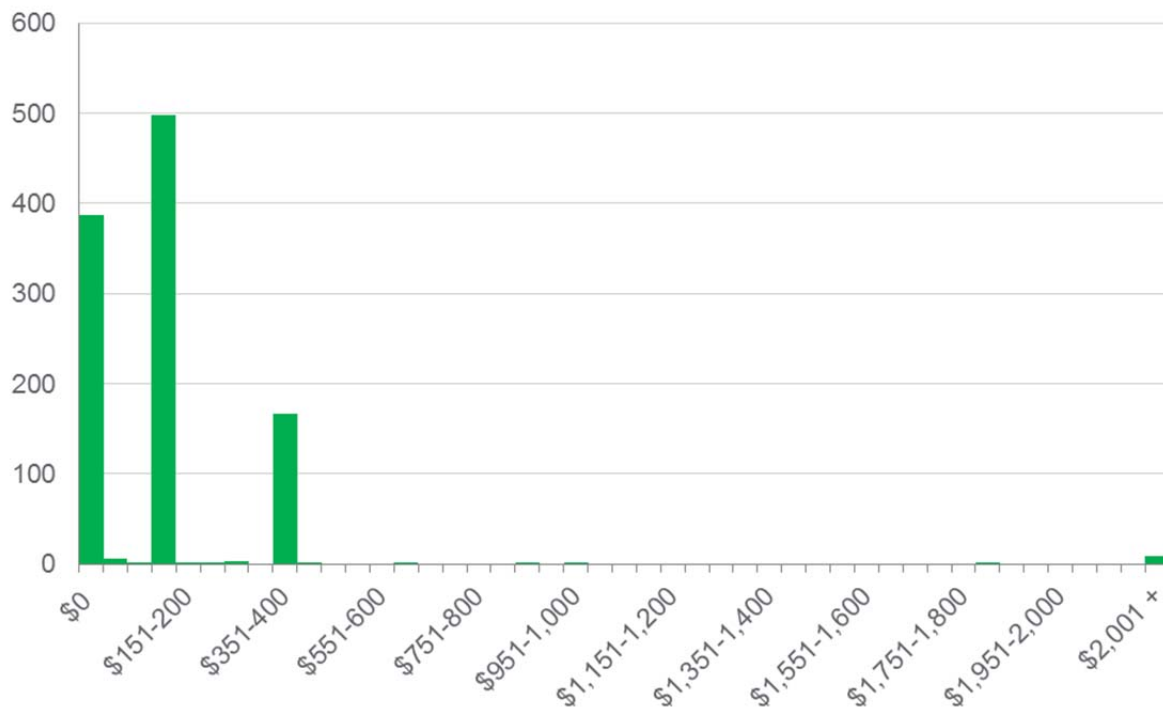


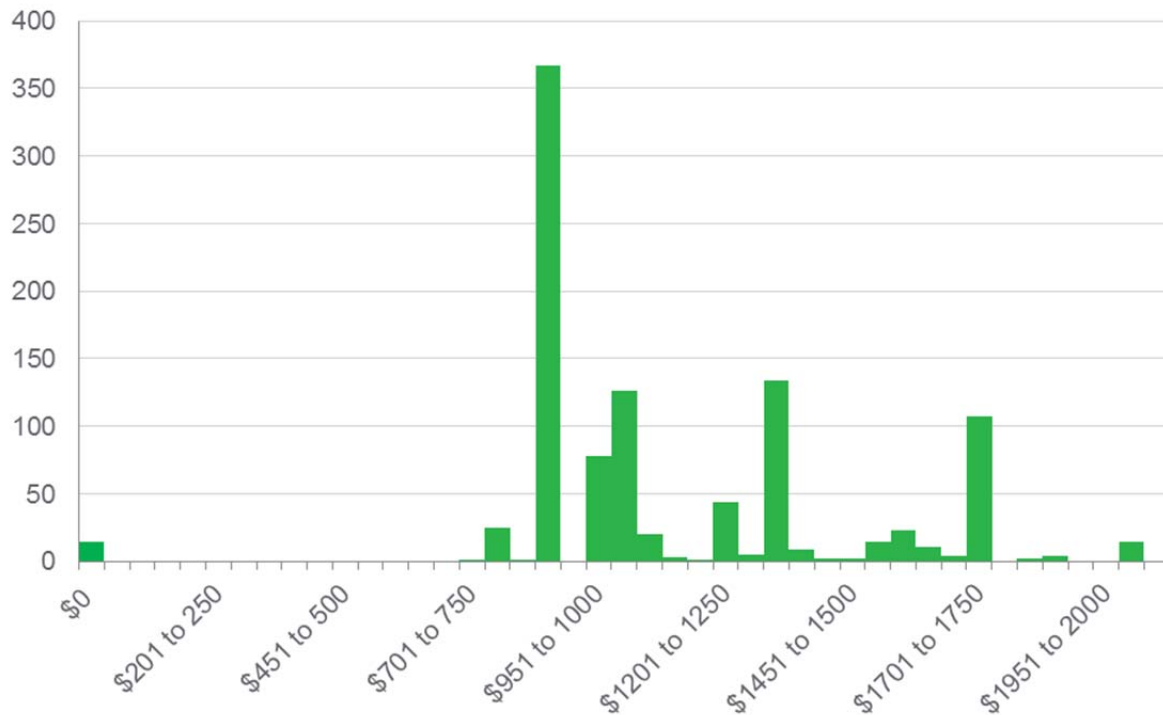
Figure 30 illustrates the initial distribution of consumer fee assessments. The figure does not include information about 161 disputes for which we were unable to identify information about

<sup>287</sup> We plan to cover the ultimate distribution of fees in the next phase of our work.

<sup>288</sup> For example, an entry reflecting \$1,100 in company fees may represent: administrative fees of \$775 plus \$125 for the arbitrator deposit plus \$200 for a live hearing; or administrative fees of \$975 plus \$125 for the arbitrator deposit.

the fees assessed to the consumer.<sup>289</sup> It does include entries for 320 filings involving fee advance requests, nine involving AAA hardship requests, and 15 involving California waiver requests.<sup>290</sup>

**FIGURE 31:** DISTRIBUTION OF INITIAL COMPANY FEE ASSESSMENTS 2010-12



As noted, we have not completed our assessment of fees incurred during this period. Although consumer obligations would increase markedly above \$75,000, based on the schedule outlined, and consistent with the data shown, at lower claim amounts the consumer’s incurred obligation was significantly smaller, with the company bearing the predominant share of initial fee

<sup>289</sup> In 129 of these 161 disputes, we were unable to identify specific initial fee assessments for either party. In the remaining 32 cases, we were able to ascertain that we were missing information on initial consumer fee assessments. We excluded data for one case in which the AAA sought payment of a \$2,800 initial fee for a three-arbitrator panel from the parties collectively, without specifically assigning this initial fee to one side or the other.

<sup>290</sup> These various fee advance and waiver requests overlap in part.

obligations.<sup>291</sup> Figure 31 illustrates the initial distribution of fees assessed to companies. It does not include information relating to 229 proceedings for which we were unable to locate information about the fees assessed to the company.<sup>292</sup> It does include information relating to 317 fee advance requests, eight AAA Hardship Requests, and 15 California Waiver requests.

Finally, we also recorded the number of instances in which the AAA provided formal notice to the parties that it declined to administer the arbitration because of the company's failure to pay required fees or deposits. This formal notice also states that because the company has failed to comply with AAA policy on consumer arbitrations, the AAA will not administer further disputes concerning that company. The notice requests that the company remove the AAA from its arbitration clause. In the AAA Case Data, we observed 29 instances of companies receiving this letter. All but six concerned credit card disputes. Of the 29, all but one were consumer-filed disputes; the final dispute was a mutual submission.

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<sup>291</sup> Filing fees are generally \$400 for United States District Courts. State court filing fees are more varied. One recent summary, "Civil Filing Fees in State Trial Courts April 2012," is available at [www.ncsc.org](http://www.ncsc.org), the website of the National Center for State Courts. That summary indicates that filing fees are under \$300 (and often significantly so) in almost all state trial courts. Small claims court fees are lower, typically on the order of \$20 to \$75, though in a few states exceed \$100 for larger claim amounts. *See id.*

<sup>292</sup> This excludes the same 129 cases for which we have no initial fee information, *see supra* note 289, as well as 100 cases for which we could ascertain that we were missing company initial fee information. It excludes the one case where the AAA sought collective payment of a \$2,800 initial fee associated with a three-arbitrator panel. *See supra* note 289.

## 5. Small claims court data

This section presents data from our review of small claims court filings. Our analysis draws on a number of different state and county small claims court databases. We reviewed these for suits filed against and by ten large credit card issuers, which collectively account for a very significant portion of the consumer credit card market.

We reviewed small claims court data for two reasons. First, as discussed in section 3.4.2, the clear majority of the arbitration clauses within our review, specifically recognize—and allow—access to small claims court as an alternative to arbitration.<sup>293</sup> In addition, small claims courts are reported to handle a significant share of some disputes about consumer financial products.<sup>294</sup> Furthermore, small claims courts are generally considered faster, cheaper, and simpler than ordinary trial courts of plenary jurisdiction, and are intended to be easier for individuals to pursue claims without using a lawyer.<sup>295</sup> (In fact, some small claims court

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<sup>293</sup> Industry groups also urged the Bureau to study small claims courts, especially in the context of small claims court carve-outs to arbitration clauses. *See, e.g.*, Chamber of Commerce RFI Comment at 12-13 (“The study should compare the features of different types of arbitral and litigation forums, including . . . small claims courts.”).

<sup>294</sup> *See* Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection*, 60 FLA. L. REV. 1, 27-28 (2008) (“[M]ost unsecured consumer debts fit comfortably within the jurisdiction of the limited-jurisdiction courts, and the overwhelming majority of suits are filed in these courts when they are available.”); *see id.* at 28 (noting that “the exclusion of courts of limited jurisdiction renders most prior studies inapplicable to the questions of how much consumer debt collection litigation exists and how it has changed over time.”).

<sup>295</sup> *See* Suzanne E. Elwell & Christopher D. Carlson, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA L. REV. 433 (1990); John C. Ruhnka & Steven Weller, *Small Claims Courts: A National Examination* at 2-3 (Nat’l Ctr. for State Courts 1978) (noting broad consensus as to the goals of the small claims court process, including “accessibility, speed, low cost, simplicity, self-representation, fairness, [and] effectiveness.”); John A. Goerd, *Small Claims & Traffic Courts: Case Management Procedures, Case Characteristics, and Outcomes in 12 Urban Jurisdictions* (Nat’l Ctr. for State Courts ed. 1992).



jurisdictions generally require parties to proceed without representation.<sup>296</sup>) We, therefore, wanted to see what use parties made of them with respect to consumer financial disputes.

Second, some commenters argue that the presence of small claims court carve-outs in arbitration clauses alleviates any need for any other litigation method to resolve small-dollar disputes.<sup>297</sup> The argument is that small claims courts are “consumer friendly”<sup>298</sup> so that having a small claims court carve-out helps endow an arbitration clause with “fundamental fairness.”<sup>299</sup> Both the AAA’s Due Process Protocol and the JAMS Minimum Standards of Procedural Fairness, which are applicable to most consumer arbitrations, require that pre-dispute arbitration clauses permit access to small claims courts.<sup>300</sup>

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<sup>296</sup> See, e.g., California Department of Consumer Affairs, *Basic Considerations and Questions: What Is Small Claims Court?*, at [http://www.dca.ca.gov/publications/small\\_claims/basic\\_info.shtml](http://www.dca.ca.gov/publications/small_claims/basic_info.shtml) (visited Nov. 20, 2013) (“In most situations, parties to a small claims action must represent themselves. As a general rule, attorneys or non-attorney representatives (such as debt collection agencies or insurance companies) may not represent you in small claims court. Self-representation is usually required. There are, however, several exceptions to this general rule: If the court determines that a party is unable to properly present his or her claim or defense for any reason, the court may allow another individual to assist that party.”).

<sup>297</sup> See Peter Rutledge, *Whither Arbitration*, 6 GEORGETOWN J.L. & PUB. POL’Y 549, 570 (2008) (asserting that the argument that a mandatory arbitration provision combined with a class action waiver denies consumers access to justice is exaggerated by noting that, amongst other things, most arbitration clauses provide access to small claims court); see also AFSA RFI Comment at 8 (“[M]any arbitration agreements will allow consumers to bring claims otherwise subject to arbitration in small claims court. Thus, for smaller claims, consumers frequently have a choice between arbitration and small claims court. This context is important in order to understand the dynamics of the claims that are (and are not) asserted in arbitration versus other methods of resolving disputes between consumers and covered persons.”).

<sup>298</sup> ABA/CBA/FSR RFI Comment at 14.

<sup>299</sup> ABA/CBA/FSR RFI Comment at 6. See also Mark Furletti, *Mandatory Arbitration Provisions in the Credit Card Industry* at 5-6 (Jan. 2003) [http://www.phil.frb.org/consumer-credit-and-payments/payment-cards-center/events/workshops/2003/MandatoryArbitrationClauses\\_012003.pdf](http://www.phil.frb.org/consumer-credit-and-payments/payment-cards-center/events/workshops/2003/MandatoryArbitrationClauses_012003.pdf). Dean Roscoe Pound of Harvard Law School is often credited as being the first to articulate a vision of a court to “provide for disposing quickly, inexpensively, and justly of the litigation of the poor, for the collection of debts in a shifting population, and for the great volume of small controversies which a busy, crowded population, diversified in race and language necessarily engenders.” Commonwealth of Massachusetts, DISTRICT COURT DEPARTMENT OF THE TRIAL COURT, REPORT OF THE SMALL CLAIMS WORKING GROUP (Aug. 1, 2007) at 3, <http://www.lawlib.state.ma.us/docs/smallclaimreport.pdf> (citing Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 315 (1912-1913)).

<sup>300</sup> The AAA’s Protocol states that: “Consumer ADR Agreements should make it clear that all parties retain the right to seek relief in a small claims court for disputes or claims within the scope of its jurisdiction.” Principle 5, Consumer

## 5.1 Previous studies

We have not identified significant numbers of recent empirical studies on the incidence and nature of consumer financial claims in small claims courts.<sup>301</sup> Two older studies cover small claims courts in multiple jurisdictions, but neither report on the incidence of consumer financial disputes.<sup>302</sup> Some studies do suggest the companies make more use of small claims court than consumers do, but these are not specific to consumer financial products. Goerdts's 1992 study of 12 urban small claims courts showed that business-initiated disputes against individuals made up 53% of all cases studied; by contrast, individual-initiated disputes against businesses made up 13% of the sample.<sup>303</sup> Similarly, in a 1990 study, Elwell & Carlson found that in the Iowa small claims court system many more businesses sued individuals than individuals sued businesses.<sup>304</sup> In their sample of 1,802 disputes, individuals filed against companies in 4% of the

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Due Process Protocol. The JAMS' Minimum Standards state that: "[N]o party shall be precluded from seeking remedies in small claims court for disputes or claims within the scope of its jurisdiction." Minimum Standard No. 1, JAMS Minimum Standards. Explaining the basis for the carve-out, the Reporter for the AAA's Protocol indicated that "[t]he Advisory Committee concluded that access to small claims tribunals is an important right of Consumers which should not be waived by a pre-dispute ADR Agreement." AAA, Consumer Due Process Protocol at 18 (Apr. 17, 1998), available at [www.adr.org](http://www.adr.org).

<sup>301</sup> Using data from 2007, Drahozal & Zyontz randomly sampled 500 cases filed in Oklahoma small claims court, finding 336 disputes related to consumer debt cases, of which "330 were brought by creditors seeking to recover unpaid debts [and] only six were brought by consumers against businesses." Drahozal & Zyontz, *Creditor Claims*, *supra* note 140, at 88 (analyzing sample of cases closed between March 31, 2007, and January 1, 2008). Of the six consumer-initiated claims in Drahozal & Zyontz's sample, just one dispute involved a credit card. This same work cites to a number of older studies of small claims court proceedings that focus primarily on debt collection issues, including default incidence. *See id.* at 82 n.18.

<sup>302</sup> *See, e.g.*, Ruhnka & Weller, *supra* note 295, at 49-50 (allocating the subject matter of disputes in small claims courts in 15 cities into just five categories: "Consumer Plaintiff", "Seller Plaintiff", "Property Damage", "Landlord-Tenant," and "Other"); Goerdts, *supra* note 295, at 7 (analyzing small claims court data from the cities of Cambridge, Denver, Des Moines, Fairfax, Hartford, Minneapolis, Portland, Sacramento, San Diego, Seattle, Washington, and Wichita); *id.* at 47-48 (noting incidence of general categories of claims including, "consumer complaints" "debt collection, "torts," "housing," and "other").

<sup>303</sup> Goerdts, *supra* note 295, at 7 (analyzing small claims court data from Cambridge, Denver, Des Moines, Fairfax, Hartford, Minneapolis, Portland, Sacramento, San Diego, Seattle, Washington, and Wichita); *id.* at 43-44 (showing filing rates by individuals and businesses).

<sup>304</sup> Elwell & Carlson, *Iowa Small Claims Court*, *supra* note 295, at 487.

cases, and businesses filed against individuals in 47% of the cases.<sup>305</sup> The significant use of small claims court for debt collection is well documented.<sup>306</sup>

## 5.2 Data sources

No centralized, comprehensive and searchable source of small claims court cases or dockets exists.<sup>307</sup> Documents related to small claims cases are generally only available on databases maintained by the administrative staffs of the small claims courts themselves (or by physically requesting the materials from the clerk’s office). These databases appear to have been designed with individual litigants in mind. Working with these databases for the purpose of collecting large volumes of data is painstaking. This may be why there is such a dearth of empirical data and academic literature on the topic—or why such studies tend to look at fragmentary data.

Our main sources of data were online small claims court databases for states that offered free or reasonable cost access to case information. In addition to these cost criteria, we used three searchability criteria for the state court databases. To be included, such databases must: (1) purport to provide statewide data; (2) permit searches by party name (or ready identification by party if keyword searches are not possible); and (3) allow for by-year date sorting. Databases for 13 state jurisdictions and the District of Columbia met these criteria. We refer to this as the “state-level sample.” We identified 12 states via this method, plus the District of Columbia. We also added New York because with the exception of New York City—for which we were able to obtain data by other means, as described further below—it otherwise met these same criteria. The 14 jurisdictions in the state-level sample, excluding New York City, cover approximately 52 million people of all ages.

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<sup>305</sup> *See id.*

<sup>306</sup> In 2007, a working group of Massachusetts trial courts judges and administrators “recognized that a significant portion of small claims cases involve the collection of commercial debts from defendants who are not represented by counsel.” Commonwealth of Massachusetts, District Court Department of the Trial Court, Report of the Small Claims Working Group (Aug. 1, 2007) at 3, <http://www.lawlib.state.ma.us/docs/smallclaimreport.pdf>.

<sup>307</sup> There is no analog to the PACER system for federal courts. Westlaw and LEXIS provide limited small claims court data, mainly dockets, for certain jurisdictions. We used these to check our primary research. As of our search on October 16, 2013, Westlaw and LEXIS provided only a limited number of small claims court dockets, from one entire state (Wisconsin) and 9 counties out of the top 30 across two different states, California and Florida.

To supplement the state-level sample, we also used county-level data. We selected the 30 most populous counties in the United States, which largely included areas not in the state-level sample. We then reviewed all of the databases in that sample of 30 that met the same cost and equivalent searchability criteria as for the state-level sample: free or reasonably priced; searchable county-wide; searchable by party name; and restrictable by date. We refer to this as the “county-level sample.” Seventeen of the 30 counties met these criteria.<sup>308</sup> These 17 counties include jurisdictions covering approximately 35 million people of any age. We are not aware of another study with coverage as broad as our combined county-level and state-level samples.<sup>309</sup>

In all these jurisdictions, we looked for potential credit card cases involving a set of 10 large credit card issuers. Given the relative concentration of the consumer credit card market, those credit card issuers cover a predominant share of that market.<sup>310</sup> In addition to covering very large players, our sample covers companies with small claims court carve-outs for both consumer and company claims (Citibank, Wells Fargo, USAA, and US Bank); non-mutual small claims court carve-outs, meaning that only consumers may require that a dispute be brought in small claims court (American Express and Discover); no small claims court carve-out at all (Fifth Third); and with no arbitration clause in 2012 (Bank of America, JPMorgan Chase, and Capital One).<sup>311</sup>

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<sup>308</sup> These added partial geographic coverage in six states not covered under our state-level review—California, Florida, Nevada, Pennsylvania, Texas, Washington—and coverage of a number of major cities or urban areas, including Houston, Philadelphia, and Silicon Valley. Three New York counties met these criteria as well; we included those results under the county search, not the New York state-level search.

<sup>309</sup> Under the auspices of the National Coalition on State Courts, Ruhnka & Weller conducted a study in 1978 of 15 separate jurisdictions, mainly urban small courts. *See generally* Ruhnka & Weller, *supra* note 295. In 1992, also working with the National Center for State Courts, Goerdt conducted an analysis of 12 small claims and traffic courts in urban jurisdictions. *See generally* Goerdt, *supra* note 295.

<sup>310</sup> As of year-end 2012, our sample covers \$564.75 billion in credit card outstandings, which represents a predominant share of the consumer credit card market. Our sample for the small claims court analysis covers 84% of the outstandings covered by the credit card contract sample used for section 3. Concentration at the top-end of the credit card market has remained roughly the same over the last decade. *Compare* The Nilson Report, Issue #1,012 at 1, 8 (Feb. 2013) (as of 2012, top 10 accounted for 85% of market) *with* Hynes, *supra* note 294, at 51 (in 2004, top-10 accounted for almost 90% of market).

<sup>311</sup> A small claims court carve-out is not necessary for either party to bring a claim in small claims court. Very few pre-dispute clauses require arbitration of all disputes. Instead, the clauses enable either party to invoke arbitration

As the issuers in our sample cover such a large share of credit card loans outstanding, we should uncover most consumer-issuer disputes involving credit card accounts in the small claims courts we selected. We will only uncover suits that can be filed in small claims court. The small claims courts covered by our review use a range of jurisdictional limits on the amount that can be claimed in small claims court. These limits—which are generally between \$2,500 and \$15,000—are laid out in detail in Appendix E.

To identify consumer credit card suits, we used small claims court dockets to identify cases filed by individuals<sup>312</sup> against specific issuers and against colloquial names for these entities (such as “Bank of America” or “Chase”).<sup>313</sup> By attempting to capture all credit card suits filed by consumers against these issuers, our search will tend to be over-inclusive. It will include, for example, some consumer cases that are not about credit cards.<sup>314</sup> It should not, however, undercount consumer credit card cases against these issuers.<sup>315</sup> Our consumer-filed case numbers, therefore, can be seen as an *outer limit* on the number of consumer credit card cases against these issuers.

To identify suits that credit card issuers filed against consumers, we focused on suits in which the docket listed: (1) the correct legal name of one of the specific credit-card issuing

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unilaterally. A small claims court carve-out, therefore, simply immunizes a small claims court filing from this potential effect of the arbitration clause. Entities with a clause but no carve-out, therefore, may still be sued or sue in small claims court. It is simply that the other party could then invoke arbitration, although that does not mean that the other party will do so.

<sup>312</sup> We excluded cases filed by non-natural persons such as corporations or partnerships.

<sup>313</sup> We included potentially common misspellings, and alternative arrangements of character strings. We excluded suits by individuals against entities within the corporate family that included in their name terms such as “mortgage,” “home loan,” “auto,” and “insurance.” We would not expect such suits to be credit card cases.

<sup>314</sup> For example, we may capture consumer cases about checking accounts (at least if there are any in small claims court). As discussed in Appendix E, our searches using company names that a consumer might associate with our ten issuers will also uncover cases against eight of the largest U.S. retail banks.

<sup>315</sup> Our data do not capture credit card-related claims by these issuers’ cardholders against other parties besides the issuer. So we are not capturing claims against private label partners. It is possible that consumers intending to sue their “credit card company” sue such partners instead. For Philadelphia County, where detailed data are available, we did look for suits against the major retail partners of an issuer in our sample that has a large private label business. We did not find any such suits. In addition, our data also will not capture claims against (or by) debt collection companies that act for issuers or purchase debt from them.

subsidiaries<sup>316</sup> in our review; and (2) an individual as the defendant. This search will tend to over count such suits to the extent that any of the credit card issuers: (1) also provide consumers with products other than credit cards; and (2) that non-credit card activity causes companies to sue consumers in small claims court. However, our review of public data suggests that this effect should not be significant as to most of the issuers.<sup>317</sup>

Further details about our sources and methodology are included in Appendix E.

## 5.3 Incidence

We start, first, with data from Philadelphia County and Alameda County. These were the two jurisdictions in our defined samples for which we were able to obtain underlying case documents on a systematic basis. These allowed us to establish, definitively, the nature of the claims at issue.

Using the broad case identification method outlined above, we identified for Philadelphia some 2,245 cases filed by issuers in our sample. (We identified no such cases in Alameda. In that county and in the rest of California, companies face severe limits on bringing collections claims

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<sup>316</sup> Thus, if there was ambiguity in the name of the company claiming (*e.g.*, the docket identified the plaintiff only as “Chase” and not “Chase Bank USA, National Association”), we excluded the dispute from the company-filed results. Although we consider it reasonable to assume that outside or in-house counsel will ensure that companies sue using their correct legal name, to the extent that is not the case for credit card company suits, we will undercount such suits.

<sup>317</sup> According to call reports, at year end 2012, three issuers in our sample—American Express, Discover, and USAA—had *no* consumer loans other than credit card loans. Based on call reports, the other issuers we studied generally had as their primary business large consumer loans, such as mortgages, or smaller-dollar loans in the form of credit card borrowing. Our results from Philadelphia (*see* section 5.3) suggest that companies are unlikely to file mortgage-related claims in small claims court. Leaving aside mortgage, therefore, call reports indicate that most of the remaining issuers had a low volume of non-mortgage consumer loans compared to their credit card holdings. This is true for Citibank, National Association (\$106.7 billion in credit card loans and \$894 million in other consumer loans), Chase Bank USA, National Association (\$93.3 billion in credit card loans and \$616.3 million in other consumer loans), Capital One (\$77.8 billion in credit card loans and \$277.5 million in other consumer loans), and JPMorgan Chase, National Association (\$21.5 billion in credit card loans and \$3 billion in other consumer loans). Three of our ten issuers, however, had a significant volume of consumer loans other than credit cards: Bank of America, National Association and FIA Card Services, National Association (\$94.8 billion in credit card loans, \$26 billion in auto loans, and \$22.8 billion in other consumer loans), Wells Fargo Bank, National Association (\$16.3 billion in credit card loans, \$12.5 billion in auto loans, and \$8.9 billion in other loans) and Fifth Third Bank (\$2.1 billion in credit card loans, \$11.3 billion in auto loans, and \$445 million in other loans).

in small claims court.<sup>318</sup>) By using the detailed review of actual pleadings available in Philadelphia, we were then able to establish that all but one of the company-filed cases were, in fact, credit card debt collection cases. This suggests that our broad methodology provides a reasonable, even close, approximation of issuer use of small claims court for credit card disputes against consumers.

Our broad case identification method also identified four Philadelphia cases and 39 Alameda cases as consumer-filed credit card cases against the issuers in our sample. When we reviewed the actual pleadings in these cases, however, none of the four Philadelphia cases involved an individual filing credit card claims against one of the ten issuers.<sup>319</sup> Reviewing the pleadings in the 39 Alameda cases, we identified only four that were clearly individuals filing credit card claims against one of the ten issuers.<sup>320</sup> This suggests that our broad methodology may well overstate the actual number of small claims court cases filed by credit card consumers against our sample of issuers.

Even using the broad methodology, however, we see relatively low outer limit estimates for consumer-filed credit card cases. For our 31 jurisdictions combined, we were able to estimate an outer limit of 870 such cases for all of 2012.<sup>321</sup> We provide the detailed results of these searches in Table 10 in Appendix E. In only three jurisdictions was our outer limit estimate higher than 70 cases against all issuers combined, and the outer limit for any one issuer was 245 across all jurisdictions combined. The outer limit of 36 cases filed against one issuer in Orange County, California was the maximum for any one issuer and jurisdiction.

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<sup>318</sup> See *infra* note 322.

<sup>319</sup> The four consumer-initiated cases involved (1) a stolen debit card; (2) certain mortgage payments not recognized as timely by the bank holding the mortgage; (3) an insurance claim; and (4) a tort that occurred in a bank (a bicycle hit a customer).

<sup>320</sup> Thirty-two disputes manifestly did not involve credit cards. These were 17 disputes involving checking accounts; ten alleging interference with real estate listings; four about home loans; and one about insurance. Another three disputes might conceivably have involved credit cards, but the record was insufficient to show that they actually did so. One of these three cases did not clearly identify any product, and merely alleged in a single sentence FCRA violations by the issuer. The other two concerned unspecified “lines of credit.”

<sup>321</sup> This adjusts for the actual count in Philadelphia and Alameda counties.

Claims filed by credit card issuers against individuals show a different pattern. We report this data in Table 9 below. Claim numbers are either substantially lower or higher than the numbers of consumer-filed claims. The low numbers in Table 9 predominantly correspond to jurisdictions that impose substantial limitations on the use of small claims courts by businesses. These include California (here represented by Orange, Riverside, San Bernardino, Santa Clara, and Alameda Counties)<sup>322</sup> and New York.<sup>323</sup> Other jurisdictions have certain procedures that, while not targeted explicitly at businesses, may dampen the number of company-initiated claims. For instance, in Utah, the clerk of court or a judge is empowered to remove multiple disputes filed by a same plaintiff from small claims court to the district court.<sup>324</sup> In King County

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<sup>322</sup> In California, corporations and partnerships may bring no claim larger than \$5,000 in small claims court, and no more than two such claims of more than \$2,500 per calendar year. See California Department of Consumer Affairs, Basic Considerations and Questions: What Is Small Claims Court? (last visited Oct. 25, 2013), [http://www.dca.ca.gov/publications/small\\_claims/basic\\_info.shtml](http://www.dca.ca.gov/publications/small_claims/basic_info.shtml) (“Corporations, partnerships, unincorporated associations, governmental bodies, and other legal entities cannot claim more than \$5,000. Also, no claimant (natural person or legal entity) may file more than two small claims court actions for more than \$2,500 anywhere in the state during any calendar year.”).

<sup>323</sup> New York imposes various restrictions on legal entities filing in small claims court. A corporation or partnership may only bring a claim in small claims court if it has its principal office in New York state. Further, a corporation or partnership must submit a demand letter before filing a claim, and can file no more than 5 claims per calendar month. See Access to Justice NY Courts, Your Guide to Small Claims & Commercial Small Claims, <http://www.nycourts.gov/COURTS/nyc/civil/pdfs/smallclaims.pdf>. But the claims that corporations or partnerships cannot bring in New York small claims court do not disappear. Rather, it appears that they bring their would-be small claims disputes instead in Civil Court, the next court of limited jurisdiction. Of the 523,186 cases filed in Civil Court in the Bronx, Kings, Queens and Richmond Counties in 2006, 53% of these cases were categorized by one study as “consumer credit litigation.” See Urban Justice, *Debt Weight: The Consumer Credit Crisis in New York City and its Impact on the Working Poor* 8 (Oct. 2007). Similarly, over half of the 320,000 cases filed in New York County Civil Court involved consumer credit. See *id.* (“More and more, New York City Civil Court is becoming a ‘credit card court,’ with over 50% of cases filed in that court arising out of ‘consumer credit transactions.’”) Based on a limited sample, the study estimated that 10.7% of “consumer credit litigation” cases were, in turn, initiated by the original creditors, including credit card issuers. Further, many if not most of these claims would have been under the small claims jurisdictional limit of \$5,000. See *id.* 14-16.

<sup>324</sup> Utah Code Title 78A Chapter 8 section 102 (“If a person or corporation other than a municipality or a political subdivision of the state files multiple small claims in any one court, the clerk or judge of the court may remove all but the initial claim from the court's calendar in order to dispose of all other small claims matters. Claims so removed shall be rescheduled as permitted by the court's calendar.”).



(WA), attorneys and paralegals are not allowed to appear for either party without the judge's permission.<sup>325</sup>

**TABLE 9:** CREDIT CARD ISSUER SMALL CLAIMS COURT SUITS AGAINST INDIVIDUALS BY JURISDICTION 2012

	Citi	Wells	USB	USAA	AmX	Dis	5/3	BoA	Cap1	JPM	Total
Alaska	0	10	0	0	0	0	0	0	0	0	<b>10</b>
Connecticut*	262	8	0	0	91	718	0	301	4,274	0	<b>5,654</b>
Delaware	0	0	1	0	22	444	0	0	0	0	<b>467</b>
District of Columbia	76	1	0	0	22	115	0	21	865	0	<b>1,100</b>
Iowa	246	33	0	0	4	501	1	94	260	0	<b>1,139</b>
Minnesota	147	0	0	0	1	114	0	0	2,029	0	<b>2,291</b>
New Mexico	0	2	0	0	29	386	0	2	2	0	<b>421</b>
New Jersey	0	0	0	0	0	0	3	0	0	0	<b>3</b>
New York, ex-NYC	0	0	0	0	0	0	0	0	0	3	<b>3</b>
North Dakota	0	0	0	0	0	0	0	0	0	0	<b>0</b>
Oklahoma	0	4	0	0	0	0	*	0	0	0	<b>4</b>
Oregon	0	0	0	0	0	0	0	0	0	0	<b>0</b>
Utah	0	0	0	0	0	0	0	0	0	0	<b>0</b>
Wisconsin	704	96	48	0	76	2,162	27	1	9,361	14	<b>12,489</b>
Alameda (CA)	0	0	0	0	0	0	0	0	0	0	<b>0</b>
Broward (FL)	265	74	0	0	254	227	2	103	2,647	0	<b>3,572</b>
Clark (NV)	0	0	0	0	0	0	0	0	0	0	<b>0</b>
Harris (TX)	614	356	47	0	319	380	0	1,051	5,046	92	<b>7,905</b>
Hillsborough (FL)	70	0	1	0	67	125	1	0	1,325	57	<b>1,646</b>
King (WA)	0	0	0	0	0	0	0	0	0	0	<b>0</b>

<sup>325</sup> See King County District Court Services, Information about Small Claims, <http://kingcounty.gov/courts/DistrictCourt/Smallclaims.aspx>.

Kings (NY)	0	0	0	0	0	0	0	0	0	0	0
New York (NY)	0	0	0	0	0	0	0	0	0	0	0
Orange (CA)	0	0	0	0	0	0	0	0	0	0	0
Palm Beach (FL)	174	15	0	0	177	306	0	86	1,594	2	2,354
Philadelphia (PA)	79	0	0	0	46	743	0	165	1,212	0	2,245
Queens (NY)	0	0	0	0	0	0	0	0	0	0	0
Riverside (CA)	0	0	0	0	0	0	0	0	0	0	0
Sacramento (CA)	0	0	0	0	0	0	0	0	0	0	0
San Bernardino (CA)	0	0	0	0	0	0	0	0	0	0	0
San Diego (CA)	0	0	0	0	0	0	0	0	0	0	0
Santa Clara (CA)	0	0	0	0	0	0	0	0	0	0	0
<b>Totals</b>	<b>2,637</b>	<b>599</b>	<b>97</b>	<b>0</b>	<b>1,108</b>	<b>6,221</b>	<b>34</b>	<b>1,824</b>	<b>28,615</b>	<b>168</b>	<b>41,303</b>

**\*Note:** Search results for Capital One in Connecticut exceeded 4,274, but further information beyond the 4,274 could not be retrieved from that database.

The higher numbers in our sample are present in jurisdictions that do not have similar limits on company filings. In addition, two issuers accounted for the vast majority of company-filed cases.<sup>326</sup> This may be attributable to the fact that these two issuers are in the subprime credit card business, where smaller credit lines are the norm. It may also reflect other issuers making greater use of debt buyers or collection agencies. Other studies have also found relatively concentrated use by particular issuers of small claims court.<sup>327</sup> Appendix E depicts these numbers relative to our outer-limit estimates for consumer-filed cases in different jurisdictions.

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<sup>326</sup> One of these issuers uses a non-mutual small claims court carve-out, which applies only to guarantee the consumer's right to remain in small claims court. The lack of mutuality in a clause, therefore, may not have any impact on company use of small claims court.

<sup>327</sup> Beth Healy, Debtor's Hell, Part 2: A System Compromised, The Boston Globe (July 31, 2006), [http://www.boston.com/news/special/spotlight\\_debt/part2/page4.html](http://www.boston.com/news/special/spotlight_debt/part2/page4.html).

## 6. Future work

In addition to the work laid out above, the Bureau has a number of phases of work that are underway or that are under consideration for inclusion in the statutory report to Congress. We discuss each of these below.

- We will finalize our analysis of arbitration clause incidence and features. This may expand to cover some other consumer financial product markets.
- Subject to OMB approval, we plan to conduct a survey of consumers that addresses consumer awareness of arbitration clauses and consumer perceptions of and expectations about formal dispute resolution. The survey may also explore the role of formal dispute resolution terms in consumer product choice. (We have already published one detailed proposal in this respect, and have retained survey contractors. We have received a number of comments and plan to carry out focus group work. The proposal will be revised in light of the comments received, feedback from the survey contractors, and any focus group input. We will submit a revised proposal for additional public comment before we finalize the proposed survey.)
- We may review arbitration case record data for filings concerning disputes about other consumer financial products or services, such as private student loans.
- We will continue our review of litigation filings concerning consumer financial products. This may involve additional research into claims filed in small claims court. We will also review available federal court filings for select products, and, to the extent reasonably available from electronic sources, state court filings as well. We may use some sampling to control for case numbers. As with the arbitration filings work, this is intended to bring to light the types and frequency of claims that consumers bring to this method of formal dispute resolution. Viewed in conjunction with the same analysis for arbitration filings, this work may also help us to discern the impact of arbitration clauses on the incidence

and nature of consumer claims, although we cannot, by definition, directly observe claims that consumers may not have pursued at all because of the absence of a particular mechanism of formal dispute resolution.

- Once we have completed our front-end identification of consumer financial cases, we will consider how—if at all—we might meaningfully compare the disposition of cases across arbitration and litigation (including class litigation), both in terms of substantive outcome and in terms of procedural variables like speed to resolution. We recognize that it may be hard to identify comparable cases across these different alternatives, not least because cases are not randomly assigned to the different streams. In addition, numerous factors will affect variables like speed to resolution and substantive outcome that are independent of the formal dispute resolution mechanism used.
- As part of our outcome analysis, we are reviewing court records to assess the circumstances under which companies invoke arbitration clauses in response to consumer claims, and how that invocation may impact the outcome of such claims. One way we are exploring this issue is to try to identify consumer challenges that have been raised with respect to particular industry practices (or alleged practices) and then assess how dispute outcomes are impacted, if at all, by the presence of arbitration clauses and the availability of arbitration.
- We will use public court records to try to assess consumer benefits and transaction costs in consumer class actions involving consumer financial services. We will also attempt to evaluate whether class actions exert improper pressure on defendants to settle meritless claims. We intend to look at the outcomes of filed class actions, including settlements, and on dispositive and certification motion practices.
- We intend to assess the possible impact of arbitration clauses on the price of consumer financial products.
- We are also examining the interrelationship between public enforcement and private aggregate enforcement. Although some empirical research compares public enforcement and private class actions in securities and antitrust matters, we have not located empirical studies that compare these in the context of consumer law. Accordingly, we are conducting an empirical analysis in this area. It will consider the types of cases brought

by public and private actors, and the relationship between any actions against the same defendants or challenging similar conduct.

## APPENDIX A

# Clause incidence methodology

This appendix sets out the methodology used in collecting the data described in section 3.

### CREDIT CARD AGREEMENTS

The sample of credit card agreements studied consists of credit card issuers with agreements on file with the CFPB as of December 31, 2010, 2011, and 2012. The Credit CARD Act of 2009 requires credit card issuers above a *de minimus* size to post their credit card agreements on the issuer's web page and to file the agreement with the appropriate regulator.<sup>328</sup> Initially, the Credit CARD Act required the agreements to be filed with the Federal Reserve.<sup>329</sup> The Dodd-Frank Act changed the requirement so that credit card agreements now must be filed with the CFPB.<sup>330</sup>

Issuers are required to update their filing only when it changes.<sup>331</sup> Some issuers have never filed new agreements, so the agreement they have on file has not changed since 2009. Other issuers file new agreements every quarter; for those issuers, the agreement studied is the agreement on file as of December 31, 2012. Many issuers have multiple agreements on file with the CFPB. In almost every case, the dispute resolution clause in each agreement filed by the issuer is identical. In the rare case in which an issuer has multiple agreements, the most frequently used type of agreement is included in the sample. In a handful of cases, the issuer filed some document other than the cardholder agreement with the Bureau. In those cases, the cardholder agreement was obtained from the issuer's website when possible.

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<sup>328</sup> Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1746, § 204(a) (May 22, 2009); see 15 C.F.R. § 226.58(c)(5) (*de minimus* exception).

<sup>329</sup> Credit CARD Act, § 204(a).

<sup>330</sup> See 15 U.S.C. § 1632(d).

<sup>331</sup> 15 C.F.R. § 226.58(c)(3).

Each credit card agreement in the sample was reviewed to determine if it included an arbitration clause.<sup>332</sup> If it did, the provisions of the arbitration agreement were coded for the information described in section 3. One issuer's agreement, while indicating that it included an arbitration clause, incorporated by reference the details of the arbitration clause included in another document, which was unavailable. That issuer's agreement was coded as providing for arbitration, but the details of the arbitration provision were coded as missing.

Data on credit card loans outstanding from the issuer's December 31, 2010, December 31, 2011, and December 31, 2012 call reports were used to measure the relative market share of each issuer. Only domestic credit card loans outstanding were used, plus securitized credit card loans, if any. Data for related issuers (*i.e.*, those that are subsidiaries of a common parent) were consolidated as long as each issuer used the same dispute resolution clause in its credit card agreement. If the issuers had different dispute resolution clauses, their data were not consolidated and each issuer was included separately in the sample.

## **CHECKING ACCOUNT AGREEMENTS**

We examined three samples of checking account agreements: the 100 largest banks based on consolidated deposits less than \$250,000 (*i.e.*, the deposit insurance threshold); a random sample of 150 banks not among the 100 largest (referred to as small and mid-sized banks); and the 50 largest credit unions based on the amount of insured deposits. We used insured deposits as a proxy for consumer accounts.

For each sample, we first attempted to collect the institution's checking account agreement (typically its general deposit account agreement) from its web page. If the agreement was not available, or if the available agreement was undated or dated prior to 2011, the Bureau directed the institution to provide the agreement pursuant to section 1022(c)(4) of the Dodd-Frank Act.<sup>333</sup> For all of the largest banks, 141 of the 150 small and mid-sized banks, and 49 of the 50 largest credit unions, we were able to obtain some version of its checking account agreement. From that agreement, we determined whether the institution used an arbitration clause, and, if so, coded it as described above.

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<sup>332</sup> Agreements that provided for use of California's judicial reference procedure were not treated as including an arbitration clause.

<sup>333</sup> 12 U.S.C. § 5512(c)(4).

As noted above, we used consolidated insured deposits, obtained from December 31, 2011 and December 31, 2012 call reports, as a measure of market share. As a general matter, insured deposits were consolidated across all affiliated institutions. If, however, affiliated institutions used different forms of dispute resolution or different arbitration clauses, we included each institution separately in the sample.<sup>334</sup>

## **GPR PREPAID CARD AGREEMENTS**

As noted above, market data are much less complete for GPR prepaid cards than for either credit cards or checking accounts. We included in the sample all GPR prepaid cards (1) listed on the Visa, MasterCard, or NerdWallet web pages advertising such cards;<sup>335</sup> or (2) examined in various recent studies of the terms of prepaid cards.<sup>336</sup> We also included agreements from the two leading credit union GPR card programs, by PSCU and CUNA.<sup>337</sup> Most of the cards in the sample (44 of 63, or 69.8%) were listed in multiple sources. We collected the cardholder agreements for the cards from the Internet, and excluded eight cards for which cardholder agreements were unavailable and three cards that had been discontinued.

Market share data came from the Aité Group's November 2012 report on the prepaid card market.<sup>338</sup> Because of limited market share data, the results for GPR prepaid cards based on the dollar amounts loaded on the cards are limited to the firms for which market share data are

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<sup>334</sup> As a result, for example, our sample of the 100 largest banks includes 103 observations.

<sup>335</sup> MasterCard, Get a Prepaid Card That's Right for You, <http://www.mastercard.us/get-a-prepaid-card.html> (visited Aug. 2, 2013); Visa, Get a Visa Prepaid Card, <http://usa.visa.com/personal/cards/prepaid/prepaid-card-online.html> (visited Aug. 2, 2013); NerdWallet, Prepaid Debit Cards, <http://www.nerdwallet.com/prepaid>.

<sup>336</sup> Aité Group, *supra* note 62, at 18-19; Bankrate.com, 2013 Prepaid Debit Cards Survey, <http://www.bankrate.com/finance/banking/best-prepaid-debit-cards.aspx>; Bretton Woods, Inc., Analysis of Branded General Purpose Reloadable Prepaid Cards: A Comparative Cost Analysis of Prepaid Cards, Basic Checking Accounts and Check Cashing 9 (Feb. 2012); CardHub, Prepaid Cards Report – 2013, <http://www.cardhub.com/edu/prepaid-cards-report-2013/>; Consumer Reports, Prepaid Cards: How They Rate on Value, Convenience, Safety and Fee Accessibility and Clarity 9 (July 2013); Pew Charitable Trusts, *supra* note 40, at 26.

<sup>337</sup> CUNA, Learn More About Our Prepaid Debit Cards, [http://www.cunastrategicservices.com/ICUL\\_Service\\_Corporation\\_CUMONEY\\_Debit\\_Cards\\_134.html](http://www.cunastrategicservices.com/ICUL_Service_Corporation_CUMONEY_Debit_Cards_134.html) (last visited Oct. 17, 2013); PSCU, Prepaid – Reloadable Cards, <http://www.pscu.com/solutions/prepaid-reloadable-cards.html> (last visited Oct. 17, 2013).

<sup>338</sup> Aité Group, *supra* note 62, at 19.



available, which make up 82.9% of the entire market.<sup>339</sup> As a result, most of the prepaid cards in the sample are not included in the market share figures. Moreover, because two of the firms that are included use two different form cardholder agreements, the market share data sometimes are presented as ranges rather than as a single figure.

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<sup>339</sup> *Id.* at 18-19.

## APPENDIX B

# Arbitration data procedures

This appendix describes our methodology for reviewing the data described in section 4.

### OVERVIEW

The AAA provided us with electronic documents from their case management records regarding all non-class consumer arbitrations from January 1, 2010 to February 2013. The AAA grouped these .pdf files together in folders by arbitration proceeding. Each folder could contain as few as one document to over 400 documents.<sup>340</sup> The folders generally all contained some variation of the AAA claim form. Otherwise, there were few consistent markers across the documents. Accordingly, unless there was a cross-reference from another document, we would likely be unaware if documents were missing from the files. Sometimes folders simply stop, seemingly mid-way through a proceeding. As we will discuss in future work, it is difficult to tell from the case record whether such files reflect claimant withdrawals, settlements, or some other outcome.

We manually reviewed the documents to identify cases relating to our product markets of interest: credit cards, checking accounts, and payday loans. This process resulted in 1,241 folders (each representing a single consumer arbitration) relating to the credit card, checking, or payday loan markets from the years 2010, 2011, and 2012. We also identified four prepaid cases, which, to date, we have not considered further. We have begun to identify other product markets, such as student loan cases, that we may consider in future work.

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<sup>340</sup> For about two-dozen cases, we were not able to access one or more individual .pdf files provided by the AAA because of technical issues. We are working with the AAA to resolve this issue. It is unlikely that these documents contain information relating to the data we collected. Once we have resolved the issue, we will update our calculations as necessary, and reflect any changes in our statutorily mandated report.

Through multiple rounds of manual review, we then coded data points from each of the files within our product markets. For some data, the collection process was only an exercise in simple data entry: copying information from a particular standard document. In other cases, the required information was similarly objective, but required gathering information from multiple documents. And finally, one specific type of coding was necessarily more subjective. We discuss each of these three “tiers” of data collection below.

- Direct coding of information from claim forms provided our most “objective” data, as it allowed no room for interpretation. This process means that our results capture and reflect any errors in the original data.
- Objective coding across multiple documents was sometimes necessary for certain data points. For example, the claim forms may touch on descriptions of the parties’ claims or the amounts in dispute, but these descriptions may be more thoroughly elucidated in party-drafted summaries of claims, exhibits to claim forms, or correspondence from the parties or AAA. The supplemental documents also provided information not raised in the claim forms at all, such as fee assessments. Relying on documents outside of the claim form, however, introduces some risk of inconsistency because other than the AAA claim forms, the case folders did not contain other specific documents on a uniform or near-uniform basis.
- Finally, our attempt to code the subject matter of claims is more subjective. We used a maximum of three such subject matters from a set list for each dispute with the intent of capturing the essence of each dispute. The procedure was intended to cover a range of claim specification—from a very short case description in a hand-written arbitration filing to a 50-page complaint drafted by a team of lawyers in a different dispute. This process required a holistic review of each proceeding. To mitigate the risk of inconsistent coding across individual reviewers, we relied on multiple rounds of review.

## **DIRECT CODING FROM SINGLE DOCUMENTS**

The information we directly coded from AAA claim forms includes but is not limited to:

- Party and representation information:
  - We coded this information for up to three parties on each side.

- We used a binary code to indicate whether more than three parties were involved on either “side.”
- We recorded whether the parties were represented by counsel (including in-house counsel for companies) and listed the names of any outside counsel.<sup>341</sup>
- Basic case information:
  - We recorded whether the claimant(s) purported to represent one or more classes of claimants.
  - We listed the date of the claim.
    - If a case file had been closed and then reopened, we recorded the earlier date.
    - If the claim form lacked a clear statement about the date, we used other information, such as a date header created by a fax-machine, to approximate the date.
  - We recorded information from claim forms regarding the relief sought by the claimants:
    - We recorded whether claimants sought a specific amount of money; “at least” or “at most” certain amounts; or whether they sought a range of relief (*e.g.*, “\$1,000 to \$10,000”).
    - If a claim form attached a supplementary document, like a long-form complaint, and included instructions akin to “see attached” in the claim form itself, our claim form claim information includes data from those incorporated documents.
    - If the documents did not indicate a single overall claim amount for multiple claims, we followed the language of the claim form (and attached documents), with the exception that if multiple claims related to the same cause of action or statute, we would not sum separately delineated claim amounts.

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<sup>341</sup> If any party changed counsel, we recorded the most recent counsel of record.

- In many cases, the parties described a specific debt amount in dispute. We recorded this number.
- We also recorded whether the parties sought injunctive relief, declaratory relief, or punitive damages.<sup>342</sup>
- We recorded who filed the claim. The AAA claim form has three checkboxes regarding “who filed,” indicating: consumer-filing, company-filing, or mutual-filing. We have not attempted to verify whether the checkbox selected on the claim form is an accurate reflection of the submission.
- We used the address of the first consumer in the AAA claim forms relating to credit card disputes to determine a relevant nine-digit zip code. We used that information to compare the median income of the consumers’ location against the median income of locations for the overall credit cardholding population. The home address information was entered into the U.S. Post Office’s on-line “Look up a Zip Code” tool.<sup>343</sup> We did not record any address information about consumers in this process other than their nine-digit zip codes. If the consumers listed a P.O. Box as their address, we would use the nine-digit zip code for the P.O. Box. If they listed their attorney’s address, however, we did not include a zip code for them in our analysis.

## **DIRECT CODING ACROSS MULTIPLE DOCUMENTS**

We looked to information outside of the AAA claim forms to record certain other information, including:

- Filing fees:
  - We recorded amounts for:
    - Initial administrative fees;

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<sup>342</sup> We ultimately determined that our data was not sufficiently specific regarding injunctive relief, declaratory relief, or punitive damages for reporting purposes. Parties frequently indicated in their claim forms that they were seeking such relief, but there was rarely additional information regarding these requests. Similarly, the requests for punitive damages were often vague or unbounded.

<sup>343</sup> <https://tools.usps.com/go/ZipLookupAction!input.action>.

- Neutral compensation (money paid by each party to the arbitrator); and
  - Any other fees.
- In gathering fee information, we also recorded instances relating to consumer fee waiver requests and fee advance requests.
- We recorded whether there was an indication of a prior litigation proceeding and, if so, who invoked arbitration as to that prior litigation proceeding. (By “invoking arbitration” as to prior litigation, we mean conduct that ends or stays the prior litigation by some form of reliance on an arbitration clause. We do not mean filing an arbitration *per se*.)
  - In many cases documents clearly showed that there was previous litigation and, in some cases, they spelled out who invoked arbitration as to those proceedings. For example, the arbitration record might contain a court order granting an identified party’s motion to compel arbitration. In other cases, the record would include documents showing that the consumer initiated the arbitration proceeding in lieu of filing an answer in state or federal court.
  - In one specific set of cases, we made an assumption about who invoked arbitration as to prior litigation. In those cases, the arbitration record: (1) had a clear indication of prior litigation; (2) indicated that only one side brought claims in the prior litigation; and (3) did not directly identify who invoked arbitration as to the prior litigation. When all three criteria were satisfied, we assumed that arbitration was invoked by the party who did not file the claims below. Our reasoning was that a party was unlikely to file a claim in litigation and then, in the absence of counterclaims, invoke arbitration as to its own claim or claims.<sup>344</sup>
- We have begun attempting to record information about claim amounts to the extent that they evolve over time prior to the arbitrator’s resolution or case closure for other reasons. This effort involves documents beyond the claim form and attachments to it.

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<sup>344</sup> In a handful of cases, we found case records that indicated that some companies filed complaints in litigation and then actually moved to compel arbitration regarding their own claims—even when there was no consumer counterclaim at issue in the court proceeding.

- We recorded instances where the AAA stated to a party that it had not complied with the AAA Due Process Protocol: *e.g.*, by not paying fees. We also recorded stated terminations by the AAA for failure to comply with the Protocol.
  
- We recorded basic information about the types of claim brought by each party, specifically whether they brought:
  - Federal statutory claims;
  - State statutory claims;<sup>345</sup>
  - Fraud claims;
  - Contract claims;
  - Tort claims;
  - “General, unspecified claims”: given the informal requirements for pleading in arbitration, we used this category to record consumer claims that were more colloquial in nature—such as “I want my money back,” “This is unfair,” or “I was discriminated against”—that the consumer did not identify as falling under any of the alternative options above; and
  - “Refutes debt”: we recorded instances in which consumers affirmatively claimed that they did not owe an alleged debt, at least to the extent that a consumer did not clearly state a contract claim to the same effect. If a consumer did not bring a claim to this effect, however, but simply faced a company claim in the arbitration for debt, then we did not use this notation. (The fields here were intended to capture claim types, not defenses.)
  
- We specifically noted instances when consumers brought actions under the following statutes:
  - The Alternative Mortgage Transaction Parity Act of 1982, 12 USC § 3801;
  - The Consumer Leasing Act of 1976, 15 USC § 1667;
  - The Electronic Fund Transfer Act, 15 USC § 1693;
  - The Equal Credit Opportunity Act, 15 USC § 1691;

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<sup>345</sup> As a subset of the statutory claims, we recorded instances where a party brought claims under an unfair or deceptive acts or practices statute or rule.

- The Fair Debt Collection Practices Act, 15 USC § 1692;
- The Fair Credit Billing Act, 15 USC § 1601;
- The Fair and Accurate Credit Transaction Act of 2003, 15 USC § 1601;
- The Fair Credit Reporting Act, 15 USC § 1681;
- The Homeowner Protection Act of 1998, 12 USC § 4901;
- The Real Estate Settlement Procedures Act, 12 USC § 2601;
- The Truth in Savings Act, 12 USC § 4301;
- The Truth in Lending Act, 15 USC § 1601;
- The Interstate Land Sales Full Disclosure Act, 15 USC § 1701;
- Antitrust statutes;
- The Credit Repair Organization Act, 15 USC § 1679;
- The Telephone Consumer Protection Act, 47 USC § 227;
- The Communications Act of 1934, 47 USC § 609; and
- The Racketeering Influenced and Corrupt Organizations Act, 18 USC § 1961.

## **CLAIM SUBJECT MATTERS**

Finally, we attempted to identify the claim subject matter of each dispute, meaning a holistic statement about the essence of each arbitration filing. We worked with subject matter experts within the Bureau, who reviewed secondary sources and manually reviewed samples of complaints in federal and state courts, to help us identify different subject matter areas for disputes that might appear between consumers, on the one hand, and companies in connection with credit cards, checking accounts/debit cards, and payday loans, on the other hand.

We organized the subject matters by product in a general hierarchy to mitigate the risk of inconsistent coding across multiple reviewers. If application of this hierarchy would cause us to miss what we considered to be the “core” subject matters of the claims, then we deviated from it to allow for more accurate coding. For each case, we used a maximum of three fields in order to capture the “core” subject matters of the dispute. We did not use all three fields unless we thought that was necessary. (We frequently used under three.)

### **For Filings Relating to Credit Cards**

We coded documents in the following priority order using our three fields. We also noted if: (a) the dispute related to other issues not listed among these choices; or (b) there was insufficient information to characterize the dispute. Not all of the subject matter categories actually appeared in our review of the AAA documents.



We could choose one of three different debt-related categories, if any applied:

- Substantive debt dispute – general claims about debt amounts owed or not owed (often brought by companies in the form of accounts stated or breach of contract claims; or brought by consumers as requests for declaratory relief that the consumers did not owe certain amounts alleged by companies). We also included in this category claims under the FDCPA if the only such claim was that the company misrepresented the amount of debt in its collection efforts. (If either of the following two debt categories applied, however, we did not also code the case as a “substantive debt dispute.”)
- Debt collection process (harassment) – allegations that a company called consumers after hours, used rude or obscene language, or made other threats during debt collection activity.
- Debt collection (process) – other claims relating to a company’s debt collection process, such as FDCPA claims that a company contacted consumers known to be represented by counsel.<sup>346</sup>

We also chose any of the following, to the extent that they applied:

#### *Payments*

- Payment allocation – allegations that payments were applied to the wrong balances (such as lower-interest rate balances);
- Payment period – allegations that a payment or grace period was too short; and
- Payment posting – allegations that the payment posting process was flawed in some respect, such as being too slow.

#### *Promotions and special features*

- Interest rate promotions;
- Balance transfer promotions;

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<sup>346</sup> Claims under the FDCPA that companies misrepresented the amount of debt owed, however, were classified as “Substantive Debt Dispute” claims.

- Convenience checks; and
- Add-on products.

#### *Interest and Fee Issues*

- Interest rates/charges;
- Late fees – this category was used, as opposed to “Interest Rates/Charges” when the allegations related solely to late fees, with no claims about interest rates;
- Foreign currency/transaction fees – allegations about foreign currency or transaction fees or exchange rate calculations;
- Annual/monthly fees; and
- Other fees.

#### *Credit line issues*

- Credit line increases/decreases;
- Account opening issues; and
- Account closing issues.

#### *Improper transactions*

- Unauthorized use of account – allegations that account was improperly used by known or unknown parties;
- Merchant-related billing error – allegations that a credit card company has failed to address alleged merchant failure to refund or correct consumers’ bills; and
- Set-off – allegation that party has set-off a credit card balance against some other account.

#### *Information sharing and credit reporting*

- Credit reporting;
- FACTA –if a dispute involved FACTA claims, we would not use the Credit Reporting (or the disclosure of private information) notation unless other claims required that we do so; and
- Disclosure of private information – allegations that information was improperly disclosed, at least outside the credit reporting context.

### *Other*

- Discrimination;
- Telemarketing; and
- Antitrust/conspiracy issues.

### **For filings relating to checking accounts and debit cards**

We used similar categories, including options to note that (a) the disputes related to other issues not listed among these choices or (b) there was insufficient information to characterize the dispute.

We could choose one of three different debt-related categories, if any applied:

- Substantive debt disputes;
- Debt collection process (harassment); and
- Debt collection process (other).

We also chose from the following:

### *Fee issues, generally*

- Foreign currency/transaction fees;
- Annual/monthly fees; and
- Other fees (other than overdraft fees).

### *Overdraft issues*

- Overdraft ordering/timing; and
- Other overdraft issues.

### *Account opening and closing*

- Refusal to open;
- Other account opening/reopening issues; and
- Account closing issues.

### *Issues with Deposits*

- Deposits – process issues – allegations that deposit process was flawed in some respect (e.g., the consumer did not receive deposited funds within the proper time frame); and

- Deposits – other errors – allegations of substantive error in the deposit process (e.g., that the consumer did not receive deposited funds in whole or in part).

#### *Issues with Authorized Payments*

- Authorized payments – process issues – allegations that payments process did not work properly (e.g., process was contrary to representations); and
- Authorized payments – other errors –allegations of substantive payment error (e.g., wrong person paid or not paid at all).

#### *Payment error – unauthorized payments*

- Unauthorized recurring payments – this also was used for allegations that a bank failed to honor stop payments on single checks;
- Merchant-related error;
- Improper set-off; and
- Other unauthorized use – this would cover failure to protect against fraudulent access; failure to address fraudulent checks, ACH, debit card, or ATM transactions; unauthorized use by known parties; or situations where consumers claimed that banks improperly provided funds pursuant to court order.

#### *Information Sharing and Credit Reporting*

- Credit reporting;
- FACTA; and
- Disclosure of private information.

#### *Other*

- Add-on products;
- Discrimination;
- Telemarketing Issues; and
- Antitrust/Conspiracy.

### **Finally, for filings relating to payday loans**

We used similar categories, including options to note that (a) the disputes related to other issues not listed among these choices or (b) there was insufficient information to characterize the dispute.

#### *Debt issues*

- Substantive debt disputes;
- Debt collection process (harassment); and
- Debt collection process (other).

#### *Account disclosures/breach of contract*

- Failure to disclose or follow core terms – we defined core terms to mean the finance charge amount and the duration of the loan; and
- Failure to disclose or follow other terms – this would include disclosure issues relating to APRs; if a case fell into both this and the prior category, we would categorize the case as falling into this category.

#### *Rollovers*

- Rollover issues.

*State regulatory requirements* – we used only one of these four options at most, with priority leading from the beginning to the end of this list:

- Unlicensed lending activity;
- Excessive interest rates;
- Improper loan duration; and
- Loan amount above state cap.

#### *Bank account debits*

- Improper access to DDA (ACH); and
- Improper access to DDA (Check).

#### *Refusal*

- Refusal to issue or reissue loans.

*Information sharing or credit reporting*

- Credit reporting; and
- Disclosure of private information.

*Product mischaracterization*

- Product mischaracterization;
- Credit Service Organizations – allegations that state regulations violated; and
- Credit Service Organizations – allegations that federal regulations violated.

*Other*

- Add-on products;
- Discrimination;
- Telemarketing issues;
- Antitrust/conspiracy claims; and
- Other unfair loan practices.

## APPENDIX C

# Identifying credit card cases in federal district courts

As a basis of comparison, we reviewed pleadings in federal district courts for the years 2010, 2011, and 2012 to ascertain the number of consumer disputes relating to the credit card product market for those years. To gather pleadings for our review, we used the LexisNexis Courtlink database, which LexisNexis describes as the “largest collection of dockets and documents.”<sup>347</sup> Courtlink search strings are limited to a maximum of either 32 words or 2,000 characters, whichever is reached first.<sup>348</sup> Courtlink does not allow for the use of parentheses to control the order of operations of search terms. Accordingly, we crafted a deliberately overbroad text search in Courtlink, using a search string intended to identify documents that were credit-card related and likely to be pleadings. We followed that with manual review.

Our search string was:

“credit card” or “credit cards” or “charge card” or “charge cards” and complaint or crossclaim or counterclaim or crossclaims or counterclaims and not motion

Applying Courtlink’s order of operations, the search resolved in the following order:

[ (“credit card” or “credit cards” or “charge card” or “charge cards”) and (complaint or crossclaim or counterclaim or crossclaims or counterclaims) ] and not motion

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<sup>347</sup> <http://www.lexisnexis.com/en-us/products/courtlink-for-corporate-or-professionals.page> (“Search across the full text of more than 168 million federal and state court dockets and documents in a single click.”).

<sup>348</sup> <https://courtlink.lexisnexis.com/Search/Single/SingleSearchHelp.aspx>.

The search, when applied against all of Courtlink's federal district court data sets, returned more than 32,000 documents. We manually reviewed these documents to isolate complaints in federal court containing company-consumer disputes about credit cards.

We also coded other information, including:

- Whether the plaintiff purported to represent a class;
- The court in which the pleading was filed;
- The docket number;
- Whether a jury was requested;
- The filing date; and
- Whether the consumer or the company filed.

For manageability, we focused our review on initial complaints, not amended complaints. We also eliminated duplicate hits. At the end of that process, we identified 3,054 cases.



## APPENDIX D

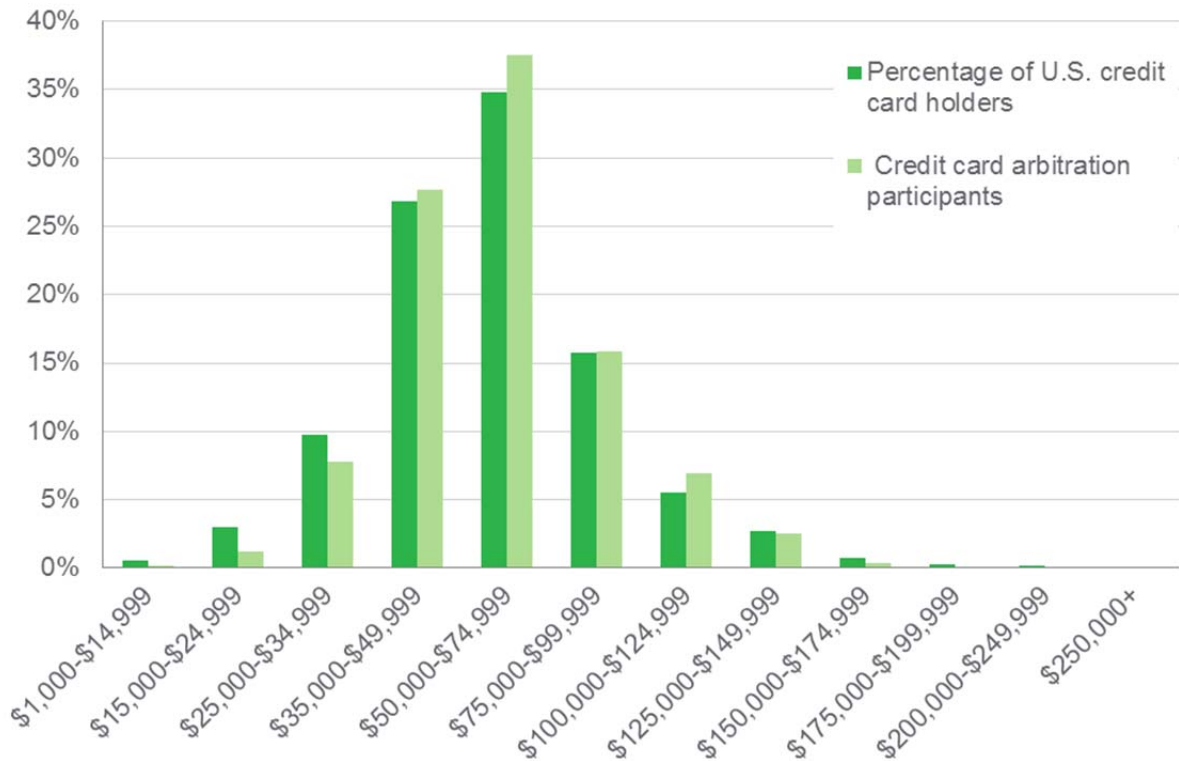
# Additional arbitration data

This appendix contains additional data figures that are referenced in section 4.7.

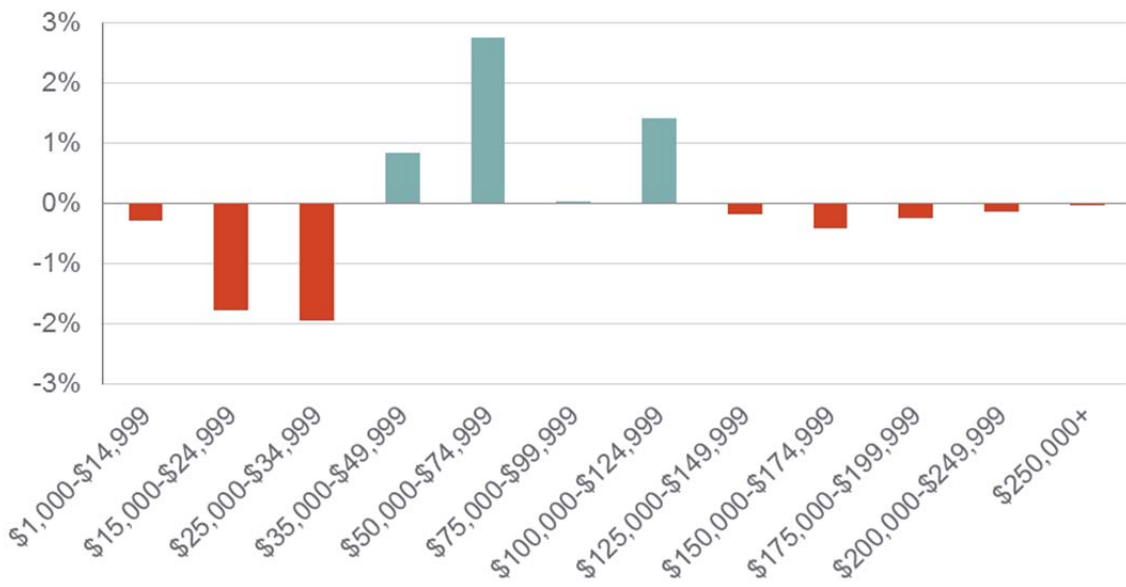
Figures 32 and 33, which relate to all credit card consumer arbitrations (debt collection, along with non-debt collection) exclude credit card proceedings for which we were unable to associate census tract-based median income information. In some cases, the AAA case record did not provide sufficient location information. (For example, it might provide location information only for the consumer's counsel or debt settlement provider.) Thus, the analysis shown here is based on information from 911 credit card arbitrations.

Figures 34 and 35, which relate to checking account/debit card consumer arbitrations, similarly exclude arbitrations for which we were unable to associate census tract-based median income information. Thus, it is based on information from 56 checking account/debit card arbitrations. Finally, Figures 36 and 37, which relate to payday consumer arbitrations, exclude payday cases for which we were unable to associate census tract-based median income information. Accordingly, it is based on information from 123 payday arbitrations.

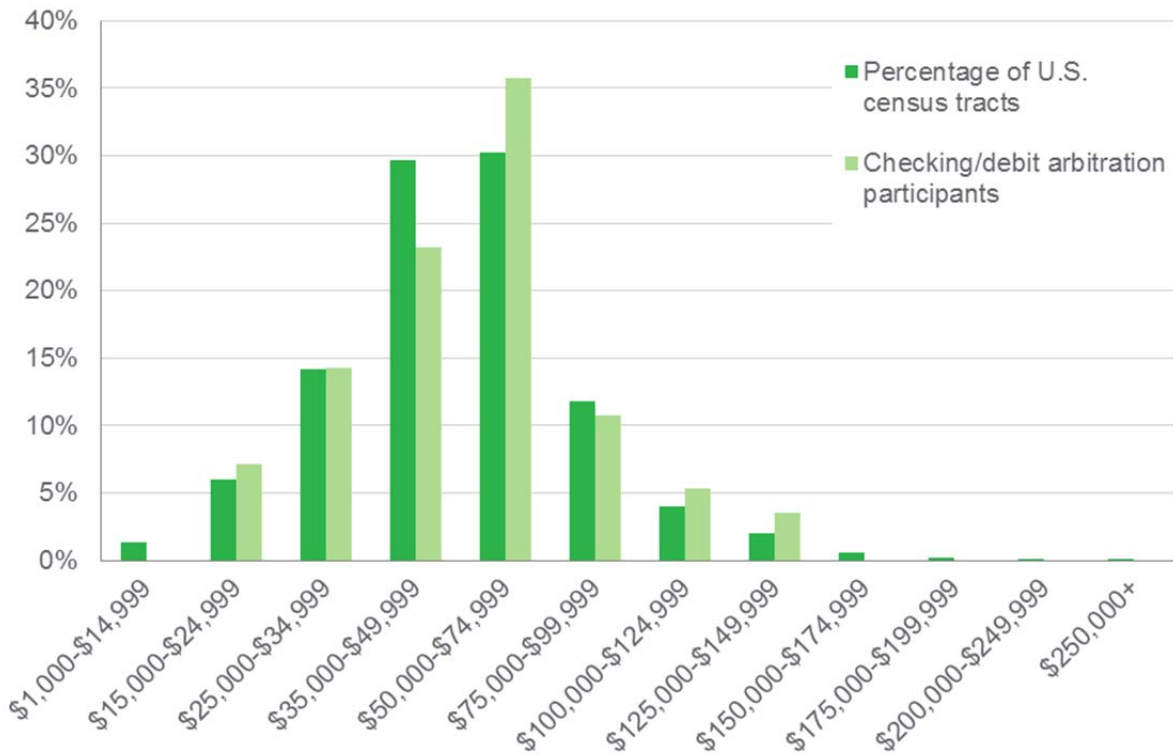
**FIGURE 32:** MEDIAN INCOME OF CREDIT CARD HOLDER LOCATIONS AND LOCATIONS OF CONSUMERS INVOLVED IN CREDIT CARD CONSUMER ARBITRATIONS 2010-12



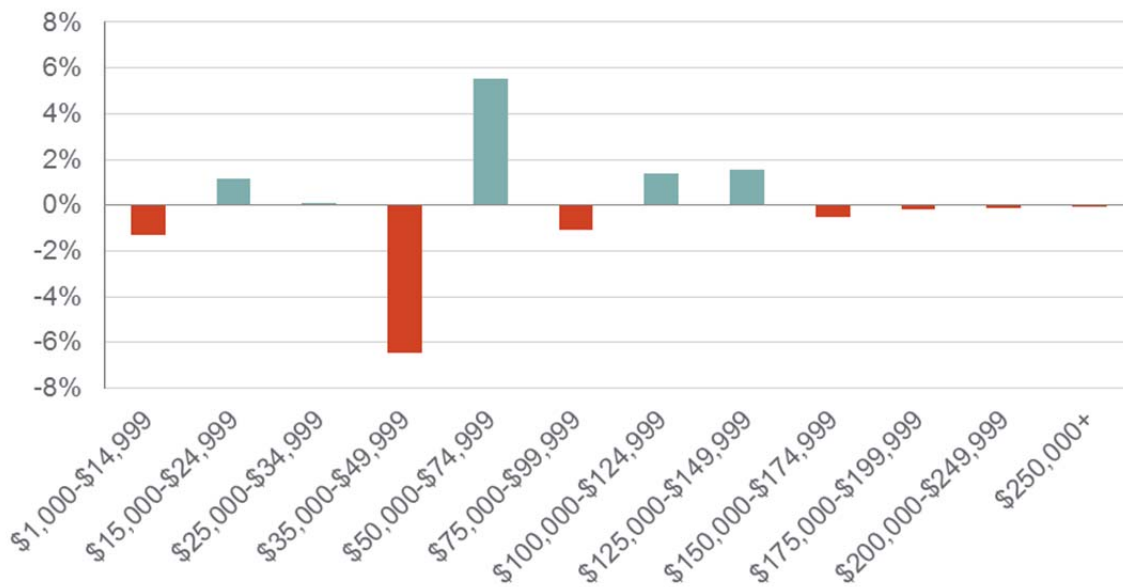
**FIGURE 33:** PERCENTAGE DIFFERENCES BETWEEN DISTRIBUTIONS IN FIGURE 32, CREDIT CARD ARBITRATIONS



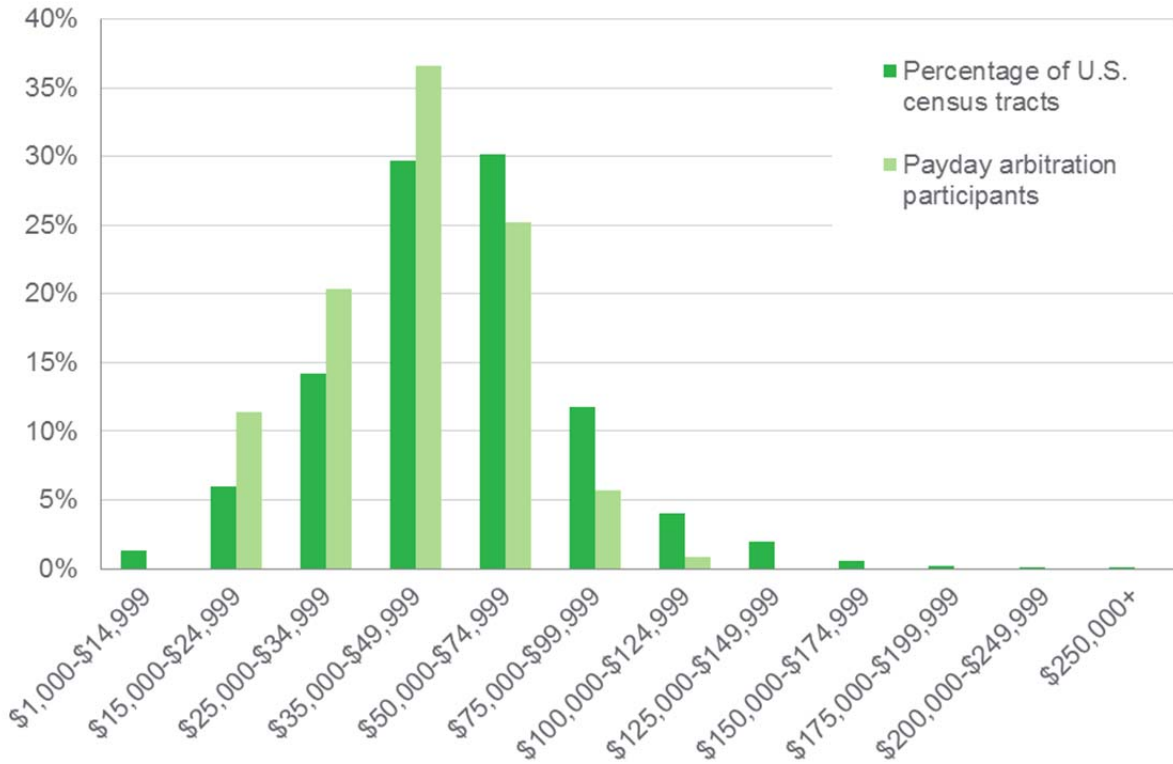
**FIGURE 34:** MEDIAN INCOME OF U.S. CENSUS TRACTS AND LOCATIONS OF CONSUMERS INVOLVED IN CHECKING ACCOUNT/DEBIT CARD CONSUMER ARBITRATIONS 2010-12



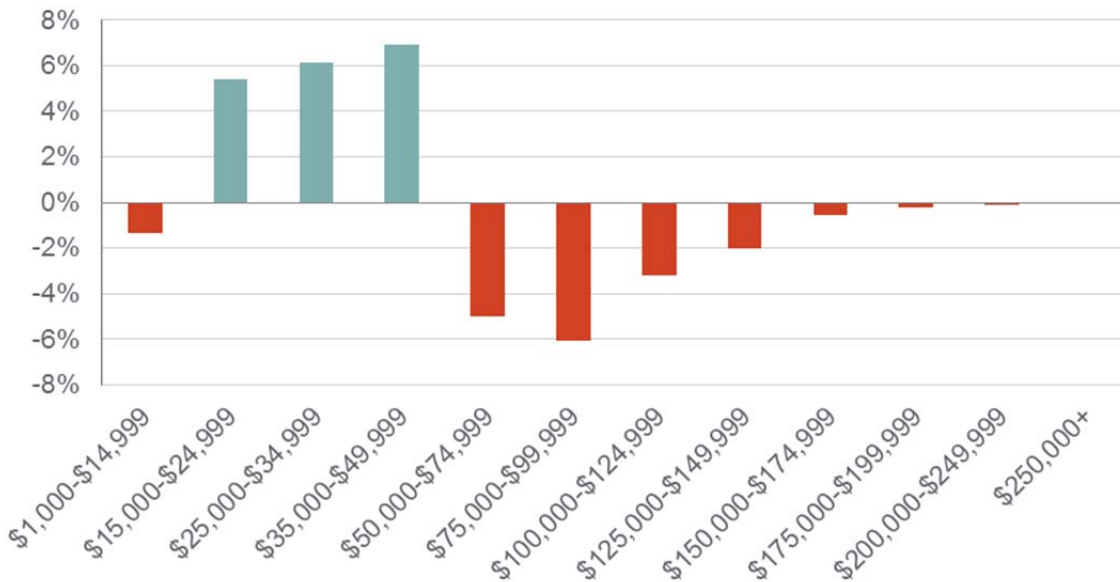
**FIGURE 35:** PERCENTAGE DIFFERENCES BETWEEN DISTRIBUTIONS IN FIGURE 34, CHECKING ACCOUNT/DEBIT CARD ARBITRATIONS



**FIGURE 36:** MEDIAN INCOME OF U.S. CENSUS TRACTS AND LOCATIONS OF CONSUMERS INVOLVED IN PAYDAY CONSUMER ARBITRATIONS 2010-12



**FIGURE 37:** PERCENTAGE DIFFERENCES BETWEEN DISTRIBUTIONS IN FIGURE 36, PAYDAY ARBITRATIONS



## APPENDIX E

# Small claims court data and methodology

This appendix provides additional data for section 5. It also provides a more detailed description of our methodology.

### DATA BY JURISDICTION

Table 10 shows data by jurisdiction for our estimated outer limit on consumer claims against our credit card issuer sample.

Our issuer sample covers on the order of 84% of the credit card market measured by outstandings.<sup>349</sup>

We have included for each jurisdiction the estimated annual volume for credit card direct mail for the issuer sample overall, using data from a commercial provider.<sup>350</sup> Those volume numbers show that our issuer sample collectively has a significant presence in each jurisdiction, at least from a marketing perspective.<sup>351</sup> It is true that a low number of claims *for a specific issuer* in a particular jurisdiction may reflect a lack of issuance *by that issuer* in that area. To address this issue, we have noted with an asterisk every instance in which a specific issuer had no direct mail volume for 2012. Our review sample only includes one predominantly regional player. The rest are national issuers. So this effect is primarily isolated to that one issuer.

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<sup>349</sup> See *supra* note 310.

<sup>350</sup> Data were available only by state. For counties, therefore, we assume that a county's population share in the state is equal to its share of direct mail.

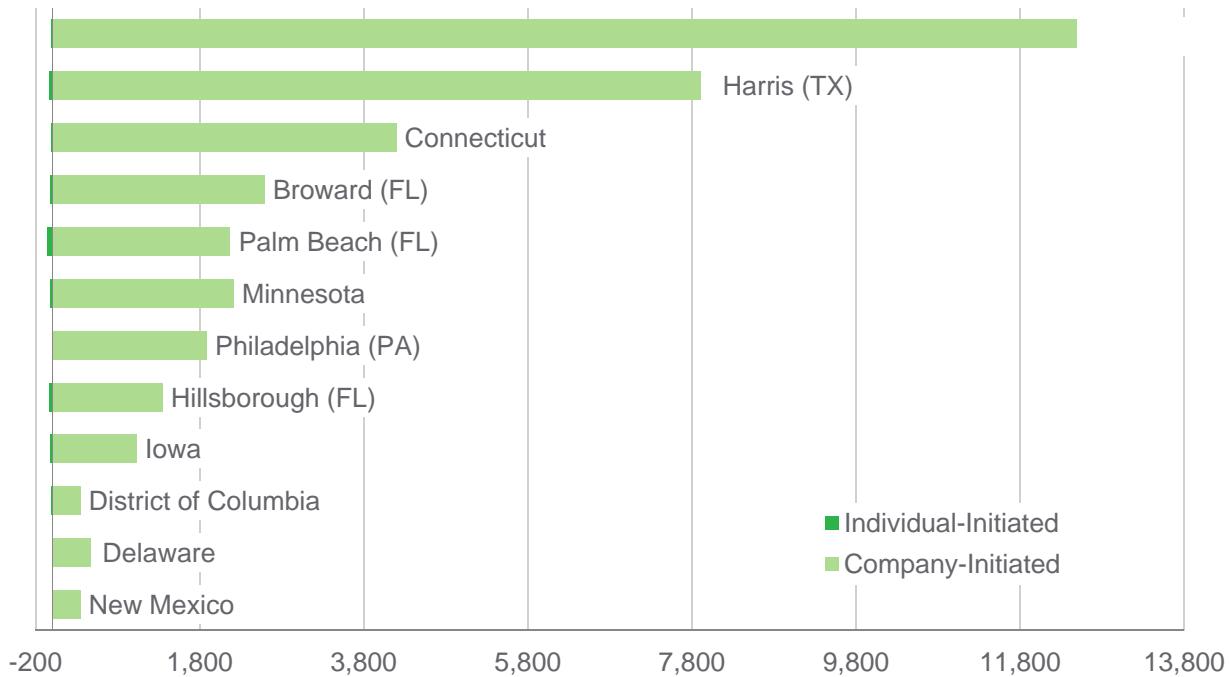
<sup>351</sup> In addition, for every jurisdiction, the direct mail numbers demonstrate that our sampled issuers *collectively* have a significant presence.

**TABLE 10: INDIVIDUAL SMALL CLAIMS COURT SUITS AGAINST ISSUERS 2012**

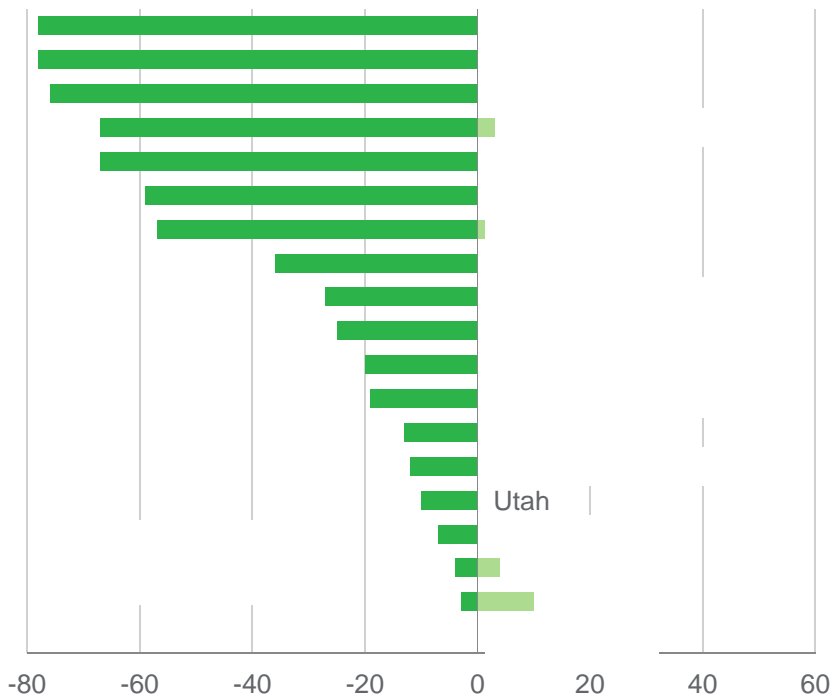
	Citi	Wells	USB	USAA	AmX	Disc	5/3	BoA	Cap1	JPM	All Issuers	2012 Mailings per Mintel
Alaska	1	0	0	0	0	0	*	2	0	0	3	n/a
Connecticut	0	2	0	0	0	0	*	4	0	5	11	129,650,753
Delaware	1	0	0	0	0	1	1	1	1	0	5	15,665,346
District of Columbia	2	4	0	0	0	0	*	2	1	0	9	40,875,797
Iowa	1	3	4	0	0	0	*	1	5	3	17	125,424,333
Minnesota	0	17	5	2	0	1	*	1	0	0	26	260,603,424
New Mexico	0	1	0	1	0	0	*	0	0	0	2	36,658,268
New Jersey	5	19	0	3	2	0	*	17	2	9	57	271,344,574
New York, ex-NYC	13	9	0	0	0	0	0	18	6	21	67	70,238,046
North Dakota	0	0	0	0	0	0	*	0	0	0	0	378,259,494
Oklahoma	0	0	0	1	0	0	*	0	0	3	4	110,984,476
Oregon	0	6	2	1	0	0	0	3	1	1	14	156,191,952
Utah	1	5	1	1	0	0	*	1	0	1	10	116,951,853
Wisconsin	1	1	1	0	0	0	0	2	0	3	8	253,280,825
Alameda (CA)*	1	0	0	0	3	0	*	2	0	1	7	57,290,710
Broward (FL)	1	0	1	0	0	0	0	17	0	4	23	59,396,856
Clark (NV)	1	2	0	1	1	0	*	6	1	0	12	40,677,128
Harris (TX)	1	2	0	1	2	0	*	9	6	11	32	118,398,987
Hillsborough (FL)	0	9	0	1	0	0	0	12	1	4	27	41,767,393
King (WA)	0	8	1	1	0	0	*	4	0	13	27	71,826,030
Kings (NY)	11	2	1	0	9	1	0	13	7	32	76	84,569,238
New York (NY)	15	2	0	0	9	0	0	12	2	27	67	53,545,763
Orange (CA)	8	14	7	0	1	0	*	36	1	11	78	114,190,320
Palm Beach (FL)	0	9	1	25	5	0	0	5	2	4	51	44,856,321
Philadelphia (PA)*	0	0	0	0	0	0	0	0	0	0	0	58,925,778
Queens (NY)	8	3	0	0	3	0	0	8	10	4	36	75,318,585
Riverside (CA)	4	8	4	0	1	0	1	32	1	8	59	83,061,972
Sacramento (CA)	2	9	2	0	1	0	*	0	1	5	20	53,820,389

The two figures below combine the data from Table 9 in section 5.3 with the data from Table 10 above. Figure 38 shows the data from the jurisdictions that do not limit or bar the use of the small claims courts by companies. In these jurisdictions, company-initiated claims uniformly outnumber our outer limit estimate for consumer-filed claims. Figure 39, by contrast, shows the data from jurisdictions almost all of which limit or bar company use of small claims court. In these jurisdictions, our outer limit estimate for the number of consumer-filed credit card claims is larger than the number of company-filed claims.

**FIGURE 38:** INDIVIDUAL AND ISSUER USE OF SMALL CLAIMS COURT 2012 – PART 1 (SCALED FROM ZERO TO 14,000)



**FIGURE 39:** INDIVIDUAL AND ISSUER USE OF SMALL CLAIMS COURT 2012 – PART 2 (SCALED FROM ZERO TO 100)



**METHODOLOGY**

We searched two sources of data to determine the incidence of consumer financial disputes in small claims court: state databases and county databases.

**State-level sample**

We checked the online databases of the small claims courts of the 50 states and the District of Columbia. We included a state database as a source of data if it allowed us to do all of the following:

- Perform a keyword search by party name *or* permit easy identification of parties;
- Identify a party as a plaintiff, defendant, or third party (such as a trustee or garnishee);
- Capture *statewide* data, at least according to the database. We excluded states for which we could tell that a number of counties were missing. The one exception was New York which we included because we were able to capture missing counties using our county-based sample;
- Conduct *statewide* keyword searches rather than county-by-county searches;
- Identify suits filed in 2012; and



- Run searches for free or for a reasonable cost (*i.e.*, less than \$1,000 per state).

The jurisdictions meeting the above criteria included Alaska, Connecticut, Delaware, the District of Columbia, Iowa, Minnesota, New Mexico, New Jersey, New York (excluding New York City), North Dakota, Oklahoma, Oregon, Utah, and Wisconsin. (The databases of the remaining 36 states did not meet one or more of the criteria above.) According to the 2010 Census data, our covered states had a combined population of 52,894,194, or about 17.1% of the total U.S. population of 308,745,538.<sup>352</sup> The states meeting our criteria were concentrated in the Midwest and Northeast.

### County-level sample

To supplement our state-level sources, we checked the online small claims court databases of the 30 most populous counties.<sup>353</sup> We included a county as a source of data if the relevant database permitted us to do the following:

- Perform a keyword search by party name or permit easy identification of parties;
- Identify a party as a plaintiff, defendant, or third party (such as a trustee or garnishee);
- Identify claims filed between January 1, 2012 and December 31, 2012; and
- Run searches for free or for a reasonable cost (*i.e.*, less than \$1,000 per state).

Thirteen counties met our criteria above: Harris (TX), Orange County (CA), Riverside (CA), San Diego (CA) San Bernardino (CA), Clark (NV), King (WA), Santa Clara (CA), Broward (FL), Philadelphia (PA), Sacramento (CA), Palm Beach (FL), and Hillsborough (FL). One county (Suffolk County, NY) met the criteria above but was excluded because it was already included in

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<sup>352</sup> All population data retrieved from <http://www.census.gov>. New York state results exclude the population of the five boroughs of New York City.

<sup>353</sup> These 30 counties in order of population were as follows: Los Angeles, CA (9,818,605); Cook County, IL (5,194,675); Harris County, TX (4,092,459); Maricopa County, AZ (3,817,117); San Diego County, CA (3,095,313); Orange County, CA (3,010,232); Miami-Dade County, FL (2,496,435); Kings County, NY (2,504,700); Dallas County, TX (2,368,139); Queens County, NY (2,230,722); Riverside County, CA (2,189,641); San Bernardino County, CA (2,035,210); Clark County, NV (1,951,269); King County, WA (1,931,249); Tarrant County, TX (1,809,034); Santa Clara, CA (1,781,642); Wayne County, MI (1,820,584); Broward County, FL (1,748,066); Bexar County, TX (1,714,773); New York County, NY (1,585,873); Philadelphia County, PA (1,526,006); Alameda County, CA (1,510,271); Middlesex County, MA (1,503,085); Suffolk County, NY (1,493,350); Sacramento County, CA (1,418,788); Bronx County, NY (1,385,108); Nassau County, NY (1,339,532); Palm Beach County, FL (1,320,134); Cuyahoga County, OH (1,280,122); and Hillsborough County, FL (1,229,226).

a state-level source (New York state). In addition to the online small claims court databases, we found county-level data from two other sources. First, we collected data in person from terminals in the small claims court clerk offices of New York, Queens and Kings Counties (the boroughs of Manhattan, Queens and Brooklyn). While not available online, these databases met all of the other county-level criteria. Second, Westlaw and Lexis’s Courtlink provided data for two counties not otherwise available online: Alameda and Riverside Counties (both CA).<sup>354</sup>

In all, these county-level sources added 17 jurisdictions to our dataset, or approximately 35,160,801 persons all from states (California, Florida, Nevada, Pennsylvania, Texas, and Washington) or locations (New York City) not already included in our set of state-level sources.

In total all our sources—state and county—together cover approximately 85 million people, and 20 states (including the District of Columbia), either in whole or in part.

In these 31 states and counties, the small claims jurisdictional limit (the maximum amount of money damages that a plaintiff may claim and still require a defendant to dispute in small claims court) ranged from \$3,000 to \$15,000, as shown below.

**TABLE 11: SMALL CLAIMS JURISDICTIONAL MONEY DAMAGES LIMITS**

State/County	Small Claims Jurisdictional Limit
Alaska	\$10,000
Connecticut	\$5,000
Delaware	\$15,000
District of Columbia	\$5,000
Iowa	\$5,000
Minnesota	\$10,000
New Jersey	\$3,000 (\$5,000 if demand is for return of deposit)

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<sup>354</sup> Other than these two counties, Westlaw and Lexis provided no unique additional jurisdictions that were not already present in our dataset; conversely, most of the jurisdictions in our dataset were not available on Westlaw and Lexis. (To the extent that Westlaw and Lexis offered data available independently online, our searches of Westlaw and Lexis either confirmed our results or showed that Westlaw and Lexis offered fewer results.)

New Mexico	\$10,000
New York (excluding NYC)	\$5,000 (additional jurisdictional limits for companies)
North Dakota	\$10,000
Oklahoma	\$7,500
Oregon	\$10,000
Utah	\$10,000
Wisconsin	\$10,000 for replevin, \$5,000 for tort, \$25,000 for consumer credit transaction (for return of personal property subject to a lease or credit from a dealer)
Alameda (CA)	\$10,000 (additional jurisdictional limits for companies)
Broward (FL)	\$5,000
Clark (NV)	\$7,500
Harris (TX)	\$10,000
Hillsborough (FL)	\$5,000
King (WA)	\$5,000
Kings (NY)	\$5,000 (additional jurisdictional limits for companies)
New York (NY)	\$5,000 (additional jurisdictional limits for companies)
Orange (CA)	\$10,000 (additional jurisdictional limits for companies)
Palm Beach (FL)	\$5,000
Philadelphia (PA)	\$12,000
Queens (NY)	\$5,000 (additional jurisdictional limits for companies)
Riverside (CA)	\$10,000 (additional jurisdictional limits for companies)
Sacramento (CA)	\$10,000 (additional jurisdictional limits for companies)
San Bernardino (CA)	\$10,000 (additional jurisdictional limits for companies)
San Diego (CA)	\$10,000 (additional jurisdictional limits for companies)
Santa Clara (CA)	\$10,000 (additional jurisdictional limits for companies)

## Institutions

Our search for disputes in small claims court involving consumer financial products focused on credit card issuers. The industry is concentrated, so searches for relatively few issuers cover most of the market.<sup>355</sup> To come up with our list, we started with the list of the largest issuers with pre-dispute arbitration clauses in their agreements at year-end 2012.<sup>356</sup> We ranked the top 15 by consolidated volume of credit card loans outstanding at year end 2012, based on call report data, as reported by SNL.<sup>357</sup> This is shown below.

**TABLE 12: SUMMARY OF LARGE ISSUERS BY SMALL CLAIMS COURT ARBITRATION CARVE-OUT STATUS**

Credit Card Issuer	2012 Loans Outstanding (\$ 000s)	Small Claims Court Carve-Out?
1. Citibank	107,126,000	Yes – Mutual
2. American Express	56,714,000	Yes – Consumer only
3. Discover	50,927,790	Yes – Consumer only
4. GE	26,349,553	Yes – Mutual
5. Wells Fargo	24,651,342	Yes – Mutual
6. U.S. Bank	17,120,000	Yes – Mutual
7. USAA	15,879,574	Yes – Mutual
8. Barclays	14,281,456	Yes – Mutual
9. Comenity	7,245,336	Yes – Consumer only

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<sup>355</sup> The credit card market is concentrated; the 10 credit card issuers we selected make up an overwhelming share of the market, as measured by outstandings. *See supra* note 310.

<sup>356</sup> *See* section 3, *supra*.

<sup>357</sup> We adjusted two loans outstanding figures where SNL's automated data via Excel appeared to be inconsistent with our independent check of the regulatory filings.

10. First National Bank of Omaha	4,229,188	Yes – Claims < \$25,000
<b>11. Fifth Third</b>	2,085,601	No
12. BB&T	1,744,138	Yes – Consumer Only
13. Merrick	1,323,392	Yes – Consumer Only
14. Regions	899,929	Yes – Mutual
15. KeyBank	729,151	Yes – Mutual

We first selected the top four issuers from this list that had “mutual” small claims court carve-outs. Excluding GE, this gave us Citibank, Wells Fargo, U.S. Bank, and USAA. We excluded GE because its credit card business is exclusively private label, meaning that it issues no GE cards, only cards for other businesses.<sup>358</sup> We then added American Express and Discover, as the largest issuers with non-mutual small claims court carve-outs (meaning that consumers may require the resolution of a dispute in small claims court, but the issuer may not do so), and Fifth Third, as the largest issuer with an arbitration provision with no small claims court carve-out. The resulting issuers are shown in bold above.

As a further comparison, we selected the largest issuers with no arbitration clauses at all. The top three issuers with no arbitration clause, by consolidated credit card loans outstanding at year end 2012, were (in order) Chase (\$117.6 billion), Bank of America (\$94.8 billion), and Capital One (\$77.8 billion).<sup>359</sup> Altogether, the 10 issuers we selected had nearly \$564.8 billion in credit card loans outstanding at year end 2012.

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<sup>358</sup> With private label credit cards, the actual credit card issuer may not be named on the card or in materials the account holder might see, such as the credit card agreement, or the monthly credit card statements. As a result, such an account holder might only know to file against the merchant listed on the credit card rather than the actual issuer. Given the lengthy list of companies issuing cards through GE, a search for consumer-initiated claims against GE likely would have been difficult, time consuming and still potentially inaccurate.

<sup>359</sup> We adjusted one figure reported by SNL. As to Bank of America, the SNL reported number included foreign credit card loans. We added the domestic FIA Card Services, National Association credit card loans (94,832,485,000) to the

### Searching for cases

To search the 31 databases meeting our criteria, we formulated search terms to find disputes in small claims courts initiated by individuals against credit card issuers (“consumer-filed cases”) and by issuers against individuals (“issuer-filed cases”).

To develop search terms for the consumer-filed cases, we started with the names of the parent companies for our sample of issuers. We added all their subsidiaries included in the credit card agreement database or reported by SNL as holding credit card loans as of year-end 2012. The resulting list of names is in column 2 of Table 13 below. From this list, we developed search terms. We selected the minimum number of common words or phrases that would still capture every legal entity related to the 10 issuers we identified (*e.g.*, “American Express” was intended to capture both “American Express Centurion Bank” and “American Express Travel Related Services, Inc.”; “Citi” was intended to capture “Citibank, National Association” and “Citigroup, Inc.”).

We added other terms likely to be used by consumers as plaintiffs, based on the assumption that consumers (or the court employees entering case information in small claims court databases) may not always list the correct credit card-issuing legal entity in their suits. They may erroneously list, instead, the corporate parent (“American Express Co.”), a truncated and informal version of the name (“American Express” or “AmEx”), alternate spellings (*e.g.*, “Capitol One” for “Capital One”), or spacings (“J. P. Morgan” rather than the now-official “JPMorgan”). They may also use trade names that would not be found in a search for the main entity (*e.g.*, “BankAmericard”).

The full list of search terms is below in Columns 3 and 4.

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domestic Bank of America, National Association credit card loans (2,822,000). After the top three issuers, the next three issuers without arbitration clauses had significantly smaller volumes of loans outstanding: Navy Federal Credit Union (\$6.777 billion), PNC Bank, National Association (\$3.821 billion), and World’s Foremost Bank (\$3.852 billion).

**TABLE 13: CREDIT CARD ISSUING ENTITIES AND SEARCH TERMS**

Corporate Parent	Subsidiary holding credit card loans as of YE 2012 per SNL	Search Term Based on Issuing Entities + Parents	Other Terms (Abbreviation, Misspellings, Trade Names)
American Express Co.	American Express Bank, FSB American Express Centurion Bank American Express Travel Related Services Company, Inc. American Express Credit Corporation	"American Express"	"AmEx" "Am Ex"
Citigroup, Inc.*	Banamex USA Citibank, National Association	"Banamex" "Citibank" "Citicorp" "Citigroup"	"Citi"
Discover Financial Services	Discover Bank	"Discover"	N/A
Fifth Third Bancorp	Fifth Third Bank	"Fifth Third"	"Fifth 3rd" "5th Third" "5th 3rd" "5/3rd"
U.S. Bancorp	U.S. Bank National Association Elan Financial Services	"U.S. Bancorp" "U.S. Bank" "Elan"	"US Bancorp" "US Bank" "U S Bancorp" "U S Bank" "U. S. Bancorp" "U. S. Bank"
USAA Insurance Group	USAA Federal Savings Bank USAA Savings Bank	"United Services" "USAA"	n/a
Wells Fargo & Co.	Wells Fargo Bank Northwest, National Association Wells Fargo Bank, National Association Wells Fargo Financial National Bank	"Wells Fargo"	"WellsFargo"
JPMorgan Chase & Co.	JPMorgan Chase Bank, National Association Chase Bank USA, National Association	"JPMorgan" "Chase"	"JP Morgan" "J P Morgan" "J.P.Morgan" "J.P. Morgan" "J. P. Morgan"
Bank of America Corp.	Bank of America, National Association FIA Card Services, National Association	"Bank of America" "FIA"	"BoA" "BofA" "BankAmericard"

Capital One Financial Corporation	Capital One, National Association Capital One Bank (USA), National Association	"Capital One"	"Capital 1" "Cap One" "Cap 1" "Capitol One"
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**\*Note:** Department Stores National Bank is a subsidiary of Citigroup, Inc. that reported some credit card loans on its balance sheet. It has no arbitration clause and, as such, it was excluded from Citibank’s loan volume and search terms.

Once we identified cases that named entities responsive to these search terms, we eliminated duplicate entries because different search terms sometimes retrieved the same case. We also removed cases in which the responsive entity was not the defendant (*e.g.*, a garnishee) because in such cases the issuer is not involved in a dispute with a consumer. We culled cases in which the responsive entity was by its name alone identifiably *not* a credit card or checking-related subsidiary. (For instance, we cut results in which “mortgage,” “home loan,” “insurance,” “casualty,” “auto,” “investment,” or “securities” appeared in the entity name.) Finally, we also removed cases in which the filing party was not a natural person.

For issuer-filed cases, we included only disputes in which the named plaintiff was one of the legal entities issuing credit cards identified in Table 13. In other words, we used column 2 for our search, not columns 3 and 4. In most jurisdictions we could not tell from available documents if a credit card was involved in the dispute. We assumed that companies would file credit card-related disputes only in the name of credit card-issuing legal entities and not in the name of other subsidiaries, including the parent company. Finally, we removed cases in which the party being sued was not a natural person.

### Consumer Checking Account Volume

The search terms used for consumer-filed cases will also identify a number of cases against large retail banks within the same corporate families. Many of the issuers covered by our sample also offer checking account and other retail banking products. In addition, our operative search terms for credit card issuer will identify other subsidiaries in the same corporate family that do not issue credit cards, but do offer checking account and other retail banking products. As a result, we should expect our outer limit estimate for credit card consumer-filed cases to include a significant share of any checking account and other retail banking product cases filed in these small claims courts.



## APPENDIX F

# Defined terms

We set out below a number of defined terms as used in this presentation:

DEFINED TERM	
<b>AAA</b>	American Arbitration Association, an arbitration administrator
<b>AAA DATA</b>	Electronic case records provided voluntarily by the AAA to the Bureau for all AAA-administered consumer arbitration filings since 2010
<b>AAA CASE DATA</b>	A subset of AAA Data pertaining only to credit card, checking account, or payday loan disputes for 2010, 2011 and 2012
<b>ADMINISTRATIVE FEES</b>	Administrative fees payable to an arbitration administrator
<b>ARBITRATION CLAUSE</b>	A provision in a consumer contract that provides for binding arbitrated resolution of claims that arise between the parties
<b>ARBITRATOR FEES</b>	Fees payable to an arbitrator to resolve claims that arise between the parties
<b>BUREAU</b>	Consumer Financial Protection Bureau
<b>CLASS ACTION</b>	A form of litigation in which a party seeks to or does represent a “class” of similarly-situated parties
<b>CONSUMER DUE PROCESS PROTOCOL</b>	AAA-adopted principles directed to the fairness of consumer arbitrations
<b>COMPANY-FILED ARBITRATION</b>	Arbitration recorded on AAA claim form as being filed by a company against a consumer
<b>CONSUMER-FILED ARBITRATION</b>	Arbitration recorded on AAA claim form as being filed by a consumer against a company

<b>DEBT COLLECTION ARBITRATION</b>	Company-filed arbitration seeking debt, or consumer-filed or mutually submitted arbitration made after court collection proceedings; see Section 4.2.2 for more details
<b>FAA</b>	Federal Arbitration Act, 9 U.S.C. §§ 1-16
<b>FLESCH READABILITY SCORE</b>	Readability tests designed to indicate the difficulty of comprehension of text. The tests are a widely used standard in plain language analysis. Scores range from 0.0 to 100.0, with a higher number indicating greater readability.
<b>FLESCH-KINCAID GRADE LEVEL</b>	Measure that translates readability of a text into the grade level required to understand the text. A lower grade level indicates greater readability.
<b>FORMAL DISPUTE RESOLUTION</b>	Litigation or arbitration mechanism that can effect binding resolution of a dispute
<b>GPR PREPAID CARD</b>	General purpose reloadable prepaid card
<b>INITIAL FEES</b>	Administrative and arbitrator fees assessed at the beginning of a consumer arbitration
<b>JAMS</b>	JAMS, Inc. (formerly known as Judicial Arbitration and Mediation Services), an arbitration administrator
<b>MUTUALLY SUBMITTED ARBITRATION</b>	Arbitration recorded on claim form as being submitted by both parties
<b>NAF</b>	National Arbitration Forum, previously a significant consumer arbitration administrator
<b>PRIVATE LABEL CREDIT CARD</b>	Credit card issued and/or managed by a financial institution on behalf of a merchant or a wholesale manufacturer for use only in that merchant establishment.
<b>SUPPLEMENTARY PROCEDURES</b>	AAA rules applicable to consumer arbitration

# Other Appendices



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## APPENDIX B: SECTION 2

# Methodology

This appendix sets out the methodology used in collecting the data described in Section 2.

### Credit card agreements

The sample of credit card agreements studied consists of credit card issuers with agreements on file with the Bureau as of December 31, 2010, 2011, 2012, and 2013. The Credit CARD Act of 2009 requires credit card issuers above a *de minimis* size to post their credit card agreements on the issuer's website and to file the agreement with the appropriate regulator.<sup>1</sup> Initially, the Credit CARD Act required the agreements to be filed with the Federal Reserve.<sup>2</sup> The Dodd-Frank Act changed the requirement so that credit card agreements now must be filed with the Bureau.<sup>3</sup>

Issuers are required to update their filing only when it changes.<sup>4</sup> Some issuers have never filed new agreements, so the agreement they have on file has not changed since 2009. Other issuers file new agreements every quarter; for those issuers, the agreement studied is the agreement on file as of December 31, 2013. Of the 393 issuers studied in the 2013 Preliminary Results, 206 filed new credit card agreements with the Bureau during 2013. The remaining issuers did not file new agreements. Seven issuers (with a miniscule percentage of credit card loans outstanding) were closed, merged into other institutions, sold their credit card loan portfolios, or had agreements that were otherwise unavailable during 2013 and so were removed from the sample.

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<sup>1</sup> Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1746, § 204(a) (May 22, 2009); *see* 15 C.F.R. § 226.58(c)(5) (*de minimis* exception).

<sup>2</sup> Credit CARD Act, § 204(a).

<sup>3</sup> *See* 15 U.S.C. § 1632(d).

<sup>4</sup> 15 C.F.R. § 226.58(c)(3).



Many issuers had multiple agreements on file with the Bureau. In almost every case, the dispute resolution clause in each agreement filed by the issuer was identical. In the rare case in which an issuer had varying dispute resolution clauses, the most frequently used type of clause was included in the sample. In a handful of cases, the issuer filed some document other than the cardholder agreement with the Bureau. In those cases, the cardholder agreement was obtained from the issuer's website when possible.

Each credit card agreement in the sample was reviewed to determine if it included an arbitration clause.<sup>5</sup> If it did, the provisions of the arbitration agreement were coded for the information described in Section 2. One issuer's agreement, while indicating that it included an arbitration clause, incorporated by reference the details of the arbitration clause included in another document, which was unavailable. That issuer's agreement was coded as providing for arbitration, but the details of the arbitration provision were coded as missing.

Data on credit card loans outstanding from the issuer's December 31, 2010, December 31, 2011, December 31, 2012, and December 31, 2013, call reports were used to measure the relative market share of each issuer.<sup>6</sup> Only domestic credit card loans outstanding were used, plus securitized credit card loans, if any. Data for related issuers (*i.e.*, those that are subsidiaries of a common parent) were consolidated as long as each issuer used the same dispute resolution clause in its credit card agreement. If the issuers had different dispute resolution clauses, their data were not consolidated and each issuer was included separately in the sample.

## Checking account agreements

We examined three samples of checking account agreements: the 100 largest banks based on consolidated deposits less than \$250,000 (*i.e.*, the deposit insurance threshold); a random sample of 150 banks not among the 100 largest (referred to as small- and mid-sized banks); and the 50 largest credit unions based on the amount of insured deposits. We used insured deposits as a proxy for consumer accounts.

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<sup>5</sup> Agreements that provided for use of California's judicial reference procedure were not treated as including an arbitration clause.

<sup>6</sup> Call reports are available at the website for the Federal Financial Institutions Examination Council. *See* [www.ffiec.gov](http://www.ffiec.gov).

For each sample, we first attempted to collect the institution’s checking account agreement (typically its general deposit account agreement) from its website. If the agreement was not available, or if the available agreement was undated or dated prior to 2011, the Bureau directed the institution to provide the agreement pursuant to Section 1022(c)(4) of the Dodd-Frank Act.<sup>7</sup> For all of the largest banks, 141 of the 150 small- and mid-sized banks, and 49 of the 50 largest credit unions, we were able to obtain some version of its checking account agreement. From that agreement, we determined whether the institution used an arbitration clause, and, if so, coded it as described above.

As noted above, we used consolidated insured deposits, obtained from the December 31, 2011, December 31, 2012, and December 31, 2013 call reports, as a measure of market share. As a general matter, insured deposits were consolidated across all affiliated institutions. If, however, affiliated institutions used different forms of dispute resolution or different arbitration clauses, we included each institution separately in the sample.<sup>8</sup>

## General purpose reloadable prepaid card agreements

Market data are less complete for general purpose reloadable (“GPR”) prepaid cards than for either credit cards or checking accounts. We included in the sample all GPR prepaid cards (1) listed on the Visa, MasterCard, or NerdWallet websites advertising such cards,<sup>9</sup> or examined in various recent studies of the terms of prepaid cards;<sup>10</sup> and (2) that continued to be available

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<sup>7</sup> 12 U.S.C. § 5512(c)(4).

<sup>8</sup> As a result, for example, our sample of the 100 largest banks includes 103 observations.

<sup>9</sup> **MasterCard, Get a Prepaid Card That’s Right for You**, <http://www.mastercard.us/get-a-prepaid-card.html> (last visited Mar. 6, 2015); Visa, Get a Visa Prepaid Card, <http://usa.visa.com/personal/cards/prepaid/prepaid-card-online.html> (last visited Mar. 6, 2015); NerdWallet, Prepaid Debit Cards, <http://www.nerdwallet.com/prepaid> (last visited Mar. 6, 2015).

<sup>10</sup> Aité Group, *The Contenders: Prepaid Debit and Payroll Cards Reach Ubiquity* 18-19 (Nov. 2012); Bankrate.com, *2013 Prepaid Debit Cards Survey*; Bretton Woods, Inc., *Analysis of Branded General Purpose Reloadable Prepaid Cards: A Comparative Cost Analysis of Prepaid Cards, Basic Checking Accounts and Check Cashing* 9 (Feb. 2012); **CardHub, Prepaid Cards Report – 2013; Consumer Reports, Prepaid Cards: How They Rate on Value**, Convenience, Safety and Fee Accessibility and Clarity 9 (July 2013); Pew Charitable Trusts, *Loaded with Uncertainty: Are Prepaid*

online during summer 2014. We also included agreements from the two leading credit union GPR card programs, by Pennsylvania State Credit Union and Credit Union National Association.<sup>11</sup> Most of the cards in the sample were listed in multiple sources. We collected the cardholder agreements for the cards from the Internet.

Market share data came from the Aité Group's November 2012 report on the prepaid card market.<sup>12</sup> Because of limited market share data, the results for GPR prepaid cards based on the dollar amounts loaded on the cards are limited to the firms for which market share data are available, which make up 82.9% of the entire market.<sup>13</sup> As a result, most of the prepaid cards in the sample are not included in the market share figures. Moreover, because two of the firms that are included use two different form cardholder agreements, the market share data sometimes are presented as ranges rather than as a single figure.

## Storefront payday loan agreements

For this study, we examined a sample of contracts from 161 storefront payday lenders, consisting of eleven major U.S. payday lenders and for each of California, Florida, and Texas, an additional fifty randomly selected payday lenders licensed to do business in the state. The major payday lenders were identified from the *Payday Loan Industry Report* published by Stephens, Inc., in June 2011.<sup>14</sup> Of the top lenders identified by Stephens, three have been acquired by others on the list since its publication, and a fourth has no locations in California, Florida, or Texas. We chose those three states due to the combined consideration of their size, their varied regulatory schemes, and the availability online of lists of lenders licensed to do business in the

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Cards a Smart Alternative to Checking Accounts? 26 (Sept. 2012), <http://www.pewtrusts.org/en/research-and-analysis/reports/2012/09/06/loaded-with-uncertainty> (last visited Mar. 6, 2015).

<sup>11</sup> CUNA, Learn More About Our Prepaid Debit Cards, [http://www.cunastrategicservices.com/LSC\\_CUMONEY\\_Prepaid\\_Debit\\_Cards\\_134.html](http://www.cunastrategicservices.com/LSC_CUMONEY_Prepaid_Debit_Cards_134.html) (last visited Mar. 6, 2015); PSCU, Prepaid – Reloadable Cards, <http://www.pscu.com/solutions/prepaid-reloadable-cards.html> (last visited Mar. 6, 2015).

<sup>12</sup> Aité Group, *supra* n.10, at 19.

<sup>13</sup> *Id.* at 18–19.

<sup>14</sup> Stephens, Inc., Payday Loan Industry Report 12 (June 6, 2011).

state. From each of the online listings, we randomly selected 50 additional payday lenders to include in the sample.

Next we attempted to obtain the contracts for each of the payday lenders in the sample. When possible, we obtained the contract from internal Bureau sources, as long as the Bureau obtained the contract no earlier than January 1, 2013. If the contract was not so available, we sought to obtain the contract from the payday lender via a section 1022(c)(4) order. From either of those sources, we obtained contracts for all of the major payday lenders for each of the three states in which they did business. We also obtained 55 contracts from the randomly selected payday lenders in the sample.<sup>15</sup> Lenders were sampled randomly from the set of all lenders registered in the relevant category under each state’s licensing regime.<sup>16</sup> The inclusion of different types of products, such as “deferred presentment” agreements, is based on those products being licensed in the respective states under the same licensing regime as payday loans. However, where a lender responded to the Bureau’s 1022(c)(4) order by stating that the lender did not make payday loans, their contract was not included in the results.<sup>17</sup>

Payday lending transactions in Texas involve three parties (the consumer, the lender, and a credit services organization (CSO)), with separate contracts between the consumer and the lender and the consumer and the CSO. In most cases, the dispute resolution clauses in the contract were substantially identical (usually only including differences reflecting the different status of the contracting party). Whenever possible, we coded the dispute resolution clause included in the contract between the consumer and the CSO.

We measured the market share of the storefront payday lenders based on the number of licensed storefront locations as shown on websites maintained by California and Texas

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<sup>15</sup> Six licensed lenders (all from Texas) responded to the Section 1022(c)(4) orders by indicating that they did not make payday loans.

<sup>16</sup> **In California, our sample is taken from the list of lenders licensed as “deferred deposit originators”; in Florida, our sample is taken from the list of lenders licensed as “deferred presentment providers”; and, in Texas, our sample is taken from the list of lenders licensed as “credit access businesses.”**

<sup>17</sup> **This study’s use of the terms “payday loan,” “payday lender,” and similar terms is solely for the purposes of the arbitration study and should not be construed to bind the Bureau in any proceeding or other undertaking involving similar products or services.**

regulators; no comparable information about Florida locations is available online. As a result, our market share data on storefront payday loans is based solely on storefronts in California and Texas. Using licensed storefront locations is an imperfect measure of market share because actual lending volume may vary across locations, but it is a commonly used measure in the industry.<sup>18</sup>

## Private student loan contracts

The sample of private student loan contracts consists of:

1. The contracts from six of the nine private student lenders used in the Bureau's 2012 report *Private Student Loans*.<sup>19</sup> This sample of nine lenders represented about 81% of the private student loan market in 2011 by originations and about 93% of the market in 2011 by total loans outstanding.<sup>20</sup>
2. The agreement used by the approximately 250 credit unions that are affiliated with Credit Union Student Choice (CUSC). CUSC is an entity that establishes partnerships with many credit unions that offer student loans, through which the credit unions fund and underwrites the loans, sets the pricing, and holds the loan balance, while CUSC handles origination, processing, and servicing.<sup>21</sup> We analyzed the CUSC agreement because random sampling was not possible, as no list of credit unions that offered private student loans was available to us.

For comparison purposes, we also examined the master promissory notes for Federal Direct Loans originated by the U.S. Department of Education, as well as Perkins Loans, which are originated by institutions of higher education under the auspices of the Department of Education's loan programs. Prior to 2011, a substantial portion of federal student loans were

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<sup>18</sup> *See, e.g.*, Stephens, Inc., Payday Loan Industry Report (2011).

<sup>19</sup> Consumer Financial Protection Bureau, Private Student Loans 7 & n.3 (Aug. 29, 2012). Three companies in the sample have since exited the market, resulting in our current sample of six.

<sup>20</sup> *Id.* at 17.

<sup>21</sup> Credit Union Student Choice, About Us, studentchoice.org., <http://www.studentchoice.org/credit-unions/about-us> (last visited Mar. 6, 2015).

originated by private entities (such as banks) under the Federal Family Education Loan program. We did not analyze these promissory notes, since new originations have been suspended.

## Mobile wireless agreements

Our sample of mobile wireless agreements consists of the consumer agreements of the 12 largest facilities-based providers of mobile wireless services in the United States, as listed in the most recent FCC Mobile Wireless Competition Report.<sup>22</sup> Since the date of that report, four of the listed providers have either been acquired by or sold their retail business to other listed providers.<sup>23</sup> Our sample consists of the eight remaining providers. Because our sample is limited to the largest facilities-based providers of mobile wireless services, our findings may not be representative of the contracting practices of other mobile wireless services providers.

We obtained the subscriber agreement from each of the company's website during summer 2014, and data on the number of subscribers from published industry sources as of the end of the second quarter 2014.<sup>24</sup>

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<sup>22</sup> Federal Communications Commission, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless 55 tbl. 13 (Mar. 21, 2013).

<sup>23</sup> See T-Mobile Press Release, *T-Mobile and MetroPCS Combination Complete—Wireless Revolution Just Beginning* (May 1, 2013), <http://newsroom.t-mobile.com/news/t-mobile-and-metropcs-combination-complete--wireless-revolution-just-beginning.htm> (last visited Mar. 6, 2015).; AT&T Press Release, *AT&T Completes Acquisition of Leap Wireless* (Mar. 13, 2014), [http://about.att.com/story/att\\_completes\\_acquisition\\_of\\_leap\\_wireless.html](http://about.att.com/story/att_completes_acquisition_of_leap_wireless.html) (last visited Mar. 6, 2015).; Sprint Press Release, *Sprint Completes Acquisition of Clearwire* (July 9, 2013), <http://newsroom.sprint.com/news-releases/sprint-completes-acquisition-of-clearwire.htm> (last visited Mar. 6, 2015).; Atlantic Tele-  
Network Press Release, *Atlantic Tele-Network Announces Completion of Sale of U.S. Retail Wireless Business to AT&T* (Sept. 20, 2013), <http://ir.atni.com/releasedetail.cfm?ReleaseID=792096> (last visited Mar. 6, 2015).

<sup>24</sup> See *Grading the Top U.S. Wireless Carriers in the Second Quarter of 2014*, FierceWireless.com (Aug. 8, 2014), <http://www.fiercewireless.com/special-reports/grading-top-us-wireless-carriers-second-quarter-2014> (last visited Mar. 6, 2015).

## APPENDIX C: SECTION 2

# Tribal and other online payday loan contracts

This appendix provides data on how frequently pre-dispute arbitration clauses and various features of pre-dispute arbitration clauses were included in a non-random sample of contracts for tribal and other online payday loans.

## Sample

The sample consists of 29 contracts used by tribal, offshore, and other online payday lenders, obtained from public filings in litigation brought against banks that processed automated clearinghouse transfers on behalf of the lenders.<sup>25</sup> The contracts were from 15 tribal payday lenders, four offshore payday lenders, and ten onshore, non-tribal payday lenders.

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<sup>25</sup> The contracts were obtained from the following cases: *Achey v. BMO Harris Bank, N.A.*, No. 1:13-cv-07675 (N.D. Ill. filed Oct. 25, 2013); *Booth v. BMO Harris Bank, N.A.*, No. 2:13-cv-05968-RBS (E.D. Pa. filed Oct. 11, 2013); *Dillon v. BMO Harris Bank, N.A.*, No. 1:13-cv-00897-CCE-LPA (M.D.N.C. filed Oct. 8, 2013); *Elder v. BMO Harris Bank, N.A.*, No. 8:13-cv-03043-JFM (D. Md. filed Oct. 11, 2013); *Gordon v. U.S. Bancorp.*, No. 0:13-cv-03005-PJS-JJG (D. Minn. filed Nov. 1, 2013); *Graham v. BMO Harris Bank N.A.*, No. 3:13-cv-01460-WWE (D. Conn. filed Oct. 4, 2013); *Gunson v. BMO Harris Bank N.A.*, No. 0:13-cv-62321-RNS (S.D. Fla. filed Oct. 23, 2013); *Hillick v. BMO Harris Bank, N.A.*, No. 5:13-cv-01222-FJS-DEP (N.D.N.Y. filed Sept. 30, 2013); *Labajo v. First International Bank & Trust.*, No. 5:14-cv-00627-VAP-DTB (C.D. Cal. filed Mar. 31, 2014); *Moss v. BMO Harris Bank, N.A.*, No. 2:13-cv-05438-JFB-GRB (E.D.N.Y. filed Sept. 30, 2013); *Parm v. BMO Harris Bank, N.A.*, No. 1:13-cv-03326-WBH (N.D. Ga. filed Oct. 4, 2013); *Riley v. BMO Harris Bank, N.A.*, No. 1:13-cv-01677-CKK (D.D.C. filed Oct. 28, 2013).

We collected the contracts from court filings (often, although not exclusively, as attachments to petitions to compel arbitration).<sup>26</sup> We limited the sample to one contract per lender, and used the most recent version available in the files. The dates on the contracts ranged from January 25, 2011, through December 12, 2013, with 22 of the 29 contracts dated sometime in 2013.

We have no reason to believe that the sample is representative of all tribal, offshore, or other online payday loan contracts; indeed, the fact that the contracts were the subject of litigation may itself be an indicator that the sample is not representative. Moreover, the range of dates on the contract is such that we may not have the most recent version of the contracts available to study. Nonetheless, the sample provides better data on the use and features of arbitration clauses in these contracts than otherwise is available from public sources and more systematic information than is provided by anecdotal reports about individual contracts.

## Clause incidence

Of the 29 contracts in our sample, 25 (86.2%) included arbitration clauses while four (13.8%) did not.<sup>27</sup> These results appear in Figure 1. The four agreements without arbitration clauses all were from tribal payday lenders. Those agreements provided for a two-stage dispute resolution process. If a consumer has a dispute with the tribal payday lender, the consumer first may petition the lender’s management. If the consumer is not satisfied with the resolution from management, the consumer may seek review by the tribal council. The clause asserts that the

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<sup>26</sup> Not all of the payday loan contracts included arbitration clauses; some contracts were attached to filings in the case file other than petitions to compel arbitration. We were able to find contracts for almost all of the payday loans to which the named plaintiffs in the cases were alleged to be parties.

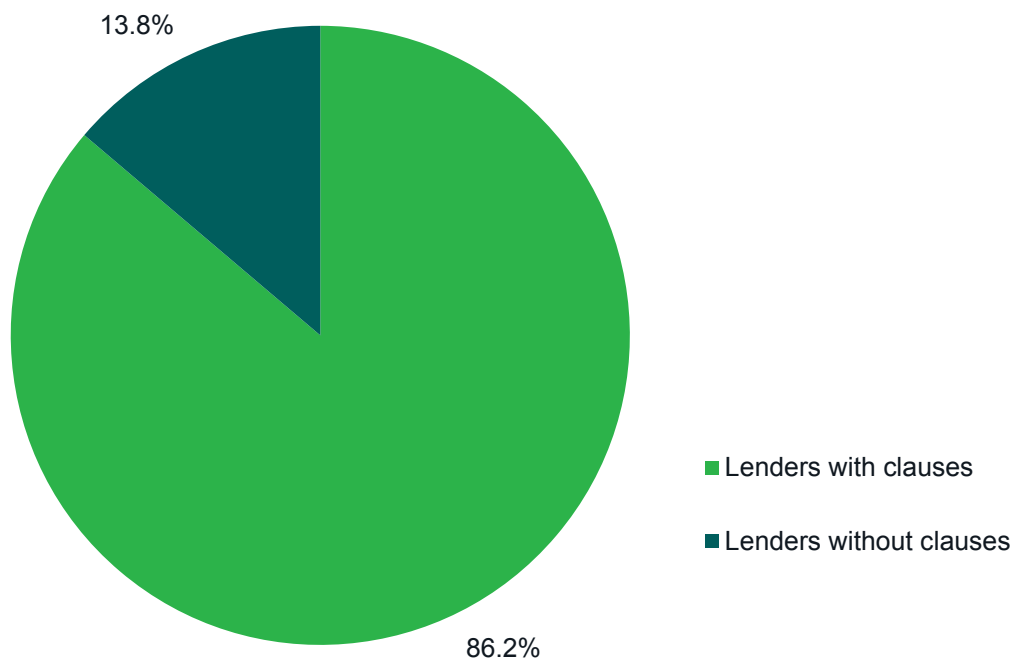
<sup>27</sup> In coding the contracts as including arbitration clauses, we followed the characterization of the dispute resolution process in the clause itself. If the clause described the process as arbitration we treated it as such for purposes of our analysis. In at least one case, however, there is at least an argument that a process described by the clause as “arbitration” was not in fact arbitration as a matter of arbitration law. One arbitration clause in a tribal payday loan contract provided for the arbitrator to be the “the Tribal Regulatory Agent duly appointed by the Tribal Council to regulate Licensed Lenders under Tribal Law.” If the Tribal Regulatory Agent is insufficiently independent or neutral, the process established by the clause might not constitute arbitration. *See Cheng-Canindin v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867, 873 (Cal. Ct. App. 1996) (“All of this authority confirms our strong view that a third party decision maker and some degree of impartiality must exist for a dispute resolution mechanism to constitute arbitration.”).



tribe is not waiving sovereign immunity in establishing this dispute resolution process and that any recourse is within the “sovereign discretion” of the tribe.<sup>28</sup>

We have no market share data for these payday lenders and so only summarize the use of arbitration clauses by number of lenders, not by market share.<sup>29</sup>

**FIGURE 1:** CLAUSE INCIDENCE IN TRIBAL AND OTHER ONLINE PAYDAY LOAN CONTRACTS, AS A PERCENTAGE OF LENDERS, 2011–2013



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<sup>28</sup> The clauses did not describe the applicable dispute resolution process as arbitration, and the courts considering the clauses in litigation did not enforce them as arbitration clauses.

<sup>29</sup> For an alternative but dated listing of online payday lenders that use arbitration clauses, *see* Affidavit of Colin E. Flora ex. 61, *in Edwards v. Geneva-Roth Capital, Inc.*, No. 49C01-1003-PL-013084 (Ind. Cir. Ct. Sept. 27, 2010) (listing 60 online payday loan contracts with arbitration clauses).

## Clause features

The tables that follow report data on the extent to which the 25 tribal and other online payday loan arbitration clauses in the sample included the various features described in Section 2 of this report:

- 68.0% of the arbitration clauses permitted consumers to opt out of the arbitration clause, and 40.0% carved out small claims from any obligation to arbitrate;
- All of the tribal and other online payday loan arbitration clauses included no-class-arbitration provisions; only three (12.0%) used anti-severability provisions under which the entire arbitration clause would be invalidated if the no-class-arbitration provision was held unenforceable;
- Only one (4.0%) included any damages limitation or confidentiality provision, and none included any time limits for filing claims or arbitral appeals provisions. Three (12.0%) of the clauses used a contingent minimum recovery provision;
- The majority of the clauses (68.0%) provided for the AAA to be the sole or one of several administrators. Almost as many (60.0%) specified JAMS as one of several administrators, while a handful (16.0%) named NAF as the sole administrator, even though NAF no longer administers consumer arbitrations;
- Most of the clauses (88.0%) expressly delegated decisions on the enforceability of the arbitration clause to the arbitrator;
- Two clauses (8.0%) specified that any hearing would take place in Belize, although the clauses permitted the consumer to participate by telephone and stated that the lender would cover the costs of the telephone call.<sup>30</sup> Most of the clauses provided either that the hearing would take place in the state or county where the consumer lived (52.0%) or in a location reasonably convenient for the consumer (32.0%);
- All of the tribal and other online payday loan arbitration clauses provided that the company would either advance (56.0%) or pay (44.0%) some or all of the consumer's arbitration costs. Most (76.0%) permitted the arbitrator to reallocate a prevailing

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<sup>30</sup> At least one court has enforced a payday loan arbitration clause specifying Belize as the hearing location, although the party seeking to avoid arbitration in the case did not challenge the location provision, arguing only (and unsuccessfully) that a third party could not avail itself of the arbitration provision. *See Elder v. BMO Harris Bank*, No. CIV. JFM-13-3043, 2014 WL 1429334, at \*1 (D. Md. Apr. 11, 2014).

consumer’s arbitration costs to the company in the award, and a few (16.0%) precluded the arbitrator from reallocating a prevailing company’s arbitration costs to the consumer in the award; and

- All of the clauses disclosed that agreeing to arbitration would preclude the consumer from participating in a class action in court, and almost all (96.0%) disclosed that agreeing to arbitration would waive the consumer’s right to a jury trial.

**TABLE 1: VARIOUS FEATURES IN TRIBAL AND OTHER ONLINE PAYDAY LOAN ARBITRATION CLAUSES**

	# of contracts with feature
Permitting opt-outs from arbitration	17 (68.0%)
Small claims carve-out	10 (40.0%)
No class arbitration	25 (100.0%)
Anti-severability provision	3 (12.0%)
Damages limitation	1 (4.0%)
Time limits for filing claims	0 (0.0%)
Confidentiality	1 (4.0%)
Contingent minimum recovery provision	3 (12.0%)
Arbitral appeal provision	0 (0.0%)

**TABLE 2: ADMINISTRATOR SPECIFIED IN TRIBAL AND OTHER ONLINE PAYDAY LOAN ARBITRATION CLAUSES**

	# of contracts
<b>Sole administrator</b>	
AAA	2 (8.0%)
JAMS	0 (0.0%)
NAF	4 (16.0%)
Other <sup>31</sup>	3 (12.0%)
<b>Sole or one of several administrators</b>	
AAA <sup>32</sup>	17 (68.0%)
JAMS	15 (60.0%)
NAF	4 (16.0%)
Other <sup>33</sup>	4 (16.0%)

<sup>31</sup> Two clauses specified the International Chamber of Commerce and one specified “the Tribal Regulatory Agent duly appointed by the Tribal Council to regulate Licensed Lenders under Tribal Law.” The ICC is a highly reputable arbitration administrator, but its fee structure is designed for international commercial arbitrations, not consumer arbitrations. *See Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998) (“[T]he excessive cost factor that is necessarily entailed in arbitrating before the ICC is unreasonable and surely serves to deter the individual consumer from invoking the process . . .”).

<sup>32</sup> One clause specified either the AAA or JAMS, but elsewhere in the agreement stated that the arbitration shall be conducted by the “Cheyenne River Sioux Tribe by an authorized representative.”

<sup>33</sup> Two clauses specified the International Chamber of Commerce, and one specified “the Tribal Regulatory Agent duly appointed by the Tribal Council to regulate Licensed Lenders under Tribal Law,” and one specified “any established nationally, regionally or locally recognized arbitration organization.”

**TABLE 3:** DELEGATION PROVISIONS IN TRIBAL AND OTHER ONLINE PAYDAY LOAN ARBITRATION CLAUSES

	# of contracts
Delegation	22 (88.0%)
Class exception	3 (12.0%)
Anti-delegation	0 (0.0%)
None	0 (0.0%)

**TABLE 4:** HEARING LOCATION SPECIFIED IN TRIBAL AND OTHER ONLINE PAYDAY LOAN ARBITRATION CLAUSES

	# of contracts
Federal judicial district of consumer's residence	0 (0.0%)
Consumer's state or county	13 (52.0%)
Reasonably convenient location for consumer	8 (32.0%)
Specific location <sup>34</sup>	2 (8.0%)
None	0 (0.0%)

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<sup>34</sup> These two clauses provided for any arbitration hearing to take place in Belize.

**TABLE 5: ARBITRATION COST AND ATTORNEYS' FEE PROVISIONS IN TRIBAL AND OTHER ONLINE PAYDAY LOAN ARBITRATION CLAUSES**

	# of contracts
<b>Provisions addressing the initial payment of arbitration costs</b>	
Company will pay some or all fees	11 (44.0%)
Company will advance some or all fees	14 (56.0%)
Company will consider advancing or paying some or all fees	0 (0.0%)
<b>Provisions addressing the allocation of costs in awards</b>	
Permits shifting company fees to consumer	13 (52.0%)
Bars shifting company fees to consumer	4 (16.0%)
Permits shifting consumer fees to company	19 (76.0%)
<b>Provisions addressing the award of attorneys' fees</b>	
Parties bear own attorneys' fees	0 (0.0%)
Attorneys' fees to prevailing party	2 (8.0%)
Attorneys' fees to prevailing consumer	4 (16.0%)

**TABLE 6: DISCLOSURES IN TRIBAL AND OTHER ONLINE PAYDAY LOAN ARBITRATION CLAUSES**

	# of contracts
No jury trial	24 (96.0%)
No class actions in court	25 (100.0%)
Disclosure of all four differences	14 (56.0%)
No disclosure of differences	0 (0.0%)

## APPENDIX D: SECTION 3

# Survey questionnaire (English)<sup>35</sup>

General Instructions, to be read to each respondent:

Hello, my name is NAME. I work for ICF International, which is helping the Consumer Financial Protection Bureau gather information that will help the government understand how financial companies interact with consumers.

***IF NECESSARY: The Consumer Financial Protection Bureau is an agency of the Federal government whose role is to make markets for consumer financial products and services work for Americans — whether they are applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products.***

Your household was randomly selected to participate in this survey. The survey requires that we randomly select an adult from your household. I need to speak to the person currently living in your household who is 18 or older and had the most recent birthday. Are you that person? IF NECESSARY: I'm not asking that you identify the youngest adult, but instead the adult whose birthday was most recent — this could be you. There's no need to tell us what the actual birthday is.

***[If respondent is not the adult with the most recent birthday]*** Could you please pass the phone to the person currently living in your household who is 18 or older and had the most recent birthday? IF NECESSARY: I'm not asking that you identify the youngest adult, but instead the adult whose birthday was most recent —this could be you. There is no need to tell us what the actual birthday is.

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<sup>35</sup> The survey was also translated into Spanish.

[*Once adult is identified and on phone*] Hello, my name is NAME. I work for ICF International, which is helping the Consumer Financial Protection Bureau gather information that will help the government understand how financial companies interact with consumers. Your household was randomly selected to participate in this survey.

- A. *Have you made a cash purchase of over ten dollars in the last week? [Yes, no, don't know, refuse]*
- B. *Have you used a gift card or gift certificate in the last year? [Yes, no, don't know, refuse]*
- C. *Do you have a checking account for your personal use? [Yes, no, don't know, refuse]*

1. Do you have a credit card for your personal use? Do not include debit cards, prepaid cards, or cards used mostly for business purposes. Also, do not include cards that can only be used at one store. [Yes, no, don't know, refuse]

Your participation in this survey is voluntary and everything you say will be kept private except where required by law. Your personal information will not be given to the Consumer Financial Protection Bureau or any other party. This study has been approved by the Federal government's Office of Management and Budget under OMB control number 3170-0046.

You do not have to answer any question you do not want to, and you can end the interview at any time. If you don't know the answer to any question, you can say that you don't know.

This call may be monitored or recorded for quality assurance purposes. If you have any questions about the survey, please call [] or visit <http://www.consumerfinance.gov/national-survey-regarding-consumer-financial-products/>.

[*If Q1 ≠ "Yes," skip to Pre19*]

I'm going to ask you some questions about your credit card use. If you have more than one credit card, please think only about the card that you use most often for your *personal use*.

2. Were you involved in the decision to get this credit card? [Yes, no, don't know, refuse]

[*If Q2 ≠ "Yes," skip to Q7*]

3. Did you compare the terms of this card against any other credit card before you got it? This could mean comparison shopping against other new cards, or just comparing the new card to one you already had. [Yes, no, don't know, refuse]



4. What, if any, features were factors in your decision to get this card? ***[After consumer stops listing answers]:*** Are there any other features that were factors in your decision to get this card? ***[Interviewer will continue probing until no other reasons are stated.]***
5. I am going to list nine different features of credit cards. This list may include features you have already mentioned because we use the same list for everyone that we call. For each of the features I read, please tell me if it was a factor in your decision to get this card.

***(Options randomized)***

- 5.1. The interest rate, including any promotional or introductory rate; [Yes, no, don't know, refuse]
- 5.2. The credit card company's reputation regarding customer service; [Yes, no, don't know, refuse]
- 5.3. The method for resolving disputes with the bank when customer service won't fix a problem; [Yes, no, don't know, refuse]
- 5.4. Rewards, including cash-back rewards; [Yes, no, don't know, refuse]
- 5.5. The card's credit limit; [Yes, no, don't know, refuse]
- 5.6. Fees, including annual fees; [Yes, no, don't know, refuse]
- 5.7. Convenience in applying; [Yes, no, don't know, refuse]
- 5.8. General reputation of the card or credit card company; [Yes, no, don't know, refuse]
- 5.9. Whether the card is widely accepted by stores and restaurants. [Yes, no, don't know, refuse]
6. For each of the features that you said were factors in your decision to get this card, I am going to ask you to tell me how important each was in your decision: "Very important"; "Important"; or "Not very important." ***[Interviewer lists each factor previously identified by consumer in response to Q5 and solicits answer.]***
7. I am going to describe a situation to you, and then ask how you would respond to that situation. Imagine that you looked at your credit card statement and noticed that your credit card company had been charging you a fee for a service relating to your account that you are sure you did not sign up for. They may have been charging you this fee for a while now. You called the customer service line, but the credit card company refused to do anything about the fees.

Do you understand the situation I am describing? ***[If not, repeat the scenario, beginning with "[Y]ou look at your monthly statement . . ."]***

- 7.1 What would you do next in this situation? ***[After the consumer stops listing answers]:*** Would you do anything else? ***[Interviewer will continue probing until no other actions are stated. If the participant asks, tell him or her to assume that the credit card company continued to refuse to do anything about the fees.]***

8. Again, think about the credit card you use most often for your personal use. What is the name of the bank, credit union, or company to which you make payments for this card? You can check your actual card if you'd like — its name may appear on the back of your card if it has other logos on the front. [Company name, don't know, refuse]

**[Interviewer instruction: If the respondent answers "Visa" or "MasterCard":** Does the card have any other company names on it?]

9. For the rest of this survey, when I refer to "the bank," I mean the bank or credit union to whom you make payments for this credit card. O.K.?

If the bank were to act in a way that you believed violated the law, would you have the right to sue this bank in court, meaning that you are asking for a judge or jury to decide your claim? Would you say yes, no, or I don't know? [or refuse]

10. **[If Q9 = "No", i.e., respondents who do not believe they have the right to sue their bank]**

10.1. Why don't you have the right to sue this bank in court?

10.2. If you had a legal dispute with this bank, would you have the right to bring your dispute to a decision maker other than a judge or a jury? Would you say yes, no, or I don't know? [or refuse?]

10.3. **[If Q10.2 = Yes]** What other decision maker could you bring your dispute to?

11. **[If Q9 = "Yes", i.e., respondents who believe they have the right to sue their bank]**

11.1. Do you have the right to sue the bank in small claims court, in "regular court," or in either?

11.2. If you did sue the bank in court, could the bank require that someone outside of court decide the case, even if you wanted to stay in court and have a judge or a jury decide the case? Would you say yes, no, or I don't know? [or refuse]

11.3. **[If 11.2 = "Yes"]** Why could the bank require you to have someone outside of court decide the case?

11.4. **[If 11.2 = "Yes"]** If the bank did require that someone outside of court decide the case, who could that be?

12. Have you ever heard of a class action lawsuit? [Yes, no, don't know, refuse]

12.1. **[If Q12 = "Yes"]** Do you have the right to participate in class action lawsuits against the bank to whom you make your credit card payments? Would you say yes, no, or I don't know? [or refuse]

12.2. **[If Q12 = "Yes"]** What does it mean to participate in class action lawsuits? **[After the consumer stops answering]:** Is there anything else you know about class action lawsuits? **[Interviewer will continue probing until no other answers are provided.]**

13. Have you ever heard of arbitration as a way of resolving disputes? [Yes, no, don't know, refuse]

- 13.1. *[If Q13 = “Yes”]* What does it mean to participate in arbitration? *[After the consumer stops answering]:* Is there anything else you know about arbitration? *[Interviewer will continue probing until no other answers are provided.]*
14. *[If Q13 = “Yes”]* Think again of the credit card that you use most frequently. Does your account agreement for this credit card include any requirements related to arbitration? Would you say yes, no, or I don’t know? [or refuse]
- 14.1. *[Q14 = “No”]* At any point, did your account agreement for this credit card include any requirements related to arbitration?
- 14.2. *[Q14 or Q14.1 = “Yes”]* Were you ever given the opportunity to opt out of arbitration requirements in your agreement? Would you say yes, no, or I don’t know? [or refuse]
- 14.3. *[If Q14.2 = “Yes”]* Did you opt out of these arbitration requirements? Would you say yes, no, or I don’t know? [or refuse]
15. *[If Q13 = “Yes”]* Have you, your spouse, or any close friends or family ever participated in an arbitration? Would you say yes, no, or I don’t know? [or refuse]
16. *[If Q12 = “Yes”]* Have you, your spouse, or any close friends or family ever participated in a class action lawsuit? Would you say yes, no, or I don’t know? [or refuse]
17. Have you, your spouse, or any close friends or family ever participated in a small claims suit? Would you say yes, no, or I don’t know? [or refuse]
18. Have you, your spouse, or any close friends or family ever participated in a court case other than a small claims suit? Would you say yes, no, or I don’t know? [or refuse]

[Pre19] Thank you. I just have a few more questions to ask you, but they will only be used for statistical analysis.

19. What was the highest grade or year in school that you completed? [Interviewer does not read the choices]
- Didn’t graduate from high school
  - Received GED (high school equivalency)
  - Graduated from high school
  - Technical/vocational schooling beyond high school
  - Attended some college (but no degree)
  - Associate’s degree (two-year college degree)
  - Four-year college degree

- Graduate or professional school beyond four-year degree
  - REFUSED
20. Are you Hispanic or Latino?
- No, not Hispanic or Latino
  - Yes, Hispanic or Latino
  - REFUSED
21. What is your race? [IF NEEDED: You may choose more than one.] [Mark all that apply]:
- American Indian or Alaska Native
  - Asian
  - Black or African American
  - Native Hawaiian or other Pacific Islander
  - White
  - REFUSED
22. How old are you? [Interviewer stop reading response options when respondent selects an answer]
- 18 to 24 years old
  - 25 to 34 years old
  - 35 to 44 years old
  - 45 to 54 years old
  - 55 to 64 years old
  - 65 or older
  - REFUSED
23. Please stop me when I get to the category that includes your total household income from all sources in (YEAR) before taxes.

- Below \$25,000;
- \$25,000 to \$49,999;
- \$50,000 to \$74,999;
- \$75,000 to \$100,000;
- Over \$100,000;
- Don't know;
- REFUSED

24. Interviewer record gender [*If necessary, the interviewer may ask: "I'm sorry to ask—are you male or female?"*]:

- Male
- Female
- REFUSED

25. That's all the questions that I have. Do you have any comments about our survey or suggestions for improving it?

## APPENDIX E: SECTION 3

# Survey methodology

## Data collection plan

To gather our sample, we used a list-assisted random digit dialing telephone sample, seeking a 70% to 30% split between households with landlines and cellphone-only households (the former group including both landline-only households and “dual-users,” who use both cell and landline phones).<sup>36</sup>

Telephone numbers are ten digits long (AAA-EEE-XXXX), where the first three numbers are the area code, the second three are the exchange, and the last four digits are the number within the exchange. The area code, three-digit exchange numbers, and the first two digits of the four-digit suffix specify a “100-bank” containing 100 telephone numbers. In collecting our landline sample, our contractors sampled telephone numbers (using randomly-generated two-digit strings to complete the telephone number) from 100-banks that had been identified as

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<sup>36</sup> This ratio represented a balance between sample representation and cost, as cell phone interviews are significantly more expensive than traditional landline interviewing (there are more regulatory restrictions on dialing of cell phone numbers, which also generally feature a higher rate of refusals as compared to landlines).

The most recent data published from the National Health Interview Survey in December 2012 shows that 35.8% of **American homes relied solely on cellphones. Further, 15.9% of American homes received “all or almost all” calls on cellphones** despite having a landline telephone.

Demographic differences may alter these numbers, though. For example, 60.1% of adults aged 25–29 lived in households with only cellular telephones. 58.2% of adults renting their home relied solely on cellphones – twice the rate of adults owning their homes, 23.2%. 75.9% of adults living only with unrelated adult roommates were in cellphone-only households. Blumberg, Stephen J. and Julian V. Luke. *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2012*. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics. Released December 19, 2012, <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201212.PDF> (last visited Mar. 6, 2015).

containing at least one listed residential number. The cellphone sample of telephone numbers were drawn separately from telephone exchanges dedicated to cellphones.

We used a variety of methods to maximize our response rates. Calls were conducted in both English and Spanish.<sup>37</sup> Where possible, we sent those with a landline number we planned to call a “pre-notification” letter in both English and Spanish, which encouraged participation by stressing the value of the survey and how the results would be used. The contractor’s interviewers varied their call attempts across the days of the week (including weekends) and throughout the day (including weeknights). Interviewers attempted to contact potential respondents at least seven times, to ensure that the survey did not just capture recipients that were easiest to contact. When contact was made with an answering machine or voicemail, the interviewers left at least two messages. The contractor set its telephone dialing system to display a toll-free number that respondents could call back, in the event that they were screening their calls.

Once contact was made with landline telephone numbers, one adult in the household was chosen to participate at random.<sup>38</sup> We did not randomize participation with cellphone recipients, as the individual answering the phone was more likely to be the only user of the phone.<sup>39</sup>

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<sup>37</sup> In 2010, the U.S. Census released a report on language use in the United States in 2007. United States Census Bureau, *Language Use in the United States: 2007* (issued April 2010), <http://www.census.gov/prod/2010pubs/acs-12.pdf> (last visited Mar. 6, 2015). United States Census Bureau. Released April 2010. The study found that 80% of the population 5 years and older spoke only English at home. Regarding the remaining 20%, the population that spoke a language other than English at home, three-fifths spoke Spanish or Spanish Creole (defined as including Spanish, Spanish Creole, and Ladino). The remaining population was in a group of diffuse categories: “Other Indo-European languages,” “Asian and Pacific Island languages,” or “Other languages.”

<sup>38</sup> The contractor used the “most recent birthday” method, which asks for the credit-card-holding adult within the sampled household who, at the time of respondent selection, had the most recent birthday (the callers did not request the date of the actual birthday). Only that randomly-selected person was eligible to participate in the survey.

<sup>39</sup> When an interviewer contacted respondents via cellphone, the interviewer asked after identifying himself: “Are you currently driving or doing anything else that would make it unsafe for you to be on the phone?” If necessary, the interviewer was able to schedule follow-up calls at times that would be more convenient for the recipient.

The contractor collected data electronically, via computer-assisted telephone interviewing software. The software helped provide uniform question sequencing, answer validation, and measuring the length of each interview (11.8 minutes, on average), as well as question skipping and randomization, where appropriate.

After interviewers completed the substantive questions with respondents, which consisted of a mix of open and closed-ended questions, interviewers asked respondents seven demographic questions. If a respondent did not provide an affirmative response to the first question — which asked whether the respondent had a credit card for personal use — the interviewer skipped to the demographic questions. This allowed us to weight the sample results to ensure a representative sample of the overall population.<sup>40</sup> We also compared publicly-available data sources describing the general market share of credit card issuers to respondents' self-identified most frequently used credit card to verify the representativeness of our sample. We provide additional detail about our weighting and non-response analysis in Appendix F.

## Non-substantive modification

While our proposed survey instrument and most of our methodology were publicly disclosed and made subject to iterative rounds of public comment beginning in June 2013, in late November 2014 we submitted an additional request to OMB to make a non-material, non-substantive change. We proposed adding three questions to the beginning of the survey, with the aim of improving respondent engagement with the survey. To emphasize the non-substantive nature of the request, we explained that we would not retain data relating to respondents' answers to the three new questions.

The survey's original first question was:

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<sup>40</sup> Mercator similarly weighted its credit card survey results against “the demographic structure of U.S. population in the statistical analysis based on geographic location, gender, income, household size, and age structure.” Ken Paterson, *U.S. Credit Cardholders: Waiting for a Rebound*, Mercator Advisory Group (Sept. 14, 2011) (Customer Monitor Survey Series, Insight Summary Report Vol. 3, Report 1). Mercator noted that the lowest economic strata of the U.S. population may have been under-represented. “On the other hand, the respondent base is certainly representative of the broad economic profile of consumers in the U.S. who have banking relationships.”



*Do you have a credit card for your personal use? Do not include debit cards, prepaid cards, or cards used mostly for business purposes. Also, do not include cards that can only be used at one store. [Yes, no, don't know, refuse]*

After fielding the survey for approximately four weeks, over 55% of the respondents stated that they did not have credit cards that they used for personal use. That was nearly twice the rate we expected, given recent studies of credit card usage by the Federal Reserve Bank of Boston and Gallup.<sup>41</sup>

Our contractor suggested that we add questions to the beginning of the survey to account for the possibility that respondents were answering “no” to the first question as a way of ending their participation in the survey in a non-confrontational manner. The new questions would de-emphasize the importance of the credit card question and its acting as a gateway for further participation in the survey:

- A. Have you made a cash purchase of over ten dollars in the last week? [Yes, no, don't know, refuse]*
- B. Have you used a gift card or gift certificate in the last year? [Yes, no, don't know, refuse]*
- C. Do you have a checking account for your personal use? [Yes, no, don't know, refuse]*

We reasoned that each of these questions should pose little burden to respondents, as they draw on the respondents’ personal knowledge of recent events. The three proposed questions involve minimal privacy issues, due to their general nature. And, to emphasize the non-substantive nature of these new questions, we instructed our contractors not to retain respondents’ answers to these three questions after they aggregated the data. OMB granted approval for the modification shortly after our submission.

After making the change, the percentage of consumers that reported having a credit card increased by less than 5%.

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<sup>41</sup> See, e.g., Tamara E. Holmes, *Credit card ownership statistics*, CreditCards.com, <http://www.creditcards.com/credit-card-news/ownership-statistics-charts-1276.php> (discussing both sources) (last visited Mar. 6, 2015).

Separate and apart from the additional questions, in order to minimize costs and in the interest of completing the survey in a timely manner, we stopped gathering demographic data from consumers that responded that they did **not** have credit cards after 557 such respondents. Accordingly, when we weighted the overall set of consumers that we reached out to, the demographics of additional “no-card” consumers were extrapolated from the sample of 557 such no-card holders we had already obtained.

## Response rates calculation

We calculated the response rate for the telephone survey using the American Association of Public Opinion Research (“AAPOR”) Response Rate 4 formula. In so doing, we assigned telephone numbers to the AAPOR-defined disposition categories,<sup>42</sup> based on the full attempt history of the record, including meeting specific milestones that indicated eligibility checkpoints. Table 7, below, shows the various disposition categories and definitions.

**TABLE 7: AAPOR CALL DISPOSITION CATEGORIES**

Category	Disposition
I	Completed interview
P	Partially completed interview
R	Refusals and breakoffs – eligible respondents who refused to complete the survey or started the survey but ended before enough was completed for it to be considered a partial interview
NC	Non-contact – respondents who were identified as eligible but were unable to be contacted during the duration of the fielding
O	Other eligible – eligible respondents but a language barrier or impairment prevented completion of the interview
UH	Unknown if household – phone numbers for which it was not possible to determine household status

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<sup>42</sup> The American Association for Public Opinion Research. 2008. *Standard Definitions: Final Dispositions of Case Codes and Outcome Rates for Surveys*. 5th edition. Lenexa, Kansas: AAPOR. See pgs. 12–17.

UO	Unknown other – phone numbers confirmed to be assigned to households, but it was impossible to determine whether an eligible adult lived there
XH	Ineligible non-household – phone numbers that are not assigned to households, such as non-working numbers and business numbers
XO	Ineligible household – for example, individuals without credit cards that were contacted after we ceased collecting data from non-credit card holders

We then calculated response rates for landline and cellphone participants using the AAPOR RR4 formula. RR4 represents the percentage of completions among all eligible records in the sample, including records known to be eligible and an estimate of eligibility among records whose status was unknown. The formula is:

$$RR4 = \frac{I + P}{(I + P) + (R + NC + O) + e(UH + UO)}$$

*e* in the formula represents the estimated proportion of eligible records, where actual eligibility status could not be determined. It is computed as the percent of eligible records divided by the sum of known eligible and ineligible records.

$$e = \frac{I + P + R + NC + O}{I + P + R + NC + O + XH + XO}$$

Using the same disposition categories, we similarly calculated the survey's cooperation rates for landline and cellphone participants using AAPOR's COOP2. The rate is a measure of the willingness of eligible respondents to complete the survey once contacted. The formula is:

$$COOP2 = \frac{I + P}{I + P + R + O}$$

Table 8, below, displays the disposition categories, response rates, and cooperation rates for landline calls, cellphone calls, and the overall survey.

**TABLE 8: AAPOR DISPOSITION CATEGORY DATA**

Disposition category abbreviation	Disposition category	Landline calls	Cellphone calls
I	Completed interview	860	626
P	Partially completed interview	30	59
R	Refusals and breakoffs	1,220	396
NC	Non-contact	420	12
O	Other eligible	39	2
UH	Unknown if household	18,406	7,575
UO	Unknown other	13,611	12,874
XH	Ineligible non-household	87,917	9,112
XO	Ineligible household	247	661
E	Estimated eligible cases	3,476	3,155
RR4	Response rate	25.6%	21.7%
COOP2	Cooperation rate	41.4%	63.3%

We calculated an overall response rate by dividing the combined number of completed and partially completed interviews (I+P) by the combined number of eligible cases, (E), resulting in an overall response rate of 23.8%.

We similarly calculated an overall cooperation rate by dividing the combined number of completed interviews (I+P) by the total number of confirmed eligible cases (I+P+R+NC+O), resulting in an overall rate of 43.0%.

## Areas of potential improvement

As described in our submission to OMB, we asked each respondent for comments on the survey, including suggestions for improvements. Approximately 10% of survey participants responded (including respondents that did not report having credit cards).

Responses ranged from simple and supportive (*e.g.*, “**Good idea,**” “**I think it’s a good survey,**” “**You were just fine**”) to flat rejection of the inquiry (*e.g.*, “**The survey is a waste of taxpayers’ money. It is redundant**”; “**Didn’t think these surveys are worth fooling with, but I guess I could be wrong. Maybe I’m too old.**”).

A number of respondents commented on the length of the survey (which took, on average, 11.8 minutes to complete). In the pre-notification letter we stated that the interview would take approximately ten minutes to complete.

Others suggested that we could have been clearer about why we were conducting the survey (*e.g.*, “**Why are you doing the survey?**”; “**A better understanding of what the survey is about**”; “**More knowledge**”). Unfortunately, the particular inquiries we focused on with the survey required that we give minimal background information to the survey participants. In that regard, because we wanted to understand consumers’ awareness of arbitration clauses and unaided default assumptions about dispute resolution rights, it was important that we not prime consumers by framing the discussion as relating to dispute resolution or arbitration.

Other respondents suggested that we not call on weekends or late in the day.

One commenter suggested that we number the choices when listing closed-listed questions. That similarly seems like a reasonable request to consider.

## APPENDIX F: SECTION 3

# Survey weighting and non-response analysis

## Weighting methodology

The CFPB Arbitration Survey used a general population sample of adults aged 18 years or older. As previously discussed, the general population sample was a cellphone and landline dual-frame sample and within the landline frame the adult with the most recent birthday was selected from all eligible adults in the household.

Respondents were classified as credit card holders and non-credit card holders. The credit card holders were administered the full survey. A subsample of non-credit card holders was administered demographic questions in order to weight to the population.

We weighted the data in three steps:

1. We developed base weights;
2. We adjusted for nonresponse during the survey; and
3. Poststratification, we adjusted the sample to match the population.

## Base weights

Both the landline and cell samples were stratified by Census region. The telephone selection weight was computed as the inverse of the probability of selection, or the total number of records on the frame divided by the total number of records selected. To reduce weight variability between the landline and cell samples, the base weights were scaled to the number of individuals where credit card usage was collected for each sample.

## Non-response adjustment

A non-response adjustment was applied to the scaled weights. This factor was designed to adjust for the failure to obtain interviews as well as subsampling of respondents who did not own credit cards. This adjustment factor was computed independently for each sample frame by census region and credit card usage, and is equal to the sum of weights for all respondents where credit card usage was collected divided by the sum of the weights for completed interviews.

## Poststratification and population adjustments

As a final step, we adjust the combined samples to match the population. The population data is based on the American Community Survey 2013 estimates. The weighting is based on an iterative series of ratio adjustments, or ranking. The population totals are based on region, age by gender, education, income, and race/ethnicity.

## Non-response analysis

“Non-response bias” is a term used to describe situations when the propensity to respond to a survey is correlated with survey outcomes — that is, when the overall group of people who respond to the survey differ from the group of people who do not in particular ways that affect answers to survey questions. In such cases, responders and non-responders will be systematically different in ways that can affect survey estimates. The measurement effect due to survey non-response is difficult to quantify since little is known about the non-respondents. In many cases, the only information readily available for the non-respondents is based on the sampling frame. Sampling frames, particularly random digit dial frames, are often limited in information and thus lead to uninformative comparative analysis. The limitations of frame-based information force non-response analysts to seek out other data sources to enhance our understanding of the non-respondents — specifically how they relate to survey respondents in terms of the survey’s substantive results. These methods typically include comparing the survey estimates to benchmark surveys or comparing “difficult-to-survey” respondents versus “easier-to-survey” respondents to detect differences. For this analysis, we examine non-response using three different methods:

- We compared early and late responders to determine whether there are differences in survey estimates between the two groups;
- We compared respondent demographics to benchmark demographics from the 2013 American Community Survey (ACS); and

- We evaluated the distribution of credit cards to independent market share data.

## Early and late responders

Early responders were consumers who responded to the survey on the first few call attempts; late responders were those who responded on later call attempts and therefore required more effort to obtain a completion. When comparing early and late responders in a non-response analysis, the underlying assumption is that, between the two sets of respondents, late respondents are more similar to non-respondents with respect to their distributions on key survey variables than they are to early respondents.

We categorized respondents based on the number of attempts that it took to obtain their participation, one attempt through eight. We calculated the percentages responding “yes” to each question (listed in Tables 9 and 10 for landlines and Tables 11 and 12 for cellphones). The percentages are based on the design weight adjusted for mid-survey terminates. This weight is prior to adjusting for demographics. We conducted a Chi-square test for independence between each attempt and each survey question using the Rao-Scott chi-square statistic.

For landline respondents, only one of the variables evaluated was markedly different: The percentage of respondents reporting that the card’s credit limit was a factor in the decision to obtain the card. However, the difference was not between early and late responders overall. Instead, the difference occurred because the percentage of respondents who responded on attempts 3 or 4 (27.4%) was different from those who responded on attempts 5–8 (54.2%). Those responding on attempts 1 and 2 fall in the middle (35.1 and 42.9%). This difference exists even after accounting for age, gender, educational attainment, and race/ethnicity. Combining attempts 3 through 8 together, the percentage was 36%, similar to attempts 1 and 2. Accordingly, we determined that the difference could have been a random variation, despite the statistically significant result.

For cellphones, three items were significant:

- Question nine, regarding the right to sue the bank in court;
- Question five (a), the closed-ended query regarding interest rate as a factor in card acquisition; and
- Question five (h), also a closed-ended query regarding card acquisition, but regarding the reputation of the card or credit card company.



For Question 9, the distribution was significant because a higher percentage of respondents interviewed on attempt 1 reported that they did not have the right to sue their bank in court (10%) compared to other attempts, which were 2–3%. (After the first attempt, there was no difference in respondents by attempt number.)

For Question 5(a), the difference occurred between attempt two (50% responding yes) and responses from attempts five through eight (70% responding yes). Attempt 1 responses (68%) and responses from attempts three and four (65%) were both closer to attempt responses from attempts 5 through 8. Given the dip was solely related to responses from attempt two, we did not conclude that there was a response pattern correlating to additional call attempts.

Similarly for Question 5(h), the difference occurred between responses to attempt 2 (84% responding yes) and attempts 3 and 4 (65%). Responses to attempt 1 (71%) and attempts 5 through 8 (78%) fell in between. Again, given the up and down by attempt number, we did not conclude that there was a response pattern correlating to additional call attempts.

**TABLE 9: LANDLINE COMPARISONS BY ATTEMPT NUMBER (638 RESPONDENTS)**

	Att. 1	Att. 2	Att. 3 4	Att. 5 8	Chi sq p value
All respondents, n =	224	166	170	78	
Q2. Involved in decision to get card	91.3	94.5	96.9	93.0	0.2137
Q9. Right to sue bank in court					0.7742
Yes	42.2	36.0	40.6	35.9	
No	5.3	8.1	8.6	4.6	
Don't know	52.5	55.9	50.8	59.5	
Q12. Heard of class action lawsuit	85.8	92.4	91.4	85.7	0.2017
Q13. Heard of arbitration	88.0	84.4	88.2	86.5	0.8105
Q17. Participated (family or friends) in small claims suit	19.6	16.4	20.8	25.6	0.2904
Q18. Participated in (family or friends) in court case other than a small claims suit	29.7	30.2	33.9	30.1	0.8730

**TABLE 10: LANDLINE COMPARISONS BY ATTEMPT NUMBER — RESPONDENTS INVOLVED IN DECISION TO ACQUIRE CARD (590 RESPONDENTS)**

	Att. 1	Att. 2	Att. 3 4	Att. 5 8	Chi sq p value
Respondents involved in card decision n =	201	157	162	70	
Q3. Comparison shopping	65.9	71.0	66.1	57.6	0.3874
<b>Factors decision to get this card (closed ended)</b>					
Q5a. Interest rate	55.7	64.2	58.9	72.2	0.1422
Q5b. Reputation	64.0	63.4	52.5	58.1	0.2486
Q5c. Dispute resolution	33.5	31.8	33.9	22.4	0.4484
Q5d. Rewards	66.8	58.6	60.4	59.0	0.5249
Q5e. Credit limit	35.1	42.9	27.4	54.2	0.0034
Q5f. Fees	68.7	68.9	75.8	76.7	0.4037
Q5g. Convenience in applying	64.6	70.7	68.6	73.6	0.5886
Q5h. Reputation of the card or credit card company.	82.3	74.3	74.8	76.4	0.4456
Q5i. Card acceptance	83.6	82.7	80.9	81.3	0.9441

**TABLE 11: CELLPHONE COMPARISONS BY ATTEMPT NUMBER (380 RESPONDENTS)**

	Att. 1	Att. 2	Att. 3 4	Att. 5 8	Chi sq p value
All respondents, n =	121	87	103	69	
Q2. Involved in decision to get card	95.0	91.9	92.1	87.0	0.2814
Q9. Right to sue bank in court					0.0390
Yes	49.3	43.8	44.7	43.2	
No	10.1	2.3	2.0	3.1	
Don't know	40.6	53.9	53.3	53.7	
Q12. Heard of class action lawsuit	85.6	84.6	79.2	80.3	0.5625
Q13. Heard of arbitration	76.5	73.4	73.4	75.7	0.9401
Q17. Participated (family or friends) in small claims suit	24.1	30.2	29.2	21.8	0.7170
Q18. Participated in (family or friends) in court case other than a small claims suit	34.2	30.1	27.8	26.1	0.7868

**TABLE 12: CELLPHONE COMPARISONS BY ATTEMPT NUMBER — RESPONDENTS INVOLVED IN DECISION TO ACQUIRE CARD (348 RESPONDENTS)**

	Att. 1	Att. 2	Att. 3 4	Att. 5 8	Chi sq p value
Respondents involved in card decision, n =	114	80	94	60	
Q3. Comparison shopping	69.7	68.6	62.5	73.1	0.5416
<b>Factors decision to get this card (closed-ended)</b>					
Q5a. Interest rate	67.9	50.2	65.0	70.5	0.0427
Q5b. Reputation	53.9	61.5	56.2	62.8	0.6043
Q5c. Dispute resolution	33.6	40.6	32.0	37.1	0.6703
Q5d. Rewards	50.9	62.0	56.3	66.0	0.2158
Q5e. Credit limit	47.7	42.4	38.0	33.3	0.2677
Q5f. Fees	74.0	67.5	73.2	79.4	0.4811
Q5g. Convenience in applying	67.6	64.9	61.4	66.1	0.8270
Q5h. Reputation of the card or credit card company.	71.3	83.8	64.8	78.0	0.0315
Q5i. Card acceptance	76.3	85.9	75.7	84.7	0.2112

## Demographic review

Large differences between the sample and benchmarks may also indicate differential non-response for population subgroups. In particular, if baseline subgroup representation differs with respect to substantive data, estimates may be biased. Given historical response rates for dual-frame telephone surveys, we expected differences in distributions based on demographics, for which we would adjust using demographic weighting.

For this analysis, we included both credit card holders and non-credit card holders. The demographic distributions were based on the design weight adjusted for partial completions. The weight is prior to adjusting for demographics. The demographic distributions are presented

in Table 13. There were no major deviations from the benchmarks, and the differences were as expected based on RDD sampling.

**TABLE 13: DEMOGRAPHIC DISTRIBUTIONS FOR DUAL-FRAME SAMPLE AND 2013 ACS**

	N	Survey	ACS 2013
<b>Age group</b>			
18 to 24 years old	125	10.8%	13.0%
25 to 34 years old	151	11.0%	17.6%
35 to 44 years old	168	11.9%	16.7%
45 to 54 years old	250	16.3%	18.0%
55 to 64 years old	326	21.6%	16.2%
65+	438	28.3%	18.4%
<b>Gender</b>			
Male	719	49.1%	48.6%
Female	761	50.9%	51.4%
<b>Educational attainment</b>			
Didn't graduate from high school	130	10.2%	13.6%
High school graduate (includes equivalency)	401	29.4%	28.0%
Attended some college/technical or vocational training beyond high school	243	16.0%	23.7%
Associate's degree (two-year college degree)	153	9.7%	7.7%

Four-year college degree	316	19.4%	17.2%
Graduate or professional school beyond four-year degree	264	15.3%	9.8%
<b>Race/ethnicity</b>			
Hispanic	179	13.3%	15.0%
Non-Hispanic white	1001	66.1%	65.6%
Non-Hispanic black	162	12.4%	11.8%
Non-Hispanic other	116	8.2%	7.7%

## Credit card distribution

Finally, because the survey collects information about respondents' credit card issuers, we anticipated that the weighted distribution of respondents' credit cards (cards most frequently used) would be similar to the distribution of outstanding credit card loans (based on 2012 data). At the very least, we believed the comparison would be useful to examine, as large differences between the sample distribution of credit cards (*e.g.*, Chase, Citibank, American Express, Discover) and the independent market share data could indicate bias.

The top 10 credit cards from the survey match the top 10 according to the outstanding loan balances from 2012.<sup>43</sup> The distribution and ranks are fairly consistent between the two distributions.

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<sup>43</sup> Using data from The Nilson Report Issue 1,012 (February 2013).

**TABLE 14: TOP TEN CREDIT CARD ISSUERS**

Issuer	2012 outstanding loan balances (bil.)	Rank, proportion of 2012 outstanding loan balances	Percent of survey respondents that identified card issuers	Rank, respondents that identified card issuers
Chase	\$126.5	1	20%	1
Bank of America	\$103.1	2	16%	3
American Express	\$88.6	3	13%	5
Citibank	\$87.8	4	10%	2
Capital One	\$67.1	5	9%	4
Discover	\$49.6	6	19%	6
Wells Fargo	\$33.6	7	4%	7
U.S. Bank	\$23.1	8	3%	8
USAA	\$15.9	9	2%	9
Barclays	\$14.4	10	3%	10

## APPENDIX G: SECTION 3

# Survey responses regarding credit card selection criteria, survey questions 4 and 5.1 through 5.9

**TABLE 15:** FEATURES THAT FACTORED INTO RESPONDENTS' DECISION TO ACQUIRE THE CREDIT CARDS THEY USE MOST FREQUENTLY FOR PERSONAL USE<sup>44</sup>

Feature	Open ended: yes	Closed list: yes	Closed list: no	Closed list: I don't know
Interest rate	29.2%	61.5%	36.9%	1.4%
Customer service	0.7%	56.0%	41.3%	2.5%
Rewards	35.2%	59.2%	39.1%	1.5%
Credit limit	2.9%	38.7%	59.5%	1.5%
Dispute resolution	0.0%	31.0%	62.1%	6.6%
Fees	9.8%	72.2%	27.0%	0.7%
Reputation	4.4%	73.5%	24.5%	1.8%
Card acceptance	2.4%	79.8%	19.3%	0.8%
Application convenience	8.2%	65.3%	33.3%	1.3%
Other	17.4%	n/a	n/a	n/a

<sup>44</sup> The closed-list percentages may not add to 100% because consumers could decline to answer the question.



## APPENDIX H: SECTION 5

# Methodology

This appendix describes our methodology for reviewing the AAA Case Data, described in Section 5. This supplements a similar discussion in Appendix B of the 2013 Preliminary Results.<sup>45</sup>

## Overview

The AAA provided us with electronic documents from their case management records regarding consumer arbitrations from January 1, 2010, to February 2013.<sup>46</sup> The AAA grouped these.pdf files together in folders by arbitration proceeding. Each folder could contain as few as one document to over 400 documents.<sup>47</sup>

We manually reviewed the documents to identify filings relating to our product markets of interest: credit cards, checking accounts and debit cards, payday loans, GPR prepaid cards, private student loans, and auto purchase loans. In the interest of thoroughness, after publishing the 2013 Preliminary Results, we double-checked records that we had initially determined to fall outside of our four product markets that were discussed in the 2013 Preliminary Results. As described in Section 5.5.1 in limited circumstances we have included records that we had initially passed over but subsequently determined should be included in the discussion. We have corrected our calculations, where appropriate.

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<sup>45</sup> As discussed below, pages 142–148 of the 2013 Preliminary Results, describing our attempt to identify the claim subject matter of disputes, is limited to the findings set out in the 2013 Preliminary Results.

<sup>46</sup> **Contrary to the description in the 2013 Preliminary Results, this data set included records relating to the AAA's class arbitration proceedings.**

<sup>47</sup> In footnote 340 of the 2013 Preliminary Results, we reported that we were unable to access multiple.pdf files due to technical issues. We have since resolved the issue and, where appropriate, corrected our calculations in this report.

## Record coding

As with the 2013 Preliminary Results, our data collection involved three tiers of analysis, performed over multiple rounds of manual review.

- In some cases, we manually recorded objective data points directly from individual documents (the primary data source being the parties' AAA Claim Forms). In such case, our results capture and reflect any errors in the original data.
- We also collected objective data across multiple documents, for example in recording pre-disposition claim amounts, disputed debt amounts, or fee assessments. Relying on documents outside of the single claim form, however, introduces some risk of inconsistency because, other than AAA claim forms, the case folders did not contain other specific documents on a uniform or near-uniform basis.
- Finally, we undertook coding of subject matter of claims for the 2013 Preliminary Results. We used multiple choices from a set list of options, with the intent of capturing the essence of the dispute. This process required a holistic review of each proceeding and multiple rounds of review in which coders and reviewers exercised judgment in assigning cases to the different categories. Ultimately, we decided to not extend our subject matter reporting beyond the product categories already described in the 2013 Preliminary Results so that we are not capturing this data for disputes relating to private student loans and auto purchase loans.

## Direct coding from single documents

The information we coded directly from AAA claim forms includes, but is not limited to:

- Party and attorney information:
  - We coded this information for up to three parties on each side of the dispute.
  - We used a binary code to indicate whether more than three parties were involved on either side.

- We recorded whether the parties were represented by an attorney (including in-house counsel for companies) and listed the names of any outside counsel.<sup>48</sup>
- We used the address of the first consumer in the AAA claim forms relating to credit card disputes to determine a relevant nine-digit zip code. We used that information to determine the median income of the consumers' location, as reported in Section 4.7 of the 2013 Preliminary Results.
- Basic case information:
  - We recorded whether the claimant(s) purported to represent one or more classes of claimants.
  - We listed the date of the claim filing with the AAA.
    - If the case file had been closed and then reopened, we recorded the earlier date.
    - If the claim form lacked a clear statement about the date, we used other information, such as the date header created by a fax machine, to approximate the date.
- We recorded information from claim forms regarding the relief sought by the claimants:
  - We recorded whether claimants sought a specific amount of money; “at least” or “at most” certain amounts; or whether they sought a range of relief (*e.g.*, \$1,000 to \$10,000) (we describe how we addressed these variations in our calculations, below);
  - If a claim form attached a supplementary document, like a long-form complaint, and included instructions akin to “see attached” in the claim form itself, our initial claim amount reflected data from the attached documents.
  - If the documents did not indicate a single overall claim amount for multiple claims, we followed the language of the claim form (and attached documents) to aggregate a claim amount — if, however, multiple claims related to the same cause of action or statute, we would not sum separately delineated claim amounts.

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<sup>48</sup> If any party changed counsel, we recorded the most recent counsel of record.

- When the parties described a specific debt amount in dispute, we recorded this number.
- We recorded whether the parties sought injunctive relief, declaratory relief, or punitive damages, but ultimately determined that our data was not sufficiently specific for reporting purposes. Parties frequently indicated in their claim forms that they were seeking such relief, but there was rarely additional information regarding these requests. Similarly, the requests for punitive damages were often vague or undelineated.
- We similarly did not record the fact of a party seeking double or triple damages under various statutory authorities. The claim amounts we recorded, as well as any related calculations such as recovery ratios, do not reflect any such doubling or tripling of claim amounts unless the claimant listed a doubled or trebled amount on the claim form as a numerical amount.<sup>49</sup>
- We recorded who filed the claim. The AAA claim form has three checkboxes regarding “who filed,” indicating: consumer-filing, company-filing, or mutual-filing.<sup>50</sup> We recorded the information as reflected on the claim forms. We did not

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<sup>49</sup> The consumer was awarded more than the amount we recorded as his claim amount in only one dispute. In 14 cases, companies were awarded more than their recorded claim amounts. Two of the three outlier awards appeared to be missing documents that would have provided more context to the ratio of company claim to award. The third involved an award of post-filing interest that was not separately calculated from the overall award.

<sup>50</sup> Of the 127 credit card cases not involving disputed debts, 89.0% were designated as having been filed by consumers; 5.5% by companies; and 5.5% mutually. Of the 899 credit card cases involving disputed debts, 66.4% were designated as having been filed by consumers; 16.0% by companies; and 17.6% mutually.

Of the 69 checking account cases not involving disputed debts, 87.0% were designated as having been filed by consumers; 8.7% by companies; and 4.4% mutually. As for the three checking account cases involving disputed debts, two were designated as having been filed by consumers; one by the company; and zero mutually.

Of the 152 payday loan cases not involving disputed debts, 91.5% were designated as having been filed by consumers; 5.3% by companies; and 3.3% mutually. Of the 14 payday loan cases involving disputed debts, 13 were designated as having been filed by consumers; one by companies; and zero mutually.

identify a systematic method for verifying whether the checkbox selected on the claim form was an accurate reflection of the submission. As noted in Section 5.6.7, however, in nearly fifty disputes filed in 2010 and 2011 the consumer purportedly participated in the filing of the dispute but did not submit documents in the proceedings in response to notice by the arbitrator. Similarly, the dominant consumer attorney heavy repeat player in filings relating to student loans appears to have marked the vast majority of student loan-related AAA claim forms as having been filed by companies. In correspondence, however, the firm references demands for arbitration “against” the companies.

- We also attempted to record whether there was an indication of a prior litigation proceeding and, if so, who invoked arbitration as to that prior litigation proceeding. Those records, however, were not uniformly included in the case files.

## Coding across multiple documents

We looked to information outside of the AAA claim forms and within the case file to record other information, including:

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Of the 4 GPR prepaid card cases, none involved disputed debts. 100% were designated as having been filed by consumers.

Of the six student loan cases not involving disputed debts, all six were designated as having been filed by consumers. Of the 280 student loan cases involving disputed debts, 14.3% were designated as having been filed by consumers; 85.4% by companies; and 0.4% mutually.

Of the 213 auto loan cases not involving disputed debts, 95.3% were designated as having been filed by consumers; 4.2% by companies; and 0.5% mutually. Of the 80 auto loan cases involving disputed debts, 71.3% were designated as having been filed by consumers; 28.8% by companies; and zero mutually.

Across all product markets filings in 2012 included a nearly five-fold increase in filings designated as having been filed by companies and a ten-fold increase in those designated as having been filed mutually, as compared to filings in 2010 and 2011. (In 2010, **2011**, and **2012**, there were **63**, **66**, and **309** “company-filed” disputes, respectively; **445**, **441**, and **348** “consumer-filed” disputes; and **32**, **13**, and **130** “mutually-filed” disputes).

## **INFORMATION ABOUT HOW ARBITRATION FEES WERE INITIALLY ASSESSED AND ULTIMATELY AWARDED**

- How filing fees were assessed, for example:
  - Administrative fees;
  - Arbitrator fees (also referred to as neutral compensation);
  - Other fees;
  - Grants of requests by consumers for advancement of initial arbitrator fees;
  - Where available, requests by consumers for waivers by the AAA of initial fees; and
  - Where available, requests by consumers for waivers of administrative fees, pursuant to California Code of Civil Procedure Section 1284.3.
- We recorded if there was formal notice, sent by the AAA, of a party not paying its initial fees.
- And, where available, we recorded how fees were allocated at the end of proceedings, primarily relying on the arbitrator's award or final bills issued to the parties.

## **ADDITIONAL INFORMATION ABOUT PARTIES' CLAIMS**

- We recorded pre-disposition claim amounts, reflecting how parties' assessments of their claim values evolved over time prior to the arbitrator's resolution of any claims or case closure for other reasons (*see* Section 5.5.2). The pre-disposition claim amounts were determined by documents filed after the AAA Claim Form or any documents not explicitly referenced therein. For example, pre-disposition claim information could have been obtained from long-form complaints, amended claims/counterclaims, correspondence from the parties to the AAA, or pre-hearing briefs. We did not, however, use arbitrator awards to determine the pre-disposition claim amounts.
  - We ultimately did not record requests for attorneys' fees or other costs, punitive damages, or pre or post award interest. Where such requests were bundled into a single claim amount without an indication of how they could be disentangled, we recorded the overall number.
- When we calculated information regarding claim amounts:

- If a claim was described as “at least” or “at most” \$x, we treated the claim as being equal to \$x.
  - If a claim was described as ranging from \$x to \$y, we treated the claim as being the midpoint of the range;
  - And, if the record was unclear as to whether a dollar figure constituted affirmative claims or disputed debt, we allocated the amount in dispute evenly between the affirmative claim and the disputed debt, unless it was clear how much the disputed debt amount was (*e.g.*, if someone described their claims as “I don’t owe credit card debt and the company owes me money for debt collection violations,” but only listed \$10,000 as a claim amount, we would assume that \$5,000 of the total related to the consumer’s affirmative claim and the other \$5,000 related to the consumer’s debt dispute).<sup>51</sup>
- For calculating disputed debt amounts, we drew from AAA claim forms, long-form complaints, amended claims/counterclaims, correspondence from the parties to the AAA, or pre-hearing briefs. Where companies asserted claims against consumers, we assumed that the claims described disputed debts, unless the descriptions of the claims led us to believe otherwise (any such affirmative claims against consumers were rare). As described in Section 5.5.2, when consumers asserted claims against companies, we generally assumed that the claims described affirmative claims, unless the narrative of the claims led us to believe that the figures described disputed debts — the notable exception was breach of contract claims.
    - In certain situations, claimants included descriptive complaints that segmented debts into principal and interest. Where the interest component of the claim appeared to be pre-judgment interest (accrued under the terms of a contract or as specified by the applicable jurisdiction’s controlling law), as opposed to the interest component of a perfected debt claim, we did not include the interest amount in the pre-disposition claim amount. In limited cases, we used the arbitrator award to help distinguish the two.

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<sup>51</sup> We split the difference between affirmative claims and disputed debts in 137 filings.

- For example, in one particularly opaque filing, a debt collector brought a claim “in the principal sum of \$4,497.92, plus interest in the amount of \$270.86 as of August 10, 2009 and continuing at the rate of 7.000% under the terms of the account agreement between Defendant and Plaintiff’s [assignor].” The claimant asked that additional interest be accrued “at the rate of 7.000% percent up until the date of the judgment . . . .” The arbitrator issued an award of \$5,507.92, explaining that “[t]his amount includes the Claim amount of \$4,497.92 and interest in the amount of \$1,010.” We ultimately recorded a disputed debt amount of \$4,498, considering the remaining interest components (\$270.86 at the time of the claim; \$1,010.00 at the time of the award) to be prejudgment interest.
- We recorded basic information about the types of claim brought by each party, specifically whether they brought:
  - Federal statutory claims;
  - State statutory claims;<sup>52</sup>
  - Fraud claims;
  - Contract claims;
  - Other tort claims;
  - “General, unspecified claims”: given the informal requirements for pleading in arbitration, we used this category to record consumer claims that were more colloquial in nature — such as “I want my money back,” “This is unfair,” or “I was discriminated against” — that the consumer did not identify as falling under any of the alternative options above; and
  - “Refutes alleged debt”: we recorded instances in which consumers affirmatively claimed that they did not owe an alleged debt, at least to the extent that a consumer did not clearly state a contract claim to the same effect. If a consumer did not bring a claim to this effect, however, but simply defended against a company claim in the

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<sup>52</sup> As a subset of the statutory claims, we recorded instances where a party brought claims under a state unfair or deceptive acts or practices statute or rule.



arbitration for debt, we did not use this notation. (The fields here were intended to capture claim types, not defenses.)

- We specifically noted instances when consumers brought actions under the following statutes:
  - The Alternative Mortgage Transaction Parity Act of 1982, 12 U.S.C. § 3801;
  - The Consumer Leasing Act of 1976, 15 U.S.C. § 1667;
  - The Electronic Fund Transfer Act, 15 U.S.C. § 1693;
  - The Equal Credit Opportunity Act, 15 U.S.C. § 1691;
  - The Fair Debt Collection Practices Act, 15 U.S.C. § 1692;
  - The Fair Credit Billing Act, 15 U.S.C. § 1601;
  - The Fair and Accurate Credit Transaction Act of 2003, 15 U.S.C. § 1601;
  - The Fair Credit Reporting Act, 15 U.S.C. § 1681;
  - The Homeowner Protection Act of 1998, 12 U.S.C. § 4901;
  - The Real Estate Settlement Procedures Act, 12 U.S.C. § 2601;
  - The Truth in Savings Act, 12 U.S.C. § 4301;
  - The Truth in Lending Act, 15 U.S.C. § 1601;
  - The Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701;
  - Antitrust statutes;
  - The Credit Repair Organization Act, 15 U.S.C. § 1679;
  - The Telephone Consumer Protection Act, 47 U.S.C. § 227;
  - The Communications Act of 1934, 47 U.S.C. § 609; and
  - The Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961.

## PROCEDURAL INFORMATION ABOUT THE DISPUTES

- We recorded the name of the arbitrators initially appointed by the AAA. We recorded whether any party challenged the appointment of any arbitrator, and the outcome of those challenges. And we recorded the arbitrators ultimately selected to hear the dispute (recording, at most, three arbitrators' names).
- Where there was an arbitration decision on the merits, we recorded from the case file the format of the decision (*e.g.*, resolution on dispositive motion; arbitrator award after desk arbitration, telephone hearing, or in-person hearing). We also recorded the date of the hearing, where appropriate.
- Where available, we used the consumers' location information and the location of an in-person hearing, to record the travel distance and travel time, as output by Google, Inc.'s Maps tool. We did not record any address information about consumers in this process other than their nine-digit zip codes. If the consumers listed a P.O. Box as their address, we would use the nine-digit zip code for the P.O. Box. If they listed only their attorney's address, however, we did not include a zip code (or travel distance/time information) for them in our analysis.
- We separately recorded the date of the resolution of the proceeding, where possible, as well as how the proceeding ended:
  - An arbitrator decision on the merits at the end of the proceedings (*i.e.*, an award);
  - A resolution on a dispositive motion;
  - A withdrawal by the claimant;
  - A settlement;
  - A consent award;
  - A stay of the proceedings, related to a bankruptcy proceeding;
  - A stay of the proceedings, unrelated to a bankruptcy proceeding;
  - Administrative closures, with numerous subsets, such as:
    - Consumer failure to pay initial fees;
    - Company failure to pay initial fees;

- The proceedings violated the AAA Debt Moratorium;
  - The company was prohibited from participating in AAA consumer arbitrations due to prior issues;
  - Closure due to the identification of a conflicting litigation or arbitration proceeding; or
  - Claimant failure to provide locale information, provide claim amount information, or provide a copy of the underlying arbitration agreement; and
- Known closures, but without explanatory information.
- For cases with an incomplete file (*i.e.*, the case file simply stops, seemingly mid-dispute) we recorded the date of the last entry in the file.
- We recorded whether only one party participated to the end of the proceedings (and whether that party was a consumer or a company) — specifically when the arbitrator states in the award that a party failed to submit documents after notice from the AAA.
- As described in the 2013 Preliminary Results, we recorded whether there was an indication of a prior litigation proceeding and, if so, who invoked arbitration as to that prior litigation proceeding. But ultimately, given the large volume of other data reported in Section 5, we decided to not extend such reporting beyond the discussion already described in the 2013 Preliminary Results.
- We recorded instances where the AAA notified a party that it had not complied with the AAA Due Process Protocol, for example, by not paying fees. We also recorded stated terminations by the AAA for failure to comply with the Protocol.
- In cases of an arbitration decision on the merits of the parties' claims, we recorded the amount awarded by the arbitrator to each party as: compensatory damages,<sup>53</sup> punitive damages, attorneys' fees, and reimbursement of initial arbitration fees.

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<sup>53</sup> Because auto purchase loan disputes could result in the complete release of the auto loan, we recorded the size of the auto loan in limited circumstances.

- We did not record awards of pre-judgment interest, post-judgment interest, or late fees that accrued after the claimant perfected their claim.<sup>54</sup>
  - For example, in one proceeding the claimant company requested that “it be awarded \$6,727.86 plus late fees and interest from September 28, 2010 to the present.” The claim was asserted in August 2011. In September 2011, the arbitrator awarded the issuer \$6,727.86, “plus interest in the amount of (\$693.40) . . . and late charges in the amount of (\$234) . . . for a total of (\$7,655.26).” We recorded \$6,727.86 for the company claim, disputed debt amount, and arbitrator award.
- In filings that proceeded to an arbitrator decision on the merits where disputed debts and affirmative claims were involved, we followed the allocation of any award amounts specified by the arbitrator. In cases where the award did not provide such detail, we used the following methodology to classify awards as relating to the affirmative claim and disputed debt components of the claims.
  - Assuming a consumer affirmative claim of \$500, company claim of \$1,000, and disputed debt of \$1,000:
    - If the arbitrator provided \$0 of relief to the company and \$0 to the consumer, we would record \$1,000 of debt forbearance for the consumer and no awards regarding the consumer or company’s affirmative claims;
    - If the arbitrator provided \$100 of relief to the company and \$0 to the consumer, we would record \$900 of debt forbearance for the consumer, \$0 regarding the consumer’s affirmative claims, and a \$100 company award;
    - If the arbitrator provided \$1,000 of relief to the company and \$0 to the consumer, we would record no debt forbearance in favor of the consumer, no award regarding the consumer’s affirmative claims, and an award of \$1,000 on the company’s claims; and

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<sup>54</sup> Where such requests were bundled into a single award amount without an indication of how they could be disentangled (for example, by using the parties’ claims as context), we recorded the overall number as the award.

- If the arbitrator provided \$0 of relief to the company and \$100 to the consumer, we would record \$1,000 of debt forbearance, \$100 on the consumer’s affirmative claims, and \$0 on the company’s claims.
- Similarly, assuming a consumer affirmative claim of \$500, a company claim of \$1,200, but a disputed debt of only \$1,000 (meaning that the consumer agreed that he owed \$200):
  - If the arbitrator provided \$0 of relief to the company, we would record \$1,000 of debt forbearance for the consumer, as well as a \$200 award to the consumer;
  - If the arbitrator provided \$100 of relief to the company, we would record \$1,000 of debt forbearance for the consumer, a \$100 company award, and a \$100 award to the consumer;
  - If the arbitrator provided \$200 of relief to the company, we would record \$1,000 of debt forbearance for the consumer, a \$200 company award, and \$0 regarding the consumer’s claims;
  - If the arbitrator provided \$300 of relief to the company, we would record \$900 of debt forbearance for the consumer, a \$300 company award, and \$0 regarding the consumer’s claims; and
  - If the arbitrator provided \$100 of relief to the *consumer*, we would have recorded \$1,000 of debt forbearance in favor of the consumer, \$0 regarding the company claims, and \$300 regarding the consumer’s claims.<sup>55</sup>

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<sup>55</sup> We describe these examples only to set out our internal coding rules for distinguishing arbitration awards relating to affirmative claims, as opposed to debt forbearance. Any of these particular variations (involving consumers **disputing only a portion of a company’s claims**) occurred very infrequently (or not at all) in the AAA Case Data, as only eleven cases involved disputed debt amounts that were less than corresponding company claim amounts. Of those, four went to an arbitrator’s award, none of which resulted in an award for a consumer.

## APPENDIX I: SECTION 5

# High-dollar consumer claims and disputed debts excluded from AAA calculations regarding average, median, and ratio calculations

As described in Section 5.5.2, we excluded consumer claims of \$1 million or more when calculating averages, medians, and related calculations. Of the filings that were excluded, there were six claim form amounts and six pre-disposition claim amounts, five of which overlap.

The filings that overlap are:

- A checking account/debit card dispute with a \$100,000,000 claim form amount and a \$100,000,000 pre-disposition claim amount;
- A checking account/debit card dispute with a \$1,314,965 claim form amount and a \$1,314,965 pre-disposition claim amount;
- An auto purchase loan dispute with a \$1,000,000 claim form amount and a \$1,000,000 pre-disposition claim amount;
- An auto purchase loan dispute with a \$2,000,000 claim form amount and \$2,000,000 pre-disposition claim amount; and
- An auto purchase loan dispute with a \$5,000,000 claim form amount and a \$5,000,001 pre-disposition claim amount.

Additionally, there were:

- A student loan dispute with a \$5,200,000 claim form amount that was revised to a pre-disposition claim amount of \$46,875 (the latter of which was included in calculations involving pre-disposition claims); and
- A checking account/debit card dispute with a \$1,369 claim form amount that was revised to a pre-disposition claim of \$52,633,745 (the former of which would be included in any calculations involving claim form amounts).

One dispute resulted in an arbitrator decision on the merits, with no award to either party. Another dispute resulted in a settlement. The remaining five resulted in outcome forms that were consistent with potential settlements.

When we counted the number of consumer claims, we included these claims in our totals, as well as disputes in which consumers alleged that they sought monetary relief, but did not make clear how *much* monetary relief they sought (155 in total).

On the other hand, when we performed calculations involving consumer claim amounts, we excluded these disputes. Similarly, these disputes are excluded from any graphics that involve segmenting our data set by claim amount (for example, in Figures 7 and 8 of Section 5.6.9 we display different types of case outcomes, compared against the size of consumers' claims).

## APPENDIX J: SECTION 5

# Comparison of affirmative claims brought in AAA filings with and without debt disputes

Table 16, below, does not include information about filings in which consumers did not have affirmative claims (generally cases in which the consumer only disputed the amount of debt they were alleged to owe).



**TABLE 16: AFFIRMATIVE CLAIM DISPUTES AND AMOUNTS FILED IN 2010–2012**

Product type	Filings where consumers only brought affirmative claims			Filings where consumers brought affirmative claims and disputed debts		
	Number of filings <sup>56</sup>	Average affirmative claim	Median affirmative claim	Number of filings	Average affirmative claim	Median affirmative claim
Credit cards	123	\$35,452	\$9,000	412	\$16,713	\$11,000
Checking accounts/debit cards	68	\$56,821	\$15,055	1	\$1,000	\$1,000
Payday loans	151	\$20,827	\$10,000	12	\$41,000	\$32,375
GPR prepaid cards	4	\$20,111	\$2,000	0	N/A	N/A
Private student loans	6	\$62,917	\$75,000	60	\$13,824	\$5,000
Auto purchase loans	213	\$31,041	\$25,000	54	\$43,598	\$38,743
All six product markets	565	\$32,488	\$13,200	539	\$20,172	\$11,000

<sup>56</sup> Not present in this table are six cases in which the consumer neither made affirmative claims nor disputed an alleged debt. Four such cases involved credit card disputes; the remaining two such cases involved payday loans and checking accounts/debit cards.

## APPENDIX K: SECTION 5

# Substantive outcomes in AAA cases, by product market

Figure 2, below, shows the proportion of arbitration awards, by product market, in which arbitrators provided relief to consumers on their affirmative claims.

Each normalized bar represents 100% of the disputes filed in 2010 and 2011 relating to each product market in which an arbitrator decided the merits of the parties' affirmative claims and we were able to determine the result. The shaded portion of each bar represents the proportion of disputes in which arbitrators provided relief to consumers on those claims.

**FIGURE 2:** SUBSTANTIVE OUTCOMES, AFFIRMATIVE CLAIMS, BY PRODUCT MARKET, FILED IN 2010–2011

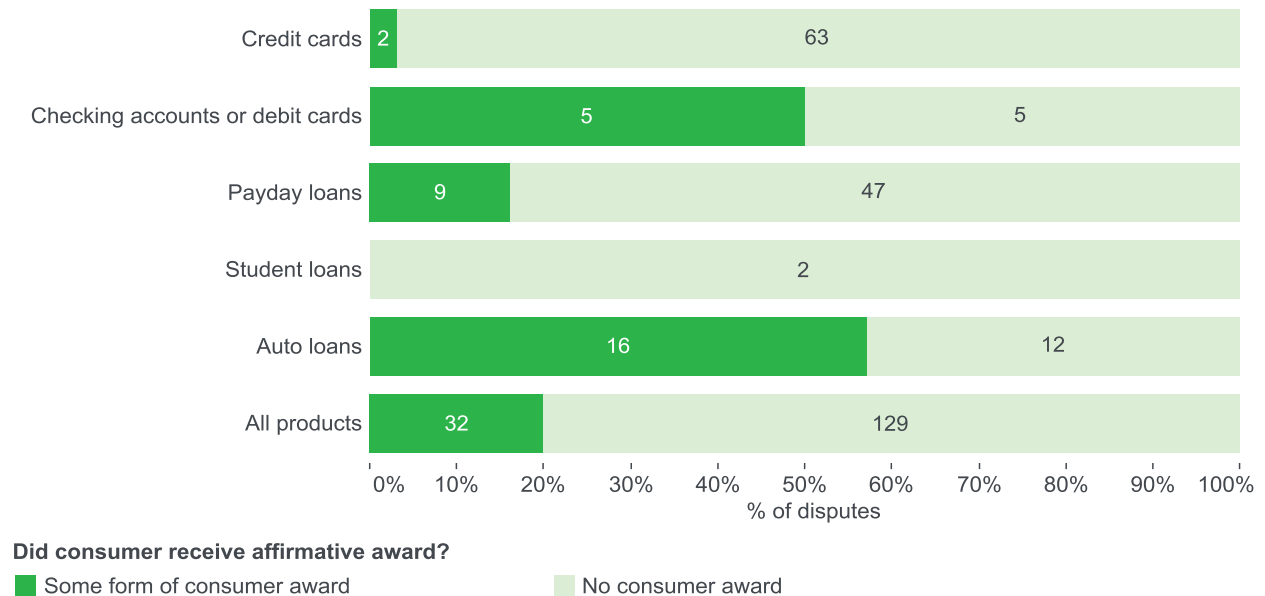


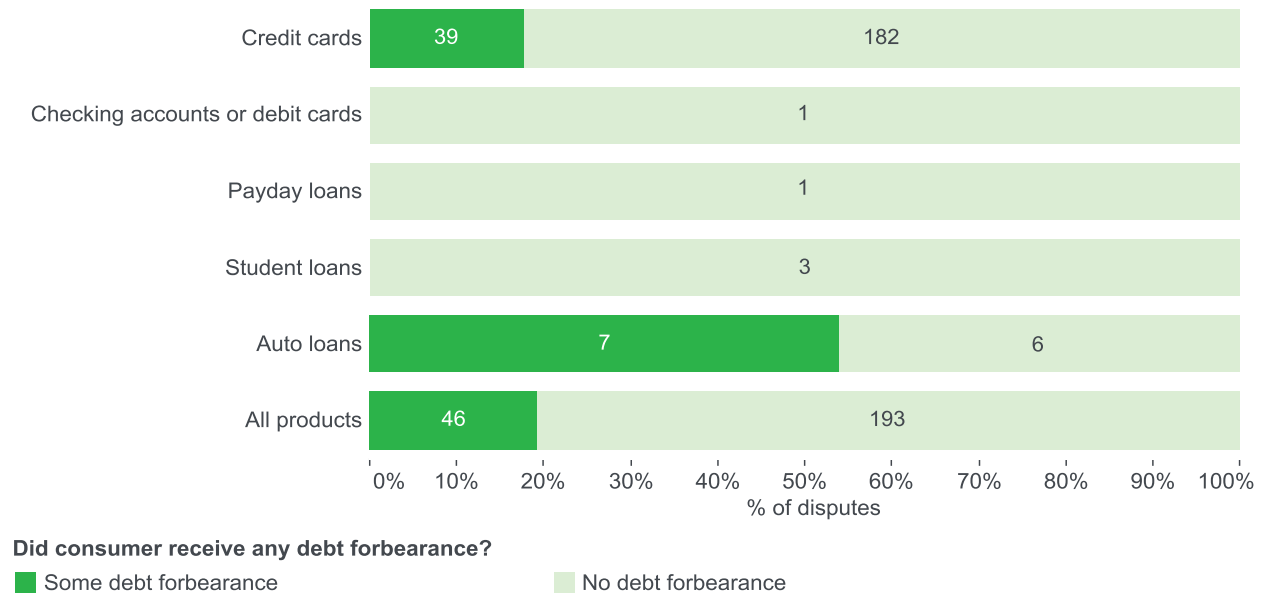
Table 17, below, shows the sum of the arbitrator awards, by product market, where arbitrators provided consumers with relief on their affirmative claims.

**TABLE 17: ARBITRATOR AWARDS PROVIDING RELIEF TO CONSUMER AFFIRMATIVE CLAIMS, BY PRODUCT MARKET, FILED IN 2010–2011**

Product market	Number of arbitrator awards providing consumer relief on affirmative claims	Sum of arbitrator awards providing consumer relief on affirmative claims
Checking account or debit cards	5	\$44,588
GPR prepaid cards	0	\$0
Auto loans	16	\$112,097
All products	32	\$172,433

Figure 3, below, focuses on disputed debts. In that regard, the figure shows, by product markets, the disputes in which arbitrators decided the merits of consumers’ disputes regarding debts they were alleged to owe and we were able to determine the results. In the shaded sections on the left-hand side of each bar, the figure shows the proportion of those arbitrator decisions on the merits in which arbitrators provided debt relief to consumers.

**FIGURE 3: SUBSTANTIVE OUTCOMES, DISPUTED DEBTS, BY PRODUCT MARKET, FILED IN 2010 –2011<sup>57</sup>**



<sup>57</sup> As described in Section 5.6.6, ten outcomes involving disputed debts are not included in Figure 3, because we could not determine the terms of the arbitrator award (six disputes) or the amount of debt in dispute (four disputes).

Table 18, below, shows the sum of the total debt forbearance, by product market, in the filings in which arbitrators provided consumers with relief regarding their disputes of alleged debt.

**TABLE 18: ARBITRATOR AWARDS PROVIDING DEBT FORBEARANCE, BY PRODUCT MARKET, FILED IN 2010–2011**

Product market	Number of arbitrator awards providing consumer debt forbearance	Sum of arbitrator awards providing consumer relief on affirmative claims
Credit cards	39	\$113,696
Checking account or debit cards	0	\$0
Payday loans	0	\$0
GPR prepaid	0	\$0
Student loans	0	\$0
Auto loans	7	\$75,411
All products	46	\$189,107

## APPENDIX L: SECTION 6

# Methodology

This appendix describes the methodology we used to identify the class and individual cases we reviewed in Section 6, and the methodology used to collect data regarding these cases, their outcomes, and related information.

### Federal court complaint collection — Courtlink search terms

We used the below search terms in LexisNexis’s Courtlink database to identify complaints filed in federal court potentially concerning the six covered products.<sup>58</sup> We crafted a deliberately overbroad text search in Courtlink, using a search string intended to identify documents that were product-related and likely to identify complaints as opposed to other pleadings. We manually reviewed the Courtlink results generated by these search terms to identify complaints, both class action and individual, fitting within the product classifications discussed below.<sup>59</sup> Complaints identified as duplicates of those already returned were excluded from the final set.

We used the search terms listed below for the respective products. As noted in the 2013 Preliminary Results (at p. 149), Courtlink limits search strings to the lesser of 32 words or 2,000 characters.<sup>60</sup> Courtlink does not use parentheses to control the order of operations; words set off by the connector “or” are grouped together, before the connectors “and” and “and not” are

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<sup>58</sup> LexisNexis describes its documents database on the Courtlink website as part of the nation’s “largest collection of dockets and documents.” See [www.lexisnexis.com/courtlink](http://www.lexisnexis.com/courtlink) (last visited Mar. 6, 2015).

<sup>59</sup> As described in Section 6.4.1 above, we excluded complaints originally filed in state court and removed to federal court.

<sup>60</sup> <https://courtlink.lexisnexis.com/Search/Single/SingleSearchHelp.aspx> (last visited Mar. 6, 2015).

applied. The connector “w/X” refers to two words or phrases that are “within X” words of one another.

- ***Checking accounts or debit cards*** – check or checking or deposit or “debit card” or dda or demand w/5 account or accounts and complaint or crossclaim or counterclaim or crossclaims or counterclaims and not motion
- ***Credit cards*** – “credit card” or “credit cards” or “charge card” or “charge cards” and complaint or crossclaim or counterclaim or crossclaims or counterclaims and not motion
- ***Prepaid cards*** – prepaid or reloadable or gift or “stored value” or ebt w/3 card or cards and complaint or crossclaim or counterclaim or crossclaims or counterclaims and not motion
- ***Payday loans*** – payday or “pay day” or “deposit advance” or “salary advance” or “deferred deposit” and complaint or crossclaim or counterclaim or crossclaims or counterclaims and not motion
- ***Private student loans*** – school or educational or student or college w/3 loan or loans or lending and complaint or crossclaim or counterclaim or crossclaims or counterclaims and not motion
- ***Automobile loans*** – auto or automobile or motor or vehicle or car w/3 loan or loans or lending or finance or credit and complaint and “class action” and venue or relief and not motion

## Multidistrict Litigation complaint collection methodology

An MDL proceeding is a procedural mechanism in which federal civil cases filed in different districts that involve common questions of fact may be transferred to a single district for pretrial proceedings.<sup>61</sup> The names of MDL proceedings are derived from the subject matter of the disputes (*e.g.*, “In re: Checking Account Overdraft Litigation”) and thus we began by reviewing the names of all MDL cases pending at any point between 2010 and 2012. We excluded cases for which the stated subject matter obviously did not concern any of the consumer financial

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<sup>61</sup> 28 U.S.C. § 1407.

products that we study in Section 6. For example, we excluded MDLs with names indicating claims relating to products liability, mass tort, Employee Retirement Income Security Act (ERISA), pension, labor, patent, the False Claims Act, securities, insurance, and mortgages. We excluded several of the remaining MDLs on the basis that they concerned business disputes, such as claims by merchants or financial institutions against other businesses. We also excluded MDLs whose subject matter was litigation relating to the automated teller machine (ATM) disclosure provisions in the Electronic Funds Transfer Act (EFTA), for reasons explained in our discussion of checking/debit card product classifications below.

For each of the remaining potentially relevant MDLs, we included in our collection set any complaints originally filed in federal court between 2010 and 2012 that appeared on the MDL docket.<sup>62</sup> Under MDL procedural rules, a complaint that is related to the subject matter of the MDL can be transferred to the MDL for proceedings that are either coordinated (separate complaints processed by the same court) or consolidated (different complaints merged into one).<sup>63</sup> If a complaint was transferred to one of the potentially relevant MDL dockets but not consolidated, we included the complaint in our collection set if it was originally filed between 2010 and 2012, regardless of when the complaint was transferred to the MDL or when the MDL itself was opened. If a complaint was transferred to an MDL and then was consolidated in the MDL between 2010 and 2012 with any other complaint(s), we included the consolidated complaint in our collection set.<sup>64</sup> We did not include the complaints being consolidated.<sup>65</sup> We

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<sup>62</sup> Our coverage of state court class actions was based on the state court complaint collection method discussed separately in the next part of this appendix. No cases identified through that collection method were transferred to an MDL.

<sup>63</sup> *See generally* 28 U.S.C. § 1407(a) (noting that related civil actions may be transferred to the MDL panel for “**coordinated or consolidated pretrial proceedings.**”).

<sup>64</sup> The consolidated complaints in MDLs were sometimes styled as consolidated amended complaints. Regardless of whether consolidated complaints were styled this way, we included consolidated complaints if any of the complaints being consolidated were originally filed in 2010–2012, even if some of the complaints being consolidated were not.

<sup>65</sup> Consolidation of class action complaints does not necessarily enlarge the number of potential members of the class, given that some complaints are consolidated to eliminate overlapping allegations.



then manually reviewed all the complaints collected to determine whether they concerned any of our product markets, as described in our discussion of product market classifications below.<sup>66</sup>

## State court complaint collection

Because we determined that we could not reliably search for terms in pleadings to identify relevant complaints filed in state court (as discussed in Section 6.4.1), we considered several ways to identify complaints concerning our consumer financial product markets filed in the four states and seven additional large counties where complaints are electronically available.<sup>67</sup> Some of these state court systems allowed searching of cases by party name and we considered identifying complaints by searching the company names of participants in the product markets. We decided against this approach, however, given that any search based on company names would require us to select market participants to search and to exclude others, thus precluding comprehensive coverage in our product markets and generating non-random results that would be inconsistent with the scope of results generated by our searches in federal courts.

Some of these state court systems allowed searching of cases by “nature of suit” (or a similarly-named subject matter category used by the state court system to group cases) and we considered searching for cases using these categories. We noticed that contract claims are a common feature of class complaints concerning the product markets we cover in Section 6, and found that a “nature of suit” category for contract cases was relatively common across state jurisdictions. Yet it appeared that the total number of cases in this category would be high,<sup>68</sup>

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<sup>66</sup> We excluded complaints identified as duplicates of those already returned from the federal court Courtlink searches described above or the state court searches described below.

<sup>67</sup> Even for a limited set of counties and states, using search terms to identify potentially relevant complaints did not appear likely to yield meaningful results. For example, we searched Courtlink state court databases using the product-related search terms for credit cards, checking accounts and debit cards, payday loans, private student loans, and prepaid cards. Yet Courtlink returned fewer than 30 cases in all of these categories combined for the identified jurisdictions; a manual review revealed that most of these cases also were not consumer financial in nature.

<sup>68</sup> For example, the number of cases in this category alone for 2012 in one county (Los Angeles Superior Court) exceeded 5,000.

while the number of consumer-filed cases concerning the products we covered would not be.<sup>69</sup> (Contract claims also would include company-filed debt collection actions filed in state courts.<sup>70</sup>) Given the very high case volume overall and low potential yield of consumer-filed cases suggested by a test relating to contract-related natures of suit, we did not review cases filed under natures of suit in order to identify those that concerned the product markets we covered.

Finally, we considered the method that we ultimately used to collect class action complaints in three states and seven counties: Searching the text of dockets in these state court systems using the third-party legal research databases to which we had access: Courtlink, Westlaw, and Bloomberg Law. However, we did not find that dockets consistently included terms that were unique to or particularly common in consumer financial cases. Unlike in our search for class **cases where the dockets generally used a term (“class action”) for which we could search**, we also did not find terms that could be used to identify a subset of individual cases potentially pertaining to the product markets we covered. Therefore, searching dockets for terms appeared likely to be an ineffective means of identifying state court individual cases concerning the product markets we covered.

## Litigation product market classifications

Once we collected the potentially relevant federal and state complaints filed between 2010 and 2012 (our “collection set”), we reviewed each one manually to determine if it alleged any claims concerning one of the six products (for class claims) or five products (for individual claims) and thus should be included in our “final set.” We looked only at the initially-filed complaint and not at any amended complaints, counterclaims, or other pleadings introduced into a case.<sup>71</sup>

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<sup>69</sup> When we reviewed information available electronically on cases classified under contract-related natures of suit that were filed in Los Angeles County in 2012 against two large credit card issuers, we were able to electronically access about half of the relevant complaints and did not identify any that concerned that product market.

<sup>70</sup> *See, e.g.*, 2013 Preliminary Results at pp. 127–28 (Table 9) (discussing prevalence of company-filed actions in small claims courts).

<sup>71</sup> As described in the discussion of our docket coding methodology below, we reviewed the complete docket of each case through February 28, 2014, to code the events and outcomes that occurred. Accordingly, the events and

We determined that a complaint related to one of the products if the core of the allegations involved the relevant product but not if the complaint simply contained a cursory mention to the product or if the dispute was not about the product as a financial service.<sup>72</sup> Cases alleging FDCPA violations in connection with collection of debt arising from any of the products we cover, or FCRA violations arising from credit reporting relating to any of the products we cover, are included in the final set for the corresponding product.

Further, to reduce the potential for duplicative results across product markets, for the federal court cases that we identified using product-focused search terms, we only included a case concerning a product if it was returned in the results of the search for that product.<sup>73</sup> If a single complaint alleged claims concerning more than one of the products and thus was included in the results of the search for each of those products, we coded the complaint as concerning the product that we determined to be the predominant basis for the complaint. This also prevented double-counting of cases across multiple product categories.

Because we are studying arbitration clauses as they relate to *consumer* financial products, we did not include in our final set cases where the complaint alleged commercial claims, even if concerning one of the products we otherwise cover. For example, we did not include a complaint alleging claims regarding a business credit card or a business checking account. We did not find any class action cases where the named plaintiff was a company and no named plaintiff was a consumer. We found five individual cases where the plaintiff was a company and no named

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outcomes that we report relate to any claims alleged during the course of each case, including those that may have been alleged in an amended complaint or as counterclaims.

<sup>72</sup> For example, a case concerns credit cards where a plaintiff alleges that the defendant credit card company charged for add-on products without the consumer's knowledge. A complaint does not concern credit cards where a plaintiff asserts claims against a business for a defective product purchased with a credit card with no allegations concerning the credit card account itself.

<sup>73</sup> For the federal court cases, if the Courtlink search for one product returned complaints concerning a second product (and not concerning the first product), we excluded those complaints from our final set for the first product. However, if the same complaint was separately returned in the Courtlink search for the second product, we included that complaint in our final set for the second product. For example, if we retrieved a complaint concerning a credit card (and not a private student loan) through our search terms designed to retrieve private student loan complaints, we did not include that result in the final set for private student loans. If the same complaint was returned through our search terms designed to receive credit card complaints, however, we did include it in the final set for credit cards.

plaintiff was a consumer but given the small number of such cases we did not include them in our final set.

We included a class action case if the named plaintiff alleged violations in the collection of debt derived from one of the six products, even if the complaint did not define the class by reference to debt derived from a particular type of product.<sup>74</sup> For purposes of our product categories used in Section 6, we classified the case by market based upon the type of debt referenced in the complaint. If the complaint did not state that any of the underlying debt derived from one of the products we cover, we did not include it in our data set.<sup>75</sup>

We excluded, however, cases against credit repair organizations and debt settlement firms hired by consumers. While such organizations may be negotiating with the provider of the consumer financial product or service, disputes over such services more accurately concern credit service or debt repair rather than any of the products we cover.

We also applied certain criteria within each product classification, as follows:

***Credit cards and checking accounts/debit cards.*** For cases concerning both credit cards and checking account/debit cards, we did not include certain types of complaints. First, we did not include complaints filed solely against merchants pertaining to the sale of goods or services that generally did not appear consumer financial in nature, including allegations of improper charges for such goods or services (*e.g.*, under EFTA) or release of information by merchants in connection with such transactions (*e.g.*, under the Fair and Accurate Transactions Act (“FACTA”) or state laws relating to privacy). Second, we did not include complaints relating to the ATM disclosure provisions in EFTA. Even when the cases were brought against financial institutions, the plaintiff typically was not alleged to be a customer of that institution but instead

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<sup>74</sup> By contrast, in the analysis of class action settlements in Section 8, debt collection cases are broken out separately into their own category, and thus include debt collection cases regardless of whether they pertain in whole or in part to other products being analyzed.

<sup>75</sup> For example, if a named plaintiff brings a class action against a debt collection firm alleging improper practices against debtors, and the named plaintiff notes that his or her debt derived from a credit card, we included that complaint in the final set, and classified the case as a credit card case, even if the class was defined as individuals from whom the debt collector had attempted to collect debt. If, however, a named plaintiff did not allege that the debt derived from any of the six products we covered, we did not include it in our final set.

appeared to be a third-party user of the financial institution's ATM. As a result, these cases generally involved plaintiffs that are not potentially covered by the defendant's arbitration clause.

***Payday loans.*** We included in our final set, to the extent that they were in our collection set, complaints concerning payday loans provided to consumers. We cover certain types of payday cases in Section 5 (analyzing AAA Cases) that we do not cover in this litigation section of the report because the AAA collection set included all AAA consumer disputes whereas the litigation set relied on search terms that were not designed specifically to retrieve complaints concerning credit service organizations that may have originated loans. Thus, the final set of complaints filed in federal court that we analyze includes complaints concerning loans originated by credit service organizations only to the extent those complaints include the search terms we applied. State court class complaints concerning loans originated by credit service organizations also would only have been included in our final set if they had used similar terminology. In contrast, payday cases covered in Section 5 included certain disputes relating to credit service organization loans. ***See*** Section 5.4.

***GPR prepaid cards.*** We included in our final set, to the extent that they were in our collection set, complaints concerning GPR prepaid cards. We did not include in our final set complaints related to non-reloadable prepaid cards issued by a particular merchant or which only can be used with a particular merchant or set of merchants ("closed loop prepaid cards"). ***See*** 2013 Preliminary Results at p. 16, n. 26 ("A general purpose reloadable (GPR) prepaid card is a card that 'a consumer can use anywhere that accepts payment from a retail electronic payments network, such as Visa, MasterCard, American Express, or Discover' and to which the consumer can add funds after the card is issued."). Consumer Financial Protection Bureau, Advance Notice of Proposed Rulemaking, 77 FR. 30,923 (May 24, 2012) (Docket No. CFPB-2012-0019).

***Private student loans.*** We included in our final set, to the extent they were in our collection set, complaints concerning private student loans. We did not include in our final set complaints against an educational institution that referred in part to private student loans (***e.g.***, solely as a measure of damages) if that institution was not also the lender. In addition, although we did not include complaints explicitly related to federal student loans in our final set, where a complaint concerned student loans but did not specify if those loans were exclusively federal loans, we included those in our final set. By contrast, in the analysis of class action settlements in Section 8, references to "student loans" are to both private and public student loans.

**Automobile loans.** We included in our final set, to the extent they were in our collection set, class complaints concerning automobile loans, including cases in which claims related to automobile warranties are asserted with relief sought from the lender. Note that this category includes all automobile loans and is not limited to the auto purchase loans covered in Section 5 (analyzing AAA Cases).

## Cases not obtained (consumer financial litigation not covered)

Based on the case collection methods discussed above, we obtained a variety of complaints concerning the six covered products. However, as with any method, there are limitations. The following types of court cases concerning consumer financial products or services, to the extent they were filed in U.S. courts in the 2010–2012 period, nonetheless would not have appeared in our final set:<sup>76</sup>

- ***Complaints concerning consumer financial products or services but not the products we covered.*** For example, we did not cover complaints concerning mortgages, or complaints concerning collection of debt that did not arise from one of the products we covered. We also did not cover individual automobile loan cases. As explained in Section 6.4, we added the automobile loan product market after the 2013 Preliminary Results was issued and comments were received. We concluded that it was not practicable at that point to manually review the number of cases identified through our search for automobile loan cases and therefore excluded individual automobile loan cases from that final set.
- ***Complaints concerning the covered products that were in any of the following categories:***
  - ***Certain class complaints filed in covered state courts.*** To the extent the docket for a class case did not use the phrase “class action,” the docket was not searchable, or the

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<sup>76</sup> Some cases in these categories may have been included, however, in the analysis discussed in Section 6.7.1 of motions to compel arbitration in additional consumer financial cases.

complaint was not accessible using our collection method, we would not have obtained the case in our collection set.<sup>77</sup>

- ***Individual complaints filed in state courts.*** We did not collect state court complaints (whether filed in small claims courts or general civil courts) that were not filed on a class basis.
- ***Complaints filed in any other judicial forum not covered by our searches.*** This would include, for example, any class complaints filed in state courts outside the seven counties and four states we searched, adversarial proceedings in federal bankruptcy cases, and complaints originally filed in state-level consolidated pleadings (such as Judicial Council Coordinated Proceedings in California).
- ***Cases in which claims involving one of our covered product markets were only introduced into the case after the initial complaint was filed.*** Except for consolidated complaints in MDLs that consolidate complaints already in our results set, we did not review amended complaints. We also did not review counterclaims. Both types of pleadings can raise new claims, including class claims, of a type that would have been included in our final set if the claim had been made in an initial complaint filed by a consumer.
- ***Complaints filed in federal court that were not transferred to or filed in an MDL and which were:***
  - Loaded into the Courtlink document database but:
    - ***Not fully searchable.*** The Courtlink database relies upon OCR search methodology. To the extent the responsive part of an electronic document including a complaint was not searchable, the complaint would not have been included in our collection set.

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<sup>77</sup> For each case for which we could not download the complaint, we reviewed case docket information such as party names and case synopses often available in one or more of the legal research databases and excluded complaints that were obviously not consumer financial cases. In each jurisdiction, the numbers of remaining potential consumer financial cases that we could not download were very few.

- ***Concerned a covered product but did not include the search terms for that product.*** Search terms are, by definition, a limited method. We designed our search terms to broadly capture most complaints that concerned the relevant consumer financial product. However, to the extent a complaint concerning one of the covered products did not use at least one of our product-related search terms, it would not have been included in our collection set.
- ***Included product search terms but also included terms suggesting the document was not a complaint.*** As noted above, when we used search terms in the process of collecting complaints, we designed the search terms to generate the documents likely to be complaints and not other pleading types. To the extent the operative text in the body of a complaint used the term “motion,” for example, it would not have been included in our collection set.
- ***Complaints not loaded into Courtlink document database.*** We were not able to obtain confirmation from Courtlink that 100% of complaints filed in federal courts are captured in their database.

## General approach to reviewing complaints and dockets

In the remainder of this appendix, we discuss the data we obtained from complaints and dockets. As with the analysis of AAA Case Data, the collection of this data involved several tiers of analysis, performed over multiple rounds of manual review by coders and reviewers.

In some instances, we manually recorded objective data points directly from complaints and court dockets relating to those complaints.<sup>78</sup> In such instances, our results capture the data from

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<sup>78</sup> For example, when reviewing complaints, we recorded whether a complaint asserts types of claims under statutes or common law, and whether a complaint demands a jury or makes class allegations. When reviewing dockets, we recorded whether a docket entry indicates a motion to compel arbitration has been filed, whether a docket entry indicates such a motion to compel has been granted or a company dispositive motion has been granted, whether a docket entry indicates a class action settlement has been finally approved in a class case, whether a docket entry indicates a trial has occurred and a verdict has been reached, whether a docket reports the case is closed, and the date the docket reports the case was closed.



the complaints and entries on the dockets, without significant analysis or exercise of judgment on our part.

In some instances, we had to analyze and make judgments about the information contained in the complaints, dockets, or case filings available on the dockets in order to record the relevant data. This creates the potential for inconsistency, based either on differences between the information across documents, or different judgments made by different persons. For example, in some cases the following determinations required analysis:

- Whether a complaint concerns a specific product market;<sup>79</sup>
- Whether a generic plea for statutory damages in the relief section of a complaint was based on a particular statutory claim asserted elsewhere in a complaint;
- The subject matter of the claims in complaints concerning the credit card, checking/debit card, and payday loan markets;<sup>80</sup>
- Whether a potential reference to non-class settlement in a docket entry or case filing reflects the actual occurrence of a non-class settlement;
- Whether a given docket entry in an MDL proceeding (such as a motion or an order) refers to a complaint in our set;

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<sup>79</sup> This determination required a holistic view of each proceeding and multiple rounds of review. Through this process, coders and reviewers exercised judgment in assigning cases to different product categories or determining the case did not concern a product category. These assignments were based on the content of complaints, but the nature of allegations expressed can vary across complaints, and pleading standards for complaints and claims under consumer financial statutes do not necessarily require that consumers identify the specific type of consumer financial product at issue in the case.

<sup>80</sup> We used multiple choices from a list set of options, with the intent of capturing the essence of the dispute. This process required a holistic view of each proceeding and multiple rounds of review in which coders and reviewers exercised judgment in assigning cases to the different categories. Ultimately we decided not to extend our subject matter reporting beyond the product categories already described so that we are not capturing this data for disputes relating to private student loans and auto loans. We also did not extend our subject matter reporting to federal individual cases.

- Whether a given docket entry in a state class proceeding reflects a motion to compel arbitration, a ruling granting such a motion, or a ruling granting a company dispositive motion;<sup>81</sup> and
- Whether a state class case or case transferred to or filed in an MDL proceeding was closed, and if so, when it was closed.

In some instances, we exercised judgment to determine that we should obtain and review from the electronic court records additional relevant documents (such as those filed on the docket with motions, orders, or other case events that may have been relevant to our coding and additional dockets in complex cases that spanned multiple courts). In these instances, we collected and analyzed data across multiple documents beyond the complaint and the docket in the court where the complaint was filed. Relying on case filings on a docket introduces some risk of inconsistency across cases because in some cases (particularly in state cases) the potentially relevant case filings may not be readily identifiable or electronically available on a near-uniform basis. Our coding would not have captured any potentially relevant information in filings we did not review or filings we could not obtain electronically.

We relied on case filings, for example, in determining whether a docket entry's reference to a withdrawal of claims by a consumer is associated with a non-class settlement, whether a potential reference in a docket entry to settlement reflects the actual occurrence of settlement, whether a court ruling on a docket relates back to a specific type of motion (company dispositive motion or motion to compel), whether a court ruling on a docket granting a company dispositive motion led to the dismissal of the moving party from the action, whether the resolution of an appeal as reflected on trial court dockets and to the extent electronically available appellate dockets affects the way in which the case had been coded prior to the appeal, and whether the parties indicated that an arbitration proceeding was filed after a motion to compel arbitration was granted.

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<sup>81</sup> When reviewing dockets, entries generally were less detailed in state class cases than in federal cases. Our coding would not have captured any potentially relevant information omitted from these docket entries, absent review of any case filing associated with the docket entries, if available.

## Litigation complaint coding method

We manually reviewed each complaint identified through our use of search terms to determine if the complaint concerned one of the covered product markets. In our final data set, we only coded the complaints for a random sample of the federal individual credit card complaints identified outside of MDLs.<sup>82</sup>

For each case in our final set we coded information from the complaint related to the plaintiff and the claims asserted. Our coding does not reflect information about the plaintiff or the claims asserted that may have been introduced in later filed documents. For all complaints, we coded the following information as stated in the complaint:

- **Attorney representation.** Whether the plaintiff (consumer) was represented by counsel when the complaint was filed.
- **Jury demand.** Whether the complaint indicates that the plaintiff demanded a jury.
- **Legal claims asserted.** The legal basis for the claims asserted, whether federal statute, state statute, or common law. Where complaints asserted multiple claims for relief, we coded each type of claim (*i.e.*, a single complaint can have multiple statutes/laws coded). Claims of violations of federal regulations implementing federal statutes were coded under the statutes implemented by the regulation.
  - Federal statutory claims:
    - Antitrust, including the Sherman Act, 15 U.S.C. § 1 *et seq.*
    - Consumer Leasing Act (CLA), 15 U.S.C. 1667 § *et seq.*
    - Credit Repair Organizations Act (CROA), 15 U.S.C. § 1679 *et seq.*
    - Electronic Fund Transfer Act (EFTA), 15 U.S.C. § 1693 *et seq.*
    - Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 *et seq.*

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<sup>82</sup>Given the volume of credit card cases we identified, we coded the complaints for a random sample of the individual credit card cases that were not filed in or transferred to MDLs to obtain a 95% confidence level with a 5% margin of error.

- Expedited Funds Availability Act (EFAA), 12 U.S.C. § 4001 *et seq.*
  - Fair Credit Billing Act (FCBA), 15 U.S.C. § 1666 *et seq.*
  - Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*
  - Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*
  - Racketeering Influenced Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*
  - Servicemembers Civil Relief Act (SCRA), 50 U.S.C. App. § 501 *et seq.*
  - Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227 *et seq.*
  - Truth in Lending Act (TILA), 15 U.S.C. § 1601 *et seq.*<sup>83</sup>
  - Truth in Savings Act (TISA), 12 U.S.C. § 4301 *et seq.*
  - Other federal statutes not listed.
- ***State statutory claims.*** Because statutes vary from state to state, we did not code specific state-level statutes. Instead, we noted the general type of state statute alleged to have been violated:
- Unfair and Deceptive Acts and Practices.<sup>84</sup>
  - Other state statute.
- ***Common law claims.*** To the extent that complaints alleged common law claims, we coded any of the following that applied:
- Contract law.

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<sup>83</sup> Certain of the above listed statutes are part of TILA. We coded a claim as asserting TILA violations only if another more specific statute did not apply.

<sup>84</sup> We classified a state statute as one concerning Unfair and Deceptive Acts and Practices (“UDAP”) only if it was included in the National Consumer Law Center’s list of state UDAP statutes found in *Unfair and Deceptive Acts and Practices* (2012), at Appendix A.

- Tort law alleging fraud, other intentional tort, a willful violation, or gross negligence.
- Tort law alleging a non-intentional tort (*i.e.*, negligence).

For each of the class action complaints in our final set, we coded the following additional information as stated in the complaint:

- ***Alleged jurisdictional amount in controversy.*** To the extent that federal complaints in the final set alleged a minimum amount in controversy for jurisdictional purposes, we coded the amount. We did not code jurisdictional minimums for state court complaints in our final set because they rarely appeared.
  - \$5 million as required for federal jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(6).
  - \$75,000 as required for federal diversity jurisdiction, 28 U.S.C. § 1332(a).
  - Other dollar amount, if stated.
- ***Monetary relief sought.*** We coded whether the complaint stated the consumer sought monetary relief, whether actual, statutory, or punitive. For class complaints, we did not distinguish among relief sought for the named plaintiff only, for class members only, or for both.
  - ***Statutory damages sought.*** We coded a complaint as seeking statutory damages when it sought an amount authorized by the statute but not if it only sought recovery of actual damages under a statute. For each complaint that sought statutory damages, we also coded the following:
    - Whether damages were sought under one or more of the federal statutes listed above in ***Legal claims asserted*** or under some other unlisted federal statute.
    - Whether damages were sought under any state statute.
- ***Injunctive relief sought in federal class complaint.*** Where a federal class complaint sought to establish a class under Fed. R. Civ. P. 23(b)(2) alleging that the company had acted on grounds that applied generally to the class such that injunctive relief was appropriate, we coded that fact. We did not code whether class complaints sought injunctive relief in classes certified under other provisions of Rule 23(b).

## Litigation docket coding method

For each complaint that we included in our final set, we reviewed the docket for the case in which the complaint was filed in order to analyze relevant case events, as described below. For the class cases filed in state court, we obtained the docket for each complaint we had identified as concerning any the covered products. For the federal court complaints where we obtained complaints through word searches or through review of MDL proceedings, we obtained the relevant dockets using information included in the complaints, including court of filing, date of filing, and party names.<sup>85</sup>

## Docket data reviewed

We reviewed the court dockets we collected as described above to identify resolutions of claims filed by consumers in the case (“outcomes”), the status of the case (closed or not), and certain other aspects of motions practice. To ensure a uniform approach to coding, we used a cutoff date of February 28, 2014; docket information after the cutoff date was not reviewed except to note, in cases not reported as closed (or with an appeal pending or other indication of pending claims), the number of cases that had finally approved class settlements, settlements under court review, or class certifications after the cutoff date. We reviewed docket entries, summary case data in headers and footers of dockets, and where applicable and electronically-available, underlying case filings associated with certain docket entries.<sup>86</sup>

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<sup>85</sup> Most dockets were obtained using Courtlink. Some of the federal court dockets were obtained directly from the **federal courts’ Public Access to Court Electronic Records (“PACER”) system, which is an electronic public access service with over one million registered users. See <https://www.pacer.gov/>** (last visited Mar. 6, 2015). In addition, for a few of the cases originally filed in state court, we could not obtain dockets in our final set from Courtlink and thus obtained the docket either from Westlaw, Bloomberg Law, or the relevant state or county filing system, where accessible.

<sup>86</sup> We did not routinely look at all case filings. Rather, we generally checked case filings when a docket entry suggested information bearing on our coding but further review of the case filing was needed. For example, docket entries in MDLs did not always clearly identify which complaints were affected by the entry, necessitating review of case filings to determine which cases were affected. In cases where a consumer withdrew claims, we checked associated case filings to determine whether the parties or the court noted the existence of a settlement. When a court granted a **company’s dispositive motion but the docket did not state that a company party was dismissed, we checked the case**

We checked the docket to determine whether it reflected the complete case. We identified from the docket any other trial courts that had jurisdiction over the complaint in addition to the court where the complaint was originally filed. Additional trial-level courts could be drawn into the case not only through a transfer to an MDL, but also through a transfer to another trial court or consolidation with a case filed in another trial court and, in the case of state class action complaints, through removal to federal court. In these cases, we also obtained the dockets from these additional courts, when electronically available, and analyzed case events that appeared on all available dockets.

We also noted if any decision in the case was appealed and reviewed documents related to the appeal in both the trial and appellate court and the appellate docket, when electronically available. If the appeal was decided on or before our February 28, 2014, coding cutoff and reversed a case event or outcome on which we report, we updated our reporting to reflect the result of the appeal.

## Coding of motions and rulings

- ***Motions invoking arbitration clauses.*** We identified any case in which any motion was filed that the docket described as a motion to compel arbitration or to dismiss or stay the litigation for arbitration.<sup>87</sup> In each of these cases, we identified those cases in which the combined court response to all such motions fell into one of the following categories:

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filings to determine whether the court did dismiss a company party. We also reviewed all cases where the court granted **a company's motion to dismiss and dismissed a company party from a class case to determine whether a class settlement in another case served as the basis for the dismissal**, but did not find any examples of this in our case set. In state court cases, we sought to check available case filings when a docket entry was too vague to determine its **nature (such as an entry that refers merely to a "motion" or "order" without specifying the relief sought)**.

<sup>87</sup> Due to standardized electronic filing conventions in federal court, and based upon a test of 100 cases, we found that docket entries in federal court reliably indicated when such motions pertained to arbitration. As previously noted, above, we did not routinely review case filings to determine whether motions with docket entries that did not refer to arbitration were, in fact, motions that pertained to arbitration. State court dockets also sometimes stated when a motion related to arbitration but not reliably, and state court pleadings were not consistently available for review. Thus we may not have captured all arbitration motions filed in state court. In addition, as noted in Section 6.7.1, three federal individual cases were coded as having motions based on the content of stipulations we had identified during our review.

- Dismissal of the party or parties filing the motion or stay of the case against them<sup>88</sup>;  
or
- Some claims against the party or parties filing the motion stayed or dismissed.
- Dispositive motions.
  - ***Motions to dismiss***. We identified any case in which a company party filed a motion to dismiss<sup>89</sup> any claim. We did not include in this category motions to dismiss for arbitration, as discussed above. We did not identify grounds for these motions to dismiss. If a dismissed party was part of a court-approved class settlement in another case in our review set concerning the same product, we checked to determine whether the class settlement in the other case was cited as a basis for the dismissal.<sup>90</sup> In each of these cases, we identified those cases in which the combined court response to all such motions included at least one ruling that granted a motion and dismissed a company party.<sup>91</sup>
  - ***Motions for summary judgment***. We also identified any case in which a company party filed a motion for summary judgment or a motion for judgment on the pleadings with respect to any claim. In each of these cases, we identified those cases

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<sup>88</sup> In many cases, all of the claims in the case are covered by the arbitration motion. In certain multi-party cases, however, there may be other claims in the case against parties who had not filed an arbitration motion and thus would still be pending even if all claims subject to the arbitration motion were stayed or dismissed.

<sup>89</sup> **This included motions styled as “demurrers” in state courts.**

<sup>90</sup> In addition, for both motions to dismiss and motions for summary judgment that were withdrawn, we treated such motions as not filed.

<sup>91</sup> **When the court granted a company party’s motion to dismiss but the docket did not indicate dismissal of a filing party, we checked the associated case filings to determine whether the court did dismiss a company party from the action on the basis of the ruling on the motion to dismiss.**



in which the combined court response to all such motions included at least one ruling that granted a motion and dismissed a company party.<sup>92</sup>

- ***Rulings certifying classes outside of settlement context***. When a complaint was filed as a class case, we determined whether the court granted in whole or in part a consumer motion for class certification outside the context of settlement. When such a court ruling was identified, we also captured the date of the court ruling.

## Identifying types of outcomes

Below we list the types of outcomes we identified. Our coding method captured each type of outcome that occurs in each case, including when more than one type of outcome occurs (*i.e.*, when certain claims have one type of outcome, and other claims have other types of outcomes).

- Court ***sua sponte*** dismissal of at least one company party.
  - Such dismissals were for various reasons, most commonly for lack of jurisdiction.
- Court granted at least one company's dispositive motion resulting in dismissal of at least one company party.
  - This included rulings on the basis of motions to dismiss on grounds other than arbitration, and motions for summary judgment or similar motion.<sup>93</sup>
- Court granted at least one company party's motion to compel arbitration (whether styled as a motion to compel, or to dismiss or stay an action for, arbitration).

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<sup>92</sup> **When the court granted a company party's motion for summary judgment but the docket did not indicate dismissal** of a filing party, we checked the associated case filings to determine whether the court did dismiss a company party from the action on the basis of the ruling on the motion for summary judgment.

<sup>93</sup> If an order granting a motion provided for dismissal of a company party but allowed for the consumer to file an amended complaint, and an amended complaint was filed against all the company parties subject to the dismissed complaint, we did not count this as a dismissal of a company party.

- This outcome category included rulings to stay or dismiss all claims against the filing party on the basis of arbitration or motions to compel arbitration but not rulings to stay or dismiss only certain claims against the filing party.
- Trial verdict in favor of a company party on all claims tried (whether on the basis of a jury or bench trial).
- Settlement of any claim.
  - We included known settlements reached on a non-class basis in class cases and individual cases.
  - We identified non-class settlements through docket entries and court filings such as a notice or letter from a consumer indicating settlement had occurred, a reference to settlement or resolution in connection with a voluntary withdrawal of claims by a consumer (*e.g.*, in a consumer motion to dismiss, a joint motion to dismiss, or a stipulation of dismissal under Fed. R. Civ. P. 41(a)), or the consumer’s acceptance of an offer of judgment pursuant to Fed. R. Civ. P. 68.
- Potential settlement.
  - This outcome category includes cases with voluntary withdrawal of claim(s) by a consumer without an indication of settlement on the docket or in associated case filings, as well as dismissals of claims against a company party due to the consumer’s failure to serve or failure to prosecute. We believe these outcomes typically resolved all claims against one or more parties.<sup>94</sup>
  - For the class action cases, these potential settlements presumably were with respect to the named plaintiff(s) only and not the putative class, given that we did not find court review of any proposed class settlement.
- Final approval of class settlements in class cases.

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<sup>94</sup> Although the amendment of a complaint could effectively withdraw claims that had been asserted in the preceding complaint, we did not treat amended complaints as potential settlements. In addition, while failure to serve and failure to prosecute dismissals were initiated by the court, and thus could be viewed as sua sponte dismissals, we categorized these as potential settlements and not as sua sponte dismissals.

- Judgment for consumer(s) on at least one claim. This would include any of the following events leading to judgment for the plaintiff:
  - A default judgment, such as pursuant to Fed. R. Civ. P. 55(b) in federal court.
  - Grant of a consumer’s motion for summary judgment in whole or in part.<sup>95</sup>
  - Trial verdict for a consumer on any claims tried (whether on the basis of a jury or bench trial).
- Classwide judgment for consumers (in federal and state class cases only).

## Monetary relief amounts in judgments and non-class settlements

Monetary relief awarded in class settlements is the subject of a separate study in Section 8. To avoid duplication, we did not cover the content of class settlements in this section. In any case with a known non-class settlement or a non-class judgment for consumer(s), we captured the amount of any monetary relief to the consumer specified in any non-class settlement agreement and court judgment on the docket (but did not capture the amount of attorneys’ fees, costs, or interest).<sup>96</sup>

## Determining case status (closed or not)

On the header of federal court dockets, the court indicates whether the case is “open” or “closed” (in Courtlink, we believe based on data obtained from the federal court’s PACER docket system). Cases reported as “closed” also have a closure date in the docket header. We captured this information. In cases conditionally transferred to MDL proceedings, which docket we used to capture closure information depended on whether the case was ultimately returned to the transferor court, whether by remand or by vacating the conditional transfer order. If these cases

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<sup>95</sup> We included a case in this category if the motion was granted, regardless of whether a judgment was entered based on the motion.

<sup>96</sup> **If the settlement or judgment amount included attorneys’ fees or court costs and did not break them out separately from monetary relief, the amount of monetary relief was not known.**

were remanded or vacated to the transferor court, we coded the case as “closed” if the transferor court reported the case as closed with a closure date after the date of the remand or vacate order.<sup>97</sup> If these cases were not remanded or vacated to the transferor court, we coded the case as “closed” if the MDL court docket reported all parties to the case as “terminated.” We also applied the latter approach to any case originally filed in an MDL. Finally, if an MDL case had a last docket entry prior to our coding cutoff and had a dismissal of all company parties, we coded it as “closed.”

State court dockets varied with respect to whether the open or closed status of a case was indicated on the docket header. For purposes of determining the status of a state class case, counties can be classified into three groups:<sup>98</sup> (1) counties where the docket header indicated the case’s closed status and the case closure date, if applicable;<sup>99</sup> (2) counties where the docket header indicated the case’s closed status but did not indicate a closure date, if applicable;<sup>100</sup> and (3) counties where the header was unclear or silent regarding the case’s closed status.<sup>101</sup> For the first group, we used the case status and closure date as indicated on the docket header. For the second group, we used the case status as indicated on the docket header, and used the date of the docket entry dismissing the case as the case closure date. Note that we relied on the Courtlink or Westlaw docket header status where the state court docket header was silent as to closure.<sup>102</sup> For the third group, we reviewed the docket entries to determine whether a case was closed, and if closed, the case closure date. Where a state court case was removed to federal

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<sup>97</sup> In some cases, the transferor court had coded the case as “closed” when the order conditionally transferring the case to the MDL was entered, and did not re-open the case when it was remanded from the MDL or the transfer to the MDL was vacated.

<sup>98</sup> Even where we searched for complaints on a statewide basis (*e.g.*, New York), the dockets within the state differed by county and thus we describe them here by county.

<sup>99</sup> Cleveland County, Oklahoma is the only county that fell into this category.

<sup>100</sup> These counties include: Cook County, Illinois; Dallas County, Texas; Harris County, Texas; New York County, New York; and San Diego County, California.

<sup>101</sup> These counties include: Los Angeles County, California and Orange County, California.

<sup>102</sup> LexisNexis and Westlaw advised us that the information on their respective dockets was received directly from the applicable court.

court, we determined the status and closure date, if applicable, by using the status information on the federal district court's docket header.

We relied on the trial court docket for indicators of closure. If a case was appealed, and the case had been reported as closed during the appeal, we still coded the case as closed.

## APPENDIX M: SECTION 6

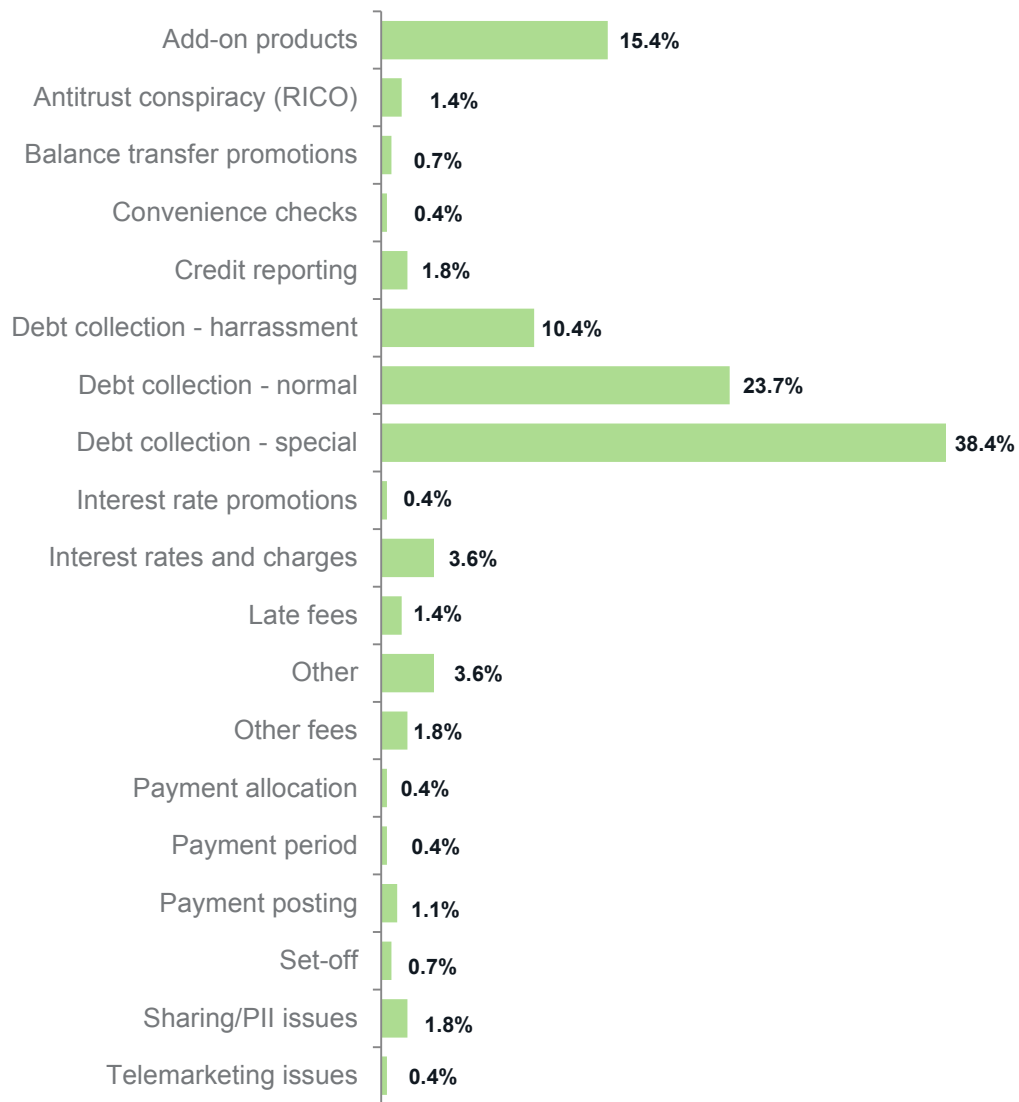
# Litigation dispute typologies in class cases concerning credit cards, checking accounts and debit cards, and payday loans

Figures 4, 5, and 6 show dispute typologies for all class cases concerning credit cards, checking accounts/debit cards, and payday loans.<sup>103</sup> We similarly reported on subject matter typologies for these product markets in our review of the AAA Case Data in the 2013 Preliminary Results at pp. 89–91.

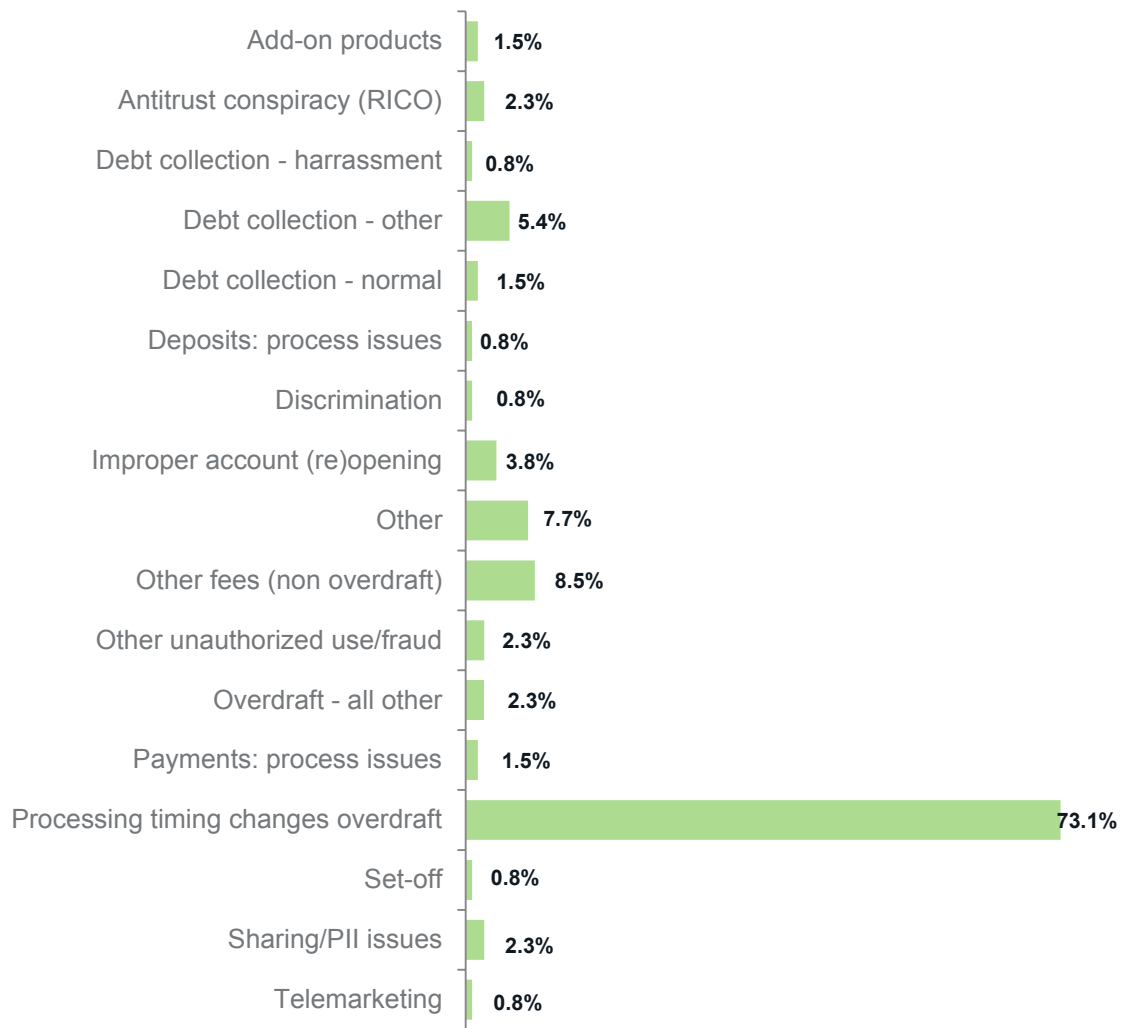
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<sup>103</sup> Note that the percentages reflected in these figures add to more than 100% because a single complaint can allege claims concerning more than one type of dispute.

**FIGURE 4:** FREQUENCY OF DISPUTE TYPOLOGIES IN FEDERAL AND STATE CLASS CREDIT CARD CASES, FILED IN 2010–2012 (279 CASES)

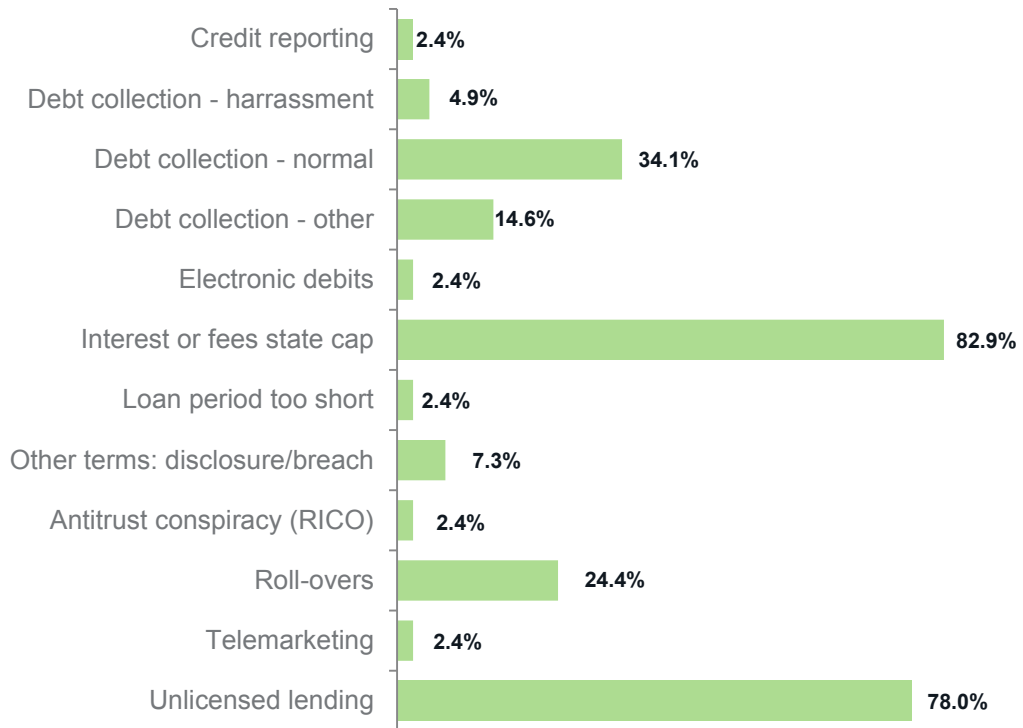


**FIGURE 5:** FREQUENCY OF DISPUTE TYPOLOGIES IN FEDERAL AND STATE CLASS CHECKING/DEBIT CARD CASES, FILED IN 2010–2012 (130 CASES)





**FIGURE 6:** FREQUENCY OF DISPUTE TYPOLOGIES IN FEDERAL AND STATE CLASS PAYDAY LOAN CASES, FILED IN 2010–2012 (41 CASES)

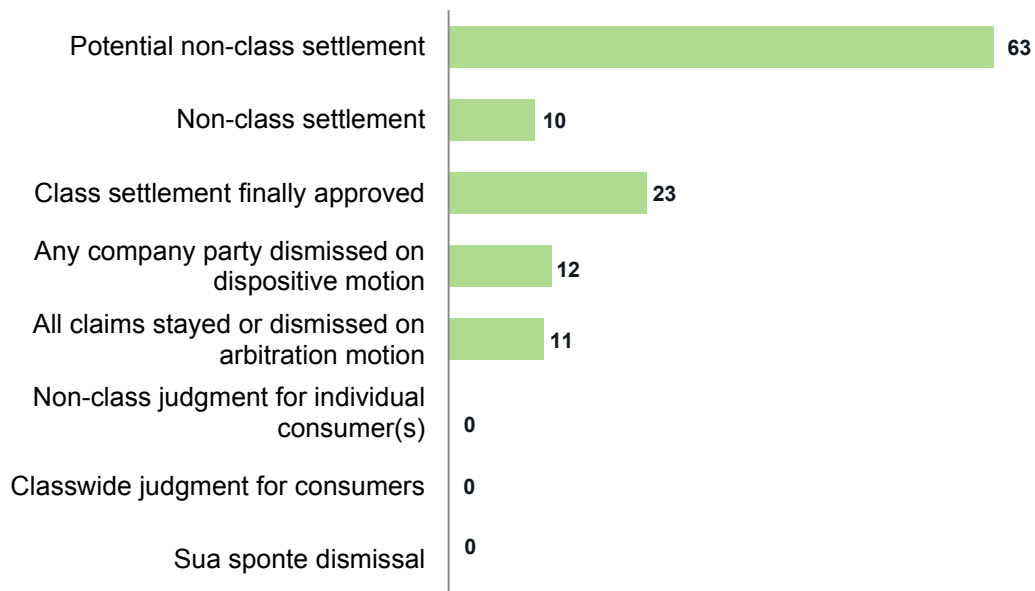


## APPENDIX N: SECTION 6

# Frequency of outcome types by product<sup>104</sup>

### Federal and state class cases

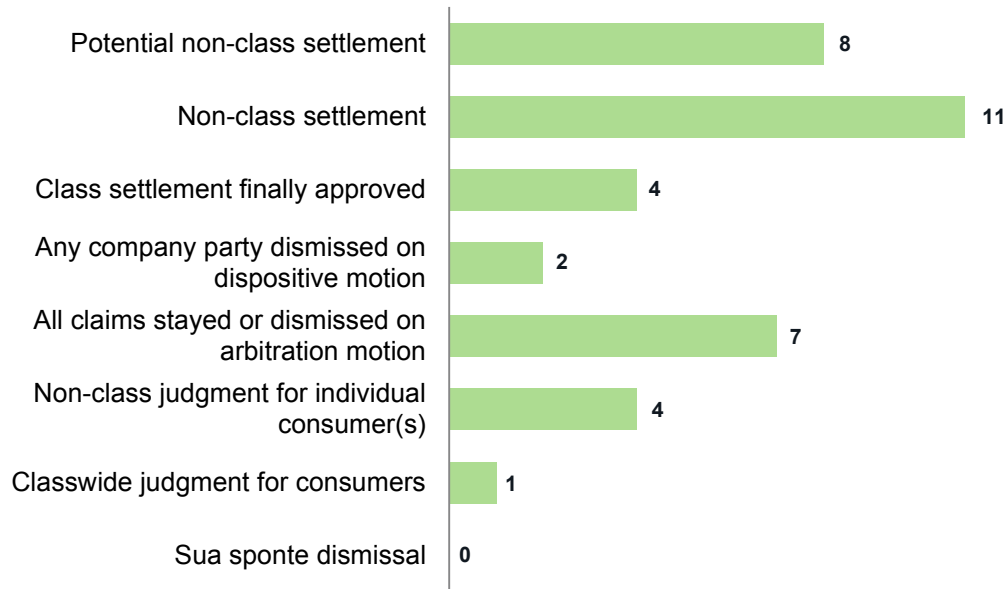
**FIGURE 7:** FREQUENCY OF OUTCOME TYPES IN FEDERAL AND STATE CLASS CHECKING/DEBIT CARD CASES, FILED 2010–2012 (130 CASES)<sup>105</sup>



<sup>104</sup> With respect to each figure presented in this appendix, the frequency of outcome types across a case set does not equal the total number of cases in that set because the outcome types are not mutually exclusive (more than one type of outcome can occur in a single case) and some cases (such as cases not reported as closed) did not have outcomes.

<sup>105</sup> There were 22 federal or state class checking/debit card cases in which we identified no outcome.

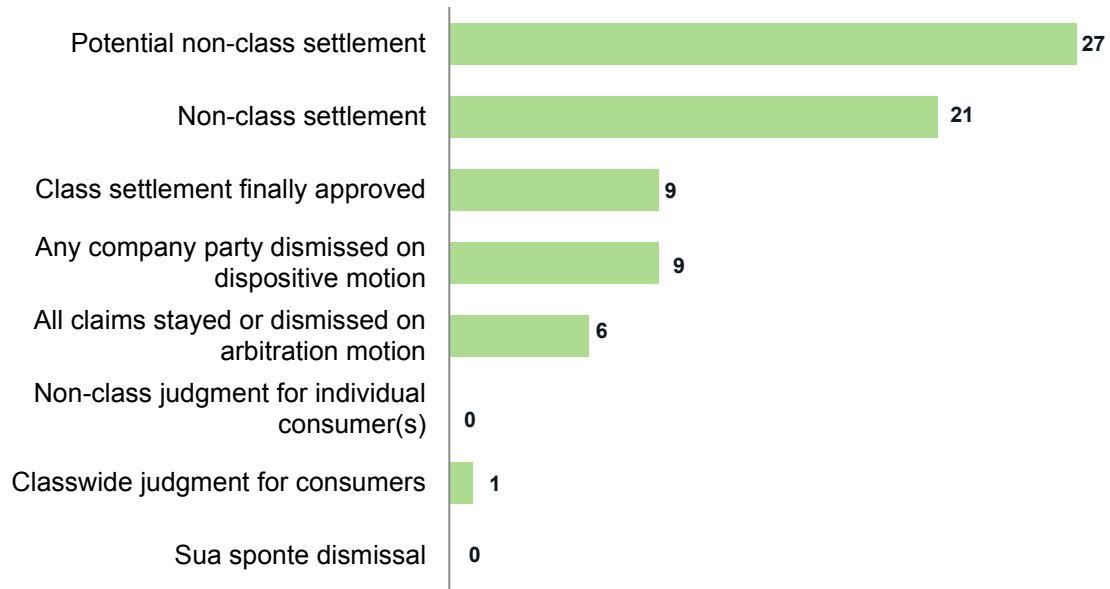
**FIGURE 8:** FREQUENCY OF OUTCOME TYPES IN FEDERAL AND STATE CLASS PAYDAY LOAN CASES, FILED IN 2010–2012 (41 CASES)<sup>106</sup>



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<sup>106</sup> There were nine federal or state class payday loan cases in which we identified no outcome.

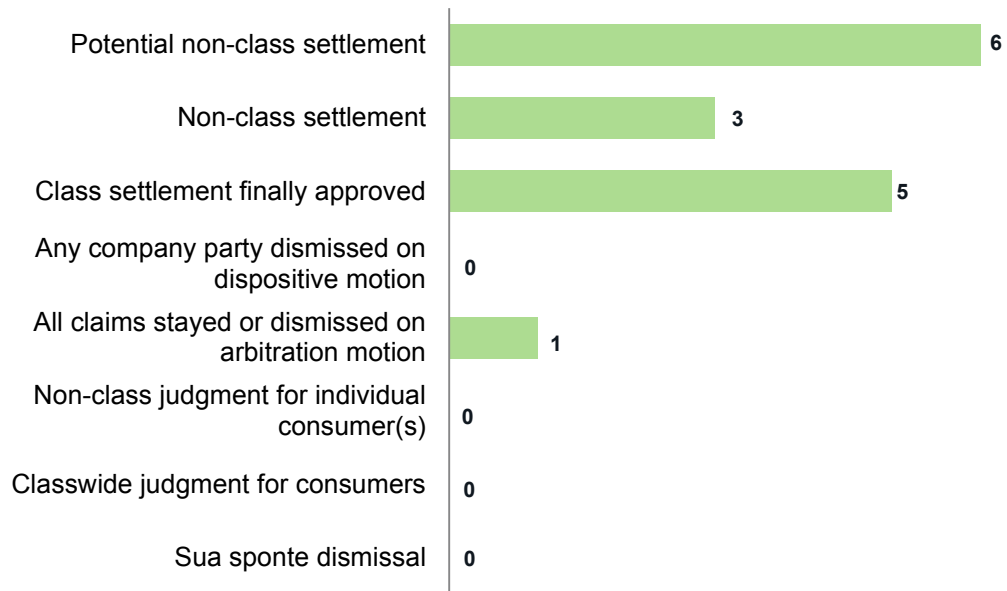
**FIGURE 9:** FREQUENCY OF OUTCOME TYPES IN FEDERAL AND STATE CLASS AUTO LOAN CASES, FILED IN 2010–2012 (93 CASES)<sup>107</sup>



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<sup>107</sup> There were 28 federal or state class automobile loan cases in which we identified no outcome.

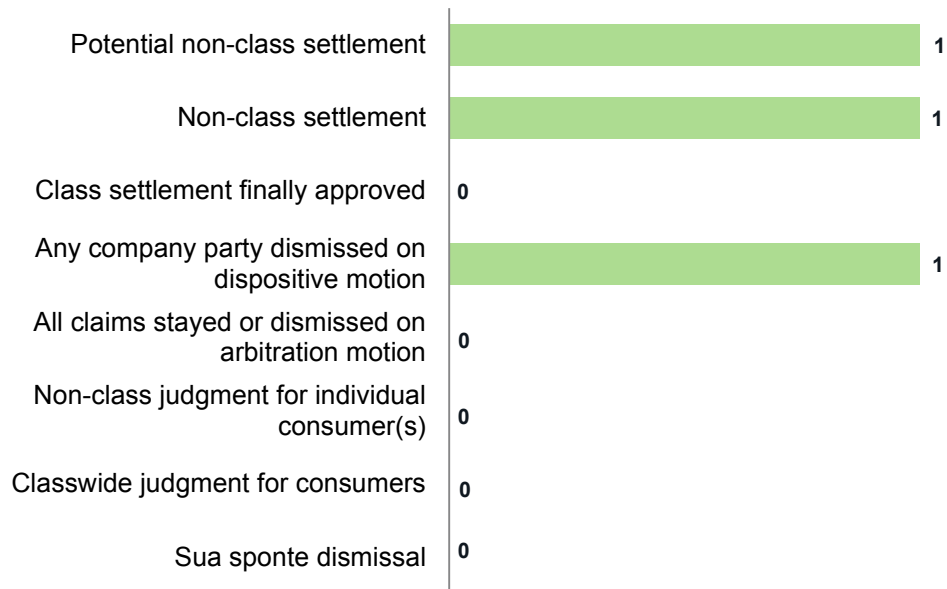
**FIGURE 10:** FREQUENCY OF OUTCOME TYPES IN FEDERAL AND STATE CLASS PRIVATE STUDENT LOAN CASES, FILED IN 2010–2012 (16 CASES)<sup>108</sup>



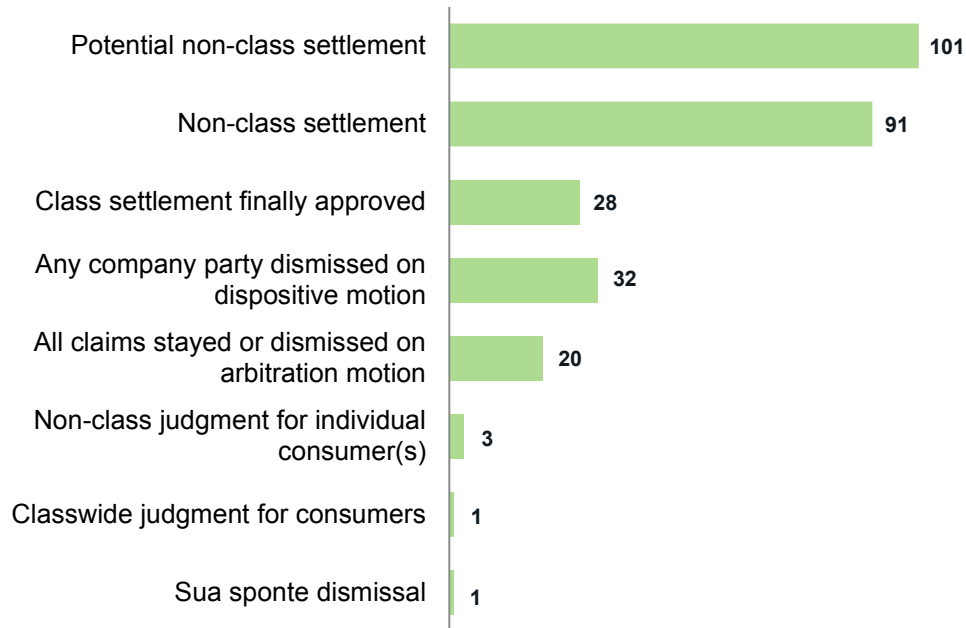
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<sup>108</sup> There were two federal or state class private student loan cases in which we identified no outcome.

**FIGURE 11:** FREQUENCY OF OUTCOME TYPES IN FEDERAL AND STATE CLASS PREPAID CARD CASES, FILED 2010–2012 (3 CASES)



**FIGURE 12:** FREQUENCY OF OUTCOME TYPES IN FEDERAL AND STATE CLASS CREDIT CARD CASES, FILED IN 2010–2012 (279 CASES)<sup>109</sup>

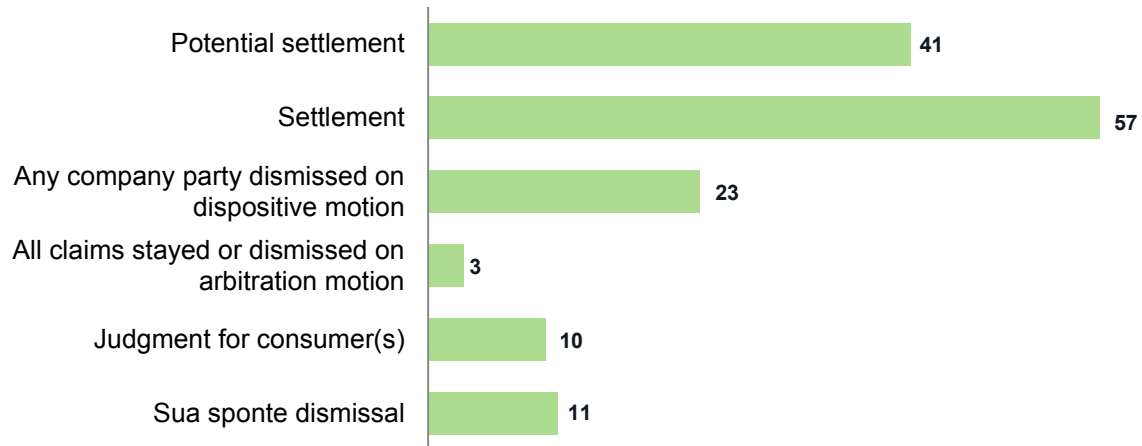


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<sup>109</sup> There were 23 federal or state class credit card cases in which we identified no outcome.

## Federal individual cases

**FIGURE 13:** FREQUENCY OF OUTCOME TYPES IN FEDERAL INDIVIDUAL CHECKING/DEBIT CARD CASES, FILED 2010–2012 (137 CASES)<sup>110</sup>

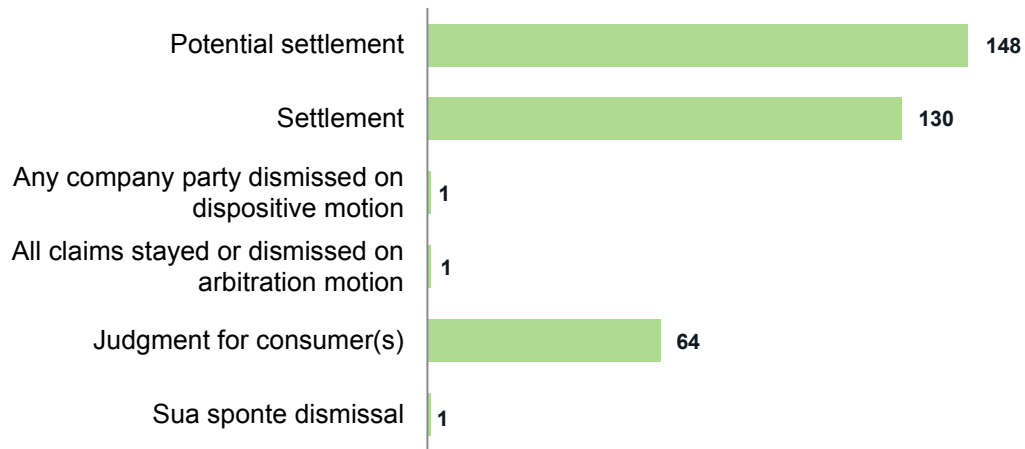


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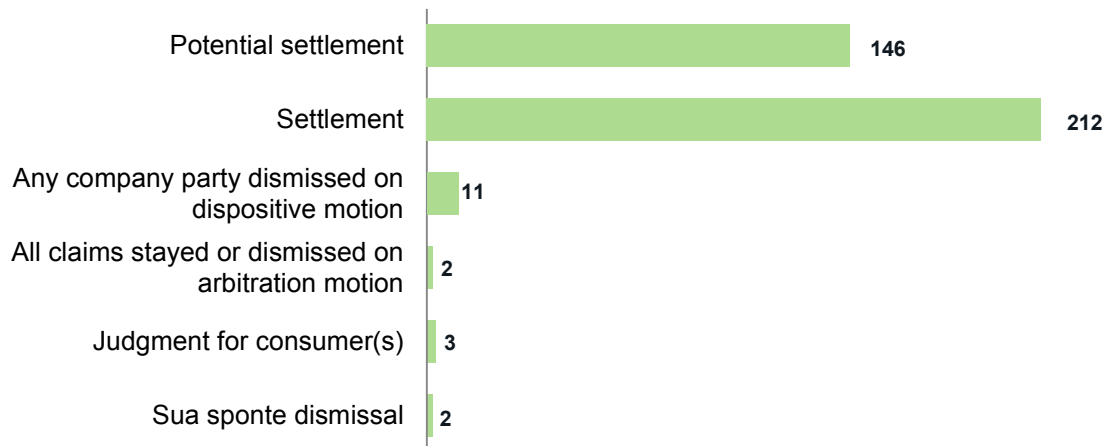
<sup>110</sup> There were two federal individual checking cases in which we identified no outcome.



**FIGURE 14:** FREQUENCY OF OUTCOME TYPES IN FEDERAL INDIVIDUAL PAYDAY LOAN CASES, FILED IN 2010–2012 (333 CASES)<sup>111</sup>



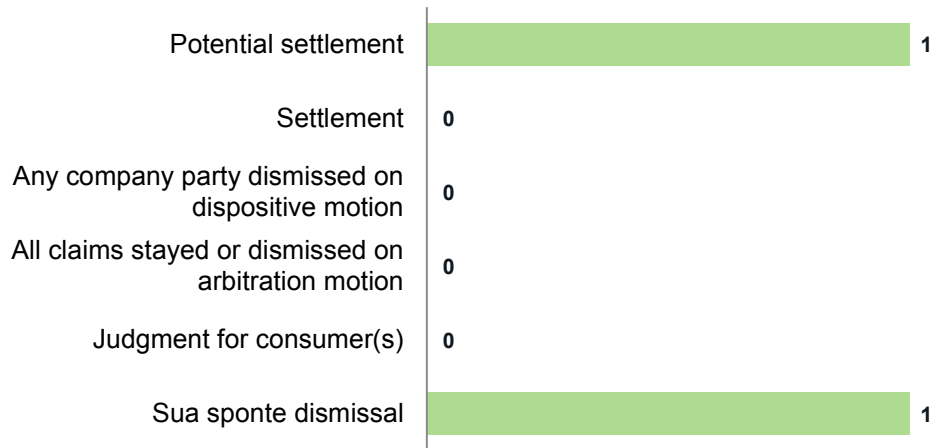
**FIGURE 15:** FREQUENCY OF OUTCOME TYPES IN FEDERAL INDIVIDUAL PRIVATE STUDENT LOAN CASES, FILED IN 2010–2012 (369 CASES)



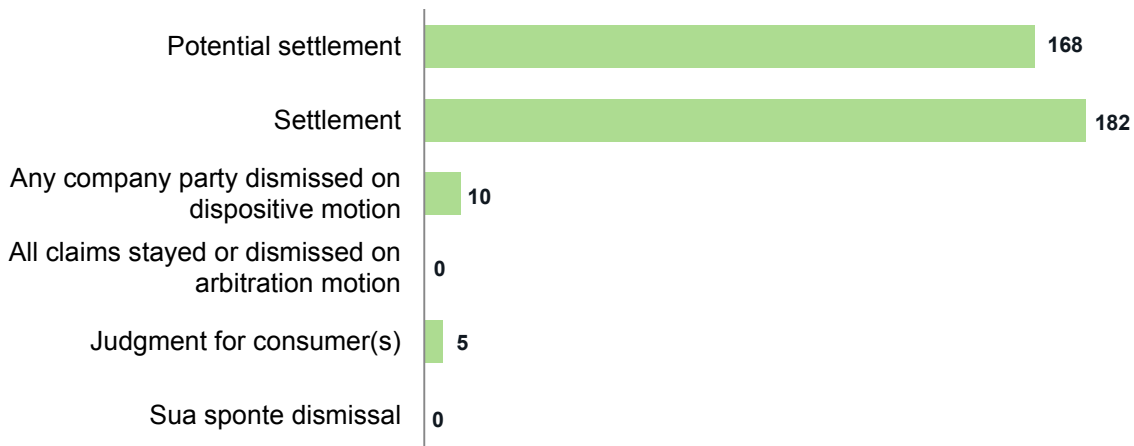

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<sup>111</sup> There were two federal individual payday loan cases in which we identified no outcome.

**FIGURE 16:** FREQUENCY OF OUTCOME TYPES IN FEDERAL INDIVIDUAL PREPAID CARD CASES, FILED 2010–2012 (2 CASES)

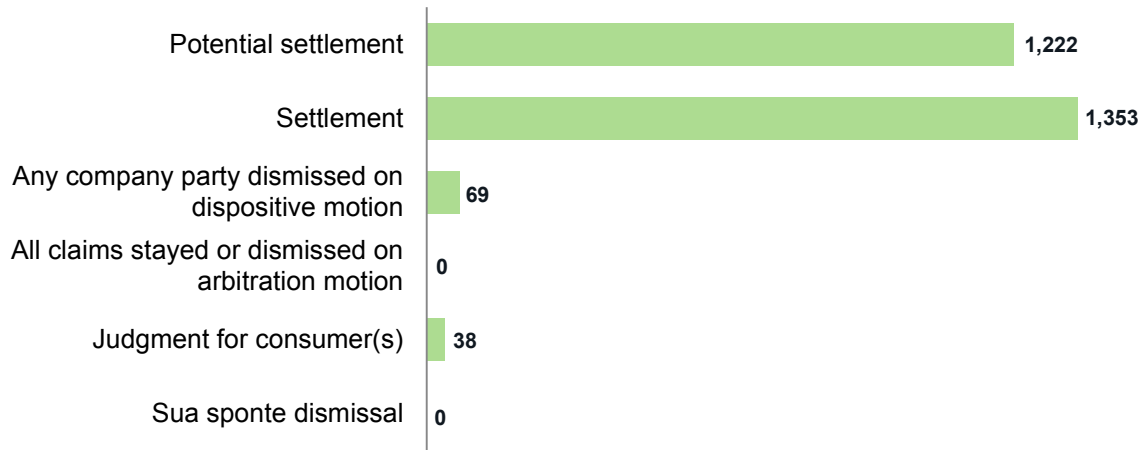


**FIGURE 17:** FREQUENCY OF OUTCOME TYPES IN FEDERAL INDIVIDUAL CREDIT CARD CASES (SAMPLE ONLY) FILED IN 2010–2012 (364 CASES)<sup>112</sup>

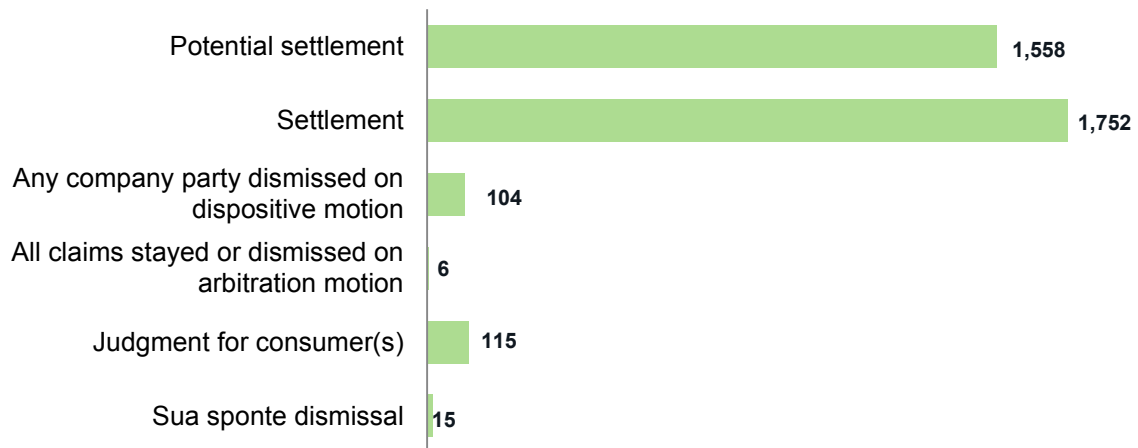


<sup>112</sup> There were ten federal individual credit card cases in the sample for which we identified no outcome.

**FIGURE 18:** FREQUENCY OF OUTCOME TYPES IN FEDERAL INDIVIDUAL CLASS CREDIT CARD CASES (SAMPLE EXTRAPOLATED TO ALL CREDIT CARD CASES) FILED IN 2010–2012 (2,621 CASES)



**FIGURE 19:** FREQUENCY OF OUTCOME TYPES IN FEDERAL INDIVIDUAL CASES (ENTIRE SET WITH CREDIT CARD OUTCOMES EXTRAPOLATED) FILED IN 2010–2012 (3,462 CASES)



## APPENDIX O: SECTION 6

# Outcome profiles matrix in class and individual litigation cases with multiple outcomes

Table 19 below shows the overlap of outcomes that occurs in class cases with multiple outcomes. Table 20 shows the same overlap that occurs in individual cases with multiple outcomes. Each possible outcome appears on both the vertical and horizontal axis of the table. The number at the intersection of each row and column is the number of cases in which the outcome in that row and column both occurred. For example, Table 19 shows the number 15 at the intersection of the row for “all claims stayed/dismissed on arbitration motion” and the column for “potential non-class settlement.” This means that there are 15 class cases in which both of those two outcomes occurred at least once.<sup>113</sup>

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<sup>113</sup> We identified two cases in the class set and two cases in the individual set that each had three outcomes and for which the intersection of each pair of outcomes within the three-outcome grouping is shown on Tables 19 and 20. Accordingly, the number of overlapping outcomes on the table equals more than the total number of cases with **multiple outcomes. The three outcomes that occurred in the class cases were: (1) “All claims against a moving party stayed or dismissed on arbitration motion” and “any company party dismissed on dispositive motion and potential settlement”;** and (2) “All claims against a moving party stayed or dismissed on arbitration motion” and “known settlement and potential settlement.” For the individual cases, the three outcomes that occurred were: (1) “judgment for consumer(s)” and “known settlement” and “potential settlement”; and (2) “judgment for consumer(s)”; “any company party dismissed on dispositive motion”; and “*sua sponte* dismissal.”

**TABLE 19: OUTCOME PROFILES MATRIX FOR FEDERAL AND STATE CLASS CASES WITH MULTIPLE OUTCOMES, FILED IN 2010–2012 (44 CASES)**

Outcome type	Potential non-class settlement	Non-class settlement	Class settlement finally approved	Any company party dismissed on dispositive motion	All claims stayed/ dismissed on arbitration motion	Non-class judgment for individual consumer(s)
Classwide judgment for consumers	1	0	2	0	0	0
Non-class judgment for individual consumer(s)	0	1	0	0	0	
All claims stayed/ dismissed on arbitration motion	15	7	0	2		
Any company party dismissed on dispositive motion	7	2	0			
Class settlement finally approved	6	0				
Non-class settlement	5					

**TABLE 20:** OUTCOME PROFILES MATRIX FOR FEDERAL INDIVIDUAL CASES WITH MULTIPLE OUTCOMES, FILED IN 2010–2012 (40 CASES)

Outcome type	<i>Sua sponte</i> dismissal	Potential settlement	Settlement	Any company party dismissed on dispositive motion	All claims stayed/ dismissed on arbitration motion
Judgment for consumer(s)	1	7	6	1	0
All claims stayed/dismissed on arbitration motion	0	0	3	0	
Any company party dismissed on dispositive motion	2	5	3		
Settlement	0	15			
Potential settlement	1				

## APPENDIX P: SECTION 6

# Review of court opinions citing *Concepcion* in cases with motions to compel arbitration

### Method for identifying cases

We tallied grants of motions to compel arbitration in consumer financial cases that cited the Supreme Court's decision in *AT&T v. Concepcion*, 131 S. Ct. 1740 (2011).

We began by identifying all cases with opinions that were, as of December 31, 2014, reported in the Westlaw database that cited to the Supreme Court's opinion.

From that set of over 1,000 opinions from the Westlaw database, we then identified opinions in cases concerning consumer financial products and services (except for mortgages) in the following categories:

- TILA (except mortgages);
- FDCPA, debt collection (any consumer debt, except mortgages);
- TCPA (any consumer finance products, except mortgages);
- FCRA/identity theft (any products, except mortgages);
- Credit cards issues, such as add on products;
- Depository bank issues, such as overdraft or non-sufficient fund fees;
- Payday lending/small dollar lending;
- Student loans;

- Car sales — financing;
- Car title lending;
- Car repossession;
- Credit counseling, debt settlement, credit repair, debt reduction;
- Credit life or disability insurance;
- Servicemember issues (across consumer financial products); and
- Medical malpractice or other lawsuit funding loan.

## Method for review of cases identified

We then reviewed the opinions to determine if a motion to compel arbitration had been filed in the cases to which they related. For those cases in which a motion to compel arbitration had been filed, we reviewed the opinions to determine whether arbitration was compelled (*i.e.*, whether the motion was granted or denied, taking into account any appeals).<sup>114</sup>

## Results of review

We found 157 cases with a motion to compel arbitration where the opinion in Westlaw cited to *Concepcion*. In 107 cases, we found that a motion to compel arbitration was granted (77 class cases and 30 individual cases). In 41 cases, we found that a motion to compel arbitration was denied (31 class cases and ten individual cases). In cases where we did not find a grant or denial, this was because either the motion was pending as of the end of 2014, the case concluded before

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<sup>114</sup> Cases involving the same plaintiff and defendant were cited as one “case” for our tally, and the final decision was recorded as the outcome – even though there were cases where courts reached different decisions about whether to compel arbitration during the course of the case (potentially in different opinions). In cases where different conclusions were reached as to different defendants, we counted the different outcomes separately. As a result, the number of cases with motions granted and the number of cases with motions denied is higher than the total number of cases in which the motions were decided. In addition, the decisions compelling arbitration may have been the subject of appeals, motions for reconsideration, or other decisions that were either added to the Westlaw database after December 31, 2014 or not recorded in the database at all.



the motion was decided (*e.g.*, the parties settled), or we could not determine the outcome of the motion.

## Comparison of scope of search to scope of other cases reviewed in Section 6

Of the consumer financial cases with motions to compel arbitration and opinions citing *Concepcion*, 24 were also identified in Section 6 as including motions to compel arbitration, and 14 of these 24 cases were identified in both sets as having motions to compel arbitration that were granted.<sup>115</sup> All of these 14 cases were class cases.

Our set of consumer financial cases with motions to compel arbitration and opinions citing *Concepcion* also was potentially narrower in some respects and broader in other respects than the cases covered in the rest of Section 6. The cases covered in the rest of Section 6 were not necessarily limited to court opinions captured in the Westlaw database, or to opinions issued after *Concepcion* that cited to *Concepcion*. However, in searching for the types of cases we covered in the rest of Section 6, our search for consumer financial cases with motions to compel arbitration and opinions citing *Concepcion* was designed to capture any of the following:

- Opinions reached through December 31, 2014 (including those beyond the coding cutoff for cases analyzed in the rest of Section 6, which was February 28, 2014).
- Opinions regardless of when the case had been filed (*i.e.*, not limited to cases filed in the three-year period between 2010 and 2012 as was the case for the rest of Section 6).
- Opinions in federal courts or state courts, including state court individual cases (which were not covered in the rest of Section 6) and state court class cases filed in jurisdictions we did not sample in the rest of Section 6.
- Opinions in cases regardless of the search terms that appeared in the complaint (federal court cases covered in the rest of Section 6 except for those in MDL proceedings were limited to those where the complaint was responsive to search terms) or on the docket

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<sup>115</sup> To identify overlapping cases, we compared consumer and company party names across the two case sets. We found two of the overlapping cases had been coded in the litigation set as having granted motions to compel arbitration, but which the Westlaw opinions revealed had been reversed on appeal after the coding cutoff date.

(state class actions covered in the rest of Section 6 were identified through docket searches).

- Opinions in any of the categories listed above, which would include product markets beyond those we covered in the rest of Section 6 (*i.e.*, including in federal individual auto loan cases, as well as other product markets for both class and individual cases).
- Opinions in civil litigation cases and bankruptcy cases (the cases covered in the rest of Section 6 were limited to civil litigation cases).
- Opinions in consumer-filed and company-filed cases (the cases reported on in the rest of Section 6 were limited to consumer-filed cases).

## APPENDIX Q: SECTION 7

# Small claims court data and methodology

This appendix provides additional data for Section 7. It also provides a more detailed description of our methodology.

### Data by jurisdiction

Table 21 shows data by jurisdiction for our estimated outer limit on consumer claims against our credit card issuer sample.

Our issuer sample covers on the order of 84% of the credit card market measured by outstandings in the 2013 Preliminary Results.<sup>116</sup>

We have included for each jurisdiction the estimated annual volume for credit card direct mail for the issuer sample overall, using data from a commercial provider.<sup>117</sup> Those volume numbers show that our issuer sample collectively has a significant presence in each jurisdiction, at least from a marketing perspective.<sup>118</sup> It is true that a low number of claims *for a specific issuer* in a particular jurisdiction may reflect a lack of issuance *by that issuer* in that area. To address this issue, we have noted with an asterisk every instance in which a specific issuer had no direct mail

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<sup>116</sup> *See* 2013 Preliminary Results at 122, n. 310.

<sup>117</sup> **Data were available only by state. For counties, therefore, we assume that a county's population share in the state is equal to its share of direct mail.**

<sup>118</sup> In addition, for every jurisdiction, the direct mail numbers demonstrate that our sampled issuers *collectively* have a significant presence.

volume for 2012 in that area. Our review sample only includes one predominantly regional player. The rest are national issuers, so this effect is primarily isolated to that one issuer.

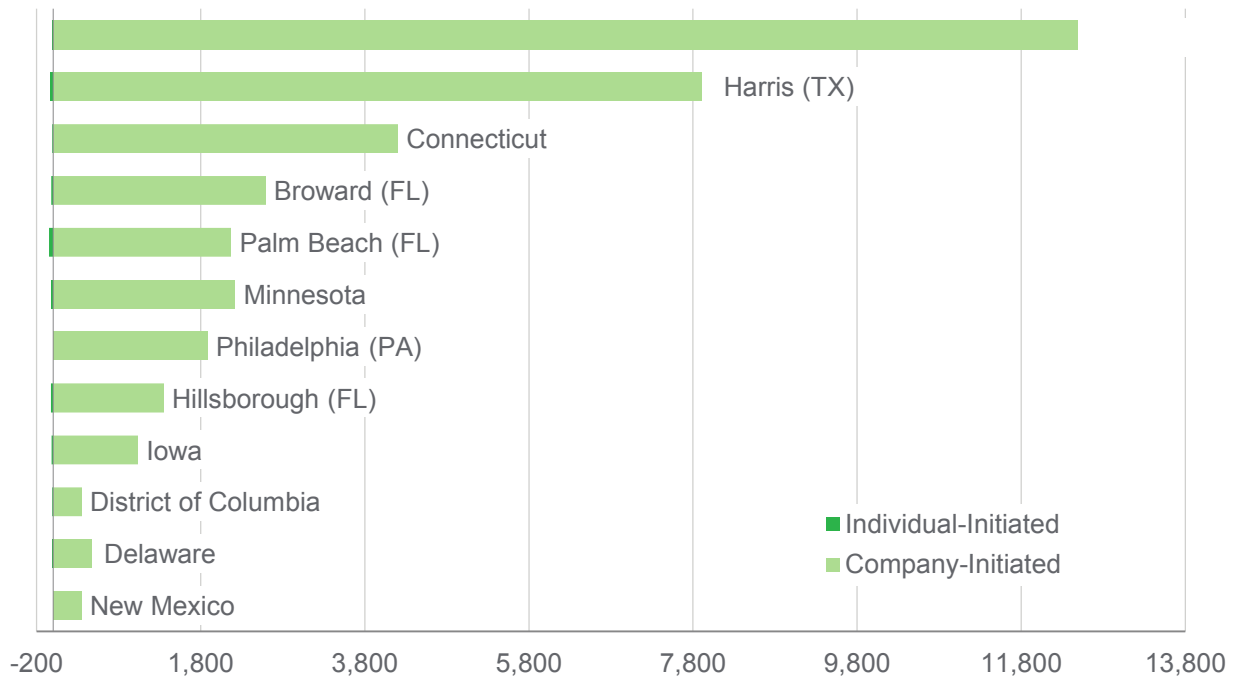
**TABLE 21: INDIVIDUAL SMALL CLAIMS COURT SUITS AGAINST ISSUERS (2012)**

	Citi	Wells	USB	USAA	Am Ex	Disc	5/3	BoA	Cap One	JPM	All issuers	2012 mailings per Mintel
Alaska	1	0	0	0	0	0	*	2	0	0	<b>3</b>	n/a
Connecticut	0	2	0	0	0	0	*	4	0	5	<b>11</b>	129,650,753
Delaware	1	0	0	0	0	1	1	1	1	0	<b>5</b>	15,665,346
District of Columbia	2	4	0	0	0	0	*	2	1	0	<b>9</b>	40,875,797
Iowa	1	3	4	0	0	0	*	1	5	3	<b>17</b>	125,424,333
Minnesota	0	17	5	2	0	1	*	1	0	0	<b>26</b>	260,603,424
New Mexico	0	1	0	1	0	0	*	0	0	0	<b>2</b>	36,658,268
New Jersey	5	19	0	3	2	0	*	17	2	9	<b>57</b>	271,344,574
New York, but not NYC	13	9	0	0	0	0	0	18	6	21	<b>67</b>	70,238,046
North Dakota	0	0	0	0	0	0	*	0	0	0	<b>0</b>	378,259,494
Oklahoma	0	0	0	1	0	0	*	0	0	3	<b>4</b>	110,984,476
Oregon	0	6	2	1	0	0	0	3	1	1	<b>14</b>	156,191,952
Utah	1	5	1	1	0	0	*	1	0	1	<b>10</b>	116,951,853
Wisconsin	1	1	1	0	0	0	0	2	0	3	<b>8</b>	253,280,825
Alameda (CA)*	1	0	0	0	3	0	*	2	0	1	<b>7</b>	57,290,710
Broward (FL)	1	0	1	0	0	0	0	17	0	4	<b>23</b>	59,396,856
Clark (NV)	1	2	0	1	1	0	*	6	1	0	<b>12</b>	40,677,128
Harris (TX)	1	2	0	1	2	0	*	9	6	11	<b>32</b>	118,398,987
Hillsborough (FL)	0	9	0	1	0	0	0	12	1	4	<b>27</b>	41,767,393
King (WA)	0	8	1	1	0	0	*	4	0	13	<b>27</b>	71,826,030
Kings (NY)	11	2	1	0	9	1	0	13	7	32	<b>76</b>	84,569,238

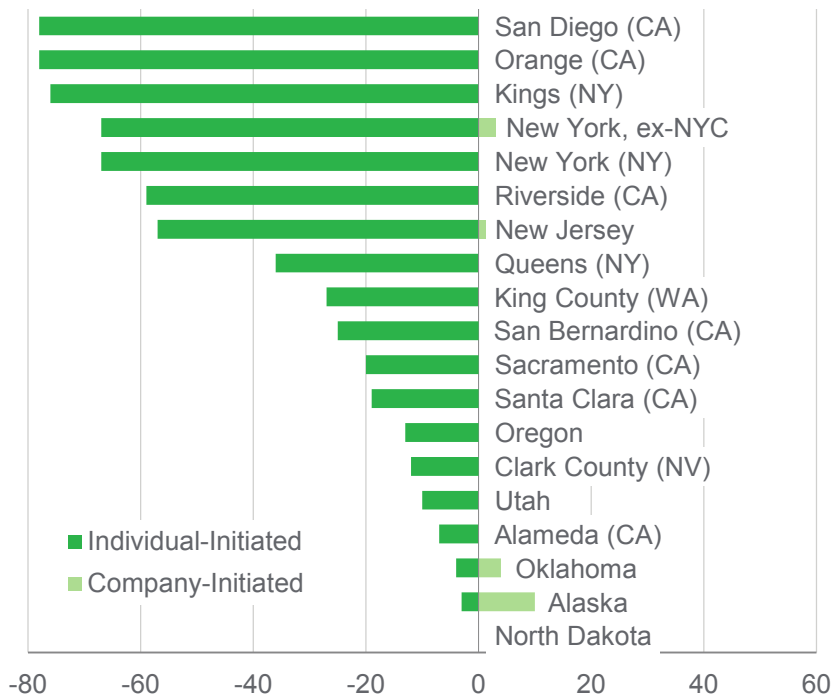
New York (NY)	15	2	0	0	9	0	0	12	2	27	<b>67</b>	53,545,763
Orange (CA)	8	14	7	0	1	0	*	36	1	11	<b>78</b>	114,190,320
Palm Beach (FL)	0	9	1	25	5	0	0	5	2	4	<b>51</b>	44,856,321
Philadelphia (PA)*	0	0	0	0	0	0	0	0	0	0	<b>0</b>	58,925,778
Queens (NY)	8	3	0	0	3	0	0	8	10	4	<b>36</b>	75,318,585
Riverside (CA)	4	8	4	0	1	0	1	32	1	8	<b>59</b>	83,061,972
Sacramento (CA)	2	9	2	0	1	0	*	0	1	5	<b>20</b>	53,820,389
San Bernardino (CA)	0	5	4	0	0	1	*	11	0	4	<b>25</b>	77,203,777
San Diego (CA)	6	28	6	1	1	0	*	20	2	14	<b>78</b>	117,417,788
Santa Clara (CA)	0	2	0	0	1	0	*	6	2	8	<b>19</b>	67,584,914
<b>All jurisdictions</b>	<b>83</b>	<b>170</b>	<b>40</b>	<b>39</b>	<b>39</b>	<b>4</b>	<b>2</b>	<b>245</b>	<b>52</b>	<b>196</b>	<b>870</b>	

The two figures below combine the data from Section 7.3 with the data from Table 21 above. Figure 20 shows the data from the jurisdictions that do not limit or bar the use of the small claims courts by companies. In these jurisdictions, company-initiated claims uniformly outnumber our outer limit estimate for consumer-filed claims. Figure 21, by contrast, shows the data from jurisdictions almost all of which limit or bar company use of small claims court. In these jurisdictions, our outer limit estimate for the number of consumer-filed credit card claims is larger than the number of company-filed claims.

**FIGURE 20:** INDIVIDUAL AND ISSUER USE OF SMALL CLAIMS COURT 2012 — PART 1 (SCALED FROM ZERO TO 14,000)



**FIGURE 21: INDIVIDUAL AND ISSUER USE OF SMALL CLAIMS COURT 2012 — PART 2 (SCALED FROM ZERO TO 100)**



## Methodology

We searched two sources of data to determine the incidence of consumer financial disputes in small claims court: state databases and county databases.

### State-level sample

We checked the online databases of the small claims courts of the 50 states and the District of Columbia. We included a state database as a source of data if it allowed us to do all of the following:

- Perform a keyword search by party name or permit easy identification of parties;
- Identify a party as a plaintiff, defendant, or third party (such as a trustee or garnishee);
- Capture statewide data, at least according to the database. We excluded states for which we could tell that a number of counties were missing. The one exception was New York which we included because we were able to capture missing counties using our county-based sample;

- Conduct statewide keyword searches rather than county-by-county searches;
- Identify suits filed in 2012; and
- Run searches for free or for a reasonable cost (*i.e.*, less than \$1,000 per state).

The jurisdictions meeting the above criteria included Alaska, Connecticut, Delaware, the District of Columbia, Iowa, Minnesota, New Mexico, New Jersey, New York (excluding New York City), North Dakota, Oklahoma, Oregon, Utah, and Wisconsin. (The databases of the remaining 36 states did not meet one or more of the criteria above.) According to the 2010 Census data, our covered states had a combined population of 52,894,194, or about 17.1% of the total U.S. population of 308,745,538.<sup>119</sup> The states meeting our criteria were concentrated in the Midwest and Northeast.

## County-level sample

To supplement our state-level sources, we checked the online small claims court databases of the 30 most populous counties.<sup>120</sup> We included a county as a source of data if the relevant database permitted us to do the following:

- Perform a keyword search by party name or permit easy identification of parties;
- Identify a party as a plaintiff, defendant, or third party (such as a trustee or garnishee);

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<sup>119</sup> All population data retrieved from <http://www.census.gov> (last visited Mar. 6, 2015). New York state results exclude the population of the five boroughs of New York City.

<sup>120</sup> These 30 counties in order of population were as follows: Los Angeles, CA (9,818,605); Cook County, IL (5,194,675); Harris County, TX (4,092,459); Maricopa County, AZ (3,817,117); San Diego County, CA (3,095,313); Orange County, CA (3,010,232); Miami-Dade County, FL (2,496,435); Kings County, NY (2,504,700); Dallas County, TX (2,368,139); Queens County, NY (2,230,722); Riverside County, CA (2,189,641); San Bernardino County, CA (2,035,210); Clark County, NV (1,951,269); King County, WA (1,931,249); Tarrant County, TX (1,809,034); Santa Clara County, CA (1,781,642); Wayne County, MI (1,820,584); Broward County, FL (1,748,066); Bexar County, TX (1,714,773); New York County, NY (1,585,873); Philadelphia County, PA (1,526,006); Alameda County, CA (1,510,271); Middlesex County, MA (1,503,085); Suffolk County, NY (1,493,350); Sacramento County, CA (1,418,788); Bronx County, NY (1,385,108); Nassau County, NY (1,339,532); Palm Beach County, FL (1,320,134); Cuyahoga County, OH (1,280,122); and Hillsborough County, FL (1,229,226).



- Identify claims filed between January 1, 2012 and December 31, 2012; and
- Run searches for free or for a reasonable cost (*i.e.*, less than \$1,000 per state).

Thirteen counties met our criteria above: Harris County (TX), Orange County (CA), Riverside County (CA), San Diego County (CA), San Bernardino County (CA), Clark County (NV), King County (WA), Santa Clara County (CA), Broward County (FL), Philadelphia County (PA), Sacramento County (CA), Palm Beach County (FL), and Hillsborough County (FL). One county (Suffolk County, NY) met the criteria above but was excluded because it was already included in a state-level source (New York state). In addition to the online small claims court databases, we found county-level data from two other sources. First, we collected data in person from terminals in the small claims court clerk offices of New York, Queens and Kings Counties (the boroughs of Manhattan, Queens and Brooklyn). While not available online, these databases met all of the other county-level criteria. Second, Westlaw and Lexis’s Courtlink provided data for two counties not otherwise available online: Alameda and Riverside Counties (both CA).<sup>121</sup>

In all, these county-level sources added 17 jurisdictions to our data set, or approximately 35,160,801 persons all from states (California, Florida, Nevada, Pennsylvania, Texas, and Washington) or locations (New York City) not already included in our set of state-level sources.

In total all our sources — state and county — together cover approximately 85 million people, and 20 states (including the District of Columbia), either in whole or in part.

In these 31 states and counties, the small claims jurisdictional limit (the maximum amount of money damages that a plaintiff may claim and still require a defendant to dispute in small claims court) ranged from \$3,000 to \$25,000, as shown below in Table 22.

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<sup>121</sup> Other than these two counties, Westlaw and Lexis provided no unique additional jurisdictions that were not already present in our data set; conversely, most of the jurisdictions in our data set were not available on Westlaw and Lexis. (To the extent that Westlaw and Lexis offered data available independently online, our searches of Westlaw and Lexis either confirmed our results or showed that Westlaw and Lexis offered fewer results.)

**TABLE 22: SMALL CLAIMS JURISDICTIONAL MONEY DAMAGES LIMITS**

State/county	Small claims jurisdictional limit
Alaska	\$10,000
Connecticut	\$5,000
Delaware	\$15,000
District of Columbia	\$5,000
Iowa	\$5,000
Minnesota	\$10,000
New Jersey	\$3,000 (\$5,000 if demand is for return of deposit)
New Mexico	\$10,000
New York (excluding NYC)	\$5,000 (additional jurisdictional limits for companies)
North Dakota	\$10,000
Oklahoma	\$7,500
Oregon	\$10,000
Utah	\$10,000
Wisconsin	\$10,000 for replevin, \$5,000 for tort, \$25,000 for consumer credit transaction (for return of personal property subject to a lease or credit from a dealer)
Alameda (CA)	\$10,000 (additional jurisdictional limits for companies)
Broward (FL)	\$5,000
Clark (NV)	\$7,500
Harris (TX)	\$10,000
Hillsborough (FL)	\$5,000
King (WA)	\$5,000
Kings (NY)	\$5,000 (additional jurisdictional limits for companies)
New York (NY)	\$5,000 (additional jurisdictional limits for companies)
Orange (CA)	\$10,000 (additional jurisdictional limits for companies)
Palm Beach (FL)	\$5,000
Philadelphia (PA)	\$12,000

Queens (NY)	\$5,000 (additional jurisdictional limits for companies)
Riverside (CA)	\$10,000 (additional jurisdictional limits for companies)
Sacramento (CA)	\$10,000 (additional jurisdictional limits for companies)
San Bernardino (CA)	\$10,000 (additional jurisdictional limits for companies)
San Diego (CA)	\$10,000 (additional jurisdictional limits for companies)
Santa Clara (CA)	\$10,000 (additional jurisdictional limits for companies)

## Institutions

Our search for disputes in small claims court involving consumer financial products focused on credit card issuers. The industry is concentrated, so searches for relatively few issuers cover most of the market.<sup>122</sup> To come up with our list, we started with the list of the largest issuers with pre-dispute arbitration clauses in their agreements at year-end 2012.<sup>123</sup> We ranked the top 15 by consolidated volume of credit card loans outstanding at year-end 2012, based on call report data, as reported by SNL.<sup>124</sup> This is shown below in Table 23.

**TABLE 23: SUMMARY OF LARGE ISSUERS BY SMALL CLAIMS COURT ARBITRATION CARVE-OUT STATUS (ISSUERS INCLUDED IN SAMPLE DESIGNATED BY BOLD FONT)**

Credit card issuer	2012 loans outstanding (\$ 000s)	Small claims court carve out?
<b>1. Citibank</b>	107,126,000	Yes – Mutual
<b>2. American Express</b>	56,714,000	Yes – Consumer only
<b>3. Discover</b>	50,927,790	Yes – Consumer only

<sup>122</sup> The credit card market is concentrated; the 10 credit card issuers we selected make up an overwhelming share of the market, as measured by outstandings. *See* 2013 Preliminary Report at 122, n 310.

<sup>123</sup> *See* 2013 Preliminary Report at Section 3.

<sup>124</sup> We adjusted two loans outstanding figures where SNL's automated data via Excel appeared to be inconsistent with our independent check of the regulatory filings.

4. GE	26,349,553	Yes – Mutual
5. Wells Fargo	24,651,342	Yes – Mutual
6. U.S. Bank	17,120,000	Yes – Mutual
7. USAA	15,879,574	Yes – Mutual
8. Barclays	14,281,456	Yes – Mutual
9. Comenity	7,245,336	Yes – Consumer only
10. First National Bank of Omaha	4,229,188	Yes – Claims < \$25,000
11. Fifth Third	2,085,601	No
12. BB&T	1,744,138	Yes – Consumer Only
13. Merrick	1,323,392	Yes – Consumer Only
14. Regions	899,929	Yes – Mutual
15. KeyBank	729,151	Yes – Mutual

We first selected the top four issuers from this list that had “mutual” small claims court carve-outs. Excluding GE, this gave us Citibank, Wells Fargo, U.S. Bank, and USAA. We excluded GE because its credit card business is exclusively private label, meaning that it issues no GE cards, only cards for other businesses.<sup>125</sup> We then added American Express and Discover, as the largest issuers with non-mutual small claims court carve-outs (meaning that consumers may require the resolution of a dispute in small claims court, but the issuer may not do so), and Fifth Third,

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<sup>125</sup> With private label credit cards, the actual credit card issuer may not be named on the card or in materials the account holder might see, such as the credit card agreement or the monthly credit card statements. As a result, such an account holder might only know to file against the merchant listed on the credit card rather than the actual issuer. Given the lengthy list of companies issuing cards through GE, a search for consumer-initiated claims against GE likely would have been difficult, time consuming, and still potentially inaccurate.

as the largest issuer with an arbitration provision with no small claims court carve-out. The resulting issuers are shown in bold above.

As a further comparison, we selected the largest issuers with no arbitration clauses at all. The top three issuers with no arbitration clause, by consolidated credit card loans outstanding at year end 2012, were (in order) Chase (\$117.6 billion), Bank of America (\$94.8 billion), and Capital One (\$77.8 billion).<sup>126</sup> Altogether, the 10 issuers we selected had nearly \$564.8 billion in credit card loans outstanding at year-end 2012.

## Searching for cases

To search the 31 databases meeting our criteria, we formulated search terms to find disputes in small claims courts initiated by individuals against credit card issuers (“consumer-filed cases”) and by issuers against individuals (“issuer-filed cases”).

To develop search terms for the consumer-filed cases, we started with the names of the parent companies for our sample of issuers. We added all their subsidiaries included in the credit card agreement database or reported by SNL Financial as holding credit card loans as of year-end 2012. The resulting list of names is in column 2 of Table 24 below. From this list, we developed search terms. We selected the minimum number of common words or phrases that would still capture every legal entity related to the 10 issuers we identified (*e.g.*, “American Express” was intended to capture both “American Express Centurion Bank” and “American Express Travel Related Services, Inc.”; “Citi” was intended to capture “Citibank, National Association” and “Citigroup, Inc.”).

We added other terms likely to be used by consumers as plaintiffs, based on the assumption that consumers (or the court employees entering case information in small claims court databases) may not always list the correct credit card-issuing legal entity in their suits. They may erroneously list, instead, the corporate parent (“American Express Co.”), a truncated and

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<sup>126</sup> We adjusted one figure reported by SNL. As to Bank of America, the SNL reported number included foreign credit card loans. We added the domestic FIA Card Services, National Association credit card loans (94,832,485,000) to the domestic Bank of America, National Association credit card loans (2,822,000). After the top three issuers, the next three issuers without arbitration clauses had significantly smaller volumes of loans outstanding: Navy Federal Credit Union (\$6.777 billion), PNC Bank, National Association (**\$3.821 billion**), and World’s Foremost Bank (**\$3.852 billion**).

informal version of the name (“American Express” or “AmEx”), alternate spellings (*e.g.*, “Capitol One” for “Capital One”), or spacings (“J. P. Morgan” rather than the now-official “JPMorgan”). They may also use trade names that would not be found in a search for the main entity (*e.g.*, “BankAmericard”).

The full list of search terms is below in Columns 3 and 4 of Table 24.

**TABLE 24: CREDIT CARD ISSUING ENTITIES AND SEARCH TERMS**

Corporate parent	Subsidiary holding credit card loans as of YE 2012, per SNL	Search term based on issuing entities + parents	Other terms (abbreviation, misspellings, trade names)
American Express Co.	American Express Bank, FSB American Express Centurion Bank American Express Travel Related Services Company, Inc. American Express Credit Corporation	"American Express"	"AmEx" "Am Ex"
Citigroup, Inc.*	Banamex USA Citibank, National Association	"Banamex" "Citibank" "Citicorp" "Citigroup"	"Citi"
Discover Financial Services	Discover Bank	"Discover"	N/A
Fifth Third Bancorp	Fifth Third Bank	"Fifth Third"	"Fifth 3rd" "5th Third" "5th 3rd" "5/3rd"
U.S. Bancorp	U.S. Bank National Association Elan Financial Services	"U.S. Bancorp" "U.S. Bank" "Elan"	"US Bancorp" "US Bank" "U S Bancorp" "U S Bank" "U. S. Bancorp" "U. S. Bank"
USAA Insurance Group	USAA Federal Savings Bank USAA Savings Bank	"United Services" "USAA"	N/A
Wells Fargo & Co.	Wells Fargo Bank Northwest, National Association Wells Fargo Bank, National Association Wells Fargo Financial National Bank	"Wells Fargo"	"WellsFargo"
JPMorgan Chase & Co.	JPMorgan Chase Bank, National Association Chase Bank USA, National Association	"JPMorgan" "Chase"	"JP Morgan" "J P Morgan" "J.P.Morgan" "J.P. Morgan" "J. P. Morgan"
Bank of America Corp.	Bank of America, National Association FIA Card Services, National Association	"Bank of America" "FIA"	"BoA" "BofA" "BankAmericard"
Capital One Financial Corporation	Capital One, National Association Capital One Bank (USA), National Association	"Capital One"	"Capital 1" "Cap One" "Cap 1" "Capitol One"

**\* Note:** Department Stores National Bank is a subsidiary of Citigroup, Inc. that reported some credit card loans on its balance sheet. It has no arbitration clause and, as such, it was excluded from Citibank’s loan volume and search terms.

Once we identified cases that named entities responsive to these search terms, we eliminated duplicate entries because different search terms sometimes retrieved the same case. We also removed cases in which the responsive entity was not the defendant (*e.g.*, a garnishee) because in such cases the issuer is not involved in a dispute with a consumer. We culled cases in which the responsive entity was by its name alone identifiably *not* a credit card or checking-related subsidiary. (For instance, we cut results in which “mortgage,” “home loan,” “insurance,” “casualty,” “auto,” “investment,” or “securities” appeared in the entity name.) Finally, we also removed cases in which the filing party was not a natural person.

For issuer-filed cases, we included only disputes in which the named plaintiff was one of the legal entities issuing credit cards identified in Table 24. In other words, we used column 2 for our search, not columns 3 and 4. In most jurisdictions we could not tell from available documents if a credit card was involved in the dispute. We assumed that companies would file credit card-related disputes only in the name of credit card-issuing legal entities and not in the name of other subsidiaries, including the parent company. Finally, we removed cases in which the party being sued was not a natural person.

## Consumer checking account volume

The search terms used for consumer-filed cases will also identify a number of cases against large retail banks within the same corporate families as credit card issuers. Many of the issuers covered by our sample also offer checking account and other retail banking products. In addition, our operative search terms for credit card issuer will identify other subsidiaries in the same corporate family that do not issue credit cards, but do offer checking account and other retail banking products. As a result, we should expect our outer limit estimate for credit card consumer-filed cases to include a significant share of any checking account and other retail banking product cases filed in these small claims courts.



## APPENDIX R: SECTION 8

# Class action settlement search methodology

Our starting point for our class action analysis in Section 8 was Professor Fitzpatrick’s methodology for his class action study. We adopted the methodology in general but changed some specific elements to yield a more comprehensive set of final class action settlements. The key change was that we ran the search terms in Westlaw’s dockets database, instead of searching published and unpublished orders and opinions available in Westlaw’s case law database. Not every class action settlement necessarily results in a written order or opinion entered into the case law database; but we believe that virtually every federal class action settlement had a docket (taken from PACER) in the docket database.

We applied the following terms to our search in the Westlaw docket database:

```
((final /10 approv! /20 class /30 settl! /80 2009) % PFIZER)127  
(final /10 approv! /20 class /30 settl! /80 2008)  
(final /10 approv! /20 class /30 settl! /80 2010)  
(final /10 approv! /20 class /30 settl! /80 2011)  
(final /10 approv! /20 class /30 settl! /80 2012)
```

We also used a data range covering the period from January 1, 2008 through December 31, 2012. We ran the search in both Westlaw’s federal docket database and Bloomberg’s federal

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<sup>127</sup> We excluded the term “Pfizer” from our searches, reflecting the fact that numerous individual cases refer to the same final approval order from a Pfizer class case, which was not a consumer financial class action.

docket database.<sup>128</sup> Westlaw produced slightly more comprehensive results than Bloomberg for recent years and so we used it. Our search returned 4,438 unique dockets.

These 4,438 dockets were downloaded with identifying information for each docket into Microsoft Excel. Since Westlaw docket searches do not provide previews of their contents, we opened each docket individually to make an initial assessment of the contents of the case.

After reviewing the results for consumer financial cases, we further reviewed several reporters of class action settlements, including *BNA Class Action Litigation Report* and *Mealey's Jury Verdicts and Settlements*. Some of these sources were used by Mayer Brown, and all of these sources were used by Fitzpatrick in his analysis. We reviewed these sources for any consumer financial class action settlements that were missing otherwise. Across all of search methods, we found 422 settlements.

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<sup>128</sup> Lexis was less viable for this particular search of federal dockets, due to the completeness of the federal docket database when performing text searches for dockets, as opposed to pleadings.

## APPENDIX S: SECTION 8

# Class action settlement review methodology

## Documents

From the dockets we found using the method set out in Appendix R, we gathered five different documents for each case, to the extent they were available: the docket sheet; the most recent amended complaint; the final approval order; the motion for fees and the fee award; and the settlement agreement. Where appropriate, we collected other documents as well. For instance, we collected preliminary approval orders if they contained modifications of settlement terms that did not appear in any other documents we collected. We also collected documents filed after the entry of the final approval order if they contained pertinent information, in particular, “final settlement accounting” documents or settlement administrator’s reports.

## Priority of sources

Based on the documents we collected, we followed a priority of sources where there were multiple numbers provided by different sources. In order, we relied first on court findings and orders. We then relied on settlement administrator submissions or reports, and then lastly relied on shared party positions (*e.g.*, settlement agreements or joint motions). For some non-relief data points, noted specifically below, we did allow (as a last resort) for the use of party-specific sources if in the record and not rejected by the court.

In general, for each field (with exceptions noted), we relied on more precise data points (*e.g.*, “1,573,298” notices sent) over estimates (*e.g.*, “more than 2m” class members) when both were available. There were common sense variations, such as when a lower priority source offered more precision later in the case than a higher priority source offered earlier. For instance, if a court estimated “more than two million,” but the settlement administrator later offered a precise number based on later facts, we used the later number (if the court did not reject it). We hardly

ever relied on figures from just one side in the dispute – we did so only where we state this below.

## Unitary settlement data

To the extent practical, we considered the settlement as a whole and made only one entry in each field per case. Generally, we only created multiple records if there were multiple and separate settlement approval processes within a single case or docket. If there was a single approval process covering multiple classes and defendants, we recorded the case as a single settlement (*e.g.*, if defendants settled collectively, facing joint and several liability, as in antitrust or conspiracy cases). If defendants settle separately, with multiple approval processes, we used multiple entries to cover the different settlements.

## Basic identifying information

We collected data from the docket sheet, including the following:

- Consumer financial defendant – We determined if the subject of the dispute involved consumer financial services offered by the defendant. We followed these rules:
  - We generally included a case if the most recent complaint contained one of the “enumerated consumer laws” set forth in Section 1002(12) of the Dodd-Frank Act.<sup>129</sup> We excluded cases if the class was not made up mainly of natural persons (*e.g.*, a class of companies). We excluded FCRA claims by employees or job applicants.
  - We did not further analyze FACTA claims brought against merchants (*i.e.*, retailers or other that provide non-financial consumer products). Such cases were not included in our data set.

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<sup>129</sup> The statutes included Alternative Mortgage Transition Parity Act (“AMTPA”), Consumer Leasing Act, Electronic Fund Transfer Act (“EFTA”), Equal Credit Opportunity Act (“ECOA”), Fair and Accurate Credit Transaction Act (“FACTA”), Fair Credit Billing Act (“FCBA”), Fair Credit Reporting Act (“FCRA”), Fair Debt Collection Practices Act (“FDCPA”), Home Owners Protection Act (“HOPA”), Home Ownership and Equity Protection Act (“HOEPA”), Interstate Land Sales Full Disclosure Act, Real Estate Settlement Procedures Act (“RESPA”), Secure and Fair Enforcement for Mortgage Licensing Act (“SAFE Mortgage Licensing Act”), Truth in Lending Act (“TILA”), Truth in Savings Act (“TISA”).

- We included a case, even absent an enumerated consumer law, if (1) the defendant offered consumer financial services that were the subject of the settlement and (2) plaintiffs were natural persons.
- We excluded cases involving investors, such as cases on securities, brokerage accounts, or investor services. We included cases about all forms of deposit account, including money management accounts and CDs.
- We excluded insurance unless it was an add-on to a consumer financial product (*e.g.*, title or credit card insurance).
- We included prepaid cards, including payroll cards, government benefit cards, gift cards and phone cards if used for more than just phone calls. (While we included Telephone Consumer Protection Act claims against consumer financial defendants, we excluded cases involving phone cards unless the case involved use of such cards for non-call transactions.)
- Identity protection and other privacy cases were included if they were brought by consumers and concerned consumer financial information.
- We excluded cases involving disputes between borrowers and residential mortgage lenders because they are outside of the scope of this study.
- Date of final settlement approval – We recorded the date of the district court order giving *final* approval to the settlement. If the case lacked final approval (*e.g.*, approval is only preliminary), we excluded the case from our data.
- Appeal/remand pending – We coded whether a settlement was still subject to an appeal or remand after the most recent district court order finally approving a settlement. If it was, we excluded the case from our data. If it was final, we included it in our data.
- Date of first complaint – We entered the date of the first complaint filed in the case.

## Claim description

We recorded data on the core legal claims asserted in the cases in our set. We took data from the final filed complaint in the case.

- Federal consumer statutory claims – We recorded the federal statutory claims raised in the complaint. (FACTA was recorded separately, though it is codified under FCRA.)

- State consumer protection statutory claim – We recorded if a state law claim was based on a state consumer protection statute. Often this was a UDAP-type statute.
- State common law claim – We recorded if claims were brought under state contract law (including quasi-contractual claims), state tort law, or both.
- Intent-based – We recorded if claims were intent-based (*e.g.*, fraud), requiring an intentional, willful, or reckless mental state.

## Settlement class type and size

We recorded data pertaining to whether the settlement covered damages and/or injunctive classes, and the numbers of consumers in the settlement class(es). Fields included:

- Consumer financial product/industry – Where possible, we recorded one product at issue in the case other than debt collection and debt settlement.<sup>130</sup>
  - Auto loans – Involved a loan or financing for a car, whether direct or indirect financing, and loans backed by or securitized by the title to the car.
  - Checking/savings – Included bank accounts, checking accounts, savings, money markets, CDs, debit cards, and related services/issues, *e.g.*, ATM fees, overdraft, etc.
  - Credit cards – Included credit card products and anything related to credit cards, including add-on products (*e.g.*, credit insurance).
  - Credit reporting – Included credit reporting agencies (CRAs) and issues involving **consumers’ credit reports, including acts by companies that are not CRAs impacting credit reports.**
  - Money transfers – Included domestic and international money transfers and remittances (*e.g.*, Western Union), and person to person transfers (*e.g.*, PayPal).
  - Mortgage-related – Included mortgage-related products (*e.g.*, title insurance, forced-placed flood insurance). Note, however, that we did not include cases involving

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<sup>130</sup> In several settlements, credit cards and debit cards (checking/savings products) were at issue.

disputes between consumers and residential mortgage lenders regarding their mortgages.

- Payday loans – Involved small (\$500 or less), short-term, high-interest rate loans, normally due on the borrower’s next payday. Included cash advances, check loans, installment loans. (We identified no payday cases in our final data set.)
- Prepaid cards – Included prepaid cards, general purpose reloadable (GPR) prepaid cards, gift cards, and phone cards if they permitted purchases beyond phone minutes.
- Student loans – Involved public or private student loans.
- Debt collection – We noted whether the settlement involved third-party debt collection firms or collectors, or debt collection activities by the original creditors.
- Debt settlement – We noted whether the settlement involved debt settlement companies.
- Number of settlement notices sent to class members – We recorded the number of *individual* notices sent to class members. Notice was individual if there was at least a unique address for each class member. We recorded nothing if individual notices were not sent (*e.g.*, notice to class given via newspaper for a 23(b)(2) injunctive class). We noted if notice was individual but no number was given for the number of notices mailed. This was one settlement data point where we as a last resort we would use party-specific numbers if in the record and not rejected by the court.
- Number of members of settlement damages class(es) – We recorded the number of settlement damages class members, cash or in-kind. This was another settlement data point where as a last resort we would use party-specific numbers if in the record and not rejected by the court. (We would use CAFA estimates before any other party-specific estimate.) If there was no number in the available documents, we used an estimated maximum or minimum, in that order. If class membership was based on account-holding, and only the number of accounts was given (instead of discrete persons), we used that as defining the size of the class.
- Number of members of settlement injunctive class(es) – We recorded the number of settlement injunctive class members. Often, estimates were given for the number of damages, but not injunctive, class members. If no estimate of the class size was given, we used an estimated maximum, then minimum, in that order, when one or the other was

provided. Here, we would **use a defendant’s CAFA numbers, but not numbers estimated** by plaintiffs alone.

## Relief, relief types, and associated payment information

### CASH RELIEF

We generally drew the data on relief from settlement agreements, final or preliminary approval orders, and/or attorneys’ fee orders. We captured a number of different data points.

- Gross settlement cash relief – We recorded the total cash settlement relief to be made available by the defendant(s) as part of the settlement.
  - We included all settlement cash relief regardless of what it funded: class cash **payments, settlement administrator costs, attorneys’ fees, *cy pres***, other costs, and so on.
  - This field was intended to capture the cash available to be paid under the settlement, not the amounts that had been paid to date. If the amount to be paid was contingent when we reviewed the case, we would enter a cap on the amount of cash to be paid. Absent a fixed amount or a cap, we would use an available estimate, per our protocol on sources, which did not allow us to use a single-party source.
  - In many settlements, this figure was the “common fund” created by defendants under the settlement. A common fund is an account funded by the defendant that covers cash payments under the settlement, potentially including those to the class, attorneys, settlement administrator, and others. If all settlement-related cash payments came from this fund, we used the common fund total to complete this field. Some settlements involved a combination, *e.g.*, a common fund that covered certain aspects of the settlement payments but not others. Sometimes with a common fund, however, some costs (settlement admin costs or attorney fees) are paid by settling defendants on top of the common fund.
- Net cash relief – Again, this focused on the amount available to be paid in cash, not the amount that had been or necessarily would be paid. Unlike gross settlement cash relief, this data point only recorded the amount available for class members. It excluded fees and all other relief not intended directly for class members.



- This covered cash, account credit, debt relief, checks, prepaid card reloads, and loaded prepaid cards. Cash was treated as cash, whether it came from a damages settlement or an injunctive settlement. (Thus, restitution may be equitable relief, but we would still count it as cash relief.)
- If the settlement stated that a fixed cash amount would be available to the class, we listed that. If the settlement did not fix the cash to be made available, but had advanced far enough for us to know or reliably estimate the cash that the class would receive, we listed that amount. If the settlement did not fix the amount of cash available to be paid, and did not advance far enough for us to reliably estimate the amount the class would receive, we would list the cap on cash payments to the settlement class.
- If the settlement fixed or capped the cash payment to the class at a still contingent amount (such as the value of a common fund less still-to-be-determined fees and costs), we recorded the most final number we could. We did not quantify any contingent component for which we did not have a good estimate. Instead, we noted that component (or components) in other fields. (*Example:* If (1) the class will receive \$10 million in cash, less fees and settlement administration costs; (2) fees were set at \$3 million; and (3) we had no reliable estimate for administration costs, we listed \$7 million as gross cash relief netted for costs **and added “settlement administration costs”** as a “component **still to be netted,” below. But if the administrator estimated costs at \$100,000, we entered \$6.9 million and made no entry for components still to be netted.) If the settlement did not fix or cap the cash available in any of these ways, we used the best estimate we could from the record and noted amounts still to be netted out.**
- Components still to be netted from total settlement cash payments – If the net cash relief still had components that had not been netted out, we noted those.

#### **OTHER COMPONENTS OF RELIEF**

- In-kind relief – We recorded if the settlement provided for vouchers or some other entitlement to in-kind benefits, such as free or discounted products.
- Behavioral relief to class members – We recorded if the defendant agreed to some change in its **behavior. Behavioral relief is often described as “injunctive relief.”** Examples included revised disclosure requirements and fee reductions. We did not

include a simple agreement to comply with the law, without more, as behavioral relief. We counted fee refunds or debt relief as cash, not behavioral relief.

- In-kind v. behavioral relief – Most forms of non-cash relief can be classified without difficulty, but the line between in-kind and behavioral relief was not always clear in every settlement. Discounts or services that are obtained by means of vouchers distributed or available to class members are in-kind relief. General changes in company policy – like changed disclosure practices – are behavioral.
- Total in-kind dollar value to class members – We recorded the total amount of in-kind relief to class members. In general, we relied on court or consensus estimates of the value of in-kind relief because more detailed data on the final value of in-kind relief after full implementation of the settlement was unavailable. We did not rely on single-side estimates. We excluded any cash components of in-kind relief (such as from vouchers convertible to cash), in order to avoid double-counting.
- Total dollar value of behavioral relief – we recorded the value of behavioral relief where it was available, although, consistent with our general rules, we would not rely on a single-party source. Ultimately, we did not include this valuation in our relief calculations because so few cases quantified behavioral relief.

#### **CLAIMS INFORMATION**

- Automatic distribution of cash – We recorded two data points: (1) whether at least some cash was distributed to some class members without having to submit claims; and (2) whether all cash distributions were claims-made or we could not tell if there were automatic distributions.
- Claims-made cash distribution to class members – We recorded several data points: (1) whether at least some class members must submit a claim form to receive some cash payments; and (2) whether (i) no class members make claims to receive cash (*e.g.*, all get cash automatically); (ii) the settlement pays no cash; or (iii) cash is only available by voucher.
- Automatic distribution of in-kind/vouchers to class members – We recorded two data points: (1) whether at least some in-kind relief was distributed automatically; and (2) whether all-kind distributions were claims-made, or we could not tell if there were any automatic distributions of in-kind relief.

- Claims-made distribution of in-kind/vouchers to class members – We recorded several data points: (1) whether at least some class members must submit a claim form to receive in-kind or voucher relief; and (2) whether (i) no class members made claims to receive in-kind relief or (ii) there was no in-kind relief.
- Number of class members getting cash/in-kind without claiming – If the settlement provided for an automatic distribution of cash or in-kind relief, we recorded the total number of automatic beneficiaries.
- Number of class members making claims for cash or in-kind relief– In claims-made settlements, we identified the number of claims submitted by class members for cash and in-kind relief.
- Opt-outs – if the record disclosed the number of opt-outs, we captured that data point.

#### **CASH PAYMENTS INFORMATION**

- Cash payments – If a settlement provided class members an identified and fixed amount of cash that defendant has paid or is unconditionally obligated to pay, such as in automatic distributions, pro rata claims-made distributions (or any other settlement in which a defendant obligated itself to pay a fixed or minimum amount to the class), or used claims-made processes where we can identify claims already made (even if the claims process was not over by the time the final approval order was entered), we identified the amount that was fixed, unconditionally obligated, or actually paid.
- These cash payment numbers did not include any payments designated for fees, costs, or *cy pres*. They also exclude any valuation for in-kind or behavioral relief.

#### **Fees and costs**

Settlements typically result in the defendant’s payment of fees to class counsel. Many settlements also result in defendant’s payment of a range of associated costs, such as settlement administration. We captured a number of data points on these payments.

- Amount of attorneys’ fees awarded – We recorded the dollar amount of attorneys’ fees awarded, as set out in the final approval order or any fee order. If the court awarded a single aggregate number for attorneys’ fees and various “costs,” we recorded that number. If the amount of fees was contingent at the time of review, we listed any court-

imposed cap on fees in this section. If no fees were awarded, we entered “0.” If no number was given, we did not calculate the fee award.

- Other plaintiff litigation costs awarded – We recorded the amount of litigation costs awarded to plaintiffs if they were not already covered under attorneys’ fees (*e.g.*, expert report costs, travel costs, filing fees, and so on.). This field was blank if no such costs were awarded, all costs were included in the attorneys’ fees field, if we could not tell if such costs were awarded, or if such costs were awarded but not quantified.
- Total paid settlement administrator costs – We recorded payments to the settlement administrator or other parties for administering some parts of the settlement, like notice or claims processing. We included only costs incurred directly by the parties or their counsel if these costs were directly paid for by the settlement. We left this blank if (1) costs were not awarded, (2) we could not tell if they were awarded, or (3) they were awarded, with no estimate.

## APPENDIX T: SECTION 9

# Statutory references to class actions in federal consumer financial laws

In enacting various laws providing for the private enforcement of consumer financial laws, Congress specifically contemplated class action relief in many statutes. This Appendix sets out the specific references to class actions in some of the federal statutes providing for the private enforcement of certain federal consumer laws.

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**CREDIT REPAIR ORGANIZATIONS ACT (“CROA”)**

15 U.S.C. §§ 1679 – 1679j

In addition to actual damages, costs, and attorneys’ fees, CROA allows punitive damages in class actions in the sum of “the aggregate of the amount which the court may allow for each named plaintiff . . . and the aggregate of the amount which the court may allow for each other class member, without regard to any minimum individual recovery.” 15 U.S.C. §1679g(a).

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**ELECTRONIC FUND TRANSFER ACT (“EFTA”)**

15 U.S.C. §§ 1693–1693r

EFTA limits statutory damages in class actions to the lesser of \$500,000 or 1% of the defendant’s net worth. 15 U.S.C. § 1693m(a)(2)(B). EFTA also establishes specific factors to consider in determining the amount of a class action award. *Id.* § 1693m(b)(2).

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**EQUAL CREDIT OPPORTUNITY ACT (“ECOA”)**

15 U.S.C. §§ 1691–1691f

ECOA provides that a credit applicant may recover actual damages “sustained by such applicant acting either in an individual capacity or as a member of a class.” 15 U.S.C. § 1691e(a). In a class action, total punitive damages are limited to \$500,000 or 1% of the creditor’s net worth, whichever is less. *Id.* § 1691e(b).

**FAIR CREDIT  
REPORTING ACT  
("FCRA")**

15 U.S.C. §§ 1681–1681x

FCRA does not have a separate civil liability structure for class actions. *See generally* 15 U.S.C. §§ 1681–1681x.

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**HOME OWNERS  
PROTECTION ACT  
("HPA")**

12 U.S.C. §§ 4901–4910

If the liable party is not subject to administrative enforcement under HPA's Section 4909, statutory damages may not exceed \$1,000 per class member and "the total recovery . . . in any class action or series of class actions arising out of the same violation by the same liable party shall not exceed the lesser of \$500,000 or 1 percent of the gross revenues of the liable party, as determined by the court." 12 U.S.C. § 4907(a)(2)(B)(ii).

If the liable party is subject to administrative enforcement under Section 4909, statutory damages "in any class action or series of class actions arising out of the same violation by the same liable party shall not exceed the lesser of \$500,000 or 1 percent of the net worth of the liable party, as determined by the court." *Id.* § 4907(a)(2)(B)(i).

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**FAIR DEBT  
COLLECTION  
PRACTICES ACT  
("FDCPA")**

15 U.S.C. §§ 1692–  
1692p

FDCPA limits statutory damages "in the case of a class action, [to] (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector." 15 U.S.C. § 1692k(a)(2)(B).

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**REAL ESTATE  
SETTLEMENT  
PROCEDURES ACT OF  
1974  
("RESPA")**

12 U.S.C. §§ 2601–2617

RESPA provides "[i]n the case of a class action, an amount equal to the sum of . . . any actual damages . . . and any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of this section, in an amount not greater than \$1,000 for each member of the class, except that the total amount of damages under this subparagraph in any class action may not exceed the lesser of-- (i) \$500,000; or (ii) 1 percent of the net worth of the servicer." 12 U.S.C. § 2605(f)(2).

**TRUTH IN LENDING  
ACT (“TILA”)**  
15 U.S.C. §§ 1601–  
1667f

TILA provides for damages “in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of \$1,000,000 or 1 per centum of the net worth of the creditor.” 15 U.S.C. § 1640(a)(2)(B)

Further, “[i]n determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor’s failure of compliance was intentional.” 15 U.S.C. § 1640(a)(4)

Violations of AMPTA (12 U.S.C. § 3806(c)), the Consumer Leasing Act (15 U.S.C. § 1667d), the Fair Credit Billing Act (15 U.S.C. § 1667d) are treated as violations of TILA.

## APPENDIX U: SECTION 9

# Methodology

This appendix sets out in greater detail the methodology used in collecting the data described in Section 9, which describes the relationship between public enforcement and consumer financial class actions.

## Search for government-private overlap in governmental sources

Our analysis proceeded in several steps:

First, we identified a set of sources of public enforcement actions and reviewed the individual actions announced on the websites of these governmental entities.

Second, in our review we identified and collected enforcement actions pertaining to consumer financial protection.

Third, we used information from those enforcement actions to create search terms to conduct queries in Lexis for class actions involving the same parties.

We then reviewed the search results and identified private class action cases addressing the same conduct.

### SOURCES

We collected the announcement of press releases for three different sets of public agencies responsible for the enforcement of consumer financial laws: (1) state attorneys general and city attorneys; (2) state banking and financial services regulators; and (3) federal regulators in the area of consumer finance.

- ***State attorneys general and city attorneys*** – For state attorney general actions, we reviewed the websites of the ten largest and ten smallest jurisdictions by population, based on the 2010 Census: California, Texas, New York, Florida, Illinois, Pennsylvania,



Ohio, Georgia, Michigan, North Carolina, New Hampshire, Rhode Island, Montana, Delaware, South Dakota, Alaska, North Dakota, the District of Columbia, Vermont, and Wyoming. In light of the increasing consumer enforcement activity of some city attorneys,<sup>131</sup> we also conducted web searches to determine if the four largest urban areas in each of the twenty selected states had a city or county attorney that posted press releases about consumer enforcement actions. Based on this review, we included the California jurisdictions of Los Angeles, San Francisco, San Diego, and Santa Clara County.<sup>132</sup> For all jurisdictions, which cover more than half of the population of the United States, we collected data from January 1, 2008, to December 31, 2012.

- **State banking regulators** – We also included in our analysis the state banking regulators in the 10 largest and 10 smallest states by population, to the extent these regulators had independent enforcement authority. The state banking regulators in our analysis included Alaska, California, the District of Columbia, Florida, Georgia, Michigan, New York, Ohio, Pennsylvania, Rhode Island, Texas, and Vermont.
- **Federal agencies** – We reviewed the websites of the federal agencies responsible for enforcing federal consumer financial laws. This includes the Consumer Financial Protection Bureau, the Federal Trade Commission, the Department of Justice (specifically the Civil Division and the Civil Rights Division), the Department of Housing and Urban Development, the Office of the Comptroller of the Currency, the now-defunct Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Federal Reserve Board of Governors, and the National Credit Union Administration. Where possible we reviewed the websites of these agencies for complaints in civil cases and press releases announcing enforcement actions (for which there may not be civil complaints) for the period January 1, 2008 through December 31, 2012, where possible.

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<sup>131</sup> See, e.g., Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices* (2010), <http://www.law.yale.edu/Morris.pdf> (last visited Mar. 6, 2015); Laura L. Gavioli, *Who Should Pay: Obstacles to Cities in Using Affirmative Litigation As A Source of Revenue*, 78 Tul. L. Rev. 941, 968 (2004); Kathleen C. Engel, *Do Cities Have Standing? Redressing the Externalities of Predatory Lending*, 38 Conn. L. Rev. 355 (2006).

<sup>132</sup> Santa Clara County includes San Jose, the third largest city in California.

## Selection of consumer financial cases

Having identified the relevant state and federal regulators, we reviewed each regulator’s press releases<sup>133</sup> to find consumer financial enforcement actions. In practice, we followed the same guidelines set out in Section 8 on defining a case as consumer financial.

We only included an action in our data set if it led to a formal complaint filed in court or if it led to a settlement agreement without the filing of such a complaint.<sup>134</sup> We limited our search to enforcement actions filed between January 1, 2008 and December 31, 2012.

## Search for “matching” private cases

As to each public enforcement action, we created search strings based on the defendants’ names (including potential variations and excluding suffixes such as “LLC”) and the word “class” to capture class actions.<sup>135</sup> A sample search thus might have read: *United Fruit Company OR “United Fruit” OR “UFC” AND class.*

We entered these search strings in Lexis’s Courtlink database and reviewed the results. A case was deemed to create an overlap if it involved the same defendants and the same conduct, regardless of the legal theory employed in the complaint at issue.<sup>136</sup>

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<sup>133</sup> Given the lack of a centralized database for enforcement actions, a search of press releases was the most comprehensive public source of enforcement data. Still, this approach was not without its limitations, as described in Section 9.3.

<sup>134</sup> Further, as with other regulators, we excluded from our list of consumer actions certain types of activity short of full enforcement actions, including warning letters, contempt actions, actions to enforce administrative subpoenas, amicus briefs, testimony, comments on rules, and investigations terminated before any enforcement action.

<sup>135</sup> Search terms included (a) the name(s) of the defendant(s), (b) potential variations of those names, (c) the name in quotation marks, (d) without business name suffixes like “LLC” or “Corp,” and (e) with the term “OR” between each defendant’s name.

<sup>136</sup> For example, a public lawsuit concerning a particular defective product and a shareholder class action lawsuit alleging losses as a result of the same defective product would be considered to have the same factual subject matter. In contrast, a private class action lawsuit against the same company for a different defective product would not be

If results were too voluminous, we further narrowed the results by selecting “Civil” as the case type and limited results to those cases filed three years before and three years after the public action at issue. Where the search results were still too voluminous to review, we further narrowed the results by conducting the search again with three added restrictions. First, we searched for results in a more limited part of Courtlink (the “Documents” tab rather than “Dockets”). Second, we added the string *complaint OR “notice of removal” AND* before the name of the defendant. Third, after the word “class,” in the search string, we added *AND* followed by terms specific to the subject matter of the public action, such as the product name or conduct at issue. A revised sample search string, thus altered, might read *complaint OR “notice of removal” AND GlaxoSmithKline AND class AND Avandia OR “off-label”*. We reviewed only those documents with “complaint” or “notice of removal” in the title, and selected only those complaints that matched the public enforcement action at issue. For this search of cases matching the public enforcement actions, we did not impose any time limitations — we reviewed private actions from any time period given that, on the whole, limiting the time period for the search did not seem to significantly reduce the work required and created a risk of missing an antecedent case.

## Review of private sources

Our analysis proceeded in several steps. First, we identified sources of private class actions, including filed cases and settlements pertaining to consumer financial protection. Second, we used information from those class actions to create search terms to conduct queries in Google for public enforcement involving the same parties. We then reviewed the search results and identified public enforcement actions addressing the same conduct.

## Sources

We reviewed three discrete sources of data to identify private class actions.

- *Large dollar volume consumer financial class action settlements cases.* From a data set of 419 class action settlements, we identified the 30 cases in which the gross relief by consumers exceeded \$10 million.

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considered to have the same factual subject matter. The determination of whether two matters concerned the same factual subject matter is, of course, a discretionary one.

- ***Random sample of other consumer financial cases.*** From a data set of 389 class action settlements of less than \$10 million in gross relief, we randomly identified and then reviewed a 10% sample of 39 cases.
- ***Consumer financial cases brought by prominent plaintiffs’ firms.*** We identified a list of prominent plaintiffs’ class action law firms in the United States, according to the *National Law Journal’s* “Plaintiffs’ Hot List,” published on October 1, 2012, of 19 top plaintiffs’ firms.<sup>137</sup> We identified consumer class action cases, filed by these top firms between January 1, 2008 and December 31, 2012.

## Identification of “matching” public enforcement actions

In our search for matching public enforcement actions, we used Google rather than Courtlink or Westlaw because many public enforcement actions do not result in a formal complaint being filed in court. As to each private class action, we devised search terms based on the party names and entered them in Google with other terms likely to hit on enforcement or regulatory actions. We conducted two searches. In a typical search string we included the primary name of the defendant in the private action, in quotation marks, along with the string “*attorney general*” *OR justice OR commission*.<sup>138</sup> A sample full search might thus read “*Abbott Laboratories*” “*attorney general*” *OR justice OR commission*. We reviewed the first four pages of search results; any links to public enforcement or regulatory actions were identified as matches to private cases if based on the same specific conduct, fact pattern, or behavior.

If this initial search string did not result in references to a public action on the first four pages of Google search pages, we added one additional search term — either the name of the product at issue or a specific term for the conduct at issue — to the original search string. For instance, the search string above, as modified, might read “*Abbott Laboratories*” *Depakote* “*attorney general*” *OR justice OR commission*. We reviewed the first four pages of these revised search

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<sup>137</sup> National Law Journal, *The Plaintiffs’ Hot List*, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202572912278&THE\\_PLAINTIFFS\\_HOT\\_LIST&sreturn=20130517101802](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202572912278&THE_PLAINTIFFS_HOT_LIST&sreturn=20130517101802) (last visited Mar. 6, 2015).

<sup>138</sup> We conducted pre-tests, using defendants in known public actions, to develop a search string that would yield information about a public action by, for example, the U.S. Attorney General or Department of Justice, a state attorney general, the FTC, or the Securities and Exchange Commission.

results and identified matches if any of these pages contained links to public enforcement or regulatory actions based on the same specific conduct, fact pattern, or behavior as in the private cases.

## APPENDIX V: SECTION 10

# Regression methodology

The **Ross** regressions estimate the relationship between the following independent variable and each of the following dependent variables, respectively:

### **Independent variable:**

- Ross\*Post (=1 if an account was issued by a **Ross** settler after the settlement; =0 otherwise)

### **Dependent variables:<sup>139</sup>**

- APR
- Credit line
- Total cost of credit:
  - Total cost of credit over a 12-month period =  $(12 * [\text{Average Monthly Fees} + \text{Finance Charges}]) / \text{Average Monthly Balance}$
  - Total cost of credit over a 24-month period
  - Total cost of credit over the lifetime of an account
- Average annual fee per account
- New subprime account openings by month

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<sup>139</sup> The Bureau ran a set of regressions with different time windows, for all consumers, and only for consumers with credit scores under 660 for each of the pricing dependent variables.

### **The following controls were used in the *Ross* regressions:**

- Credit score (including a square and a log term)
- Refreshed credit score (including a square and a log term)
- Issuer indicator variable
- Non-Ross issuer(s) that ceased or started using arbitration provisions in the study period
- Borrower income (including a square and a log term)
- Month of origination
- Year of origination
- Month-year of origination
- Origination channel
- Whether the borrower has multiple relationships with the issuer
- Whether the borrower has multiple cards with the issuer
- Whether an account was issued by a *Ross* settler (“*Ross*,” in the independent variable, above)
- Whether an account was issued after the *Ross* settlement (“*Post*,” in the independent variable, above)
- Whether an account was issued by an issuer that has never used an arbitration agreement

### **Regressions**

The regressions generally took the form of

$$DV = \alpha + \gamma X_{\text{Controls}} + \beta X_{\text{Post}} + X_{\text{Ross}},$$

with the unit of observation being a customer’s account and dependent variables (DV) that **included TCC, credit limit, APR, and annual fees. The Bureau reports the results on  $\beta$**  at (and utilizes) the standard 95% confidence level, when not reporting *p*-values. The Bureau utilizes standard procedures such as clustering of standard errors (at the issuer level).

