



Private Regulation of Consumer Arbitration

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University of Kansas School of Law Working Paper No. 2011-4

August 3, 2011

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PRIVATE REGULATION OF CONSUMER ARBITRATION

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ABSTRACT

Arbitration providers, such as the American Arbitration Association (“AAA”) and JAMS, have promulgated due process protocols to regulate the fairness of consumer and employment arbitration agreements. A common criticism of these due process protocols, however, has been that they lack an enforcement mechanism. While arbitration providers state that they enforce the protocols by refusing to administer cases in which the arbitration agreement materially fails to comply with the relevant protocol, the private nature of arbitral dispute resolution makes it difficult to verify whether providers in fact refuse to administer such cases.

This article reports the results of the first empirical study of the AAA’s enforcement of its Consumer Due Process Protocol. We find that the AAA’s review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations. During the time period studied, the AAA refused to administer a substantial number of cases (almost 10% of its total consumer caseload) that involved a protocol violation. Moreover, in response to AAA protocol compliance review, over 150 businesses have either waived problematic provisions or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol.

Our findings support the proposition that private regulation by the AAA complements existing public regulation of the fairness of consumer arbitration clauses. Any consideration of the need for future legislative action should take into account the effectiveness of this private regulation. That said, we do not

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Thanks to the SCJI and the University of Kansas for financial and other support for this project. We are especially grateful to the American Arbitration Association, in particular Bill Slate, Richard Naimark, Ryan Boyle, and Gerry Strathmann, for providing access to the data and other assistance. We appreciate insightful comments on prior drafts from Mark Weidemaier, Jason Johnston, Jiro Kondo, Max Schanzenbach, Tom Stipanowich, and Jean Sternlight, as well as members of the Searle Board of Overseers, participants in the Searle Center spring research retreat, and attendees at the annual meeting of the Midwestern Law & Economics Association. Henry Butler, Geoff Lysaught, and Judy Pendell also provided helpful comments on drafts, as well as support and oversight throughout the project. Thanks also to Elise Nelson, Matthew Sibery, Jonathan Hillel, and A.J. Noronha for their work in compiling and processing the data and in helping us ensure the accuracy of the data.

assert that private regulation alone — with no public regulatory backstop, such as through court oversight — suffices to ensure the fairness of consumer arbitration proceedings. Rather, we suggest ways that courts and policy makers could reinforce the AAA’s enforcement of the Consumer Due Process Protocol as well as ways the AAA could improve its own review process.

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I. INTRODUCTION

The debate over consumer (and employment) arbitration — more specifically, the enforceability of pre-dispute arbitration clauses in consumer and employment contracts — has largely focused on the appropriate degree of public regulation. Courts play a central role, using various state law contract doctrines (most commonly unconscionability¹) as well as other

¹ The state law contract doctrine most commonly used to police arbitration agreements is unconscionability, of course. Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194-96 (2004). But courts also have used various other contract law doctrines, such as lack of assent, *e.g.*, *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 289 (Cal. App. 1998); material breach and breach of the duty of good faith and fair dealing, *e.g.*, *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999); lack of consideration, *e.g.*, *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1131 (1997); and fraud, *e.g.*, *Engalla v. Permanente Medical Group, Inc.*, 938 P.2d 903, 908 (Cal. 1997), to police the fairness of arbitration agreements. Indeed, occasional courts have found the procedures in some “arbitration” agreements to be so one-sided that the process could not fairly be called arbitration, and refused to enforce the agreement for that reason as well. *E.g.*, *Cheng-Canindin v. Renaissance Hotel Assocs.*, 57 Cal. Rptr. 2d 867, 877-78 (Cal. App. 1996).

theories to police the fairness of arbitration agreements.² The threat of preemption by the Federal Arbitration Act has constrained state legislatures from extensive regulation of consumer and employment arbitration.³ But Congress has become increasingly active, both by making pre-dispute arbitration agreements unenforceable as to certain types of contracts⁴ and claims,⁵ and by delegating to the new Consumer Financial Protection Bureau the authority to regulate arbitration clauses in consumer financial contracts.⁶

But not all regulation of business behavior comes from public entities. Private regulation also can constrain business practices.⁷ In the arbitration arena, private regulation takes the form of due process protocols setting out minimum standards of procedural fairness. As Paul Verkuil has stated:

The Consumer Due Process Protocol, for example, calls for a “fundamentally fair process” in arbitration that stipulates adequate notice, an opportunity to be heard, and an independent decisionmaker. These procedural ingredients are comparable to those that would be provided pursuant to the informal due process requirements of the Constitution or under the fair procedure requirements of private associations like the NCAA or universities.⁸

The leading arbitration providers (the American Arbitration Association (“AAA”) and JAMS) have both promulgated due process protocols governing consumer and employment arbitrations; the AAA has also promulgated protocols governing health care and debt collection arbitrations.⁹

A common criticism of these due process protocols has been that they lack a mechanism for ensuring compliance with their provisions.¹⁰ While the protocols set out minimum standards

² *E.g.*, *In re Am. Express Merchants’ Litig.*, 2011 U.S. App. LEXIS 4507, at *32-*33 (2d Cir. 2011) (finding class arbitration waiver in arbitration clause in commercial contract unenforceable because it precluded the claimant from vindicating its statutory rights).

³ *See generally* Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 407-20 (2004) (providing overview of FAA preemption analysis).

⁴ *E.g.*, 15 U.S.C. § 1226(a)(2) (making arbitration clause in motor vehicle franchise contract unenforceable); 10 U.S.C. § 987(f)(4) (making arbitration clause in agreement to extend consumer credit to military personnel unenforceable); Truth in Lending Act, § 129C(e)(1) (precluding residential mortgage loan contract from including arbitration clause); *see also* 7 U.S.C. § 197c(a) (requiring livestock or poultry contract that includes an arbitration clause to permit a producer or grower to opt out of the arbitration clause prior to entering the contract).

⁵ *E.g.*, Department of Defense Appropriations Act § 8116(a) (2010) (restricting clauses in employment contracts of defense contractors providing for the use of arbitration to resolve civil rights or sexual harassment claims); Dodd-Frank Wall Street Reform & Consumer Protection Act, § 1057 (2010) (making unenforceable an arbitration agreement that requires arbitration of employee protection claim); 7 U.S.C. § 23(n)(2) (making unenforceable an arbitration agreement that requires arbitration of whistleblower claim).

⁶ Dodd-Frank Wall Street Reform & Consumer Protection Act, § 1028 (a) & (b) (2010) (requiring the Consumer Financial Protection Bureau to study the use of pre-dispute arbitration agreements in consumer financial services contracts and authorizing the CFPB to regulate consistently with the findings of the study).

⁷ *See* Tim Büthe, *Private Regulation in the Global Economy: A (P)Review*, 12(3) BUS. & POL. 1, 15-20 (2010) (surveying literature on compliance with private regulation). For a normative analysis of private versus public regulation of consumer and employment arbitration, *see* Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQUETTE L. REV. ____ (forthcoming 2011).

⁸ Paul R. Verkuil, *Privatizing Due Process*, 57 ADMIN. L. REV. 963, 985 (2005).

⁹ *See infra* text accompanying notes 73-76.

of procedural fairness, they do not specify how the standards are to be enforced. Arbitration providers like the AAA and JAMS state that they will refuse to administer a case when the arbitration clause materially fails to comply with the relevant protocol.¹¹ But the private nature of arbitral dispute resolution makes it difficult to verify whether providers in fact refuse to administer such cases.

In particular, some critics have alleged that the AAA fails to ensure compliance with the protocols. For example, Laura MacCleery, Director of Public Citizen’s Congress Watch Division, testified before Congress that “[w]hile AAA touts its internal protocols, it does not pledge to always follow them.”¹² The plaintiffs in *Ting v. AT&T* alleged in their complaint in California federal court that “despite its representations to the contrary, AAA regularly administers arbitrations or otherwise endorses the validity of mandatory pre-dispute arbitration clauses that do not comply with its Due Process Protocol.”¹³

To evaluate the criticisms requires empirical evidence on AAA protocol compliance review. Direct evidence of the nature and extent of protocol compliance review by the AAA has been unavailable.¹⁴ As Mark Weidemaier has stated: “With respect to the AAA, for example, we

¹⁰ Margaret M. Harding, *The Limits of Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 372 (2004) (“The lack of [monitoring and enforcement] provisions makes it impossible to determine if the due process protocols are in fact being followed by individual arbitrators and arbitration service providers in actual cases.”); Jean R. Sternlight, *Consumer Arbitration*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 174 (Edward Brunet et al. eds. 2006) (“Because the protocols are simply policies adopted by arbitration providers, there is no clear enforcement mechanism.”).

¹¹ W. Mark C. Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (and Do Not) Define the Process*, 40 CREIGHTON L. REV. 655, 662 (2007).

¹² H.R. 3010, the Arbitration Fairness Act of 2007, Hearing Before the Comm’l and Admin. Law Subcomm. of the House Comm. on the Judiciary, 110th Cong., 1st Sess. (Oct. 25, 2007), *available at* http://judiciary.house.gov/hearings/hear_102507.html (Testimony of Laura MacCleery) (ms. at 5) (*citing* Declaration of Robert E. Meade, senior vice president, American Arbitration Association *in* *Stahle v. Blue Cross of California*, Case No. BC 218082 (Cal. Super. Ct. Feb. 17, 2000) (“[Health Care Due Process Protocol] consists of recommended procedures and compliance with the procedures is voluntary.”)).

¹³ Class Action Complaint ¶ 59, *Ting v. AT&T* (Cal. Super. Ct. July 31, 2001), *available at* www.consumer-action.org/press/articles/ting_consumer_action_sues_atampt_over_binding_arbitration_clause/. Some of these criticisms are misdirected, however. For example, Public Citizen cites evidence that many franchise agreements include remedy limitations as showing the ineffectiveness of the Consumer Due Process Protocol. Public Citizen, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* 33 (2008), *available at* [http://www.citizen.org/documents/ArbitrationDebateTrap\(Final\).pdf](http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf). But the Consumer Protocol does not apply to franchise agreements, so the comparison misses the mark.

¹⁴ For a narrow exception, focusing on arbitration costs in employment arbitration, see Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 9 (2011) (“Among these cases, the employer paid all arbitration fees 97 percent of the time, indicating that the employer-pays rule is generally being enforced in AAA employment arbitration cases.”); Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMPL. RTS. & EMPLOY. POL’Y J. 405, 424 (2007) (“In 96.6 percent of the cases in this sample the employer paid 100 percent of the arbitrator fees.”); Alexander J.S. Colvin, *Employment Arbitration: Empirical Findings and Research Needs*, 64 J. DISP. RESOL. 6, at *7 (Aug./Oct. 2009) (discussing 2007 Colvin study and implications for protocol compliance).

There is indirect evidence of compliance with the Employment Due Process Protocol, in the form of a study by Lisa Bingham and Shimon Sarraf finding that employee win-rates in AAA employment arbitration increased after adoption of the Protocol. Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, in *ALTERNATE DISPUTE RESOLUTION IN THE*

do not know whether it routinely conducts an adequate, independent review of the governing agreement before accepting a case for arbitration.”¹⁵ Without systematic empirical study, the only evidence consists of occasional anecdotal reports of alleged violations of the protocols.¹⁶

This article reports the results of the first empirical study of the AAA’s enforcement of its Consumer Due Process Protocol, using a sample of 301 AAA consumer arbitrations resulting in an award between April and December 2007. Our main findings are as follows:

- In the sample of AAA consumer arbitrations we reviewed, the majority of consumer arbitration clauses (229 of 299, or 76.6%) fully complied with the Consumer Due Process Protocol as applied by the AAA.
- The AAA’s review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations. In 266 out of 271 cases (98.2%), the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.
- The AAA in the time period studied refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (or 9.4% of its total consumer caseload), because the business failed to comply with the Consumer Due Process Protocol.
- In response to AAA protocol compliance review, over 150 businesses have either waived problematic provisions or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol.

Our findings support the proposition that private regulation by the AAA complements existing public regulation of the fairness of consumer arbitration clauses. Any consideration of the need for future legislative action should take into account the effectiveness of such private regulation. That said, we are not asserting that private regulation alone — with no public regulatory backstop, such as through court oversight — suffices to ensure the fairness of consumer arbitration proceedings. Rather, we suggest ways that courts and policy makers could reinforce the AAA’s enforcement of the Consumer Due Process Protocol as well as ways the AAA could improve its own review process.

EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 321 (Samuel Estreicher & David Sherwyn eds. 2004).

¹⁵ W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 93 n.138 (2007); see also *id.* at 170 (stating that data are lacking on “how consistently the AAA or other providers enforce their due process protocols” and that this “is an area worthy of further study”); Weidemaier, *supra* note 11, at 659 (“Another possibility is that the company knows that JAMS and AAA often do not enforce their rules. This cannot be ruled out, in part because providers are reluctant to provide the data needed to evaluate this possibility. There have been allegations that actual practices sometimes conflict with providers’ public stances. Providers, however, are under no small amount of scrutiny, and I am not aware of supported allegations of under- or non-enforcement of these providers’ due process rules.”).

¹⁶ See Paul Bland, CL&P Blog, AAA Breaks Its Promise Not to Hear Pre-Dispute Arbitrations in Health Care Cases (Feb. 22, 2007), http://pubcit.typepad.com/clpblog/2007/02/aaa_breaks_its.html.

Part II of this article discusses the incentives of arbitration providers to promote the fairness of consumer arbitration proceedings. Part III provides an overview of the history and content of the due process protocols. Part IV describes in detail the AAA's process for enforcing the Consumer Due Process Protocol. Part V details our empirical methodology, and Part VI presents our empirical results.

II. ARBITRATION PROVIDERS AND ARBITRAL FAIRNESS

The axiom that “arbitration is a matter of contract”¹⁷ generally is directed toward the contract between the parties to the arbitration proceeding — i.e., the parties' arbitration agreement.¹⁸ Because arbitration is a matter of contract, “nothing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement.”¹⁹ Moreover, “just as [the parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.”²⁰

But the parties' arbitration agreement is not the only contract that governs the arbitration process. When they choose an arbitrator, the parties are agreeing to have that person resolve their dispute; the agreement of the arbitrator to serve is an essential part of that process.²¹ The same is true when the parties choose an “arbitration provider” to provide administrative services that facilitate the arbitration process.²² As described by Ed Brunet:

Organizations of arbitration providers such as the AAA and the Judicial Arbitration and Mediation Service, Inc. are full-service firms that not only supply arbitrators but also help the disputants in the many procedural issues that can arise during an arbitration. In return for a fee, the provider organizations essentially process an arbitrated dispute. They open a file, help the parties mutually select an arbitrator or panel, collect and disburse organizational and arbitrator fees, file motion requests, build a panel of expert arbitrators, publish procedural rules for

¹⁷ E.g., *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (“The FAA reflects the fundamental principle that arbitration is a matter of contract.”); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract.”).

¹⁸ Of course, not all aspects of arbitration law are derived from a contractual model, see Lawrence A. Cunningham, *Rhetoric versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts (and Why Contracts Teachers Need Not Teach the Cases)*, 61 DUKE L.J. ____ (forthcoming 2011), which should not be surprising, as arbitration law is governed by federal and state statutes enacted to change the common law of contracts.

¹⁹ *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002); see also *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) (“We think it is also clear from our precedents and the contractual nature of arbitration that parties may specify with whom they choose to arbitrate their disputes.”).

²⁰ *Volt Info. Sci., Inc. v. Bd. Of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).

²¹ See Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151, 193 (2004) (arguing for a contract-based approach to arbitral immunity).

²² Weidemaier, *supra* note 11, at 663; see also Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U.L. REV. 761, 781 (2003) (“arbitration administrators”); Restatement (Third) U.S. Law of International Commercial Arbitration cmt. x to § 1-1. (“arbitral institution”).

arbitrations, and answer procedural questions to avoid ex parte contact between disputants and arbitrators.²³

Of course, parties need not use an arbitration provider to provide these administrative services.²⁴ The arbitrator or arbitrators might themselves handle the administrative duties, or the parties might set up an administrative process that is separate from any arbitration provider.²⁵ That said, most contracts with arbitration clauses, at least those for which data are available, specify an arbitration provider in the clause.²⁶

The leading domestic arbitration providers are the American Arbitration Association (“AAA”) and JAMS (formerly the Judicial Arbitration and Mediation Service).²⁷ The list of international arbitration providers is much longer, and includes the International Centre for Dispute Resolution (the international arm of the AAA), the Court of International Arbitration of the International Chamber of Commerce, the London Court of International Arbitration (LCIA), and others.²⁸ Some arbitration providers, such as the AAA, are organized as not-for-profit entities; others, such as JAMS, are for-profit businesses.²⁹ Some providers tend to focus on a particular type of dispute;³⁰ others provide arbitration services for a wide range of industries. The AAA, for example, has commercial arbitration rules, employment arbitration rules, and consumer arbitration rules, but also has wide array of industry-specific arbitration rules.³¹

Like other providers of services, arbitration providers compete with each other to attract business.³² This competition can take a variety of forms. Arbitration providers certainly

²³ Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 52-53 (1999) (footnotes omitted).

²⁴ Such arbitrations are referred to variously as “non-administered,” see International Institute for Conflict Prevention & Resolution (CPR), Non-Administered Arbitration Rules (effective Nov. 1, 2007), available at <http://www.cpradr.org/Portals/0/Resources/ADR%20Tools/Clauses%20&%20Rules/2007%20CPR%20Rules%20for%20Non-Administered%20Arbitration.pdf>, or “ad hoc,” see Restatement (Third) U.S. Law of International Commercial Arbitration reporters’ note c to § 1-1.

²⁵ However, when a business does not choose a reputable arbitration provider, a court might justifiably look more skeptically on the enforceability of such a clause. See *infra* text accompanying note 233.

²⁶ See, e.g., Drahozal & Rutledge, *supra* note 7, at ___ table 3.

²⁷ The National Arbitration Forum likely would have been on this list as well, because of the size of its consumer arbitration caseload, before July 2009, when it stopped administering new consumer arbitration cases in settlement of a consumer fraud suit brought by the Minnesota Attorney General. See *infra* note 51.

²⁸ See Hong Kong International Arbitration Centre, Case Statistics – 2009, http://www.hkiac.org/show_content.php?article_id=405 (last visited Apr. 22, 2011) (listing case filing statistics reported by various international arbitration institutions).

²⁹ Joseph M. Matthews, *Consumer Arbitration: Is It Working Now and Will It Work in the Future?*, 79 FLA. BAR J. 1, at *2-*4 (Apr. 2005).

³⁰ E.g., American Health Lawyers Association Alternative Dispute Resolution Service, Rules of Procedure for Arbitration (revised July 2010), available at <http://www.healthlawyers.org/Resources/ADR/Code%20of%20Ethic%20and%20Rules%20of%20Procedures1/Arbitration%20Rules%20and%20Procedures%20-%20Revised%20July%202010.pdf>.

³¹ See Am. Arb. Ass’n, Major Arbitration and Mediation Rules and ADR Programs, http://www.adr.org/commercial_arbitration (last visited Apr. 22, 2011) (listing arbitration rules for construction, energy, financial services, health care, insurance, real estate, accounting, intellectual property, internet, securities, sports, and wireless disputes).

³² E.g., Brunet, *supra* note 23, at 52 (“At present, arbitration services are supplied in a very competitive market.... Rivalry is intense among individual arbitrators and firms who provide arbitration services.”); Rutledge,

compete on price.³³ They also compete by updating their arbitration rules — which serve as standard form terms that parties can incorporate by reference into their contract — to make them more attuned to their customers’ needs.³⁴ And they compete by providing new and different forms of dispute resolution services.³⁵

This competition among providers has been criticized as giving the providers an incentive to structure the arbitration process to favor businesses, which are more likely to be repeat players in arbitration, over consumers and employees.³⁶ For example, the proposed Arbitration Fairness Act sets out as one of its legislative findings that “[p]rivate arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.”³⁷ Public Citizen has asserted that arbitration providers “have the strongest of incentives to favor business: Their very existence depends on whether businesses choose them.”³⁸ As a result, according to Public Citizen, “binding mandatory arbitration creates market competition to favor business.”³⁹ This possibility has been described as a “race to the bottom” in consumer and employment arbitration.⁴⁰

On the other hand, the competitive pressures faced by arbitration providers are not unconstrained. As noted above, courts regulate the arbitration process by refusing to enforce arbitration agreements that they find to be too unfair.⁴¹ An arbitration provider that caters solely to businesses by providing unfair arbitration procedures risks having arbitration agreements

supra note 21, at 164 (“These markets for dispute resolution services (both domestic and international) are marked by fierce competition among suppliers (except in rare cases of mandatory tribunals, such as the Iran Claims Tribunal). Suppliers of dispute resolution services (i.e., arbitral institutions) compete with courts and with each other to encourage parties to resolve their disputes by means of their services.”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1650 (2005) (“Arbitration organizations, such as the American Arbitration Association (AAA) and the National Arbitration Forum (NAF), are now competing to provide arbitration services for particular companies that require their consumers to arbitrate future disputes.”).

³³ Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT’L L. 79, 100 (2000).

³⁴ *Id.*; Larry Smith & Lori Tripoli, *Privatized International Dispute Settlement ... Competing Arbitration Centers Mean User-Friendly Resolutions Worldwide*, INSIDE LITIG., May 1998, at 1, 2 (“Clearly the motive for [ICC rules revisions] was competitive.”).

³⁵ *E.g.*, American Arbitration Association, *Optional Rules for Emergency Measures of Protection* (amended and effective June 1, 2009), available at <http://adr.org/sp.asp?id=22440>.

³⁶ It may be that lawyers who represent employees or consumers are repeat players even if individual employees or consumers are not. Christopher R. Drahozal, *“Unfair” Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 751.

³⁷ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong., § 2(4).

³⁸ Public Citizen, *supra* note 13, at 25.

³⁹ *Id.*

⁴⁰ Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 842-43 (2002) (“Moreover, not all arbitrators and arbitral organizations have signed on to the Due Process Protocols, so there is some risk that arbitrators will engage in a race to the bottom in order to secure large numbers of arbitration contracts.”); Jean R. Sternlight, *Consumer Arbitration*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 174 (Edward Brunet et al. eds. 2006) (“[M]any have raised concerns that if major and reputable arbitration providers all choose to adopt fairness protocols, other less reputable providers may enter the field, offering companies an alternative that is beneficial to the company, but not its opponents. That is, the Protocols could prompt a classic ‘race to the bottom.’”).

⁴¹ *See supra* text accompanying notes 1-2.

specifying its use, or awards made under its auspices, set aside.⁴² Such court oversight can give arbitration providers an incentive to provide for fair arbitration procedures.⁴³ As Mark Weidemaier has explained:

[P]roviders may also sell legitimacy. Arbitration clauses are often challenged by parties who would prefer to litigate their disputes in court, and the designation of a recognized provider may help immunize the arbitration agreement from challenge.... One way a provider can confer legitimacy is to publicly adopt and enforce due process or “fairness” rules.⁴⁴

Thus, one reason an arbitration provider might adopt a due process protocol would be to protect its reputation as a provider of a fair dispute resolution process, and thus to enhance the enforceability of arbitration agreements and awards in court. Indeed, the benefits of developing a reputation for fairness are not limited to the provider’s credibility with courts, but could extend more generally to the provider’s acceptability to parties more generally. This incentive would be particularly strong for a provider that also provides administrative services for business-against-business arbitrations.

But an arbitration provider might adopt a due process protocol for other reasons as well.⁴⁵ Arbitration providers might adopt due process protocols to reduce the risk of additional public regulation — i.e., to reduce likelihood that Congress would more dramatically regulate consumer arbitration or preclude altogether the enforcement of pre-dispute arbitration clauses in consumer and employment contracts.⁴⁶ A provider might adopt a due process protocol because of a demand for fair arbitration procedures by businesses, who seek to enhance their own reputations for dealing fairly with their customers.⁴⁷ Conversely, a provider might adopt a due process

⁴² See, e.g., *FIA Card Servs., N.A. v. Escobar*, 2010 N.Y. Misc. LEXIS 3729, at *2 (N.Y. Civ. Ct. May 21, 2010) (“Respondent has submitted evidence, un rebutted by petitioner, that NAF is not a neutral party [S]uch [institutional] bias itself, without the need to prove bias by individual arbitrators, at the very least strongly militates in favor of vacating an award.”). *But see Siler v. Chase Bank, USA, N.A.*, 2011 U.S. Dist. LEXIS 18309, at *10-11 (N.D. W. Va. Feb. 25, 2011) (refusing to vacate award on the basis of allegations of “general bias”: “this Court [is] unable to vacate an arbitration award simply because a few news articles and a Minnesota consent judgment question the partiality of the association to which the subject arbitrator belongs”).

⁴³ Drahozal, *supra* note 36, at 769 (“[A]rbitration institutions have a strong incentive to enhance the fairness of the process in order to assure users that their arbitration awards will be enforceable.”); Peter B. Rutledge, *Common Ground in the Arbitration Debate*, 1 YB. ON ARB. & MED. 1, 28 (2009) (“For many organizations, such as the American Arbitration Association, their reputation for neutrality and independence may be far more important: the enforceability of the award is the ‘bond’ on which parties depend when they opt for its services. If courts begin to vacate their awards, then the institution’s ‘bond’ effectively fails, and parties would cease using those services.”).

⁴⁴ Weidemaier, *supra* note 11, at 661-62.

⁴⁵ Note that these explanations are not mutually exclusive; more than one might apply.

⁴⁶ ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 143 (2009) (“These moves [promulgating the Consumer Due Process Protocol and offering reduced-cost consumer arbitration] presumably represent a compromise between consumer groups and companies brokered by the AAA to preserve consumer arbitration against the risk that consumer groups will be able to persuade legislators to enact more stringent protections at the state or federal level.”); Drahozal, *supra* note 36, at 769 (“[U]nfairness in arbitration raises the possibility of increased government regulation of the arbitration process. Such regulation could take a variety of forms, but many would pose a serious threat to the business of arbitration institutions. As often happens, the threat of government regulation can spur the industry to self-regulate in an attempt to head off restrictive legislation.”).

⁴⁷ Drahozal, *supra* note 36, at 767-69.

protocol because of a demand for fair arbitration procedures by consumers or employees (or, more likely, their lawyers).⁴⁸ More cynically, an arbitration provider might adopt a due process protocol to give the appearance of fairness that does not really exist. Such a characterization seems implicit in the suggestions that arbitration providers might not be enforcing the protocols they have adopted.⁴⁹ Or perhaps more idealistically, an arbitration provider might adopt a due process protocol because its management believes that is the right thing to do.⁵⁰

It is not possible to distinguish fully among these various reasons arbitration providers might adopt due process protocols, at least not using the evidence we have available. Our goal instead is more modest: to examine (1) how effectively the AAA — the first provider to adopt a due process protocol — reviews consumer arbitration clauses for protocol compliance; (2) whether it refuses to administer cases that do not comply with the Consumer Due Process Protocol; and (3) whether it requires businesses to make changes in their dispute resolution clauses for future cases (as well as the extent to which businesses do so). If the AAA is reasonably effective at carrying out these enforcement practices, then at the very least we can have confidence that there is substance to the AAA's adoption of the Consumer Due Process Protocol — that it does more than merely provide the appearance of fairness.

III. OVERVIEW OF ARBITRATION DUE PROCESS PROTOCOLS

The major arbitration providers each have their own due process protocols.⁵¹ The AAA adheres to the Employment Due Process Protocol, the Consumer Due Process Protocol, the Health Care Due Process Protocol, and the Consumer Debt Collection Due Process Protocol.⁵²

⁴⁸ See *infra* note 66.

⁴⁹ See *supra* text accompanying notes 12-13.

⁵⁰ Arbitration providers that are not-for-profit entities might be less subject to market pressures than for-profit entities, and so more likely to follow pro-consumer business strategies. See Ryan Bubb & Alex Kaufman, Consumer Biases and Firm Ownership 3 (Oct. 26, 2009), available at http://www.people.fas.harvard.edu/~akaufman/papers/BubbKaufman_ConsumerBiases.pdf.

⁵¹ In addition, the National Arbitration Forum had issued an Arbitration Bill of Rights applicable to consumer arbitrations it administered. National Arbitration Forum, Arbitration Bill of Rights (2007), available at www.adrforum.com/users/naf/resources/ArbitrationBillOfRights3.pdf. In July 2009, however, the NAF agreed to discontinue administering new consumer arbitrations as part of its settlement of a consumer fraud action brought by the Minnesota Attorney General. Consent Judgment para. 3, *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>. Because the NAF no longer administers new consumer arbitrations, we have omitted any discussion of its Arbitration Bill of Rights in this section. But the NAF might illustrate (assuming that the allegations in the Minnesota Attorney General's complaint were accurate) that merely promulgating a due process protocol does not itself protect consumers; the arbitration provider must enforce the protocol as well.

⁵² National Consumer Disputes Advisory Committee, Consumer Due Process Protocol (April 17, 1998), available at www.adr.org/sp.asp?id=22019 [hereinafter Consumer Due Process Protocol]; see also Task Force on Alternative Dispute Resolution in Employment, Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (May 9, 1995), available at www.adr.org/sp.asp?id=28535 [hereinafter Employment Due Process Protocol]; Commission on Health Care Dispute Resolution, Health Care Due Process Protocol (July 27, 1998), available at www.adr.org/sp.asp?id=28633 [hereinafter Health Care Due Process Protocol]; National Task Force on the Arbitration of Consumer Debt Collection Disputes, Consumer Debt Collection Due Process Protocol – Statement of Principles (Oct. 2010), available at <http://www.adr.org/si.asp?id=6248> [hereinafter Consumer Debt Collection Due Process Protocol]. Professor Drahozal was a member of the Task Force that prepared the Consumer Debt Collection Due Process Protocol.

JAMS has set out Minimum Standards of Procedural Fairness for both consumer arbitration and employment arbitration.⁵³

A. History of the Protocols

The origins of the due process protocols have been described in detail by other authors.⁵⁴ This Section summarizes those origins briefly, focusing on the Employment Due Process Protocol and the Consumer Due Process Protocol and their implementation by the AAA.

The due process protocols trace back to the work of the “Dunlop Commission,” which was established in 1993 to “investigate the current state of worker-management relations in the United States.”⁵⁵ Among the issues considered by the Commission was whether to enhance the ability of the parties themselves to resolve workplace disputes, rather than relying on the courts and regulators.⁵⁶ Accordingly, the Commission examined the use of employment arbitration, finding that while some employers adopted “serious and fair” arbitration programs,⁵⁷ others established programs that did not meet accepted standards of “fairness.”⁵⁸

Thereafter, the Chair of the Commission, John T. Dunlop, requested Arnold M. Zack, president of the National Academy of Arbitrators, to develop a list of private due process standards that would “extend the negotiated due process protections of union management arbitration to this expanding non-union setting.”⁵⁹ Zack ended up as co-chair of the Task Force on Alternative Dispute Resolution in Employment, which drafted the Employment Due Process Protocol.⁶⁰ The members of the Task Force included representatives from an array of interest groups involved in employee-employer relations,⁶¹ although the members made clear that “the protocol reflects their personal views and should not be construed as representing the policy of the designating organizations.”⁶² The Task Force issued the Employment Protocol in May 1995. Zack summarized the Task Force’s view of its work as follows: “All the Task Force members

⁵³ JAMS, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses: Minimum Standards of Procedural Fairness (revised Jan. 1, 2007), *available at* www.jamsadr.com/rules/consumer_min_std.asp [hereinafter JAMS Consumer Minimum Standards]; JAMS, JAMS Policy on Employment Arbitration, Minimum Standards of Procedural Fairness (revised Feb. 19, 2005), *available at* www.jamsadr.com/rules/employment_Arbitration_min_stds.asp [hereinafter JAMS Employment Minimum Standards].

⁵⁴ In particular, see Harding, *supra* note 10, at 373-416. For a personal account of the origins of the Employment Due Process Protocol, see Arnold M. Zack, *The Due Process Protocol: Getting There and Getting Over It*, 11 EMPL. RTS. & EMPLOY. POL’Y J. 257, 257-59 (2007).

⁵⁵ COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT-FINDING REPORT xi (1994).

⁵⁶ *Id.*

⁵⁷ THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 51 (1995).

⁵⁸ *Id.* at 73.

⁵⁹ Zack, *supra* note 54, at 258.

⁶⁰ Employment Due Process Protocol, *supra* note 52.

⁶¹ The Task Force included representatives of the AAA, several committees of the American Bar Association, the National Academy of Arbitrators, the Society of Professionals in Dispute Resolution, the National Employment Lawyers Association, Federal Mediation & Conciliation, and the Workplace Rights Project of the American Civil Liberties Union. *Id.*

⁶² *Id.*

will acknowledge that the Protocol does not contain all the protections and assurances that each of us as individuals would have liked to include, but the achievement of agreement on the components of the document did mark a substantial step forward in providing due process protections in procedures where many such protections had been lacking.”⁶³

In July 1995, the AAA established a pilot program in California to administer arbitrations using new rules incorporating the Employment Due Process Protocol.⁶⁴ Based on its experience in California, and drawing on a national Employment Conclave it sponsored in September 1995,⁶⁵ the AAA promulgated new Employment Arbitration Rules (effective June 1996) reflecting the principles of the Employment Protocol.⁶⁶ The AAA later announced that it would refuse to administer employment arbitrations if the plan failed materially to comply with the Protocol; the AAA also established a process by which employers could obtain advance review of their dispute resolution programs for protocol compliance.⁶⁷

The Employment Due Process Protocol in turn served as the “primary model” for the Consumer Due Process Protocol.⁶⁸ In 1997, the AAA established the National Consumer Disputes Advisory Committee, which like the Employment Task Force consisted of an array of individuals from interested groups.⁶⁹ In May 1998, the Committee issued the Consumer Due Process Protocol, which is described in more detail below.⁷⁰ Thomas J. Stipanowich, the Academic Reporter for the Protocol, explained that although the AAA established the Advisory Committee, the AAA’s “representatives did not play an active role in the Committee’s deliberations or drafting process.”⁷¹ The AAA thereafter incorporated the principles of the

⁶³ Zack, *supra* note 54, at 260. For example, the Task Force members agreed to disagree on whether pre-dispute arbitration clauses should be enforceable in employment contracts. *See infra* text accompanying note ____.

⁶⁴ American Arbitration Association, Fair Play: Perspectives from American Arbitration Association on Consumer and Employment Arbitration 12 (Jan. 2003) [hereinafter AAA, Fair Play].

⁶⁵ Zack, *supra* note 54, at 260-61 (“The critical first step in the effort toward recognition of the validity of the proposals inherent in the Protocol was the decision of William Slate, President of AAA, to convene a Conclave on Employment Arbitration in Washington, D.C., on September 22-23, 1995.”).

⁶⁶ AAA, Fair Play, *supra* note 64, at 13. JAMS likewise adopted the Employment Protocol. *JAMS/Endispute Issues Minimum Standards for Employment Arbitration*, 6 WORLD ARB. & MED. REP. 50, 50 (1995).

Some have suggested that another factor playing a role in both providers’ adoption of the Employment Due Process Protocol was a threatened boycott by the National Employment Lawyers Association. *E.g.*, Harding, *supra* note 10, at 403 n.193; Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, A.B.A. J., Aug. 1996, at 58, 58-59 (“[The Employment Protocol] largely languished until NELA issued an ultimatum to AAA and JAMS.”); *see National Employment Lawyers Association Will Boycott ADR Providers*, 6 WORLD ARB. & MED. REP. 240, 240 (1995); *JAMS/Endispute Clarifies Position on Mandatory Employment Arbitration*, 7 WORLD ARB. & MED. REP. 512, 512 (1996).

⁶⁷ AAA, Fair Play, *supra* note 64, at 13; *see also infra* text accompanying notes 100-106.

⁶⁸ Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 907.

⁶⁹ The Task Force included representatives of the AAA, the Federal Trade Commission, Freddie Mac, Fannie Mae, the American Association of Retired Persons, Consumer Action, Consumers Union, the American Council on Consumer Interests, the National Association of Consumer Agency Administrators, the National Association of Attorneys General, Duke University, two lawyers in private practice who formerly were attorneys for large corporations, as well as academics and a retired judge. National Consumer Disputes Advisory Committee, *Introduction: Genesis of the Advisory Committee*, in Consumer Due Process Protocol, *supra* note 52, at 46.

⁷⁰ *Id.*; *see infra* Part IV.B.

⁷¹ Stipanowich, *supra* note 68, at 896 n.383.

Consumer Protocol into its Consumer Arbitration Rules, as well as announcing (as with the Employment Protocol) that it would refuse to administer cases that materially failed to comply.⁷²

Shortly after the Consumer Due Process Protocol was issued, the Commission on Health Care Dispute Resolution issued a Health Care Due Process Protocol as well.⁷³ As discussed below, the Health Care Due Process Protocol differs from the Employment and Consumer Protocols because it requires a post-dispute agreement to arbitrate health care disputes involving patients.⁷⁴ The AAA likewise has announced that it will follow the Health Care Protocol and refuse to administer cases arising out of pre-dispute agreements to arbitrate disputes within its scope.⁷⁵ Most recently, the AAA developed a Consumer Debt Collection Due Process Protocol, supplementing the Consumer Due Process Protocol with additional protections to address issues that are particularly problematic in consumer debt collection cases.⁷⁶

B. Content of the Protocols

The due process protocols of the leading arbitration providers are broadly consistent in content. This Section describes key features the protocols have in common as well as highlighting some important differences.

First, several of the protocols set out an overarching principle of “fundamental fairness.”⁷⁷ The protocols do not make clear whether “fundamental fairness” is an independent requirement that must be satisfied or whether complying with the other requirements of the protocols constitutes fundamental fairness. The Commentary to the Consumer Due Process Protocol suggests the latter, explaining that the other principles in the Protocol “identify specific minimum due process standards which embody the concept of fundamental fairness.”⁷⁸

⁷² AAA, Fair Play, *supra* note 64, at 14. The protocols have influenced the arbitration of consumer and employee disputes in other ways as well. Businesses have incorporated the provisions of the Protocols into their arbitration clauses. *E.g.*, First Victoria, TIB – The Independent Bankersbank Visa Gift Card Terms and Conditions (Associate Program) (2005), *available at* www.firstvictoria.com/PDFs/VISAGiftCardTerms.pdf (“All disputes between you and the Bank in connection with your Gift Card and these Terms and Conditions will be resolved by BINDING ARBITRATION in accordance with the Consumer Due Process Protocol”); AT&T, BellSouth Service Agreement for Residential Services in Alabama (2006), *available at* http://cpr.bellsouth.com/pdf/al/al_res_sa.pdf (“[I]n the event that the AAA determines that any provision of this Agreement does not comply with applicable standards stated in the AAA’s Consumer Due Process Protocol, the standards in the protocol shall control.”). Courts have relied on the protocols in evaluating the fairness of an arbitration clause. *See* Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 178-84 (2005) (discussing cases). Proposed federal legislation (not the Arbitration Fairness Act) has been modeled on the protocols. Fair Arbitration Act, S.1135, 110th Cong. (2007).

⁷³ The Commission was comprised of representatives of the AAA, ABA, and the American Medical Association. Health Care Due Process Protocol, *supra* note 52, at 3-4.

⁷⁴ *Id.* princ. 3.

⁷⁵ *See infra* text accompanying note 81.

⁷⁶ Consumer Debt Collection Due Process Protocol, *supra* note 52, at 7-11.

⁷⁷ *E.g.*, Consumer Due Process Protocol, *supra* note 52, princ. 1.

⁷⁸ *Id.* Reporter’s Comments to princ. 1.

Nonetheless, the requirement of fundamental fairness might be construed to have independent force as a constraint on procedures in consumer arbitrations.⁷⁹

Second, several of the protocols address the contract formation process. The Consumer Due Process Protocol and the JAMS Minimum Standards for consumer arbitrations require businesses to provide consumers with “full and accurate information” on the arbitration program.⁸⁰ As noted above, one important difference between the Health Care Due Process Protocol and the other due process protocols is that the Health Care Protocol precludes enforcement of pre-dispute arbitration agreements.⁸¹ By comparison, the drafters of the Employment Due Process Protocol agreed to disagree on whether pre-dispute arbitration clauses should be enforceable; the drafters of the Consumer Due Process Protocol did likewise.⁸² The effect of the disagreement is that neither of those protocols address the enforceability of pre-dispute arbitration agreements — i.e., they do not set out as a prerequisite for a fair process that the arbitration agreement be entered after a dispute arises. The same is true for the JAMS Minimum Standards.⁸³

Third, the Consumer Due Process Protocol and the JAMS Minimum Standards of Procedural Fairness for consumer arbitrations permit claimants to bring claims in small claims court rather than arbitration, even if the claims are subject to a pre-dispute arbitration agreement.⁸⁴ Neither the Employment Due Process Protocol nor the JAMS Minimum Standards for employment arbitrations contains opt outs for small claims court,⁸⁵ presumably due to the sorts of claims that typically arise out of the employment relationship.

The JAMS Minimum Standards (for both consumer arbitrations and employment arbitrations) contain an additional limitation on the scope of arbitration agreements — that arbitration agreements must be “reciprocally binding.”⁸⁶ Under the JAMS Minimum Standards, an arbitration clause is “reciprocally binding” when a business is bound to arbitrate to the same extent as the consumer or employee.⁸⁷ None of the other protocols has a similar requirement.⁸⁸

⁷⁹ And, in fact, the AAA does so in examining arbitration clauses for protocol compliance. *See infra* text accompanying note 126.

⁸⁰ Consumer Due Process Protocol, *supra* note 52, princs. 2 & 11; JAMS Consumer Minimum Standards, *supra* note 53.

⁸¹ Health Care Due Process Protocol, *supra* note 52, princ. 3.

⁸² Consumer Due Process Protocol, *supra* note 52, Scope (“As was the case with the task force which developed the *Employment Due Process Protocol*, opinions regarding the appropriateness of binding pre-dispute arbitration agreements in consumer contracts were never fully reconciled.”).

⁸³ JAMS Employment Minimum Standards, *supra* note 53, Introduction (“JAMS does not take a position on the enforceability of condition-of-employment arbitration clauses”).

⁸⁴ Consumer Due Process Protocol, *supra* note 52, princ. 5; JAMS Consumer Minimum Standards, *supra* note 53, Standard 1(B).

⁸⁵ Employment Due Process Protocol, *supra* note 52; JAMS Employment Minimum Standards, *supra* note 53.

⁸⁶ JAMS Consumer Minimum Standards, *supra* note 53, Standard 1(A); JAMS Employment Minimum Standards, *supra* note 53, Standard 7 (“Both the employer and the employee must have the same obligation (either to arbitrate or go to court) with respect to the same kinds of claims.”).

⁸⁷ JAMS Consumer Minimum Standards, *supra* note 53, Standard 1(A) (defining an arbitration clause as “reciprocally binding” when if a consumer or employee is “required to arbitrate his or her claims or all claims of a certain type, the company is so bound” as well).

⁸⁸ Courts likewise are split on whether nonmutual arbitration clauses are enforceable. Christopher R.

Fourth, the bulk of protocol provisions address procedural aspects of arbitration. Here, the requirements of the protocols are broadly similar. The protocols typically require: (1) independent and impartial arbitrators; (2) reasonable arbitration costs; (3) a reasonably convenient hearing location; (4) reasonable time limits for the proceeding; (5) the right to representation; (6) adequate discovery; and (7) a fair hearing.⁸⁹ Not all of the provisions of the protocols on these topics are identical, but they are broadly consistent.

Fifth, the protocols all address the remedies available in arbitration and the arbitration award itself. Every protocol requires that all remedies available in court also be available in arbitration.⁹⁰ In addition, the protocols typically require the arbitrator to follow the law in making a decision and to issue a written award (with reasons on request).⁹¹

IV. AAA ENFORCEMENT OF THE CONSUMER DUE PROCESS PROTOCOL

This Part discusses in detail the AAA's review of consumer arbitration clauses for compliance with the Consumer Due Process Protocol, beginning with the review process and then addressing the substance of the AAA's review.⁹² For a case to be treated as a "consumer" case by the AAA, it must meet the following requirements: (1) it must arise out of "an agreement between a consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers;"⁹³ (2) "the terms and conditions of the purchase of standardized, consumable goods or services [must be] non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices;"⁹⁴ and (3) "[t]he product or service must be for personal or household use."⁹⁵ The AAA makes the initial determination whether a case is a consumer case, subject to redetermination by the arbitrator.⁹⁶

Drahozal, *Non-Mutual Arbitration Clauses*, 27 J. CORP. L. 537, 542-52 (2002).

⁸⁹ See, e.g., Consumer Due Process Protocol, *supra* note 52, princs. 3, 6-9, 12 & 13.

⁹⁰ See, e.g., *id.* princ. 14.

⁹¹ See, e.g., *id.* princ. 15.

⁹² Throughout this Part, we describe the AAA's procedures as set out in its rules and other publications, or as explained to us in discussions with knowledgeable AAA personnel. The extent to which the AAA's actual practices are consistent with this description is a subject of our empirical findings *infra* Part VI.

⁹³ American Arbitration Association, Supplementary Procedures for the Resolution of Consumer-Related Disputes Rule C-1(a) (effective Sept. 15, 2005), available at <http://www.adr.org/sp.asp?id=22014> [hereinafter AAA Consumer Rules].

⁹⁴ *Id.*

⁹⁵ *Id.*; see also JAMS Consumer Minimum Standards, *supra* note 53, at n.1 ("These standards are applicable where a company systematically places an arbitration clause in its agreements with individual consumers and there is minimal, if any, negotiation between the parties as to the procedures or other terms of the arbitration clause. A consumer is defined as an individual who seeks or acquires any goods or services, including financial services, primarily for personal family or household purposes.").

⁹⁶ AAA Consumer Rules, *supra* note 93, Rule C-1(a) ("The 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.").

A. Process of AAA Protocol Compliance Review

If a consumer case involves a claim for compensatory damages of \$75,000 or less, the AAA's procedure is for the AAA itself to review the arbitration clause for compliance with the Consumer Due Process Protocol.⁹⁷ After undertaking this review, "[i]f the Association determines that ... a dispute resolution clause on its face, substantially and materially deviates from the minimum due process standards of this Protocol, the Association may decline to administer cases arising under this clause."⁹⁸ If the claim is seeking over \$75,000, issues of protocol compliance are for the arbitrator.⁹⁹

AAA review of consumer arbitration clauses for protocol compliance can take place both before and after a dispute arises. Before a dispute arises, the AAA has set up an "advance review" procedure similar to the procedure under its Employment Arbitration Rules.¹⁰⁰ According to the AAA, "[i]f a business intends to use the arbitration services of the Association in a predispute arbitration clause that involves consumers, it shall, at least thirty (30) days before the planned effective date of the clause (1) notify the Association of its intention to do so; and (2) provide the Association with a copy of the clause."¹⁰¹ If the business does not do so, the AAA "reserves the right to decline its administrative services."¹⁰² The description of the AAA's process for advance review of consumer arbitration clauses, while available on the AAA web site,¹⁰³ is not included in either the AAA's Commercial Arbitration Rules¹⁰⁴ or its Supplementary Procedures for Resolution of Consumer-Related Disputes.¹⁰⁵ By comparison, the provision for advance review of employment arbitration clauses is set out in the AAA's Employment Arbitration Rules.¹⁰⁶

The potential benefits of advance review are at least twofold. First, advance review permits the business and the AAA to resolve any issues of protocol compliance before a dispute arises, so that the compliance review process does not interfere with resolution of the dispute between the business and consumer. Second, advance review extends the benefits of the

⁹⁷ American Arbitration Association, Rules Updates, Consumer Arbitrations: Notice to Consumers and Businesses, available at <http://www.adr.org/sp.asp?id=24714&printable=true> (last visited July 28, 2011) [hereinafter AAA Rules Updates].

⁹⁸ *Id.*

⁹⁹ AAA, Fair Play, *supra* note 64, at 33. Likewise, "issues that are not clearly substantial and material deviations will be presented to the arbitrator for determination." AAA Rules Updates, *supra* note 97.

¹⁰⁰ AAA, Fair Play, *supra* note 64, at 33 ("[B]usinesses" are asked to obtain advance review by AAA of the program to determine compliance with the protocols."); AAA Rules Updates, *supra* note 97 (describing advance review process); see American Arbitration Association, Employment Arbitration Rules, Rule 2 (amended and effective Nov. 1, 2009), available at <http://www.adr.org/sp.asp?id=32904> [hereinafter AAA Employment Rules] ("An employer intending to incorporate these rules or to refer to the dispute resolution services of the AAA in an employment ADR plan, shall, at least 30 days prior to the planned effective date of the program: (i) notify the Association of its intention to do so and, (ii) provide the Association with a copy of the employment dispute resolution plan.").

¹⁰¹ AAA Rules Updates, *supra* note 97.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ American Arbitration Association, Commercial Arbitration Rules and Mediation Procedures (amended and effective June 1, 2009), available at <http://adr.org/sp.asp?id=22440>.

¹⁰⁵ AAA Consumer Rules, *supra* note 93.

¹⁰⁶ AAA Employment Rules, *supra* note 100, Rule 2.

Protocol to all consumers who agree to a form contract with the business, not just those who are party to an arbitration before the AAA.

Post-dispute protocol review is to occur once a claimant files a demand for arbitration with the AAA. Under the AAA's arbitration rules, the demand must include a copy of the arbitration clause.¹⁰⁷ The parties need not attach the entire contract. Accordingly, in conducting its review for protocol compliance, the "AAA reviews the parties' arbitration clause only, and not the entire contract."¹⁰⁸

Before undertaking administration of the case, the AAA case intake staff is to review the arbitration clause for compliance with the Consumer Due Process Protocol¹⁰⁹ (the substance of that review is described in the next section).¹¹⁰ The case intake staff also is to check the name of the business against the AAA "business list" — a list of all businesses of which the AAA is aware that mention (or at least at some point mentioned) the AAA in their consumer arbitration clauses. If the business is one that has refused either to waive an objectionable provision or to pay its share of arbitration costs in a prior consumer case, it should be classified as "unacceptable" on the AAA business list so that the AAA will refuse to administer future cases involving the business.¹¹¹ Otherwise, the business should be classified as "acceptable."

If the clause complies with the Protocol, the business is to be classified as "acceptable" on the AAA business list. Provided that the business pays its share of the arbitration fees, the case will proceed to arbitration.¹¹² If the clause does not comply, the AAA's procedure is to contact the business to determine whether the business will waive the offending provision or provisions — not only for this dispute, but for future disputes.¹¹³ Moreover, the AAA will advise the business regarding the changes that can be made to bring the clause into compliance with the Protocol. If the business does not waive the provision, AAA policy is to refuse to

¹⁰⁷ AAA Consumer Rules, *supra* note 93, Rule C-2(a).

¹⁰⁸ American Arbitration Association, AAA Review of Consumer Clauses 1, *available at* <http://www.adr.org/si.asp?id=4453> (last visited Apr. 25, 2011); *see also* JAMS Employment Minimum Standards, *supra* note 53 ("In assessing whether the standards are met and whether to accept the arbitration agreement, JAMS, as the ADR Provider, will limit its inquiry to a facial review of the clause or procedure. If a factual inquiry is required, for example, to determine compliance with the Minimum Standards, it must be conducted by an arbitrator or court.").

¹⁰⁹ AAA, Fair Play, *supra* note 64, at 33-34 ("[S]pecially designated AAA staff members review clauses submitted in consumer cases ... to check protocol compliance.").

¹¹⁰ *See infra* Part IV.B.

¹¹¹ Note that review of the AAA business list is not to replace reviewing the arbitration clause itself, as the clause may have changed since the most recent entry on the AAA business list.

¹¹² Assuming, of course, that the other requirements for AAA administration are met, such as that the consumer paid his or her share of the arbitrator's fees.

¹¹³ *See Ragan v. AT&T Corp.*, 824 N.E. 2d 1183, 1194 (Ill. Ct. App. 2005) (quoting letter from AAA employee to AT&T dated Oct. 29, 2002) ("The AAA's willingness to administer disputes under AT&T's arbitration agreement is contingent upon AT&T's continued willingness to have all past, present[,] and future consumer-related disputes administered in accordance with the Consumer Rules and the Protocol."). For a sample letter that is in the public domain, see Letter from Molly A. Bargenquest to Melissa Hoag Sherman & Kevin Mason dated Dec. 19, 2003, included in CD-ROM Appendix to NATIONAL CONSUMER LAW CENTER, CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS (5th ed. 2007).

administer the case.¹¹⁴ If the company is listed as “unacceptable” on the AAA business list, or if the business fails to pay the required fees, the AAA likewise should refuse to administer the case.

If questions arise, the case intake staff can consult with a designated AAA employee who maintains the AAA business list. Note that protocol review in consumer cases differs from protocol review in employment cases, in which review is handled centrally by a single AAA employee.¹¹⁵ In the consumer setting, by comparison, the case intake staff conduct the review, with the employee who maintains the AAA business list available for consultation in individual cases.

B. Substance of AAA Protocol Compliance Review

The Consumer Due Process Protocol sets out fifteen principles it describes as “embodiments of fundamental fairness” in dispute resolution.¹¹⁶ In deciding whether to administer a consumer case, the AAA reviews the arbitration clause submitted with the arbitration demand for compliance with the Due Process Protocol. This review is subject to several important constraints.

First, as noted above, the AAA reviews the text of the arbitration clause, not the entire contract, to determine protocol compliance.¹¹⁷ To the extent a problematic provision is not located in the arbitration clause but rather is located elsewhere in the contract, the provision is not subject to the AAA’s review.¹¹⁸

Second, evaluating compliance with some principles of the Due Process Protocol may require factual determinations rather than simply a review of the text of the arbitration clause. To the extent factual inquiries are necessary in a particular case, the matter becomes one for the arbitrator rather than for the AAA’s review process.¹¹⁹

Third, it has been the longstanding policy of the AAA to comply with any court order directing that the administration of an arbitration proceed in a particular manner.¹²⁰ Typically,

¹¹⁴ AAA Rules Updates, *supra* note 97; *see also* JAMS Employment Minimum Standards, *supra* note 53 (“If JAMS becomes aware that an arbitration clause or procedure does not comply with the Minimum Standards, it will notify the employer of the Minimum Standards and inform the employer that the arbitration demand will not be accepted unless there is full compliance with those standards.”); JAMS Consumer Minimum Standards, *supra* note 53 (“JAMS will administer arbitrations pursuant to mandatory pre-dispute arbitration clauses between companies and consumers only if the contract arbitration clause and specified applicable rules comply with the following minimum standards of fairness.”).

¹¹⁵ Bingham & Sarraf, *supra* note 14, at 321 (“The internal mechanism the AAA uses to enforce the Protocol is for a single employee to review each and every employer arbitration plan in which the AAA is named as third-party administrator. If the plan does not comport with the Protocol, the AAA advises the employer to revise it, and the AAA refuses to administer any arbitration under the plan until it comports with the Protocol. The fact that a single employee centrally reviews all plans ensures a certain consistency in internal administration.”).

¹¹⁶ Consumer Due Process Protocol, *supra* note 52, princ. 1.

¹¹⁷ *See supra* text accompanying notes 107-108.

¹¹⁸ Presumably challenges to such a provision could still be made to the arbitrator.

¹¹⁹ *Cf.* JAMS Employment Minimum Standards, *supra* note 53.

¹²⁰ The description in this paragraph is based on discussions with AAA personnel knowledgeable of its

the AAA is not a party to such a court proceeding; rather, only the parties to the arbitration clause are parties to the court order. Nonetheless, the AAA’s policy is to defer to the court order compelling arbitration and to administer the case, even if the clause includes provisions that are inconsistent with the Consumer Due Process Protocol. However, AAA policy is to administer the case consistently with the Protocol, unless the court order directs otherwise.

Fourth, administrative review is limited to cases seeking \$75,000 or less — the same cutoff the AAA uses for the reduced fee schedule in its Consumer Arbitration Rules.¹²¹ In determining the amount of the claim, the AAA’s rules provide for it to consider only compensatory damages.¹²² Amounts sought as punitive damages, interest, or attorneys’ fees are not to be considered. The Protocol still applies in cases in which the claimant seeks more than \$75,000, but in those cases decisions on application of the Protocol are for the arbitrator.¹²³

In our empirical analysis below,¹²⁴ we evaluate the effectiveness of the AAA’s review for protocol compliance. To do so, we examine the arbitration clauses in the cases in the sample under the same standards the AAA seeks to apply in its review. The rest of this Section describes our understanding of those standards.¹²⁵

- Principle 1. Fundamentally-Fair Process: As discussed above, the text of the Protocol is not clear whether Principle 1 states a separate requirement of fundamental fairness or whether it merely indicates that the remaining principles of the Protocol protect fundamental fairness.¹²⁶ Nonetheless, in reviewing clauses, the AAA is to consider whether the procedures set out in the arbitration clause are unduly one-sided — that is, whether they unduly favor the business in ways not addressed in other principles of the Protocol.
- Principle 2. Access to Information: The AAA’s review is limited to the arbitration clause itself; it does not examine the surrounding circumstances to evaluate whether the consumer was able to obtain “full and accurate information” regarding the ADR program.¹²⁷ As a result, the AAA’s protocol compliance review does not consider this Principle. Presumably, the consumer could raise the issue of compliance before the arbitrator.
- Principle 3. Independent and Impartial Neutral: Various contract provisions might violate the requirement that the arbitrator be independent and impartial. Certainly a provision permitting the business to select the arbitrator unilaterally, or to control the list of prospective arbitrators, would violate this Principle.¹²⁸ In addition, provisions setting

policies and practices in administering consumer cases.

¹²¹ AAA Consumer Rules, *supra* note 93, Rule C-8 (“Administrative Fees”).

¹²² *Id.*

¹²³ *See supra* text accompanying note 99.

¹²⁴ *See infra* Part VI.

¹²⁵ The description below is based on discussions with AAA personnel knowledgeable about its protocol compliance review and on guidance given to case intake staff who conduct that review.

¹²⁶ *See supra* text accompanying notes 77-79.

¹²⁷ Consumer Due Process Protocol, *supra* note 52, princ. 2.

¹²⁸ *E.g.* *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938-39 (4th Cir. 1999) (“The Hooters rules also provide

out required qualifications for arbitrators likewise might be problematic. For example, a requirement that the arbitrator work at a company that sells the good or service at issue would be objectionable under this Principle.¹²⁹

- Principle 4. Quality and Competence of Neutrals: This Principle focuses on the quality of the arbitrators named by the AAA. The AAA views it as directed at the AAA's screening and training of potential arbitrators (so that the AAA's policy is to appoint only attorney arbitrators for consumer arbitrations, for example), rather than at the parties' arbitration clause. On this view, there is nothing for the AAA to review in the arbitration clause with respect to this Principle.
- Principle 5. Small Claims: This Principle requires that the arbitration agreement "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."¹³⁰ The AAA's Supplementary Procedures for Resolution of Consumer-Related Disputes provide that "[p]arties can still take their claims to a small claims court."¹³¹ As such, unless the arbitration clause expressly precludes the consumer from going to small claims court, the AAA treats this Principle as satisfied.
- Principle 6. Reasonable Cost: The AAA addresses the Principle in part through its arbitration rules, which provide for the business to pay all administrative costs for claims of \$75,000 or less, and the parties to share equally the arbitrator's fees, capped at \$125 or \$375 for consumers.¹³² In addition, the AAA reviews clauses for provisions that would increase arbitration costs above the amounts provided under its rules. Thus, a clause that requires the parties to share equally all arbitration costs (not just the arbitrator's fees) would be objectionable under this Principle. Similarly, a clause that requires three arbitrators rather than one likewise would be objectionable because it would increase (potentially triple) the consumer's costs.
- Principle 7. Reasonably Convenient Location: This Principle addresses clauses that would require the consumer to travel unreasonably long distances to attend an in-person arbitration hearing.¹³³ A clause that requires arbitration to take place at the business's location would be problematic for a business that provides goods or services nationally. For businesses that typically sell locally, however, the AAA will not find such a clause to violate the Protocol because the location of the business would be convenient for most

a mechanism for selecting a panel of three arbitrators that is crafted to ensure a biased decisionmaker. The employee and Hooters each select an arbitrator, and the two arbitrators in turn select a third. Good enough, except that the employee's arbitrator and the third arbitrator must be selected from a list of arbitrators created exclusively by Hooters.").

¹²⁹ Cf. Drahozal, *supra* note 36, at 733 (provision in franchise agreement).

¹³⁰ Consumer Due Process Protocol, *supra* note 52, princ. 5.

¹³¹ AAA Consumer Rules, *supra* note 93, Rule C-1(d).

¹³² AAA Consumer Rules, *supra* note 93, Rule C-8 ("Administrative Fees").

¹³³ See also American Arbitration Association, *Locale Determinations: AAA (2007)*, available at www.adr.org/sp.asp?id=22025 ("For consumer disputes, if the claim is under \$75,000 then AAA will require the business to waive the locale if the locale is not reasonably convenient for the consumer.").

consumers, although the arbitrator may find a violation in a particular case, based on the particular circumstances of that case.

- Principle 8. Reasonable Time Limits: This Principle requires that arbitration take place “without undue delay.”¹³⁴ The AAA interprets this Principle as primarily applicable to its rules and procedures, which set out the time limits for the arbitration process. Only if the arbitration clause unduly lengthens those time limits so as to unreasonably delay the arbitration proceeding would there be an issue for the AAA’s review.¹³⁵
- Principle 9. Right to Representation: This Principle provides that the consumer has the right to the representative of his or her choice. An arbitration clause that precluded the consumer from being represented by counsel (or other representative) would violate this Principle.
- Principle 10. Mediation: This Principle encourages but does not require the use of mediation. As a result, in the AAA’s view there is nothing for it to review.
- Principle 11. Agreements to Arbitrate: See discussion above of Principle 2.¹³⁶
- Principle 12. Arbitration Hearings: The sorts of provisions that would violate this Principle include a provision that requires the arbitrator to decide on the basis of documents only (i.e., bars an in-person hearing) or otherwise restricts the arbitrator’s discretion as to how to resolve the case.
- Principle 13. Access to Information: By “Access to Information,” the Protocol means discovery. Thus, contract provisions that unduly restrict the amount of discovery in the arbitration would violate this Principle.
- Principle 14. Arbitral Remedies: This Principle requires that the same remedies be available in arbitration as would be available in court. This Principle can be interpreted in two ways. The broader interpretation is that the remedies generally available in court — such as punitive damages and injunctive relief — also must be available in arbitration. Under that interpretation, contractual limitations on remedies would not be permitted. The narrower interpretation is that a contractual limitation on remedies would be permissible in a particular case so long as the limitation was enforceable under the applicable state law. In applying this principle, the AAA has adopted the broader

¹³⁴ Consumer Due Process Protocol, *supra* note 52, princ. 8.

¹³⁵ Interestingly, in *Martinez v. Master Protection Corp.*, 12 Cal. Rptr. 3d 663 (Cal. Ct. App. 2004) (alternate holding), the AAA evidently applied the comparable principle of the Employment Due Process Protocol in refusing to enforce a provision that shortened the statute of limitations for bringing a claim. *Id.* at 667 (“AAA’s policy was against conducting arbitrations on employment plans such as [the employer’s], which gave parties less time to assert claims than would otherwise be available by statute.”); see Employment Due Process Protocol, *supra* note 52. By contrast, Principle 8 of the Consumer Due Process Protocol focuses solely on eliminating delays in the arbitration process, rather than on provisions that reduce the time for bringing a claim. Consumer Due Process Protocol, *supra* note 52, Reporter’s Comments to princ. 8 (“[I]t is not enough that the agreement places strict time limitations on procedural steps if these limitations are not effectively enforced.”).

¹³⁶ See *supra* text accompanying note 127.

interpretation.¹³⁷ As interpreted by the AAA, clauses that preclude the recovery of punitive damages or consequential damages violate this Principle. In addition, clauses that cap the amount of damages to something less than full compensatory damages or preclude any award of attorneys' fees would be objectionable.

- Principle 15. Arbitration Awards: The AAA interprets this Principle as generally addressing (and dealt with by) its rules on the making of an award, although a provision that bars written awards, for example, presumably would violate this Principle.¹³⁸

V. RESEARCH METHODOLOGY

A. Research Questions

The empirical question of interest is how effectively the AAA enforces compliance with the Consumer Due Process Protocol. In answering that question, we consider a series of subsidiary questions.¹³⁹

First, to what extent do arbitration clauses giving rise to AAA consumer arbitrations comply with the Due Process Protocol of their own right? The greater the extent to which clauses comply on their own, the less need for the AAA to enforce compliance.¹⁴⁰ Conversely, if many arbitration clauses are problematic under the Protocol, effective AAA compliance review becomes even more important.

Second, how effective is AAA review of arbitration clauses for compliance with the Consumer Due Process Protocol? Does the AAA identify and respond appropriately to problematic provisions? Or are there systematic gaps in the AAA's review efforts?

Third, to what extent does the AAA refuse to administer consumer cases because of Protocol issues? The AAA has indicated that when it identifies an issue of protocol compliance,

¹³⁷ Weidemaier, *supra* note 15, at 90 (“[O]n one occasion, the AAA asserted that an agreement violated the Consumer Protocol by allowing only recovery of direct damages in most cases and barring recovery of punitive and other damages in all cases, without suggesting that its decision depended on whether a court would enforce a similar limitation.”) (citing Affidavit of Neil B. Currie on Behalf of the American Arbitration Association in Response and Objection to a Subpoena for Documents Issued by Plaintiff, *Ragan v. AT&T Corp.*, No. 92-L-168 (Ill. Cir. Ct. July 15, 2002)); see also *Ragan v. AT&T Corp.*, 824 N.E. 2d 1183, 1194 (Ill. Ct. App. 2005) (quoting Currie affidavit).

¹³⁸ Weidemaier, *supra* note 15, at 89 (“To be sure, businesses might forbid reasoned, written awards in the arbitration agreement itself; it is unclear whether providers like the AAA would view such contract terms as consistent with the due process protocols”).

¹³⁹ In addition to these research questions, we examine several other issues that arise in connection with the due process protocols. In particular, we look at how frequently parties arbitrate their disputes based on post-dispute (rather than pre-dispute) arbitration agreements; how often businesses include class arbitration waivers in their consumer arbitration clauses; and how the AAA administers disputes arising out of the health care industry in its consumer caseload. Our findings are reported *infra* Appendix 3.

¹⁴⁰ Of course, the fact that a clause currently complies with the Protocol does not mean that it always did so. Its current compliance may be due to prior AAA enforcement actions. Thus, an additional question we consider is the extent to which the AAA's protocol compliance efforts have resulted in changes to the terms of consumer arbitration agreements.

it will refuse to administer the case unless the business waives the objectionable provision.¹⁴¹ How often does the AAA refuse to administer a case and under what circumstances?

Fourth, how do businesses respond to AAA enforcement of protocol compliance? A business might respond in several ways. First, the business might waive the objectionable provision and/or change its arbitration clause to remove the objectionable provision. Second, the business might refuse to waive or change the provision, resulting in the AAA declining to administer the case and future cases involving the business. Third, the business might obtain a court order compelling arbitration of the dispute. Fourth, the business might modify its arbitration clause for future disputes, either by switching to another arbitration provider (that perhaps will administer cases under the objectionable provision) or by removing the pre-dispute arbitration clause altogether.¹⁴²

B. Data & Methodology

Our data set for this study consists of 301 AAA consumer arbitration cases closed by an award between April 2007 and December 2007 (“the case file sample”). This case file sample is subject to several possible selection biases, which we have described in detail elsewhere.¹⁴³

To obtain information on the arbitration clause and on the details of AAA protocol compliance review, we reviewed the original case files for the cases in the case file sample. For each of the cases, we examined the arbitration clause attached to the arbitration demand for compliance with the Consumer Due Process Protocol.¹⁴⁴ In evaluating compliance, we applied the standards used by the AAA as described above. We also determined from the file whether the AAA case intake staff identified any protocol violation and, if so, whether the AAA obtained a waiver of the violation from the business.

One file was missing the arbitration clause.¹⁴⁵ The business in the case appeared in at least one other case in the case file sample; the clause in that case contained no provisions violating the protocol. Because we could not be certain that the same clause was involved in the two cases, however, we treated the clause as missing. For another file, the arbitration clause appeared to be incomplete. While the file included a lengthy portion of the arbitration clause, it appeared that the claimant may not have provided a copy of the entire clause. Although the clause had no problematic provisions in the portion we were able to review, we excluded it from

¹⁴¹ See *supra* text accompanying note 98.

¹⁴² See Weidemaier, *supra* note 11, at 670 (“I have heard anecdotally from provider employees that businesses and employers often waive terms that conflict with the due process protocols. I know of no other evidence to support this assertion.”).

¹⁴³ Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 868-69 (2010).

¹⁴⁴ Thus, we examined all arbitration clauses that gave rise to a consumer arbitration before the AAA that was resolved by an award from April to December 2007. The arbitration clauses in the case file sample are not a random sample of all consumer arbitration clauses, nor are they even a random sample of all consumer arbitration clauses specifying the AAA as arbitration provider.

¹⁴⁵ The file clearly had included the arbitration clause at one point, but by the time we obtained the case file for review the clause was no longer included.

the case file sample because we could not be certain what provisions were included in the rest of the clause. Accordingly, the case file sample as used to evaluate AAA protocol enforcement consists of 299 AAA consumer arbitration clauses.¹⁴⁶

We used the case file sample to evaluate the extent to which arbitration clauses in the case file sample complied with the Consumer Due Process Protocol and how well the AAA applied its standards in reviewing arbitration clauses for protocol compliance.

The case files contained no indication of whether the business had sought advance review (i.e., pre-dispute review) of its arbitration clause for protocol compliance. To obtain information on business use of advance review, we examined the AAA business list,¹⁴⁷ which included a notation when the business sought advance review of its arbitration clause. We verified those notations against AAA files documenting the request for advance review. We also examined a sample of other entries on the AAA business list to ensure that requests for advance review had not been misclassified.¹⁴⁸

The AAA does not maintain a list of the cases it refuses to administer for failure to comply with the Consumer Due Process Protocol. To estimate the number of cases the AAA refused to administer during 2007, we started with a list of “pre-filing” cases provided by the AAA (“AAA pre-filing cases”). “Pre-filing” cases are cases submitted to the AAA that do not satisfy the filing requirements of the AAA Consumer Rules. Such requirements include a completed demand for arbitration, a copy of the arbitration clause, and payment of the appropriate fee,¹⁴⁹ as well as the business’s payment of its share of the fees and waiver of any protocol violations.¹⁵⁰

Cases the AAA refused to administer because of protocol violations should be included in the AAA pre-filing cases. But also included would be cases brought by a consumer (or business, for that matter) that did not meet the requirements for filing the claim.¹⁵¹ To distinguish between these types of cases, we cross-checked the AAA pre-filing cases against the AAA business list. If the business was listed as “unacceptable” on the AAA business list, we presumptively treated the case as one that the AAA refused to administer because of a protocol violation. In such cases, we further examined the AAA files documenting the business’s status on the AAA business list. In a number of cases, we were able to confirm from those files that the AAA refused to administer a particular case because of protocol noncompliance.¹⁵²

¹⁴⁶ Because the rest of the file that was missing the arbitration clause was complete, we are able to use this case in examining other aspects of AAA consumer arbitrations.

¹⁴⁷ See *supra* text accompanying note 111. We used the AAA business list as of April 25, 2008.

¹⁴⁸ We found one additional case in which the business had sought advance review.

¹⁴⁹ AAA Consumer Rules, *supra* note 93, Rule C-8.

¹⁵⁰ See *supra* text accompanying notes 112-114.

¹⁵¹ This may occur because the claimant decides not to pursue the case, or because the parties settle before the filing requirements are met.

¹⁵² If the business’s status on the AAA business list changed because of some action during the case we were examining, the correspondence relating to that case would be in the files. For example, if the AAA added the business to the AAA business list because it refused to waive a problematic provision or failed to pay its share of arbitration fees, that correspondence would be in the AAA business list file. If, however, the AAA declined to administer the case because the business was already listed as unacceptable because of prior events, we would find no evidence of the later refusal (only the prior one) in the AAA business list file.

Finally, we obtained data on how businesses responded to AAA enforcement of the Consumer Due Process Protocol. As described above, a business might respond to AAA enforcement actions in several ways.¹⁵³ We again used the AAA business list (and supporting files) as the best available source of data on such actions.

As discussed above, the AAA classifies the businesses on the AAA business list either as “acceptable” — i.e., the AAA will administer consumer arbitrations involving the business — or “unacceptable” — i.e., the AAA will not administer consumer arbitrations involving the business.¹⁵⁴ For each entry, the AAA business list also includes a short explanation of the businesses’ current status as acceptable or unacceptable.¹⁵⁵ We used those explanations to provide an initial characterization of how the business responded to AAA protocol compliance review. We then sought to verify that characterization by reviewing the AAA’s files supporting the AAA business list entry. For some types of entries, we examined all available supporting files. For others, time constraints limited us to examining a random sample of the supporting files.¹⁵⁶ We also collected data on the underlying protocol issue, if any, involved.

Using this data, we sought to estimate how frequently businesses responded to AAA protocol review by: (1) waiving the objectionable provision for future cases and/or updating their clauses to eliminate problematic provisions; (2) refusing to update their clauses or simply not responding to the AAA; or (3) updating their clauses to replace the AAA with a different arbitration provider (or to remove the arbitration clause altogether).¹⁵⁷

Our access to all of the data from the AAA is subject to a non-disclosure agreement entered into with the AAA.

¹⁵³ See *supra* text accompanying note 142.

¹⁵⁴ The AAA also includes a sub-category of “acceptable businesses” on the AAA business list — typically large entities for which in the past there had been some confusion over the appropriate contact person when a consumer brought a claim against the business. For those businesses, the AAA business list typically identifies the appropriate contact person to receive the demand for arbitration.

¹⁵⁵ If the business’s arbitration clause complied with the protocol at the time it was first reviewed, and if the business had always paid its share of the arbitration fees, the business would be listed but only with the date of the first review.

¹⁵⁶ For AAA business list entries indicating that the business did not respond to the initial case filing, we originally examined a random sample of supporting files. When that examination revealed that in some of the cases businesses failed to pay their share of the arbitration fees while in others they failed to waive protocol violations or update their arbitration clauses to remove protocol violations, we expanded our examination to include supporting files for all of those entries. For AAA business list entries indicating that the business did not respond to a follow-up contact by the AAA to update its arbitration clause or to waive protocol violations in all future cases, we examined a random sample of supporting files. Because those files confirmed that the business failed to waive a protocol violation or update its arbitration clause, we did not expand our review. We examined a handful of files in which the AAA listed the business as acceptable with no further comment. (Our examination of the cases in the case file sample provides a more satisfactory test of the effectiveness of AAA protocol compliance review because it includes cases that might not be listed on the AAA business list.) For all other types of AAA business list entries, we examined all the supporting files.

¹⁵⁷ The AAA business list files contain no information on how frequently businesses seek court orders compelling arbitration of cases the AAA refuses to administer.

VI. EMPIRICAL RESULTS

This Part presents our findings on each of the research questions of interest: (1) to what extent do the consumer arbitration clauses in the case file sample comply with the Consumer Due Process Protocol? (2) how effective is AAA review of arbitration clauses for protocol compliance? (3) how frequently does the AAA refuse to administer consumer cases because of noncompliance with the Protocol? and (4) how do businesses respond to AAA enforcement efforts?¹⁵⁸ Our focus is solely on the AAA. Although other providers also have promulgated due process protocols, we have no data on their enforcement practices.

A. Problematic Clauses

The substantial majority of arbitration clauses we examined contained no provisions that violated the Consumer Due Process Protocol as applied by the AAA. Consistent with the AAA's treatment of the cases, we examined cases seeking \$75,000 or less separately from cases seeking more than \$75,000 (a much smaller group) and cases seeking non-monetary relief.

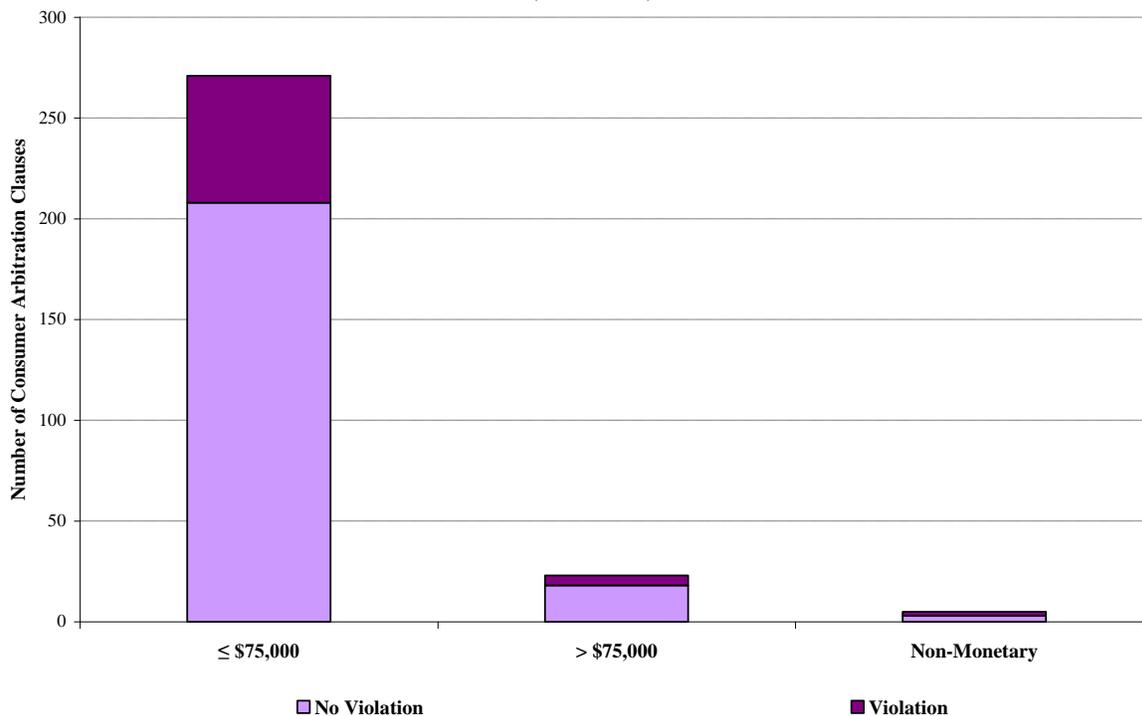
Of the 271 clauses in cases seeking \$75,000 or less in the case file sample, 208 (or 76.8%) had no provision that violated the Protocol, as shown in Figure 1. Of the 23 clauses in cases seeking more than \$75,000, 18 (or 78.3%) had no provisions that violated the Protocol. An additional five cases sought no monetary remedy; three of those five clauses (or 60.0%) had no problematic provisions. Overall, then, 229 of 299¹⁵⁹ clauses (or 76.6%) had no provisions that violated the Protocol.¹⁶⁰

¹⁵⁸ In addition, in Appendix 3 we set out findings as to several related questions of interest: how frequent are post-dispute (as opposed to pre-dispute) agreements to arbitrate? how often do arbitration clauses contain class arbitration waivers? and how does the AAA administer cases arising out of the health care industry?

¹⁵⁹ As discussed above, two files for cases in the case file sample did not contain complete arbitration clauses. See *supra* text accompanying notes 145-146.

¹⁶⁰ A number of businesses appeared in the case file sample more than once, so that their arbitration clauses were counted multiple times. That may be the better approach, since it weights the clauses according to the frequency with which they gave rise to disputes that were arbitrated to an award. By comparison, 78.1% (150 of 192) of the clauses in the case file sample (counting each business's clause only once) included no problematic provisions under the Protocol.

**Figure 1:
Number of Consumer Arbitration Clauses with Protocol Violations by Amount Claimed
(Cases = 299)**



There was no statistically significant difference in the frequency of protocol violations across categories of amount claimed¹⁶¹ — even though the AAA does not review clauses for protocol compliance in cases seeking more than \$75,000. This likely is true for several reasons. First, the Consumer Due Process Protocol applies to all consumer arbitrations, not just those seeking \$75,000 or less. The difference is that protocol compliance is an issue for the arbitrator to decide in cases seeking more than \$75,000 rather than a matter for review by the AAA. Second, businesses are unlikely to be able to differentiate in their standard form contract terms between consumers based on the amount of any likely claim. Third, to the extent businesses seek to develop a reputation for fair dealing, they will not distinguish between consumers in their contracting practices.

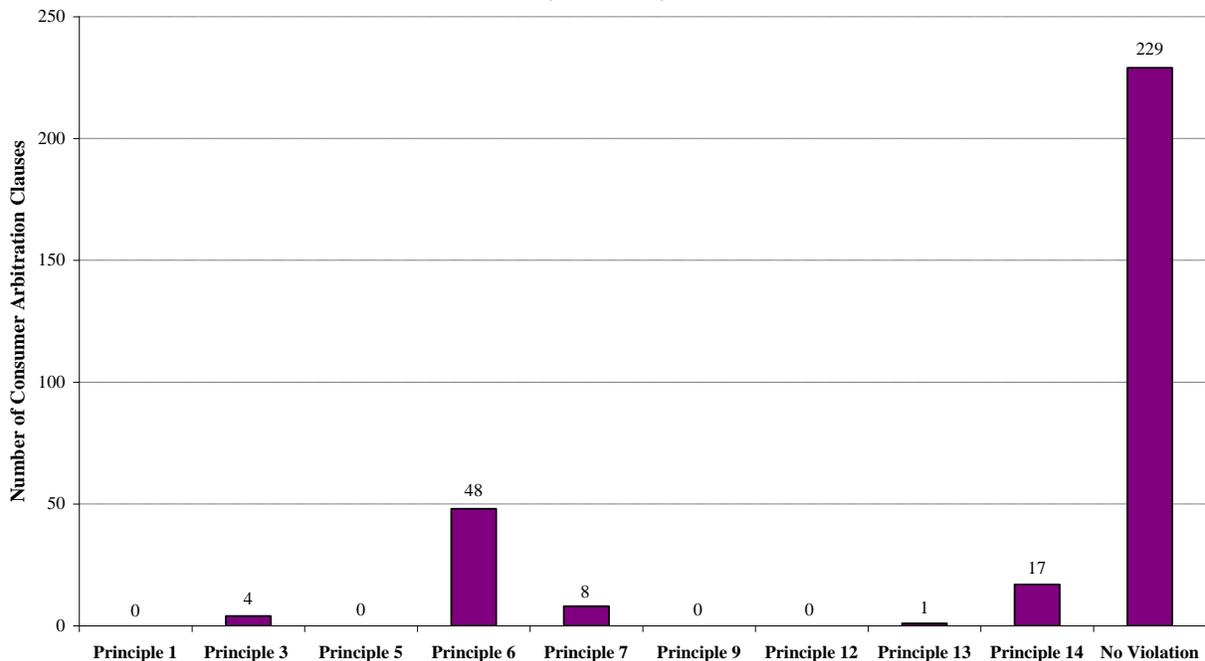
A total of seventy (or 23.4%) of the clauses in the case file sample contained at least one provision that violated the Consumer Due Process Protocol as applied by the AAA. Of those clauses, sixty-three (90.0%) included one problematic provision, five (7.1%) included two problematic provisions, and two (2.9%) included three problematic provisions.

By far, the most common problematic provision was one that dealt with arbitration costs in a manner inconsistent with Principle 6 of the Protocol, which requires that arbitration be

¹⁶¹ The Pearson's Chi-squared statistic is 0.0271 (DF = 1 and p = 0.8690), which means we fail to reject the null hypothesis that protocol violations are not associated with amount claimed if categorized into claims \$75,000 or less and greater than \$75,000. Including cases seeking non-monetary relief resulted in cells with a minimum expected count of less than five.

available at reasonable cost to the consumer.¹⁶² Of the seventy clauses with at least one problematic provision, forty-eight (68.5%) contained a provision inconsistent with Principle 6. Typically, the provisions either required three arbitrators to resolve the dispute (thus increasing the cost over the cost of a single arbitrator) or specified that the consumer was to share the administrative fees with the business. (Under the AAA consumer procedures, the consumer pays a share of the arbitrator’s fees but does not pay any of the AAA’s administrative fees.¹⁶³) The second most common type of problematic provision was one that limited the available remedies contrary to Principle 14,¹⁶⁴ usually by precluding or limiting the recovery of punitive damages. Of the seventy clauses, seventeen (or 24.3%) included such a provision. Other problematic clauses were much less common: eight clauses (or 11.4%) specified a potentially inconvenient location for the hearing contrary to Principle 7;¹⁶⁵ four clauses (or 5.7%) were inconsistent with the requirement of an impartial arbitrator under Principle 3;¹⁶⁶ and one clause (1.4%) limited discovery contrary to Principle 13.¹⁶⁷ Figure 2 summarizes the results. (Note that the totals here sum to more than the total number of cases because a few clauses contained more than one provision that violated the Protocol.)

Figure 2:
Types of Protocol Violations in Consumer Arbitration Clauses
(Cases = 299)



¹⁶² Consumer Due Process Protocol, *supra* notes 52, princ. 6.

¹⁶³ AAA Consumer Rules, *supra* note 93, Rule C-8 (“Administrative Fees”).

¹⁶⁴ Consumer Due Process Protocol, *supra* note 52, princ. 14.

¹⁶⁵ *Id.* princ. 7.

¹⁶⁶ *Id.* princ. 3.

¹⁶⁷ *Id.* princ. 13.

Further description of the four clauses that were problematic under Principle 3 may be of interest, given that an impartial arbitrator is central to the fairness of an arbitration proceeding.¹⁶⁸ None of the clauses gave the business control over arbitrator selection or the pool of prospective arbitrators. Instead, all of the clauses were problematic because they required the arbitrator to have qualifications that might give rise to questions about the arbitrator's impartiality. Three of the clauses were in car sales contracts and required, at least under some circumstances, that the arbitrator be a certified master mechanic.¹⁶⁹ The other clause was in a home inspection contract and required that the arbitrator be an experienced member of one or another association of home inspectors.

Presumably, the concern is that to meet the qualification provisions would require prospective arbitrators to be employed by or engaged in the type of business involved in the arbitration. In addition, these required qualifications conflict with the AAA's policy of appointing only attorneys (with ten or more years of experience) or retired judges as arbitrators in consumer cases, unless the parties agree otherwise post-dispute. Although the AAA properly identified the provisions as ones that violated Principle 3 of the Protocol,¹⁷⁰ the provisions illustrate well the trade-off between expertise and impartiality that commonly arises in arbitration.¹⁷¹

Here, again, we face possible selection bias in the case file sample. Initially, clauses with provisions that violate the Consumer Due Process Protocol might discourage consumers from bringing claims (as might provisions that were waived by the business but never modified in the contract), so our results might understate the frequency of problematic provisions. We have no data on how frequently consumers fail to bring claims, so we cannot test for this possibility. As an imperfect proxy, we can examine whether damages limitations seem to deter consumers from asserting claims for punitive damages. In the case file sample, consumers sought punitive damages in 6 of 17 (or 35.3%) cases in which the arbitration clause contained a damages limitation, and in 72 of 282 (or 25.5%) cases in which the arbitration clause did not. Thus, consumers were more likely to assert a claim for punitive damages when facing a damages limitation than when not facing a damages limitation (although the number of cases with damages limitations is too small for reliable statistical testing). Certainly asserting a claim for punitive damages after having brought a claim in arbitration is a much lower cost activity than bringing a claim in the first place. Thus, as noted, this is an imperfect proxy. But the results

¹⁶⁸ *E.g.*, *Armendariz v. Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 682 (Cal. 2000) (stating that the requirement of a "neutral arbitrator ... is essential to ensuring the integrity of the arbitration process") (*citing* *Graham v. Scissor-Tale, Inc.*, 623 P.2d 165, 176 (Cal. 1981)).

¹⁶⁹ Two of the clauses required the presiding arbitrator to be a certified master mechanic when three arbitrators were selected; the requirement of three arbitrators itself is problematic under Principle 6 (reasonable cost) of the Protocol.

¹⁷⁰ Consumer Due Process Protocol, *supra* note 52, princ. 3 ("Independent and Impartial Neutral").

¹⁷¹ *Sphere Drake Ins., Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620 (7th Cir. 2002) ("The more experience the panel has, and the smaller the number of repeat players, the more likely it is that the panel will contain some actual or potential friends, counselors, or business rivals of the parties. Yet all participants may think the expertise-impartiality tradeoff worthwhile."); Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1022 (1996) (describing "technical areas" such as medicine in which "[t]hose who can understand the facts will be found disproportionately among specialists in the field, i.e., those with a presumed bias").

suggest at least one circumstance in which a standard form contract provision may not discourage consumers from asserting a claim.

We also considered carefully the possibility that arbitration clauses may have had more (or fewer) problematic provisions, and that AAA compliance review might have been less (or more) effective, in non-awarded cases than in awarded cases — i.e., that our results are subject to selection bias because we studied only awarded cases. Several considerations give us some degree of confidence that this source of selection bias is not a serious problem with our results.

First, using a AAA consumer dataset that included all cases closed from April through December 2007, we were able to determine that the non-awarded cases appear to have been administered properly under the Protocol, at least so far as the administrative fees assessed to consumers.¹⁷² The most common type of protocol violation in the case file sample (awarded cases) was a violation of Principle 6, which requires that the cost of arbitration to consumers be reasonable.¹⁷³ The contract provisions that violated this Principle either sought to impose on the consumer a greater share of costs than permitted under the AAA Consumer Rules, or required three arbitrators to resolve the dispute.¹⁷⁴ In 353 out of 361 (97.8%) of the non-awarded cases with claims seeking \$75,000 or less, consumers paid no administrative fees (as provided in the AAA Consumer Arbitration Rules). In seven of the eight cases in which the consumer paid fees, it appears that the business may have failed to pay its share of fees and that the consumer chose to advance the fees in order to proceed with the case. In one case the consumer and the business shared the fees.¹⁷⁵ Moreover, in all of the non-awarded cases with claims seeking \$75,000 or less, one arbitrator (rather than three) was appointed.¹⁷⁶ In short, the cases appear to have been administered properly under the cost provisions of the Protocol and the AAA Consumer Rules. For other principles of the Protocol, evaluating compliance is difficult, if not impossible, without examining the parties' arbitration clause.

Second, we compared the businesses involved in the non-awarded cases from the AAA consumer dataset closed from April through December 2007 to the businesses involved in the awarded cases in the case file sample, as well as to the AAA business list. Of the 361 non-awarded cases seeking \$75,000 or less, 158 involved businesses that matched those in the case file sample. None of the clauses in those cases included unwaived protocol violations. Another 144 cases involved businesses that were classified as acceptable on the AAA business list. As to these 302 cases (83.7% of the 361 non-awarded cases), all indications are that the arbitration clause did not include an unwaived protocol violation. Another thirty-nine cases involved businesses that did not appear on the AAA business list.¹⁷⁷ For the case file sample, thirty-eight cases involved businesses that did not appear on the AAA business list, a larger percentage than

¹⁷² Although the AAA consumer dataset has slightly lower accuracy rates for AAA administrative fees assessed per party than other variables, it is the only data available for this purpose. For further discussion of the AAA consumer dataset, see Drahozal & Zyontz, *supra* note 143, at 868-71.

¹⁷³ Consumer Due Process Protocol, *supra* note 52, princ. 6.

¹⁷⁴ See *supra* text accompanying note 132.

¹⁷⁵ We have no data on the share of the arbitrator's fees paid by the consumer.

¹⁷⁶ If any; many cases were closed before any arbitrators were appointed.

¹⁷⁷ The businesses likely should have been reported so that they could be added to the AAA business list. But the failure to do so should not have affected parties in future cases because the case intake staff in each case is to review the arbitration clause without regard to the businesses' status on the AAA business list.

for the non-awarded cases. The remaining twenty cases involved businesses that were classified as unacceptable on the AAA business list. Based on the date of their most recent status change on the AAA business list, fifteen of those businesses appear to have been added after the non-awarded case we were considering was filed. For the other five, it is possible that they could have been administered under a court order or a post-dispute arbitration agreement. But even assuming that the AAA should have refused to administer all of those cases, the percentage of unwaived violations among the non-awarded cases would have been 5 out of 361, or 1.4%.

Obviously, we cannot be certain that the frequency of protocol violations and (more importantly) unwaived protocol violations is the same in non-awarded cases as awarded cases. But we have no reason to believe that our focus on awarded cases results in any significant bias to our results.

B. AAA Review of Protocol Compliance

As discussed above, AAA review for protocol compliance is limited to cases seeking \$75,000 or less in compensatory damages.¹⁷⁸ We had 271 such cases in the case file sample, 63 of which involved an arbitration clause with a problematic provision. The next question is the extent to which the AAA properly identified and responded to those problematic provisions by requiring a waiver from the business.¹⁷⁹

Initially, we examined the type of procedure by which the AAA made the determination of protocol compliance — i.e., how often did businesses obtain advance review of their arbitration clause for compliance with the Consumer Due Process Protocol? We found that in the vast majority of cases, AAA review for protocol compliance occurs after a dispute arises. Very few businesses obtained approval of their consumer arbitration clauses before a dispute arose. Of the 1706 businesses listed as acceptable on the AAA business list,¹⁸⁰ 15 (or 0.9%) obtained AAA approval of their arbitration clause before a dispute arose.¹⁸¹ The potential benefits of advance review were rarely obtained in consumer cases.¹⁸²

¹⁷⁸ In other cases, the Protocol continues to apply, but application of the Protocol is a matter for the arbitrator. See *supra* text accompanying notes 97-99.

¹⁷⁹ For discussion of the possibility of selection bias due to our focus on awarded rather than non-awarded cases, see *supra* text accompanying notes 172-177.

¹⁸⁰ In our review of the documentation supporting the AAA business list, we identified a number of businesses that were on the AAA business list but for which there were no supporting files. This was either because the business was no longer treated as a consumer business (70 businesses, typically involving the home construction industry) or else because the business had been added to the AAA business list before the AAA began maintaining the supporting files (10 businesses). We excluded both types of businesses from the analysis. Because we did not perform a similar review of many of the files of businesses listed as acceptable, the number of such businesses (1706) may be slightly overstated. Any such difference is immaterial here, however.

¹⁸¹ The AAA business list shows only businesses that obtained advance approval of their consumer arbitration clause. It does not show businesses that sought approval but were turned down because their clause violated the Protocol. We have no information on how many clauses the AAA refused to approve through the advance review process.

¹⁸² We do not include as advance review cases those cases in which the party sought and obtained AAA approval of changes to its arbitration clause in response to the AAA's determination that a prior version of the clause violated the Protocol. Those types of cases are relatively common, as discussed *infra* text accompanying notes 218-

We then evaluated the effectiveness of AAA post-dispute review for protocol compliance. Of the 271 consumer cases from the case file sample with a demand amount of \$75,000 or less, five (1.8%) included an arbitration clause that in our judgment violated the Consumer Due Process Protocol as applied by the AAA but had not been waived by the business.¹⁸³ Table 1 summarizes the findings. Most cases (76.8%) arose out of clauses that did not violate the Protocol, as noted above.¹⁸⁴ Of those cases with clauses that did violate the Protocol, the AAA obtained a waiver from the business before administering the case in 51 cases (18.8%). The AAA handled the protocol violation in three cases (1.1%) administratively.¹⁸⁵ In four cases (1.5%), the AAA administered the case without a waiver because the case had been ordered to arbitration by a court.¹⁸⁶ Again, only five cases involved an unwaived protocol violation. Stated otherwise, in 266 out of 271 cases (98.2%), the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.

Table 1: AAA Review of Protocol Compliance

	Number of Cases (% of Total Cases)
No protocol violation	208 (76.8%)
Provision waived by business	51 (18.8%)
Violation handled administratively	3 (1.1%)
Case administered per court order	4 (1.5%)
Unwaived violation	5 (1.8%)
Total Cases (seeking \$75,000 or less)	271

219.

¹⁸³ An alternative measurement would be to calculate a false negative rate — the number of unwaived violations (false negatives) as a percentage of all clauses with protocol violations. FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 482 (2d ed. 2002). So calculated, the false negative rate here is 5 out of 63 cases, or 7.9%.

¹⁸⁴ See *supra* text accompanying note 159.

¹⁸⁵ In all three cases, the AAA case intake staff identified the provision that violated the protocol. In two cases, the provision raised a cost issue (in one, by requiring three arbitrators for claims above \$20,000, and in the other by requiring the parties to share the costs of arbitration equally). In both cases, the AAA administered the case under the Protocol and contacted the business separately to request it to update the clause. In the other case, the parties had entered into two arbitration agreements, one of which provided for AAA arbitration but included a punitive damages waiver and required the hearing to be held at the business's location. The other clause did not mention the AAA but also did not contain any provisions problematic under the Protocol. The AAA administered the case under the Protocol and contacted the business separately to address the protocol issues.

¹⁸⁶ The AAA's usual practice in such cases is to administer the case pursuant to the Protocol, see *supra* text accompanying note 120, so that the unwaived violation may have had little effect on the proceedings.

We examined the case files for those five cases to determine what happened in the case.¹⁸⁷ Table 2 summarizes key characteristics of the cases.

Table 2: Unwaived Protocol Violations

	Type of Violation	Events in Case
Case 1	Location provision	Consumer did not respond to demand for arbitration
Case 2	Remedy limitation	No claim for punitive damages in case
Case 3	Remedy limitation	No claim for punitive damages in case
Case 4	Location provision and remedy limitation	AAA identified location provision; issue not resolved prior to hearing. AAA did not identify remedy limitation; no claim for punitive damages in case
Case 5	Remedy limitation	Arbitrator relied on consequential damages exclusion as alternative basis for award

In Case 1, the clause provided that the arbitration hearing was to be held at the business’s location, which was distant from the consumer’s home.¹⁸⁸ The consumer did not respond to the business’s demand for arbitration.¹⁸⁹ In Cases 2 and 3, the arbitration clause contained a punitive damages waiver;¹⁹⁰ the claimant in the cases did not seek punitive damages.¹⁹¹

Case 4 was complicated. The arbitration clause contained two provisions that violated the Due Process Protocol: a provision limiting the recovery of punitive damages and a provision selecting the business’s home as the location for the arbitration hearing. The AAA did not identify the remedy limitation. The business claimant was not seeking punitive damages and the consumer did not bring a counterclaim.

The AAA identified the location provision as a Protocol violation. The business objected, arguing that the dispute was not a consumer dispute so the Protocol did not apply. The AAA concluded that the arbitrator would have to decide whether the Protocol applied, and

¹⁸⁷ Mark Weidemaier raises the possibility that the consumer might waive the protections of the protocol and permit the arbitration to go forward despite the objectionable term. Weidemaier, *supra* note 11, at 662 & n.26. He indicates that JAMS permits such waivers, and that such a waiver is equivalent to a post-dispute agreement to arbitrate, which should be permissible. *Id.*; see also Consumer Due Process Protocol, *supra* note 52, Reporter’s Comments to princ. 1 (“Assuming they have sufficient knowledge and understanding of the rights they are waiving, however, Consumers may waive compliance with these Principles after a dispute has arisen.”). We found no cases in the case file sample in which the AAA permitted a case to go forward based on a consumer waiver of the protections of the Protocol when a provision in an arbitration clause violated the Protocol. We did find seven cases in which the consumer voluntarily paid the business’s share of the arbitration fees when the business failed to do so, cases in which the business’s behavior rather than the arbitration clause was problematic.

¹⁸⁸ See Consumer Due Process Protocol, *supra* note 52, princ. 7.

¹⁸⁹ The business was the claimant in the case, and was seeking to recover the amount it allegedly was owed for its services.

¹⁹⁰ See Consumer Due Process Protocol, *supra* note 52, princ. 14.

¹⁹¹ On whether consumers might be discouraged from seeking punitive damages by the presence of a punitive damages waiver, see *supra* text accompanying notes 171-172.

proceeded to appoint an arbitrator from the state in which the business was located. Meanwhile, the consumer filed suit in her home state challenging the enforceability of the arbitration agreement, resulting in the arbitration being held in abeyance for over a year. Eventually, the trial court held that the dispute had to be arbitrated, and the state appellate court affirmed. Meanwhile, the consumer changed counsel. The result was that no one raised the location issue until shortly before the hearing was held, at which point the arbitrator deemed it too late to reschedule the hearing.

In the award, the arbitrator did hold that the case was a consumer case and that the Protocol applied. Relying on the Protocol, the arbitrator then refused to enforce a “loser-pays” provision in the arbitration clause, which would have required the consumer (who lost in the arbitration) to pay all the business’s attorneys’ fees. In so holding, the arbitrator went beyond the AAA’s administrative application of Principle 6 of the Protocol, under which the AAA does not deem loser-pays provisions to violate the Protocol.¹⁹²

The provision in Case 5 that violated the Protocol was a remedy limitation — a provision that precluded the recovery of consequential or special damages. It appears that the AAA identified the violation and handled the issue administratively,¹⁹³ but there is no evidence that it obtained a waiver of the provision in the arbitration proceeding itself. In the award, the arbitrator relied on the remedy limitation to preclude the consumer’s recovery in part, finding no gross negligence by the business that would have made the remedy limitation inapplicable. The arbitrator also concluded that the consumer had failed to establish the business’s liability for damages in the first place, so that the remedy limitation was only an alternative basis for the business to prevail.

One final note: as Table 2 illustrates, the most common type of unwaived violation was a provision limiting in some way the amount of damages the consumer could recover in arbitration. Typically, but not always, these provisions preclude the award of punitive damages in arbitration. There are several possible explanations for why remedy limitations are the most commonly overlooked protocol violation. First, the provisions vary widely in language — ranging from a waiver of all punitive damages recovery to some sort of cap on (but not waiver of) damages recovery. The variations in the type of the provision may make problematic provisions more difficult to identify. Second, it may not always be clear whether the remedy limitation is in the arbitration clause (and hence subject to protocol compliance review) or merely near the arbitration clause and perhaps not subject to AAA review. Third, as discussed above, the AAA has adopted a broad interpretation of Principle 14 of the Consumer Due Process Protocol.¹⁹⁴ Under a narrow reading of the Protocol, a remedy limitation would be permissible

¹⁹² Except in cases from California, in which AAA policy is to follow California law on loser-pays provisions. See CAL. CODE CIV. PROC. § 1284.3(a) (“No neutral arbitrator or private arbitration company shall administer a consumer arbitration under any agreement or rule requiring that a consumer who is a party to the arbitration pay the fees and costs incurred by an opposing party if the consumer does not prevail in the arbitration, including, but not limited to, the fees and costs of the arbitrator, provider, organization, attorney, or witnesses.”).

¹⁹³ The AAA eventually classified the business as unacceptable on the AAA business list when it failed to respond to requests that it update its arbitration clause.

¹⁹⁴ See AAA, Fair Play, *supra* note 64, at 34 (“There may be circumstances where AAA will not provide administration even if a provision may be legally enforceable, as the standard followed by AAA may be higher than the law allows.”).

so long as the limitation was lawful under the governing law. But the AAA applies the Protocol more broadly, refusing to administer arbitrations arising out of clauses with remedy limitations even if the remedy limitation would be permitted under the governing law. If consumers (or arbitrators) are not aware of the broader interpretation, they may not raise the protocol issue in cases in which the AAA does not itself raise the issue.¹⁹⁵

C. Refusal to Administer Cases

When a business refuses to waive a provision that violates the Consumer Due Process Protocol, or when the business fails to pay its share of the arbitration costs in an arbitration,¹⁹⁶ the AAA's policy is to refuse to administer the case.¹⁹⁷ The result is that the case filings and fee are returned to the claimant, and the business is classified as unacceptable on the AAA business list. In addition, the AAA refuses to administer future consumer cases involving the business, at least until the business provides a blanket waiver of any provisions that violate the Protocol.

From the AAA pre-filing cases¹⁹⁸ we identified 129 cases that likely were cases the AAA had refused to administer because of protocol violations in 2007.¹⁹⁹ Of those cases, we were able to confirm that eighty-five (65.9%) in fact were protocol-related refusals to administer.²⁰⁰ The other forty-four cases (34.1%) likely also were protocol-related refusals to administer, but we were unable to confirm the status of the cases definitively.²⁰¹ Moreover, there may have been other refusals to administer that our methods did not uncover. Accordingly, we can confidently say that in 2007 the AAA refused to administer at least 85 cases, and probably at least 129 cases, due to violations of the Consumer Due Process Protocol. We did not examine data from other years, but we have no reason to believe the results from 2007 are atypical.

¹⁹⁵ That said, cases in which the consumer or the consumer's attorney assert a protocol violation appeared to be rare in the case file sample, although if the issue was raised with the arbitrator there may have been no record of it in the files we reviewed. Case 4 above, *see supra* text accompanying notes 191-192, was unusual in this regard.

¹⁹⁶ If the business refuses to pay its share of the arbitration fees, the consumer has the option of paying the fees and then trying to collect them later from the business. AAA Consumer Rules, *supra* note 93, Rule C-8 ("Arbitrator Fees") ("If a party fails to pay its fees and share of the administrative fee or the arbitrator compensation deposit, the other party may advance such funds. The arbitrator may assess these costs in the award.") If the consumer pays the arbitration fees, the AAA will administer the case. As noted previously, *see supra* note 114, we found seven cases in the case file sample in which the consumer paid some or all of the business's arbitration costs when the business had failed to do so. Thus, only if the business refuses to pay its share of the fees and the consumer declines to advance the amount of the fee will the case be rejected while in pre-filing status.

¹⁹⁷ *See supra* text accompanying note 114.

¹⁹⁸ *See supra* text accompanying notes 149-152.

¹⁹⁹ We identified the cases by comparing the businesses involved in the case to those classified as unacceptable on the AAA business list. *See supra* text accompanying notes 109-111.

²⁰⁰ We confirmed the status of the cases by examining the AAA files documenting the AAA business list.

²⁰¹ The primary distinction between the cases we could confirm and those we could not was whether the business was or was not already listed as unacceptable. For businesses that were not already on the AAA business list, the AAA created a file containing the documentation of the Protocol violation. That documentation included the name of the case, which enabled us to verify the entry on the list of AAA pre-filing cases. For businesses that already were listed as unacceptable, the AAA does not add additional documentation to the files for subsequent refusals to administer. Accordingly, for those cases we were unable to determine definitively the reason the AAA refused to administer the case. Nonetheless, it is quite likely that the cases are ones that the AAA refused to administer under the Protocol.

Those cases constitute 9.4% of the 1378 consumer cases closed by the AAA during 2007.²⁰² The total consumer cases closed in 2007 consisted of 439 cases (31.9%) that resulted in an award;²⁰³ 544 cases (39.5%) that did not result in an award; and 395 pre-filing cases (28.7%) that never met the AAA’s filing requirements, either because they settled very early on, because the claimant failed to meet the filing requirements, or because the AAA refused to administer the case due to protocol violations.

Various types of protocol violations gave rise to the refusals to administer, as shown in Table 3. The AAA refused to administer forty-four cases (of 129, or 34.1%) because the business already was classified as unacceptable on the AAA business list. The remaining cases (85 of 129, or 65.9%) involved businesses that were not already classified as unacceptable. Of those cases, the AAA refused to administer fifty-five because the business failed to pay its share of the arbitration fees and the rest (thirty cases) because the arbitration clause violated the Protocol.²⁰⁴

Table 3: AAA Refusals to Administer, 2007

Reason for Refusal to Administer	Number of Cases (% of Total Cases)
Business failed to pay fees	55 (42.6%)
Business already classified as unacceptable	44 (34.1%)
Cost issue	11 (8.5%)
Remedy limitation	8 (6.2%)
Location issue	6 (4.7%)
Multiple violations	5 (3.9%)
Total	129

Although we are able to estimate with some degree of confidence the number of cases that the AAA refused to administer for protocol violations, we have no information on what happened to the cases afterwards. In some cases the dispute might nonetheless end up in AAA arbitration. If a business subsequently resolves the protocol issue, the case may be refiled with the AAA. Or a party might obtain a court order requiring the case to be arbitrated, which the

²⁰² The cases closed in 2007 consist of the cases in the AAA consumer dataset and the AAA pre-filing cases.

²⁰³ The case file sample includes 301 of these cases, closed between April and December 2007. The number for all of 2007 is adjusted for several exclusions from the case file sample, as described *supra* text accompanying notes 145-146.

²⁰⁴ The provisions violated were Principle 6 (“Reasonable Cost”) (11 cases); Principle 14 (“Arbitral Remedies”) (8 cases); Principle 7 (“Reasonably Convenient Location”) (6 cases); and multiple provisions (5 cases). A business’s failure to pay its share of the arbitration fees has the same effect in that case as a contract term that imposes all costs on the consumer while permitting the consumer to recover the fees from the business. The failure to pay differs from such a contract clause, however, because it is limited to the particular consumer dispute. Accordingly, we classify the failure to pay separately from other protocol violations.

AAA will honor.²⁰⁵ We have no evidence, however, whether any of the 2007 refusals to administer were refiled with the AAA or were administered pursuant to a court order.

Another possibility is that the case was subsequently filed with another arbitration provider. Some arbitration clauses give the claimant the choice among several alternative arbitration providers, and specify that if one will not administer the case it should be filed instead with a different one.²⁰⁶ Again, we do not know whether any of the 2007 refusals to administer were subsequently filed with another arbitration provider.

A third possibility is that the case might end up in court. The reported court cases addressing how to deal with arbitrations the AAA has refused to administer, or dealing with the unavailability of the provider specified in the arbitration agreement, have reached divided results.

The difficulty for consumers in such cases is that the standard mechanism by which the AAA enforces the Consumer Due Process Protocol — refusing to administer cases arising out of clauses that do not comply — may not be effective when the business is the respondent. If the business is the claimant, and the arbitration provider refuses to administer the case, the business has an incentive to waive the offending provision and modify the clause in future contracts so that it can proceed with its claim. But if the business is the respondent, the business has little incentive to do so —presumably the business does not want the claim to go forward. If the business does not waive the protocol violation and the provider refuses to administer the arbitration, the consumer cannot proceed with the case in arbitration and the business might avoid being held liable.

The question then is whether the consumer claimant has any other remedy. The case most directly on point is *Martinez v. Master Protection Corp.*,²⁰⁷ in which the AAA refused to administer an employment arbitration agreement because it contained provisions inconsistent with the Employment Due Process Protocol.²⁰⁸ The employee then sought to assert his claim in court, while the business sought to have the court appoint an arbitrator. The California Court of Appeal held that the trial court had erred in appointing an arbitrator, stating that California arbitration law “does not permit the trial court to choose an alternative forum when the chosen forum refuses to hear the case.”²⁰⁹ Accordingly, because the AAA was not available as a forum to administer the arbitration proceeding, the employee could proceed with his claim in court.

Beyond *Martinez*, courts have addressed the issue (or a similar issue) in several settings. In cases in which a business respondent fails to pay its share of the required arbitration fee, courts have generally held that the consumer or employee claimant may bring his or her claim in court instead. Most courts have treated the business’s failure to pay the arbitration fee as waiving its right to arbitration.²¹⁰ At least two courts have held that the business’s refusal to pay

²⁰⁵ See *supra* text accompanying note 120.

²⁰⁶ See *infra* note 216.

²⁰⁷ 12 Cal Rptr 3d 663 (Cal. Ct. App. 2004) (alternate holding)

²⁰⁸ *Id.* at 674.

²⁰⁹ *Id.* at 675.

²¹⁰ *Garcia v. Mason Contract Prods., LLC*, 2010 U.S. Dist. LEXIS 92869, at *11 (S.D. Fla. Aug. 18, 2010) (finding waiver); *Stowell v. Toll Bros.*, 2007 U.S. Dist. LEXIS 287, at *3 (E.D. Pa. Jan. 4, 2007) (finding waiver); *Sanderson Farms, Inc. v. Gatlin*, 848 So. 2d 828, 838 (Miss. 2003) (finding waiver); *Boulds v. Dick Dean Economy*

the arbitration fees was a material breach of the arbitration agreement that permitted an employee to file suit in court.²¹¹ Because a business's failure to pay fees is the most common reason for the AAA to refuse to administer a case,²¹² this line of cases usefully reinforces the AAA's private enforcement actions.

In cases in which the AAA has refused to administer an arbitration subject to the Health Care Due Process Protocol because the case arose out of a pre-dispute arbitration agreement, most courts have held that the claimant may not litigate the case in court.²¹³ Instead, the remedy is for the court to order the case to arbitration but itself to appoint the arbitrator (pursuant to section 5 of the FAA²¹⁴). Such a remedy is less beneficial to the consumer, obviously. But these cases are distinguishable from the first group of cases because here the business can do nothing to remedy the violation other than to give up altogether the right to arbitrate. By comparison, in the cases dealing with arbitration costs or other types of protocol violations, the business merely has to remedy the violation to keep the case in arbitration.

In cases in which the arbitration provider becomes unavailable for some other reason, courts are divided on whether the case should proceed in court or in arbitration (with the court appointing the arbitrator).²¹⁵ The central inquiry is whether the identity of the provider is

Cars, Inc., 2010 Mo. App. LEXIS 13, at *15-*16 (Mo. App. Jan. 12, 2010) (finding waiver); *see also* Brandifino v. Cryptometrics, Inc., 896 N.Y.S.2d 623, 631 (N.Y. Sup. Ct. 2010) (giving defendant one more chance to pay before finding waiver). *But see* JuiceMe, LLC v. Booster Juice Ltd., 2010 U.S. Dist. LEXIS 77375, at *24-*25 (D. Or. July 30, 2010) (finding waiver issue for arbitrator to decide); Fogal v. Stature Constr., Inc., 2009 Tex. App. LEXIS 4497, at *18 (Tex. App. June 18, 2009) (finding no waiver when claimant failed to pay arbitration fees).

²¹¹ Sink v. Aden Enter., Inc., 352 F.3d 1197, 1201 (9th Cir. 2003); Brown v. Dillard's Inc., 430 F.3d 1004, 1010 (9th Cir. 2005). In Cox v. Ocean View Hotel Corp., 533 F.3d 1114 (9th Cir. 2008), the Ninth Circuit distinguished *Dillard's* on the ground that the employee in *Ocean View* never filed a demand for arbitration with the AAA. *Id.* at 1123-24. Instead, the employee had merely written to the employer asserting a claim of sex discrimination and requesting the employer to "provide the date and time of the arbitration hearing" to the employee's attorney. *Id.* at 1118.

²¹² *See supra* text accompanying note 204.

²¹³ *See* Fellerman v. Am. Retirement Corp., 2010 U.S. Dist. LEXIS 43177, at *14-*16 (E.D. Va. May 3, 2010) (enforcing arbitration agreement even though AAA would not administer arbitration arising out of pre-dispute agreement); Estate of Eckstein v. Life Care Centers of Am., Inc., 623 F. Supp. 2d 1235, 1238 (E.D. Wash. 2009) (same); Blue Cross Blue Shield of Ala. v. Rigas, 923 So. 2d 1077, 1092 (Ala. 2005) (same); Mathews v. Life Care Centers of Am., Inc., 177 P.3d 867, 872 (Ariz. Ct. App. 2008) (same); New Port Richey Med. Investors, LLC v. Stern, 14 So. 3d 1084, 1087 (Fla. App. 2009) (same); Estate of Perez, 2009 Fla. App. LEXIS 16553, at *3 (Fla. App. Nov. 6, 2009) (same); Broughsville v. OHECC, LLC, 2005 Ohio App. LEXIS 6070, at **18-**19 (Ohio St. App. Dec. 21, 2005) (enforcing arbitration agreement even though American Health Lawyers Association would not administer arbitration arising out pre-dispute agreement); Owens v. National Health Corp., 263 S.W.3d 876, 885-86 (Tenn. 2007) (enforcing arbitration agreement even though AAA would not administer arbitration arising out of pre-dispute agreement); Nail v. Consol. Resources Health Care Fund I, 2010 Wash. App. LEXIS 578, at *10-*11 (Wash. App. Mar. 18, 2010) (same); *see also* Oesterle v. Atria Mgmt. Co., 2009 U.S. Dist. LEXIS 60057, at * (D. Kan. July 14, 2009) (construing arbitration agreement as requiring arbitration in accordance with AAA rules, but not AAA policy). *But see* Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds, 14 So.3d 695, 709 (Miss. 2009) (refusing to enforce arbitration agreement specifying AHHA as arbitration provider); Grant v. Magnolia Manor-Greenwood, Inc., 678 S.E.2d 435, 439 (S.C. 2009) (same); Jackson v. Health Net Ins. Co., 2004 Cal. App. Unpub. LEXIS 9305, at *12 (Cal. App. Oct. 14, 2004) (same).

²¹⁴ 9 U.S.C. § 5.

²¹⁵ *See In re* Salomon Inc. Shareholders' Derivative Litigation, 68 F.3d 554, 561 (2d Cir. 1995) ("None of these cases, however, stands for the proposition that district courts may use § 5 to circumvent the parties' designation of an exclusive arbitral forum."); Reddam v. KPMG LLP, 457 F.3d 1054, 1061 (9th Cir. 2006) (holding

“integral” to the arbitration clause. If so, the entire arbitration clause is unenforceable; if not, then the obligation to arbitrate persists and the court fills the resulting gap in the arbitration agreement by appointing the arbitrator itself.²¹⁶

The fourth and final possibility is that the case may end up not being brought at all when the AAA refuses to administer it. We have no data on how frequently cases end up being dropped after the AAA refuses to administer the arbitration.

Overall, then, we find that in enforcing the Consumer Due Process Protocol, the AAA refused to administer at least 85 consumer cases, and likely 129 consumer cases — amounting to 9.4% of its consumer caseload — in 2007. We have no information, however, on what happened to those cases after the AAA refused to administer them.

that NASD as provider was not integral to arbitration agreement), overruled on other grounds, *Atlantic Nat’l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931, 940 (9th Cir. 2010); *Brown v. ITT Consumer Fin’l Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) (stating that when chosen forum is unavailable, arbitration agreement is not void unless the chosen forum “was an integral part of the agreement to arbitrate”).

Many of these cases in recent years have involved arbitration clauses that specified the National Arbitration Forum as the arbitration provider. Courts are divided on whether the unavailability of the NAF, *see supra* note 51, renders the arbitration agreement unenforceable. *Compare Ranzy v. Tijerina*, 2010 U.S. App. LEXIS 17872, at **4-**5 (5th Cir. Aug. 25, 2010) (unpublished opinion) (holding arbitration agreement unenforceable because NAF integral to agreement); *Khan v. Dell, Inc.*, 2010 U.S. Dist. LEXIS, at *12 (Aug. 18, 2010 D.N.J.) (same); *Carideo v. Dell, Inc.*, 2009 U.S. Dist. LEXIS 104600, at *17-*18 (W.D. Wash. Oct. 26, 2009) (same); *Carr v. Gateway, Inc.*, 2011 Ill. LEXIS 424, at *26-*27 (Ill. Feb. 3, 2011) (finding that arbitration agreement is unenforceable because “the designation of the NAF as the arbitral forum is integral to the agreement”); *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 219 (Pa. Superior Ct. 2010) (“The trial court’s legal conclusion that the Agreement was unenforceable due to the NAF’s unavailability is supported by a majority of the decisions that have analyzed language similar to that in the Agreement. In sum, these cases concluded that the NAF’s participation in the arbitration process was an ‘integral part’ of the agreement to arbitrate.”) *with Adler v. Dell Inc.*, 2009 U.S. Dist. LEXIS 112204, at *10-*11 (E.D. Mich. Dec. 3, 2009) (finding that arbitration agreement is enforceable because NAF is not integral to agreement); *Levy v. Cain, Watters & Assocs.*, 2010 U.S. Dist. LEXIS 9537, at *15-*16 (S.D. Ohio Jan. 15, 2010) (same); *Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1168 (D. S.D. 2010) (same); *Miller v. Dell Fin’l Servs.*, 2010 U.S. Dist. LEXIS 9462, at *7-*8 (S.D. W.Va. Feb. 4, 2010) (same); *Wilson v. Dell Fin’l Servs.*, 2010 U.S. Dist. LEXIS 10809, at *7-*8 (S.D. W.Va. Feb. 8, 2010) (same); *see also Smith v. AmeriCredit Fin’l Servs., Inc.*, 2009 U.S. Dist. LEXIS 115767, at *22 (S.D. Cal. Dec. 11, 2009) (holding NAF not integral when arbitration agreement permitted choice of additional provider on consent of other party); *Clerk v. First Bank of Del.*, 735 F. Supp. 2d 170, 180 (E.D. Pa. 2010) (holding NAF not integral when arbitration agreement gave choice of arbitration providers); *Jackson v. Payday Loan Store of Ill., Inc.*, 2010 U.S. Dist. LEXIS 25266, at *10 (N.D. Ill. Mar. 17, 2010) (same); *In re Checking Acct. Overdraft Litig.* 2010 U.S. Dist. LEXIS 65672, at *43 (S.D. Fla. May 25, 2010) (holding NAF not integral when arbitration agreement provides for court to appoint provider).

²¹⁶ Some consumer arbitration clauses set out a choice of arbitration providers, and some provide to the effect that “no arbitration may be administered by any administrator that has any formal or informal policy, rule or procedure that is inconsistent with or purports to override the terms of this section.” *E.g.*, Community America Credit Union, Credit Card Agreement, para. 11, *available at* http://www.cacu.com/ancillary/CU-108_Credit%20Card%20Agrmt.pdf (last visited Apr. 25, 2011). The latter type of provision appears directed at provider policies addressing class arbitration waivers rather than due process protocols. *See* Alan S. Kaplinsky & Mark J. Levin, *Is JAMS in a Jam Over Its Policy Regarding Class Action Waivers in Consumer Arbitration Agreements?*, 61 BUS. LAW. 923 (2006). Nonetheless, the provision would make it difficult for a court to permit the consumer to file suit in court when a provider relies on a due process protocol (which presumably would qualify as a “formal or informal policy”) to refuse to administer a case, unless the court were to find the provision unconscionable as an attempt to avoid the due process protocols or otherwise unenforceable.

D. Business Responses to AAA Compliance Review

This Section addresses how businesses respond to the AAA’s enforcement of the Due Process Protocol. Of course, most cases in the case file sample do not present a protocol violation in the first place; most businesses comply with the protocol in advance of AAA review. Thus, as explained above, 76.6% of the cases in the case file sample contained no provision that violated the Protocol as applied by the AAA. Similarly, the number of businesses classified as “acceptable” on the AAA business list (i.e., the 1706 businesses for which it will administer consumer arbitrations) is more than two-and-one-half times as large as the number of businesses (647) classified as “unacceptable.”²¹⁷

One possibility is that the business might respond by waiving the violation in the pending case and/or revising the clause for future cases.²¹⁸ Since the AAA began reviewing consumer clauses for protocol violations, over 150 businesses have updated their arbitration clauses to remove a protocol violation and/or have waived such provisions for future cases, as shown in Table 4.²¹⁹ In a handful of those cases (five), the business waived future violations but then indicated it would remove the AAA from its arbitration clause. In one case the business waived future violations and then informed the AAA it was eliminating its arbitration clause altogether. Those businesses are in addition to over 1550 businesses with arbitration clauses that did not violate the Protocol.

By far the most common protocol issue in these cases involved arbitration costs. Sixty of the clauses presented only cost issues and a number more raised cost issues together with other protocol violations.²²⁰ Eliminating provisions raising cost issues (either by waiver or updating the clause) likely would benefit all consumers who arbitrate against the company under the revised clause. Otherwise the consumer would either have had to pay a larger share of the arbitration costs or else contribute toward the fees of three arbitrators instead of one. In Mark Weidemaier’s words: “these are cases in which the due process rules yield a clear benefit to individual claimants.”²²¹ By comparison, not every consumer will benefit from the elimination of a remedy limitation or a location provision (requiring the hearing to be held at a distant location); not every consumer will have a claim for punitive damages and not every consumer

²¹⁷ As discussed above, while we examined occasional files of businesses classified as acceptable on the AAA business list, we did not subject those businesses to the same comprehensive review as those classified as unacceptable. As a result, there may be businesses so classified that no longer arbitrate using the AAA’s consumer arbitration rules. Conversely, however, AAA case intake staff may be less likely to make sure that acceptable businesses are added to the AAA business list than unacceptable businesses; clauses from acceptable businesses need to be reviewed again each time the business is involved in a consumer arbitration in any event. Thus, the number of businesses that have been involved in AAA consumer arbitrations with clauses that fully comply with the protocol may be either more or less than 1706, although likely not materially so in either direction.

²¹⁸ As between the two, revising the clause would seem preferable, as it reduces the possibility consumers might not file a claim and thus not learn of the waiver.

²¹⁹ Businesses may have an incentive to waive violations and change their clause to comply with the Due Process Protocol because of the “legitimacy” provided by arbitrating with a well-respected arbitration provider. *See supra* text accompanying notes 43-44.

²²⁰ *See infra* app. 1.

²²¹ Weidemaier, *supra* note 11, at 670 (distinguishing between cases in which “the offending term serves no function” and “‘meaningful’ waivers” of provisions that violate the protocols).

will want an in-person hearing. Nonetheless, for those consumers who do, the AAA’s protocol review process again has clear benefits.

Table 4: Business Responses to AAA Protocol Compliance, On Business List As “Acceptable”

Business Response	Total Cases
No Response Necessary	1539
Updated Clause	95
Waived Violation for Future Cases	51
Waiver and Removed AAA	5
Waiver and Removed Arbitration	1
Sought Advance Review	15
Total "Acceptable" Businesses	1706

A second possibility is that the business might respond by doing nothing — either not participating in the case or not updating its clause for future cases. A number of businesses simply fail to pay their share of arbitration fees in a case or do not respond to requests by the AAA to waive any problematic provisions under the Protocol. As shown in Table 5, 358 businesses are classified as unacceptable on the AAA business list for these reasons. Most commonly, the business failed or refused to pay its share of arbitration costs even though its arbitration clause fully complied with the Protocol. Somewhat less commonly, the business failed to pay arbitration fees and to waive a problematic provision under the Protocol as well.²²²

²²² The types of provisions that businesses most commonly refused to waive or change were provisions addressing arbitration costs, specifying the location of the arbitration hearing, and limiting remedies. *See infra* App. 2.

Table 5: Business Responses to AAA Protocol Compliance, On Business List As “Unacceptable”

Business Response	Total Cases
Did Not Respond to Case Initiation	358
Did Not Respond to AAA Contact	201
Refused to Pay, Update Clause, or Waive	61
Notified Removing AAA	13
Removing Arbitration Clause	1
Out of Business	10
Unable to Locate	3
Total "Unacceptable" Businesses	647

Another 201 businesses are classified as unacceptable because they did not respond to a subsequent contact by the AAA seeking to have the business update its arbitration clause to remove a protocol violation. An additional 61 businesses refused to comply with the protocol, either by refusing to pay their share of arbitration fees or refusing to waive a protocol violation or update their arbitration clause.²²³

A third possibility is that the business might remove the arbitration clause altogether from its consumer contracts or replace the AAA with a different arbitration provider. To the extent businesses respond to AAA protocol review by switching to other arbitration providers, or by avoiding the AAA altogether, the Consumer Due Process Protocol becomes less effective as a means of private regulation.

We have limited ability to determine the extent to which companies in fact switched to other arbitration providers or removed arbitration clauses from their consumer contracts. A business that changes its clause in either of these ways presumably would no longer show up in the case file sample. But we would be unable to determine whether their failure to show up was due to their switching arbitration providers or whether they simply did not have any disputes with consumers go to arbitration during the period we studied.²²⁴

The AAA does record on the AAA business list those businesses that inform the AAA they have removed or will be removing the AAA (or arbitration in general) from their dispute resolution clause. The number of such businesses is quite small. Of the 647 businesses listed on

²²³ Although we attempted to follow the classification scheme in the AAA business list by distinguishing between cases in which the business did not respond and cases in which the business refused to comply, one should not place too much significance on these differing classifications. As a practical matter, the result is the same in both types of cases: the business does not pay its share of fees and/or the problematic provision remains.

²²⁴ The remaining categories shown in Table 5 are that the business went “out of business” (ten cases) or that the AAA was unable to locate the business (three cases).

the AAA business list as unacceptable, thirteen (or 2.0%) informed the AAA that they had removed or would be removing the AAA from their clause, and one (or 0.15%) informed the AAA that its dispute resolution clause no longer provided for arbitration. Another five businesses (of 1706, or 0.3%) listed as acceptable waived any protocol violations but then informed the AAA they would no longer provide for AAA arbitration in their dispute resolution clause. And one business (0.05%) listed as acceptable waived any protocol violations but then removed arbitration altogether from its consumer contracts. Overall, then, eighteen businesses (0.8%) of those on the AAA business list informed the AAA that they would no longer provide for AAA arbitration, and two businesses (0.08%) removed their arbitration clause altogether.

But of course not all businesses that switch dispute resolution providers (or remove arbitration altogether from their contract) necessarily inform the AAA that they are doing so. Any number of businesses classified as unacceptable by the AAA might have changed their contracts without informing the AAA.

Another way to identify businesses that switch away from the AAA is to look at data from other arbitration providers. California law requires arbitration providers to disclose basic information about their consumer arbitration cases, including the name of the business party.²²⁵ As others have noted, the disclosure documents are not always in the most useful format for researchers.²²⁶ But Public Citizen has compiled data from the National Arbitration Forum's ("NAF's") California disclosures into a spreadsheet available on Public Citizen's web site.²²⁷ We matched the businesses that brought NAF arbitrations in California against the AAA's list of unacceptable businesses to try to identify businesses that might have switched from the AAA to NAF.

Of the 647 businesses classified as unacceptable on the AAA business list, we found five (or 0.8%) that were subsequently listed as arbitrating cases using the NAF during the period covered. The combined caseload of those businesses before the NAF was small; they were not major contributors to the NAF caseload.²²⁸ Interestingly, three of the five businesses were ones

²²⁵ CAL. CODE CIV. PROC. § 1281.96.

²²⁶ California Dispute Resolution Institute, *Consumer and Employment Arbitration in California: A Review of Website Data Posted Pursuant to Section 1281.96 of the Code of Civil Procedure 27* (Aug. 2004) ("Many providers posted required information on their websites. However, a number of data points were not provided. Some providers, however, posted data that resulted in inconsistent, incomplete and/or ambiguous data.").

²²⁷ See NAF California Data Jan. 2003 to Mar. 2007, *available at* www.citizen.org/congress/civjus/arbitration/NAFCalifornia.xls (last visited Apr. 22, 2011). Public Citizen describes the spreadsheet as follows:

This spreadsheet consists of the information on 33,948 National Arbitration Forum cases conducted in California between Jan. 1, 2003 and Mar. 31, 2007. It was compiled from quarterly reports that the National Arbitration Forum posted in a difficult-to-find place on its Web site in Adobe Systems' Portable Document Format (PDF). Public Citizen converted them to an Excel spreadsheet so California residents and others interested in binding mandatory arbitration may do their own analysis of NAF arbitrations in California and of the records of NAF arbitrators.

Public Citizen, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, <http://www.citizen.org/publications/publicationredirect.cfm?ID=7545> (last visited Apr. 22, 2011)

²²⁸ To avoid the possibility of identifying any of the businesses, we do not quantify the percentage of the NAF caseload provided by the businesses, although it was small. We can say that neither MNBA Bank nor Banc One – which with their assignees and successors accounted for a substantial majority of the NAF caseload in the Public Citizen spreadsheet – was one of the businesses that switched from the AAA to the NAF.

that had informed the AAA that they would no longer use AAA arbitration in future cases. Two businesses classified by the AAA as unacceptable showed up in the NAF cases that had not already informed the AAA they were switching providers. And one of those two had appeared before the AAA because of a claim it had acquired from another business, arising out of a contract providing for AAA arbitration.

The NAF data have various limitations. First, obviously they only involve arbitrations administered by the NAF. If the business switched from the AAA to a provider other than the NAF, it would not show up in the NAF data. Second, the disclosures are limited to California.²²⁹ To the extent businesses switching from AAA arbitration do not operate in California, they would not show up in the NAF data. That said, one would expect that a major business operating nationally might have at least one case in California during the period covered by the NAF disclosures. Third, we do not have access to the arbitration clause giving rise to the NAF arbitrations. Some arbitration clauses permit the claimant to choose either the AAA or the NAF (or sometimes JAMS) to administer their arbitration.²³⁰ It might be that the arbitrations before the NAF were brought under such a clause, rather than a clause that removed the AAA as provider. Thus, the mere fact that the business appears both on the AAA business list and in the NAF spreadsheet does not necessarily mean that the business is one that switched from the AAA. Subject to those caveats, however, we find little evidence that businesses switched from the AAA to the NAF as an alternative arbitration provider.²³¹

VII. CONCLUSIONS

A. Empirical Findings

Our central empirical findings on the enforcement of the AAA Consumer Due Process Protocol are as follows:

- In the case file sample of AAA consumer arbitrations, the majority of consumer arbitration clauses (229 of 299, or 76.6%) fully complied with the Consumer Due Process Protocol as applied by the AAA. We found no statistically significant difference in how frequently clauses violated the Protocol between cases seeking \$75,000 or less (which were subject to AAA protocol compliance review) and cases seeking over \$75,000 (which were not).
- The AAA's review of arbitration clauses for protocol compliance appears to be effective at identifying and responding to those clauses with protocol violations. Of the 271 cases in the case file sample subject to the AAA's protocol compliance review, five (or 1.8%)

²²⁹ See *supra* text accompanying note 224.

²³⁰ Drahozal & Rutledge, *supra* note 7, at ____.

²³¹ See Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMPLOYEE RTS. & EMPL. POL'Y J. 363, 399 (2007) ("To the extent those rogue arbitration agencies and opportunistic employers represent a significant share of the market, they could place competitive pressure on AAA and JAMS to deviate from their rules and policies. There are reasons to believe that this is not a widespread problem.").

included an arbitration clause with an unwaived violation of the Consumer Due Process Protocol. Stated otherwise, in 266 out of 271 cases (98.2%), the arbitration clause either complied with the Due Process Protocol or the non-compliance was properly identified and responded to by the AAA.

- The AAA in the time period studied refused to administer at least 85 consumer cases, and likely at least 129 consumer cases (or 9.4% of its total consumer caseload), because the business failed to comply with the Consumer Due Process Protocol. The most common reason for refusing to administer a case (55 of 129 cases, or 42.6%) was the business's failure to pay its share of the costs of arbitration rather than any problematic provision in the arbitration clause.
- In response to AAA protocol compliance review, over 150 businesses have either waived problematic provisions or revised arbitration clauses to remove provisions that violated the Consumer Due Process Protocol. Those businesses are in addition to over 1550 businesses with arbitration clauses that did not violate the Protocol. By comparison, the AAA has identified 647 businesses for which it will refuse to administer arbitrations. The most common reason (358 of 647, or 55.3%) for the AAA to refuse to administer consumer arbitrations for a business is the business's failure to pay its share of the arbitration costs.

B. Policy Implications

Private regulation by the AAA complements existing public regulation of the fairness of consumer arbitration clauses. Our evidence indicates that the AAA effectively reviews arbitration clauses for protocol compliance and appropriately responds to clauses that do not comply. A number of businesses have responded to AAA compliance efforts by changing their arbitration clauses to comply with the Protocol. Any consideration of the need for additional public regulation should take into account such private regulation of consumer arbitration.

To be clear, we examined only the AAA's enforcement of the Consumer Due Process Protocol and business responses to those enforcement actions. We did not examine the AAA's enforcement of the Employment Due Process Protocol (or other due process protocols) or business responses to those enforcement actions.²³² Nor does this study address the enforcement of due process protocols by other arbitration providers or examine whether smaller arbitration providers even have adopted due process protocols. Thus, nothing we say here should be taken

²³² As noted above, the AAA's procedures for enforcing the Employment Due Process Protocol differ from its consumer procedures. See *supra* text accompanying notes 100-106. In addition, employers may have stronger incentives to comply with AAA enforcement measures due to their more frequent repeat dealings with employees than with consumers. Drahozal, *supra* note 36, at 768. Anecdotal reports are consistent with this supposition. See Eric Tuchmann, The Arbitration Fairness Act, Analyzed: International Dispute Negotiation Podcast 62, minute 14:05 (Feb. 20, 2009), available at <http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/455/IDN-62--The-Arbitration-Fairness-Act-Analyzed.aspx> ("So if we tell them there's a problem with it in the employment context they're very likely to welcome our suggestions and make the changes that we're asking for. The consumer situation is a little bit different. Those are much more likely to be one-off disputes with customers.... The results are a little bit more mixed in the consumer context with organizations' willingness to comply with our requests.").

as asserting that private regulation alone — with no public regulatory backstop, such as through court oversight — suffices to ensure the fairness of consumer arbitration proceedings.

Indeed, courts and policymakers usefully could consider ways to reinforce the AAA’s enforcement of the Consumer Due Process Protocol. For example, courts could look more skeptically on arbitration clauses that do not choose a reputable arbitration provider.²³³ In addition, courts could give businesses additional incentive to waive violations of the Protocol (or pay their share of arbitration fees) by making clear that the consumer can bring the case in court if the business does not do so. The rationale could be that the identity of the provider was “material” to the agreement to arbitrate; hence, the inability to arbitrate before the AAA would result in invalidation of the entire arbitration clause.²³⁴ Congress, state legislatures, and the courts also might consider ways to extend the protections of the Consumer (and Employment) Due Process Protocols to arbitration clauses that do not provide for AAA arbitration.

Although our evidence indicates that the AAA effectively reviews clauses for protocol compliance, that review process could nonetheless be improved in several ways. First, the process of reviewing consumer clauses might be centralized in a single person, as it is for the Employment Due Process Protocol. Centralization might reduce further the number of unwaived protocol violations, although at some resource cost to the AAA. Second, the AAA might provide additional training for case intake staff, particularly on how to identify problematic remedy limitations, the most commonly overlooked type of violation. Third, the AAA might publish the standards it uses in reviewing clauses for protocol compliance. Publication would give businesses better information on what provisions are problematic, and could enlist consumer claimants and their attorneys in enforcement of the Protocol. Finally, the AAA might give more prominent notice of the availability of advance review, such as by incorporating advance review into its Consumer Arbitration Rules.

²³³ Drahozal, *supra* note 36, at 769-70 & n.476.

²³⁴ Perhaps an arbitration clause that permits a business to choose a different provider when the provider refuses to administer a case because of protocol violations, *see supra* note 216, could be subject to challenge as unconscionable, for example.

**APPENDIX 1. BUSINESS RESPONSES TO AAA PROTOCOL COMPLIANCE,
ON THE AAA BUSINESS LIST AS "ACCEPTABLE"**

Business Response	Protocol Issue	Number of Cases	Total Cases
No Response Necessary			
	No issues	1539	
	Total No Response Necessary		<u>1539</u>
Updated Clause			
	Cost issue	44	
	Location issue	9	
	Remedy limitation	16	
	Cost issue and location issue	3	
	Cost issue and remedy limitation	13	
	Others	9	
	Unspecified	1	
	Total Updated Clause		<u>95</u>
Waived Violation for Future Cases			
	Cost issue	16	
	Location issue	4	
	Remedy limitation	5	
	Cost issue and location issue	2	
	Cost issue and remedy limitation	7	
	Unpaid fees	9	
	Others	3	
	Unspecified	5	
	Total Waived Violation for Future Cases		<u>51</u>
Waiver and Removed AAA			
	Cost Issue	4	
	Remedy Limitation	1	
	Total Waiver and Removed AAA		<u>5</u>
Waiver and Removed Arbitration			
	Hearing Issue	1	
	Total Waiver and Removed Arbitration		<u>1</u>
Sought Advance Review			
	Approved as submitted	14	
	Approved after revision (various protocol issues)	1	
	Total Sought Advance Review		<u>15</u>
Grand Total "Acceptable" Businesses			<u><u>1706</u></u>

**APPENDIX 2. BUSINESS RESPONSES TO AAA PROTOCOL COMPLIANCE,
ON THE AAA BUSINESS LIST AS “UNACCEPTABLE”**

Business Response	Protocol Issue	Number of Cases	Total Cases
Did Not Respond to Case Initiation			
	Unpaid fees	252	
	Cost issue	41	
	Location issue	20	
	Remedy limitation	15	
	Cost issue and location issue	2	
	Cost issue and remedy limitation	6	
	Cost issue and arbitrator selection issue	5	
	Location issue and remedy limitation	3	
	Other	10	
	Unspecified	4	
	Total Did Not Respond to Case Initiation		358
Did Not Respond to AAA Contact			
	Cost issue	30	
	Location issue	12	
	Remedy limitation	23	
	Cost issue and location issue	1	
	Cost issue and remedy limitation	4	
	Cost issue and arbitrator selection issue	2	
	Location issue and remedy limitation	2	
	Other	5	
	Unspecified	2	
	Did not examine	120	
	Total Did Not Respond to AAA Contact		201
Refused to Pay			
	Unpaid fees	29	
	Unpaid fees and cost issue	2	
Refused to Update Clause			
	Remedy limitation	2	
Refused to Waive			
	Cost issue	9	
	Location issue	6	
	Remedy limitation	9	
	Cost issue and remedy limitation	2	
	Other	1	
	Unspecified	1	
	Total Refusals		61
Removing AAA			
	Unpaid fees	3	
	Cost issue	6	
	Remedy limitation	2	
	Cost issue and remedy limitation	1	
	Unspecified	1	
	Total Removing AAA		13
Removing Arbitration Clause			
	Remedy limitation	1	
	Total Removing Arbitration Clause		1
Out of Business			
	Unavailable	10	
	Total Out of Business		10
Unable to Locate			
	Unavailable	3	
	Total Unable to Locate		3
	Grand Total "Unacceptable" Businesses		647

APPENDIX 3. OTHER EMPIRICAL ISSUES

Our data also permit us to address several other issues related to the Due Process Protocols. First, to what extent do consumer arbitrations arise out of post-dispute versus pre-dispute agreements? Second, how common are class arbitration waivers — which are not addressed by the Protocols — in consumer arbitration agreements? Third, how did the AAA handle cases in the case file sample involving the health care industry, which might be subject to the Health Care Due Process Protocol?

A. Pre-Dispute v. Post-Dispute Agreements

The Consumer Due Process Protocol does not bar enforcement of pre-dispute arbitration agreements, although the matter was controversial among the drafters of the Protocol.²³⁵ Thus, it is not surprising that arbitrations arising from pre-dispute clauses are common in the case file sample. Indeed, virtually all of the 301 cases in the case file sample — 290 (or 96.3%) — arose out of pre-dispute agreements; 11 (or 3.7%) arose out of post-dispute agreements to arbitrate.²³⁶ These results are consistent with prior studies of employment and international arbitration.²³⁷

The more interesting question is what, if anything, can be learned from the dramatically greater number of arbitrations arising from pre-dispute as opposed to post-dispute agreements. A common argument by critics of pre-dispute consumer arbitration agreements is that if arbitration were fair, parties would agree to it post-dispute even if they could not agree to it pre-dispute.²³⁸ The usual response is that parties are unlikely to agree post-dispute to arbitrate, even if arbitration would make them both better off *ex ante*. Once parties know of their claim, they often will be unable to agree to arbitration, either because of limitations on the bargaining process²³⁹ or because an uncertainty that would have permitted the parties to make a beneficial bargain earlier has been resolved.²⁴⁰

²³⁵ See *supra* text accompanying notes 81-83. By comparison, the Health Care Due Process Protocol does preclude enforcement of pre-dispute arbitration agreements “in cases involving patients.” Health Care Due Process Protocol, *supra* note 52, princ. 3 (“In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises.”).

²³⁶ Although we treated two of the clauses as missing for purposes of evaluating AAA protocol compliance review, see *supra* text accompanying notes 145-146, those clauses plainly were pre-dispute clauses, and we treat them as such here, even though we could not determine all of the provisions in the clause.

²³⁷ Stephen R. Bond, *How to Draft an Arbitration Clause (Revisited)*, 1(2) ICC INT’L CT. ARB. BULL. 14 (1990), reprinted in CHRISTOPHER R. DRAHOZAL & RICHARD W. NAIMARK, TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 65, 67 (2005) (“Of the cases submitted to the ICC Court, only four [of 237] in 1987 and six [of 215] in 1989 resulted from a *compromis*, that is, an agreement to submit an already-existing dispute to arbitration.”); Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 319 (2003) (“AAA found only 6% (69/1148) of their 2001 employment arbitrations were the result of post-dispute agreements. In 2002, the frequency of post-dispute agreements was even lower, 2.6% (29/1124).”).

²³⁸ E.g., Charles Knapp, *Common Sense and Contracts Symposium: The Gateway Thread – AALS Contracts Listserv*, 16 TOURO L. REV. 1147, 1173 (2000) (“[I]f arbitration is so economically sound for everybody, then let the consumer be persuaded ‘once the dispute has arisen’ that arbitration is in her best interests too.”).

²³⁹ Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 747 (2006).

²⁴⁰ E.g., Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9

While our results do show that arbitrations arising out of post-dispute agreements to arbitrate are rare, they do not resolve the disagreement over the implications of that rarity. If pre-dispute agreements to arbitrate consumer disputes are made unenforceable, it seems likely that the number of consumer arbitration proceedings would decline dramatically. But our data provide no definitive evidence on the reason for that decline.

B. Use of Class Arbitration Waivers

One criticism of the Consumer Due Process Protocol is that it is underinclusive — it does not include all provisions in arbitration clauses that some see as unfavorable to consumers.²⁴¹ The most frequently litigated such clause, and one central to the policy debate over consumer arbitration, is the class arbitration waiver.

The existing empirical evidence is mixed on how frequently consumer arbitration clauses include class arbitration waivers. Eisenberg, Miller, and Sherwin found that in a sample of contracts from consumer financial services companies and telecommunications companies,²⁴² twenty of twenty-six (76.9%) consumer contracts included arbitration clauses²⁴³ and all twenty of the contracts with arbitration clauses included class arbitration waivers.²⁴⁴ Based on this “fairly narrow” sample,²⁴⁵ they concluded that “apart from the role of arbitration clauses in shoring up the validity of class action waivers, it is not clear why consumer arbitration would appeal to companies... [F]rom the perspective of corporate self-interest, concern over class actions remains the most likely explanation for the prevalence of arbitration clauses in consumer agreements.”²⁴⁶

CARDOZO J. CONFLICT RESOL. 267, 278-80 (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, 262-64 (2006).

²⁴¹ Bales, *supra* note 72, at 188 (“[One] issue is the enforceability of arbitration clauses that forbid employees from bringing claims as an arbitral class action.”); Malin, *supra* note 231, at 402 (“[T]he neutral community has failed to address the common practice in employer-imposed arbitration systems that prohibit not only class actions but also joinder of claims of even two individuals.”); Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 424 (2008) (“A more substantive failing of the Employment Protocol and similar ventures is that they either do not address remedial issues such as the availability of class actions or expressly exclude standard litigation remedies from mass arbitration.”); Sternlight, *supra* note 10, at 175 (“By contrast [to the Health Care Protocol], the Consumer Protocol neither bans mandatory arbitration nor clauses that would eliminate consumers’ rights to proceed in class actions.”).

²⁴² Theodore Eisenberg, Geoffrey 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, 881-82 (2008) (describing their sample as consisting of the following types of companies (with the number of such companies in parentheses): “Telecommunications (7); Cable services (CATV, Internet, phone) (5); Securities services (4); Commercial banks (3); Retail credit card issuers (2); and Financial credit company (1)”).

²⁴³ *Id.* at 883.

²⁴⁴ *Id.* at 884.

²⁴⁵ *Id.* at 891 (“Our study is limited to a fairly narrow range of industries. As described above, only six major groups appear in our sample.”).

²⁴⁶ *Id.* at 894. The study is unclear whether its conclusions apply to businesses generally or apply only to the types of businesses studied.

By contrast, in end user license agreements (EULAs) for computer software, Florencia Marotta-Wurgler found almost no use of arbitration clauses and no use of class arbitration waivers.²⁴⁷ Her conclusions are in stark contrast to those of Eisenberg, Miller, and Sherwin: “Although much analysis remains to be done, these results immediately cast doubt on casual claims that sellers’ rampant use of choice of forum and arbitration clauses deprive buyers of their day in court, or that sellers are shielding themselves from liability by making it impossible for buyers to aggregate low-value claims.”²⁴⁸

An older study found only limited use of class arbitration waivers in a variety of consumer contracts. Linda Demaine and Deborah Hensler examined dispute resolution clauses in a sample of contracts from businesses that an average consumer “was most likely to patronize.”²⁴⁹ Of the 161 contracts they examined, 57 (or 35.4%) included an arbitration clause.²⁵⁰ The use of arbitration clauses varied widely across their industry groups, from a high of 69.2% in financial businesses to none in food and entertainment businesses.²⁵¹ They also found that a minority (30.8%) of the arbitration clauses included class arbitration waivers, but they did not provide a breakdown by industry type.²⁵² Demaine and Hensler collected their data in 2001,²⁵³ however — prior to *Bazzle* — and so their results do not provide any insight into the post-*Bazzle* use of class arbitration waivers.

We also find varied use of class arbitration waivers in consumer contracts giving rise to AAA consumer arbitrations in 2007. Overall, of the clauses we examined in the case file sample, 109 of 299 (or 36.5%) included class arbitration waivers. The use of class arbitration waivers varied widely across contract types, as shown in Figure 3. Consistent with Eisenberg, Miller, and Sherwin, we found that all cases involving cell phone companies (5 of 5, or 100.0%) and all cases involving credit card issuers (26 of 26, or 100.0%) arose out of arbitration clauses with class arbitration waivers. By comparison, just over half of cases arising out of car sale contracts (34 of 64, or 53.1%) and contracts with home builders (11 of 17, or 64.7%) included class arbitration waivers. Meanwhile, none of the cases arising out of insurance contracts or real estate brokerage agreements included class arbitration waivers.²⁵⁴ Thus, while some types of consumer contracts in the case file sample commonly included class arbitration waivers, other types did not.

²⁴⁷ Florencia Marotta-Wurgler, “Unfair” *Dispute Resolution Clauses: Much Ado about Nothing?*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 45, 51 (Omri Ben-Shahar ed. 2007) (“Not a single EULA out of 597 includes a class-action waiver.”). Of the consumer EULAs she studied, only 15 or 259 (or 5.8%) included an arbitration clause. *Id.* at 52.

²⁴⁸ *Id.*

²⁴⁹ Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer’s Experience*, 67 *LAW & CONTEMP. PROBS.* 55, 59 (2004). The businesses were from the following types of industries: “housing and home services,” “retail services,” “transportation,” “health,” “food and entertainment,” “travel,” “financial,” and “other.” *Id.* For a more detailed listing of the types of businesses they studied, see *id.* tbl. 1.

²⁵⁰ *Id.* at 63-64 tbl. 2.

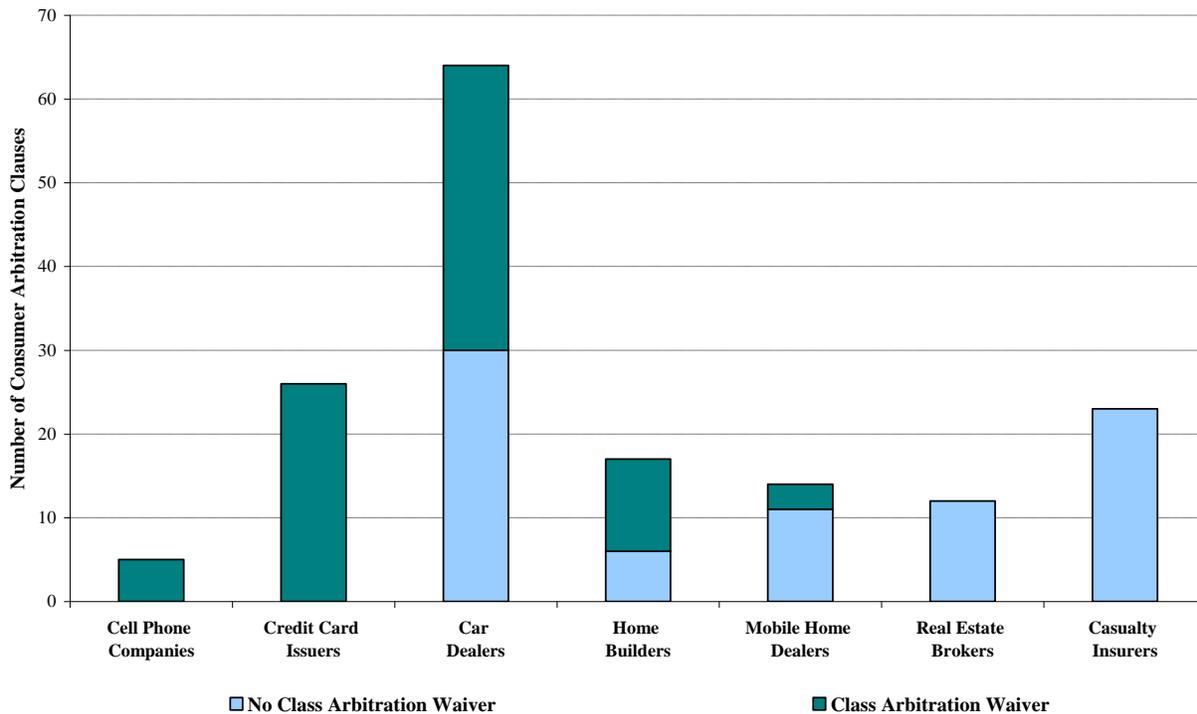
²⁵¹ *Id.*

²⁵² *Id.* at 65.

²⁵³ *Id.* at 60.

²⁵⁴ We should note that almost all of the insurance cases involved a single insurer.

**Figure 3:
Use of Class Arbitration Waivers by Type of Contract
(Cases = 161)**



One caveat to these findings: the case file sample of arbitration clauses is limited to those giving rise to AAA consumer arbitrations closed in 2007. Clauses selecting other providers may differ in how frequently they include class arbitration waivers.²⁵⁵ Moreover, many of those arbitrations (180 of 301, or 59.8%) were filed in 2007, although a number were filed earlier. We do not have data on the date on which the arbitration agreements giving rise to those arbitrations were entered. For some types of contracts, such as car sales agreements, one would expect a dispute to arise relatively close in time to when the sales contract was signed. But for others, there may have been a time lag between the time the arbitration agreement was entered and when the case arising out of the arbitration agreement was closed. So we cannot exclude the possibility that the arbitration clauses we examined might have changed subsequently to include class arbitration waivers.

That said, the evidence suggests that many consumer arbitration clauses may not include class arbitration waivers. Studies that have found widespread use of class arbitration waivers focused on types of businesses that most commonly used class arbitration waivers. The evidence here suggests that those businesses may not be representative of all the businesses that include arbitration clauses in their consumer contracts.

²⁵⁵ The AAA has promulgated rules governing the administration of class arbitrations and has a well established class arbitration docket. *See* American Arbitration Association, Supplementary Rules for Class Arbitrations (effective Oct. 8, 2003), *available at* www.adr.org/sp.asp?id=21936. We do not know whether the availability of class arbitration before the AAA makes it less likely or more likely that arbitration clauses specifying the AAA will include class arbitration waivers.

C. Health Care Cases

Although the focus of this article is on the Consumer Due Process Protocol, the case file sample provides a limited opportunity to consider the AAA's application of the Health Care Due Process Protocol as well. As discussed above, unlike the other due process protocols, the Health Care Due Process Protocol provides that "[i]n disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises."²⁵⁶ In its Healthcare Policy Statement, the AAA has indicated that it would not administer "cases involving individual patients" unless the parties agreed to arbitrate after the dispute arose.²⁵⁷ The AAA distinguishes cases involving a "patient undergoing health care treatment" from "other situations involving an individual," in which the AAA "will continue to administer pre-dispute agreements to arbitrate."²⁵⁸ Thus, under the AAA's Healthcare Policy Statement, if the dispute involves treatment of the patient, a post-dispute arbitration agreement is necessary; but for other disputes, such as those involving the payment of money, the AAA will still administer pre-dispute arbitration agreements, even in the health care field.

The case file sample included seven health-care-related cases. Three of the cases were disputes between a health insurance company and its insured. In two cases, the claimant sought coverage of treatment that had not yet been provided. In both of those cases, the parties entered into a post-dispute arbitration agreement. In the other case, the claimant sought coverage for treatment that already had been provided; in other words, the dispute was over reimbursement of money to the consumer. The parties arbitrated that case pursuant to a pre-dispute arbitration agreement.

The other four health-care-related cases were brought by or against nursing homes. In one case, a consumer sought damages against the nursing home for negligence in the care it provided. In that case, the parties entered into a post-dispute arbitration agreement. One of the other claims was a claim by a consumer for overcharges against the nursing home. The other two cases were collection actions brought by the nursing home against the patient or a family member. All three of those cases were brought pursuant to pre-dispute arbitration agreements.

Overall, then, the AAA's administration of the small number health care cases in the case file sample seems to have followed the line it draws between cases involving treatment of a patient and cases involving other types of disputes (e.g., the recovery of money).

²⁵⁶ Health Care Due Process Protocol, *supra* note 52, princ. 3.

²⁵⁷ American Arbitration Association, Healthcare Policy Statement (effective Jan. 1, 2003), *available at* www.adr.org/sp.asp?id=32192.

²⁵⁸ *Id.*