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Forced Arbitration: Unfair and Everywhere

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Acknowledgments

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About Public Citizen

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Introduction

Despite a scandal that compelled one of the largest binding arbitration firms to close its consumer arbitration business and another major provider to acknowledge "legitimate concerns" surrounding debt collection arbitrations, forced arbitration remains almost ubiquitous in many industries.

Posing as prospective customers, we queried major players in seven industries – credit cards, banks, cell phones, computer manufacturers, cable television and high-speed Internet, auto dealers, and brokerages – to determine whether they impose binding arbitration on their customers. We supplemented our findings from these queries with data on major home builders that we published in our May report, "Home Court Advantage: How the Building Industry Uses Forced Arbitration to Evade Accountability."

Of companies from which we obtained answers, 75 percent use mandatory binding arbitration, and nearly two-thirds force consumers to accept these terms as a condition of doing business. These findings omit auto dealerships, where we believe arbitration is nearly universal but few businesses would provide clear information. [See Figure 1] By contrast, recent polling shows that 79 percent of consumers expect that they can sue a company if they have a dispute, and 64 percent have no recollection of seeing anything about arbitration in the terms of agreement for goods and services.[1]

Figure I: Prevalence of Arbitration by Industry

Industry*	Major providers using arbitration**	Companies with arbitration that allow consumers to opt-out**	Companies that require arbitration as a condition of doing business
Credit Cards	8 out of 10	3 out of 8	5 out of 10
Banks	5 out of 7	0 out of 5	5 out of 7
Cell Phones	9 out of 10	2 out of 9	7 out of 10
Computer Manufacturers	4 out of 9	0 out of 4	4 out of 9
Cable/Internet Providers	6 out of 13	1 out of 6	5 out of 13
Brokerages	10 out of 10	0 out of 10	10 out of 10
Home builders	9 out of 9	1 out of 9	8 out of 9
Total	51 out of 68	7 out of 51	44 out of 68

* Auto dealers are not included because the vast majority of auto dealers we queried were unable or unwilling to provide clear answers on their arbitration policies.

** Only providers for which we were able to make clear determinations are included in these results.

In forced arbitration, consumers lose the right to go to court to settle disputes with businesses. Instead, they must go before private tribunals that are chosen by businesses

[1] Lake Research Partners, Nat'l Study of Public Attitudes on Forced Arbitration 14-15 (2009), *available at* http://www.fairarbitrationnow.org/uploads/Forced%20Arbitration%20Study%20Slides%200409.pdf.

and compete with one another to satisfy these business clients. In addition, arbitration is usually conducted in secret, often imposes onerous costs on consumers, and provides extremely little opportunity for meaningful appeal (even when a ruling ignores the law). In September 2007, Public Citizen took advantage of one of the few arbitration disclosure laws in the country to analyze the results of cases administered by the National Arbitration Forum (NAF), the nation's largest debt collection arbitration firm at the time. The resulting study, "The Arbitration Trap: How Credit Card Companies Ensnare Consumers" found that consumers had lost more than 94 percent of cases handled by NAF arbitrators.

In July of this year, Minnesota Attorney General Lori Swanson sued NAF, alleging that it was financially connected to debt collection firms that furnished NAF with the bulk of its business.[2] Swanson also alleged that NAF had stopped referring cases to arbitrators who did not award businesses what they sought and that it had recruited as supposedly "neutral" arbitrators people who were likely to rule against consumers.[3] Swanson also wrote a letter to the American Arbitration Association (AAA), urging it to stop administering forced arbitrations because they are "fundamentally unfair."[4]

Just five days after Swanson filed suit, NAF signed a consent judgment in which it agreed to abandon its massive consumer arbitration practice.[5] AAA announced the next day that it would cease accepting debt collection cases pending consideration of "legitimate concerns" over arbitrator neutrality, evidentiary requirements, and consumers' difficulty defending themselves in identity theft cases.[6] Shortly thereafter, Bank of America and JPMorgan Chase said they would stop requiring credit card customers to settle disputes in binding arbitration,[7] and American Express said it was "evaluating" its policy.[8] Bank of America also said it would drop arbitration clauses from its deposit agreements for bank account holders.[9]

But these high profile concessions do not solve the problem of forced arbitration. As Swanson said in congressional testimony, "while our consent judgment with the National Arbitration Forum may have removed a problem company from the consumer arbitration marketplace, it did not and cannot solve the systemic problems with

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[2] *"Arbitration" or "Arbitrary": The Misuse of Mandatory Arbitration to Collect Consumer Debts. Before the House Subcommittee on Domestic Policy, Committee on Oversight and Government Reform*, 111th Cong. 3 (2009) (statement of Lori Swanson, Attorney General Minnesota) [hereinafter Swanson Testimony].
[3] *Id*.
[4] Letter from Lori Swanson, Attorney General of Minnesota, to the American Arbitration Association (July 19, 2009).
[5] Consent Judgment, *Swanson v. National Arbitration Forum, Inc*., (Minn. 4th Jud. Dist. July 17, 2009) (No. 27-CV-09-18550), *available at* http://www.lawblog.com/docs/nafconsentdecree.pdf.
[6] Letter from William Slate II, President of AAA to Lori Swanson, Minnesota Attorney General (July 20, 2009).
[7] Kathy Chu, *BofA Drops Mandatory Arbitration Clauses*, USA TODAY, Aug. 14, 2009, at 1B.
[8] Jonathan Stempel, *Bank of America ends arbitration of card disputes*, REUTERS, Aug. 13, 2009.
[9] Robin Sidel, Bank of America Ends Arbitration Practice, WALL STREET JOURNAL ONLINE, Aug. 14, 2009, *available at* http://online.wsj.com/article/SB125019071289429913.html.

mandatory pre-dispute arbitration clauses in fine-print consumer contracts."[10] Noting that federal court rulings prevent states from regulating arbitration meaningfully, Swanson urged Congress to ban the use of mandatory arbitration clauses in consumer contracts.[11]

This report demonstrates that the use of forced arbitration remains rampant. Even with Bank of America and JPMorgan Chase dropping binding mandatory arbitration, eight of the top 10 credit card providers still include it in their contracts. (Three providers say they permit consumers to opt out, but they either provide only thirty days to do so or refuse to share their opt-out procedures with the public.) And even the providers that have dropped arbitration could easily resume using it after public attention subsides. For example, Citigroup re-imposed "universal default" policies on consumers less than two years announcing to great fanfare that it was ending its use.[12] It took congressional action to end that practice for good.[13]

Forced arbitration is even more widespread in other industries. For example, it is still very difficult for consumers to obtain cellular telephones, purchase houses from major builders, or find stock brokers without having binding mandatory arbitration foisted upon them.

Our survey also validated concerns about improper ties between businesses and arbitration providers. One major provider referred to NAF as one of its own divisions.

Merely obtaining information about forced arbitration policies is far too difficult. For example, several credit card companies told us that we had to apply for a credit card and be approved before we could see their terms. But the mere act of applying for a credit card risks harm to one's credit rating.[14] Other credit card representatives provided information over the telephone that we believe was false. Auto dealers told us we could not see contractual agreements until signing final paperwork to buy a car. All of the bank representatives we encountered were completely unaware of their arbitration policies.

Contracts that we obtained revealed disconcerting uses of forced arbitration. Almost across the board, providers that impose arbitration also prohibit consumers from pursuing legal claims as a class. Bank of America, which has dropped arbitration clauses from its credit card and banking contracts, continues to ban class actions.[15] Such bans, which many courts have found unlawful, effectively eliminate consumers' opportunity to seek redress for systemic harms unless they involve very large amounts of money.

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[10] Swanson Testimony at 8.
[11] *Id*.
[12] *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 20 (2008).
[13] *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 108 (2008).
[14] BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REPORT TO CONGRESS ON CREDIT SCORING AND ITS EFFECTS ON THE AVAILABILITY AND AFFORDABILITY OF CREDIT, Submitted to the Congress pursuant to section 215 of the Fair and Accurate Credit Transactions Act of 2003 15-16, 22 (2007) [hereinafter Federal Reserve Report].
[15] David Lazarus, *Got a Complaint Against BofA? You're on your Own*, L.A. TIMES, Aug. 23, 2009.

We found that arbitration clauses often go to ridiculous extremes to convey an illusion of fairness. Several businesses employ language stating that neither they nor the consumer may pursue class actions against the other, even though the notion that a group of businesses would band together as a class to sue a single customer is nonsensical. Other contracts are more blatantly unfair. One provider reserves the right to pursue cases against consumers in court while preventing consumers from pursuing cases against it in court.[16]

In the past, courts have played a key role in uncovering unscrupulous behavior and providing redress for consumers. In just one example, Providian Bank in the late 1990s agreed to pay more than $100 million after litigation exposed the company's practice of doctoring bar codes on return envelopes so customers' payments would arrive late, allowing the company to assess fees.[17] If today's arbitration clauses had been in effect at the time, that litigation likely would never have gone forward.[18]

The near ubiquity of binding arbitration in certain industries, the lack of transparency about it, and the absurd legalese embedded in contracts employing it debunk the myth that arbitration terms represent "voluntary agreements,"[19] as the U.S. Chamber of Commerce has claimed. Likewise, they contradict the American Arbitration Association's idyllic characterization of arbitration as a "private, informal process by which all parties agree, in writing, to submit their disputes to one or more impartial persons."[20]

Forced arbitration creates a systemic bias in favor of businesses while offering few, if any, meaningful deterrents against negligence or even foul play. The only way to end this injustice is for the Congress to follow Attorney General Swanson's advice and ban arbitration clauses in consumer contracts.

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[16] Metro PCS Terms and Conditions of Service, *available at* http://www.metropcs.com/privacy/terms.aspx.
[17] *The Federal Arbitration Act: Is the Credit Card Industry Using it to Quash Legal Claims? Before the House Subcommittee on Commercial and Administrative Law, Committee on the Judiciary*, 111th Cong. 2-3 (2009) (statement of Michael Donovan) [hereinafter Donovan Testimony].
[18] *Id*.
[19] Press Release, US Chamber of Commerce, Voters Strongly Back Arbitration, New Poll Shows, *available at* http://www.uschamber.com/press/releases/2008/april/08-109.htm.
[20] Drafting Dispute Resolution Clauses, American Arbitration Association, Sept. 1, 2007 *available at* http://www.adr.org/si.asp?id=4125.

I. Credit Card Providers

Until recently, all 10 of the largest credit card companies included binding mandatory arbitration terms in their contracts, although three appeared to offer consumers a short window of opportunity to opt out.

This near uniform state of affairs was rocked in late July when NAF, the largest administrator of debt collection arbitrations, agreed to shut down its business less than a week after being accused by Minnesota's Attorney General Lori Swanson of engaging in a litany of abusive practices. Swanson's alleged that NAF had financial ties to debt collection law firms whose cases it handled, systemically "deselected" arbitrators who ruled against businesses, and recruited individuals likely to rule against consumers to serve as purportedly "neutral" arbitrators.[21]

The same week that NAF agreed to shutter its consumer arbitration practice, AAA announced that it would stop accepting debt collection cases while problems relating to debt-collection arbitration were considered. AAA acknowledged "legitimate concerns" over arbitrator neutrality, rules of evidence, and consumers' difficulty defending themselves in identity theft cases.[22]

Shortly thereafter, Bank of America and JPMorgan Chase said they would cease requiring their consumers to settle disputes in binding arbitration, [23] while American Express said it was "evaluating" its policy.[24] But most major credit card providers still force their customers to settle disputes in binding mandatory arbitration.[25] Moreover, Bank of America and JPMorgan Chase may reinstitute binding mandatory arbitration at any time.

Although publicity over the NAF scandal might prompt some consumers to seek information about companies' arbitration policies, we found that credit card companies hold it closely. Only three of the 10 credit card providers we queried would share the contractual language of their arbitration clauses with us. (A Public Citizen employee was able to obtain a contract from a fourth provider because he was a holder of the firm's card.) One provider, U.S. Bank, required our caller to divulge his Social Security number before the firm would answer any questions on arbitration and, even then, the firm limited its answers to general responses over the telephone.[26]

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[21] Swanson Testimony at 3.
[22] Letter from William Slate II, President of AAA to Lori Swanson, Minnesota Attorney General (July 20, 2009).
[23] Kathy Chu, *BofA Drops Mandatory Arbitration* Clauses, USA TODAY, Aug. 14, 2009, at 1B.
[24] Jonathan Stempel, *Bank of America ends arbitration of card disputes*, REUTERS, Aug. 13, 2009.
[25] At least in the short term, credit card companies and collection agencies may have difficulty finding an arbitration firm willing to administer their disputes. In the wake of AAA and NAF's announcements that they would cease performing debt collection arbitrations, Public Citizen called JAMS, the best known national arbitration firm aside from AAA and NAF. JAMS General counsel Jay Welsh said the firm had only rarely handled such cases in the past and has no intention of opening that line of business. Interview with JAMS General Counsel Jay Welsh, Aug. 21, 2009.
[26] Phone conversation with U.S. Bank employee (Apr. 23, 2009).

Each of the actual credit card contracts we obtained prohibited consumers from taking legal action as a class, which is the only way for consumers to seek redress unless they have large claims.

Most banks will provide non-customers with only rudimentary details about their arbitration policies. For example, the only reference to arbitration on the electronic application form on Wachovia's Web site is that "claims and disputes will be subject to arbitration."[27] Citibank does not even mention arbitration in the terms and conditions in the online application we found.[28]

Consulting with credit card representatives is usually futile, as well. We typically first encountered a sales representative who was unable to answer questions about arbitration. The representative would then transfer us to the firm's customer service department. A customer service agent, in turn, would say that he or she was only authorized to speak with people who are already customers, not prospective ones. Some agents assured us that their full agreement was available online, when in fact their Web sites included only fleeting references to arbitration, if any.

Of those willing to discuss the specifics of arbitration, some provided information that was likely incorrect. For example, JPMorgan Chase said that Visa or MasterCard served as the arbiter of its disputes.[29] Bank of America said that arbitration is free to consumers except for the cost of their own attorneys.[30] These statements are almost certainly untrue.[31]

One provider characterized its arbitration firm as its own "division." Prior to NAF's termination of its debt collection business, American Express representatives twice referred us to the company's "arbitration provision division."[32] In both instances, the phone number they provided was to the National Arbitration Forum. An NAF representative, in turn, said he could not speak about the specific rules for arbitrations the

[27] Credit Card Terms and Disclosures, *available at* https://www.wachovia.com/foundation/v/index.jsp?vgnextoid=24f9f6534432d110VgnVCM100000127d6fa2RCRD.

[28] Terms and Conditions, *available at* https://www.accountonline.com/ACQ/DisplayTerms?sc=4T3Z1DG97BCTMDJ860W&app=UNSOL&siteId=CB&langId=EN&BUS_TYP_CD=CONSUMER&DOWNSELL_LEVEL=2&BALCON_SC=&B=M&DOWNSELL_BRANDS=M,M,&DownsellSourceCode1=4T3Z2DV97BCTMDJ860W&B1=M&DownsellSourceCode2=4T3Z3DW97BCTMDJ860W&B2=M&t=t&d=&uc=3KD&AMEX_PID_AF_CODE=&AAPID=.

[29] Phone conversation with JPMorgan Chase employee (Apr. 23, 2009).

[30] Phone conversation with Bank of America employee (Apr. 23, 2009).

[31] Neither Bank of America nor JPMorgan Chase would provide its actual arbitration agreement to us, but all other credit card providers arbitrated its claims through NAF or AAA. Both NAF and AAA charged fees to consumers. The fee schedule for NAF is available at http://www.adrforum.com/users/naf/resources/20070801FeeSchedule.pdf. The fee schedule for AAA is available at http://www.adr.org/sp.asp?id=22039.

[32] Phone conversations with American Express employees (June 23, 2008 and Apr. 23, 2009).

firm performed for American Express.[33] Three weeks after NAF ended its consumer arbitration practice, we called American Express back to see whether the firm still referred arbitration questions to NAF. After we were bounced from agent to agent for 30 minutes, a representative offered to transfer us to "another customer service department that knows about arbitration." That "department" turned out to be NAF, which greeted us with an endless series of recorded options.[34]

Of the seven providers that refused to disclose their terms to customers, several justified withholding them on the basis that consumers' credit scores affect some of the terms of the agreement. These claims were not likely accurate. In contracts we obtained, the arbitration provisions were in "cardmember agreements," while consumer-specific terms, such as interest rates, appeared in separate documents. Discover calls this separate document its "Pricing Schedule," Citibank refers to it as the "Fact Sheet.[35]

Some providers that refused to share their terms suggested that we apply for a credit card. If accepted, they said, we would receive the cardholder agreement along with the new card, at which point we could decline to activate the card. But consumers who follow this course would jeopardize their credit scores. In processing credit applications, credit card companies check applicants' credit scores. The act of checking the credit score can cause it to be lowered.[36]

Three providers – Discover, Wachovia, and GE Money – claimed that consumers could opt out of arbitration clauses, although each offered unnecessarily difficult ways to opt out or would not say what the procedure would be. To opt out of Discover's arbitration clause, a cardholder must within thirty days send a written letter to a post office box that includes the cardholder's "name, address, telephone number, account number and signature and must not be sent with any other correspondence."[37] Wachovia also requires written notice within thirty days.[38] It is unclear whether Discover or Wachovia provide confirmation of receipt. GE Money's Web site states that its Cardmember Agreement "includes an arbitration provision that may limit my rights unless I reject that provision under the Agreement's instructions."[39] We were unable to obtain the agreement to learn what the instructions are.

Proponents of mandatory binding arbitration argue that it lowers companies' legal costs, allowing them to offer better deals to consumers. But a more likely effect is that it gives businesses free reign to abuse consumers. Scholars Samuel Issacharoff and Erin F. Delaney described binding mandatory arbitration "nothing but a shield against legal accountability by the credit card companies."[40]

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[33] Phone conversation with American Express employee (Apr. 23, 2009).
[34] Phone conversation with American Express employee (Aug. 19, 2009).
[35] "Cardmember Agreement" Discover Card, "Card Agreement" Citibank (on file with author).
[36] Federal Reserve Report at 15-16.
[37] "Cardmember Agreement" Discover Card (on file with author).
[38] "Wachovia Cardmember Agreement and Disclosure Statement" (on file with author).
[39] Key Credit Terms for the GE Money Platium Card Agreement, *available at* https://www.onlinecreditcenter6.com/consumereApply/Internet/gemoney/en/js/TermsConditions.htm
[40] Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 173 (2006).

Class action lawsuits are often the only effective way to combat these abusive practices. By banning class actions, credit card companies deter consumers from bringing individual claims for which potential damages are smaller than the anticipated legal costs.

Credit card provider Providian was forced to settle a series of consumer lawsuits in the late 1990s alleging that the company imposed late fees on payments that were not actually late, failed to provide the promotional rates it advertised, and steered credit card customers into subprime home equity loans.[41] During the course of litigation, attorneys discovered that Providian had tampered with bar codes on return bill payment envelopes to increase the likelihood that they would receive payments late, upon which they would impose fees.[42] These memos were uncovered because of the discovery rights that litigation provides. Arbitration provides for only limited discovery and offers few deterrents to businesses flouting discovery requests.

Other lawsuits illustrate the importance of class actions remaining an option. Credit card companies have lost litigation or paid out settlements for advertising "no annual fee" cards but changing their terms to include annual fees within months of consumers signing up for cards;[43] engaging in "adverse action repricing," a term for raising an interest rate based on information in a consumer's credit report without disclosing what factors caused the increase;[44] failing to disclose up-front charges for making transactions in foreign currencies or with foreign merchants;[45] and charging a fee for flight and baggage insurance for travel purchases but failing to cancel these charges when flights were cancelled.[46]

In these cases, the cost of arbitration or litigation would generally be vastly greater than the amount that any individual consumer is owed. Only as a member of a class does a consumer have any practical opportunity to win relief – or a business face any danger of repercussions in the civil justice system for unscrupulous behavior.

[41] Donovan Testimony at 3.
[42] *Id.*
[43] *Rossman v. Fleet Bank*, 280 F.3d 384, 387-88 (3rd Cir. 2002).
[44] *Barrer v. Chase Bank*, 566 F.3d 883, 886 (9th Cir. 2009).
[45] *See In re Currency Conversion Fee Antitrust Litigation*, MDL No. 1409 WL 1834351 (S.D.N.Y. 2009).
[46] *Aviation Data, Inc. v. American Express*, 152 Cal. App. 4th 1522, 1526-28 (2007).

Figure II: Use of Forced Arbitration Clauses by Credit Card Providers

Provider	Does provider include arbitration terms in contract	Does provider reveal whether its contracts include arbitration?	Does contract ban class actions?	Does provider share contract with prospective customers?
Bank of America	No***	Yes	Yes	No
Citibank	Yes	Yes	Yes	Yes
Capital One	Yes	Yes	Unknown	No
American Express	Yes	Yes	Yes	No
Discover	Yes*	Yes	Yes	Yes
Wachovia	Yes*	Yes	Yes	Yes
HSBC	Yes	Yes	Unknown	No
G.E. Money	Yes**	Yes	Unknown	No
U.S. Bank	Yes	Yes	Unknown	No
JPMorgan Chase	No***	Yes	Unknown	No

* Opt out available.

** Agent reported that opt out is available, but refused to furnish actual language.

*** Announced it would stop using arbitration following NAF's announcement that it would end its consumer arbitration practice.

II. Banks

Of the seven banks from which we were able to obtain deposit agreements, five force arbitration on their customers. The two exceptions are Bank of America, which recently dropped its arbitration provision, and TD Bank.[47] One bank refused to reveal its terms to anyone who was not already a customer.[48] All five banks that use arbitration also prohibit consumers from pursuing claims as a class.

Consumers inquiring to bank employees about the meaning of mandatory arbitration clauses are bound to be disappointed. Not a single bank representative we spoke with was familiar with arbitration.

We learned whether banks required arbitration only by reading deposit agreements, which we obtained with varying degrees of difficulty. Some representatives handed out these documents unprompted, some hesitated, and some refused outright. Bank representatives' discretion, rather than banks' policies, appeared to be the main factor affecting whether we could view their deposit agreements. For example, while a representative at one Bank of America branch refused to show us the document, a representative at another branch readily provided it.[49]

At one BB&T branch, a representative claimed that there were no contractual documents associated with opening a bank account. He insisted that this was the case even after being shown copies of deposit agreements from other banks.[50] BB&T does, however, have a deposit agreement.[51] BB&T provided the document on request to a Public Citizen employee who is a customer of BB&T.

Two PNC Bank branches refused to provide us an agreement, saying that the bank would not share its terms until after an account was opened.[52] Among banks from which we obtained deposit agreements, TD Bank was the only one that did not require arbitration.[53]

Litigation is a potential check on abusive practices in the banking industry. For example, in 1999 Wells Fargo paid $6.7 million to settle a lawsuit accusing it of illegally selling personal information to telemarketers.[54] Suing as a class was the only viable solution for Wells Fargo's customers because their damages – allegedly including receiving harassing telephone calls and excessive mail – were difficult to calculate and may have been too small for any individual claim to justify the cost of litigation. If Wells

[47] Robin Sidel, *Bank of America Ends Arbitration Practice*, WALL STREET JOURNAL ONLINE, Aug. 14, 2009, *available at* http://online.wsj.com/article/SB125019071289429913.html.
[48] Visits to PNC branches (June 8-9, 2009).
[49] Visits to Bank of America branches (June 8-9, 2009).
[50] Visit to BB&T branch (June 8, 2009).
[51] One of our researchers has an account with BB&T and was able to obtain its deposit agreement.
[52] Visits to PNC branches (June 8-9, 2009).
[53] Visit to TD Bank branch (June 19, 2009).
[54] Harriet Chiang, *Wells Fargo Settles Lawsuit*, S.F. CHRON., Aug. 24, 2004, at C1.

Fargo's customers were bound by the arbitration clauses banning class actions, that lawsuit likely would not have gone forward.

Figure III: Use of Forced Arbitration Clauses by Personal Banking Institutions

Provider	Does provider include arbitration terms in contract	Does provider reveal whether its contracts include arbitration?	Does contract ban class actions?	Does provider share contract with prospective customers?
Bank of America	No	Yes	Yes	Yes
BB&T	Yes	Yes	Yes	No
Citibank	Yes	Yes	Yes	Yes
Chevy Chase	Yes	No	No	Yes
PNC Bank	Unknown	No	Unknown	No
Wachovia	Yes	Yes	Yes	Yes
TD Bank	No	No	No	Yes
SunTrust	Yes	Yes	Yes	Yes

III. Cell Phones

Nine of the 10 cell phone companies we queried force arbitration on their customers. Two providers, T-Mobile and Cricket, allow consumers to opt out. Of the nine providers that use arbitration, all but one bans class actions.

Each of the top 10 providers publishes its contract online. MetroPCS's contract is particularly notable. It affords itself – but not its customers – the right to pursue damages in court. Its contract reads in part, "Notwithstanding the foregoing MetroPCS has the right to institute legal or equitable proceedings in any court of competent jurisdiction for claims or disputes . . . ."[55]

Litigation has enabled consumers to change some of the industry's most unfair practices. After becoming subject to numerous lawsuits and being threatened by regulation, cell phone providers began prorating early termination fees based on the amount of time left on a customer's contract.[56]

Separately, AT&T customers won refunds in 2008 for unauthorized charges from third-party content providers who supplied ring tones and daily text messages but failed to adequately explain the charges.[57] Consumers also won a settlement against Sprint-Nextel in 2006 resulting from a complaint alleging that Sprint "misled customers by concealing rate increases, hiding various regulatory fees, failing to disclose that it rounded minutes up to the next whole minute, and failing to disclose the limitations of its geographical coverage and capacity."[58]

[55] Metro PCS Terms and Conditions of Service, *available at* http://www.metropcs.com/privacy/terms.aspx.
[56] Elise Ackerman, *People Happier with cell phone service*, SAN JOSE MERCURY NEWS, Dec. 12, 2008, at 1C.
[57] *AT&T settles lawsuits over cell-phone content fees*, REUTERS, June 3, 3008.
[58] Dan Margolies, *Class-action suit alleged hidden fees and other charges: Judge OKs settlement*, K.C. STAR, Sep. 13, 2006, at C3.

Figure IV: Use of Forced Arbitration Clauses by Cell Phone Providers

Provider	Does provider include arbitration terms in contract?	Does provider reveal whether its contracts include arbitration?	Does contract ban class actions?	Does provider share contract with prospective customers?
Verizon Wireless	Yes	Yes	Yes	Yes
AT&T	Yes	Yes	Yes	Yes
Sprint-Nextel	Yes	Yes	Yes	Yes
T-Mobile	Yes*	Yes	Yes*	Yes
Tracfone	Yes	Yes	No	Yes
US Cellular	Yes	Yes	Yes	Yes
Metro PCS	Yes	Yes	Yes	Yes
Virgin Mobile	No	No	No	Yes
Cricket	Yes*	Yes	Yes*	Yes
Boost Mobile	Yes	Yes	Yes	Yes

* Opt out available

IV. Computer Manufacturers

Four of the 10 computer makers we queried include forced arbitration clauses in their sales contracts. We also investigated forced arbitration in the manufacturers' financing contracts. Of seven companies that provided financing options, four required arbitration, one did not, and two provided multiple financing options, with varying policies on arbitration.

Financing is typically offered either through an account that extends a line of credit, a credit card account that is initiated with a computer purchase, or a third party that extends a line of credit.

The most common financing option involves computer companies offering consumers a credit card. Hewlett-Packard, Sony, Apple, and Toshiba offer credit cards with promotional rates to consumers who purchase a computer. These cards all require arbitration. Toshiba and Lenovo also offer financing through a company called Bill Me Later, which is operated by CIT Bank. This agreement does not require arbitration.[59]

Dell's financing option takes the form of a membership in what is referred to as a preferred account. This membership is essentially a financing agreement through CIT Bank. It requires arbitration.[60]

Lawsuits against computer manufacturers have forced them to compensate consumers for alleged false claims and faulty products. Dell settled one lawsuit in which it was accused of selling new computers with used parts and with smaller-than-advertised monitors.[61] In other cases, Hewlett-Packard paid a settlement to consumers for producing computers that froze during normal use[62] and settled another case regarding computers that plaintiffs alleged were prone to causing the loss or corruption of data because of a defective part.[63] Because monetary damages to individual plaintiffs would have been relative small or hard to quantify in these instances, class action suits were the only viable way to remedy these companies' practices.

[59] Terms and Conditions of the Bill Me Later® Payment System, *available at* https://www.securecheckout.billmelater.com/paycapture-content/fetch?hash=PD4106KD&content=bmlweb/bmlwebtnc.html
[60] Dell Preferred Account Preliminary Credit Agreement, *available at* https://financing.dell.com/financing/us_ca/doc.aspx?doc=dpa_terms_printsave_popup.
[61] *In Brief*, DALLAS MORNING NEWS, Apr. 22, 1997, at 15D.
[62] *Around the Nation*, HOUSTON CHRON., Mar. 22, 2006, at 3.
[63] Settlement Agreement and Release at 40-41, *Grider v. Compaq Computing Co.*, (Okla. Dist. Ct. of Cleveland County) (CJ-2003-969-L), *available at* http://www.barrettgrider-v-hpcompaq.com/pdfs/Settlement%20Agreement%20and%20Release.pdf.

Figure V: Use of Forced Arbitration Clauses by Computer Makers

Provider	Does provider include arbitration terms in contract?	Does provider include arbitration terms in financing?	Does contract ban class actions?	Does provider share contract with prospective customers?
Dell	Yes	Yes	Yes	Yes
Lenovo (IBM)	No	No	No	Yes
Hewlett-Packard	No	Yes	No	Yes
Gateway/Acer	Yes	Variable	Yes	Yes
Sony	No	Yes	No	Yes
Apple	No	Yes	No	Yes
Samsung	No	Financing not available	No	Yes
Toshiba	Yes	Variable	Yes	Yes
Fujitsu	Yes	Financing not available	No	Yes
Asus	Unknown	Financing not available	Unknown	Unknown

V. Cable and Internet Providers

Six of 13 cable or satellite television and Internet service providers we surveyed include arbitration clauses in their contracts. One of the six permits customers to opt out of the arbitration clause. Each of the providers requiring arbitration also prohibits class actions. All 13 companies make their service agreements available online.

Lawsuits against cable and Internet providers show why class actions, in court, are an important tool for policing companies' behavior. While monetary damages to individuals harmed by these industries' unfair practices are often relatively low, the practices nonetheless serve to deprive consumers of the services they paid for. Besides reimbursing consumers, successful class actions stop abusive practices and help deter future ones.

For example, class action lawsuits have ended several abusive practices in this industry. DirecTV lost a class action lawsuit in 2008 alleging that it failed to provide the DVD players that its customers were promised in exchange for signing up for the service.[64] Comcast lost a class-action suit in 2003 and was ordered to pay $13.7 million for violating trade practices by unilaterally imposing an unreasonably high late fee as a form of liquidated damages.[65]

Figure VI: Use of Forced Arbitration by Cable TV/Internet Providers

Provider	Does provider include arbitration terms in contract?	Does contract ban class actions?	Does provider share contract with prospective customers?
Comcast	Yes*	Yes	Yes
Time Warner Cable	Yes	Yes	Yes
Cox Communications	No	No	Yes
Charter Communications	No	No	Yes
DirecTV	Yes	Yes	Yes
Dish Network	No	No	Yes
AT&T	Yes	Yes	Yes
RCN	No	No	Yes
Cablevision/Optimum	No	No	Yes
Verizon/FIOS	No	No	Yes
Earthlink	Yes	No	Yes
Qwest	Yes	Yes	Yes
Bright House Networks	No	No	Yes

* Opt-out available

[64] Maria Baran, *Class Action Suit Award is Set Against DirecTV*, BELLEVILLE NEWS DEMOCRAT, July 17, 2008, A1.
[65] *District Cablevision Ltd. Partnership v. Bassin*, 828 A.2d 714, 717 (D.C. 2003), Bethany Broida, *Cable Cash*, *LEGAL TIMES*, Jan. 24, 2005, 4.

VI. Auto Dealerships

Although there are indications that auto dealers almost universally require arbitration clauses as a condition of sale, consumers are not likely to learn whether a particular dealer uses arbitration until they are filling out final paperwork to buy a car.

We queried 15 auto dealers in person or on the telephone. Five told us that they required arbitration, none said that they did not, and 10 were unwilling or unable to provide any information on the subject. We were able to obtain only two sales orders, one of which appeared to be missing a page. The lone complete sales contract that we obtained required arbitration.[66]

There are two key obstacles to determining whether dealerships impose arbitration clauses on their customers: Most dealers will not share contractual information until close to the actual point of sale, and most sales representatives do not know much about forced arbitration.

No employee we spoke to expressed familiarity with forced arbitration until we described it, at which point some indicated a vague understanding. Several sales representatives thought we were referring to non-binding arbitration provided in state lemon laws, which are intended to protect consumers.

We were told on several occasions that all dealerships use precisely the same language. In an e-mail discussions about arbitration clauses, one dealer wrote, "…all dealerships have the same legal paperwork because the state and there [sic] states attorneys [sic] wrote these docs to protect the customer where ever they went to buy a car in Md. So yes we have the same wording."[67] A Mazda dealer we visited provided a similar account.[68]

This is not entirely true. While state laws require certain information to be put in writing for the sale of an automobile in what is generally called a "bill of sale" or "sales order," the exact language in the forms is not mandated. For example, the two forms we received in whole or in part from Maryland dealers contained slightly varying language.[69]

In our quest to obtain forms, we first tried telephoning dealerships. Although the typical sales orders is just two-to-three pages long, only one dealer was willing to provide a sample document to us, and that document turned out to be incomplete. Representatives gave several different justifications for declining to provide the documents: they did not have access to the documents, the documents were customized to each purchase, the documents were numbered, or the documents were only shown to customers who visit the actual dealership.

[66] In-person conversation with Sport Chevrolet employee (June 4, 2009).
[67] E-mail from Herb Gordon Nissan employee (June 4, 2009).
[68] In-person conversation with Castle Mazda employee (June 4, 2009).
[69] Beltway Toyota Sales Order (on file with author), Sport Chevrolet Sales Order (on file with author).

Visits to dealerships yielded slightly better results than telephone or e-mail discussions. At two of four dealerships we visited, representatives readily handed us copies of what they believed was a sales order. (In one case, the dealer handed us a lease order in an apparent mistake that we did not realize until we returned to our office.) But two refused to do so, stating that they would only provide the documents further along in the sale process.[70]

In denying our request to see contractual terms, a sales representative for a Volkswagen dealership said the method of dispute resolution was immaterial because there would never be a dispute. He said the long history of the dealership ensured that we would have nothing to complain about.[71]

Despite our difficulty in determining whether these specific dealerships required arbitration, other observers have found that nearly all dealers include forced arbitration clauses in sales contracts, financing agreements, or both. In an article for *Mother Jones*, Stephanie Mencimer described her inability to find a dealership that did not use arbitration and quoted a dealer who e-mailed her, "I honestly don't think your [sic] going to find a dealership that will eliminate the arbitration clause."[72] In the end, Mencimer was unable to find a dealer that did not include forced arbitration. She purchased her car from a private seller.[73]

But despite finding a private seller, Mencimer was still unable to avoid arbitration. Each financing option she looked into required arbitration.[74] As Rosemary Shahan, founder of Consumers for Auto Reliability and Safety testified before Congress in 2008, even if a consumer finds a dealer or private seller that does not require forced arbitration, financing options almost always require forced arbitration.[75]

We inquired about forced arbitration to auto financing companies.[76] Only three would provide any information at all.[77] Of these, two said they required arbitration,[78] and the third left it up to the dealer to decide.[79]

Giving car buyers the option of taking dealerships to court is the only way to protect consumers from abusive practices that car dealers sometimes engage in. For

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[70] In-person conversation with Castle Mazda and Castle Ford employees (June 4, 2009).
[71] Phone conversation with auto dealership (June 2, 2009).
[72] Stephanie Mencimer, *The Quest for a Car, Sans Arbitration Clause*, MOTHER JONES, *available at* http://www.motherjones.com/politics/2007/12/quest-car-sans-arbitration-clause.
[73] *Id.*
[74] *Id.*
[75] *Hearing on the Arbitration Fairness Act of 2008 Before the Subcommittee on Commercial and Administrative Law of the House Committee on the Judiciary*, 110th Congress, 69 (2008) (testimony of Rosemary Shahan) [hereinafter "Shahan Testimony"].
[76] E-mails to media relations employees at GMAC, Toyota, Volkswagen, Ford, Chrysler Financial, Hyundai, and Nissan, (Aug. 24-26, 2009).
[77] E-mails from Chrysler Financial (Aug. 27, 2009), Ford Credit (Aug. 31, 2009) and Toyota (Aug. 25, 2009).
[78] E-mails from Chrysler Financial (Aug. 27, 2009) and Ford Credit (Aug. 31, 2009).
[79] E-mail from Toyota (Aug 25, 2009).

example, odometer fraud occurs approximately 450,000 times a year, costing consumers over $1 billion annually.[80] The Federal Odometer Act specifically allows for victims of odometer fraud to receive the greater of treble damages or $1,500.[81] Arbitrators, however, are not required to follow these guidelines in determining damages.[82]

Because such a high percentage of dealers were unable or unwilling to provide information on their arbitration policies, we did not include a table with this section.

[80] Shahan Testimony at 23.
[81] 49 U.S.C. § 32701 (2000).
[82] Shahan Testimony at 24.

VII. Brokerages

All ten of the brokerage companies we studied include arbitration clauses in their customer agreements. All are available online, as required by the National Association of Securities Dealers.[83]

The venue for resolving virtually all disputes between investors and brokers is the arbitration system of the Financial Industry Regulatory Authority (FINRA).[84] FINRA is a self-regulatory organization and "is responsible for the regulatory oversight of all securities firms that do business with the public."[85] While FINRA provides some protections that are not available under other arbitration firms' rules, critics – including those who have participated in the system – view it as biased against investors.[86]

Securities attorneys have claimed that the fairness of FINRA's arbitration system is compromised by its lack of transparency and its use of panelists who have close associations with the securities industry.[87] Critics also contend that the system is not the efficient, low-cost alternative to litigation it was intended to be.[88] William Francis Galvin, Secretary of the Commonwealth of Massachusetts, called it "an industry sponsored damage containment and control program masquerading as a juridical proceeding."[89]

[83] NASD Conduct Rule 3110(f) (Nat'l Ass'n Secs. Dealers, Inc. 2005), *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3734.
[84] Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 98 Va. L. Rev. 785, 802 (2009).
[85] John H. Walsh, *Institution-Based Financial Regulation: A Third Paradigm*, 49 HARV. INT'L L.J. 381, 383 n.17 (2008).
[86] Jill Gross & Barbara Black, *Report to the Securities Industry Conference on Arbitration, Perceptions of Fairness of Securities Arbitration: An Empirical Study* (Feb. 6, 2008), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1477&context=lawfaculty.
[87] Gretchen Morgenson, *Is This Game Already Over?*, N.Y. TIMES, June 18, 2006, § 3 (Sunday Business), at 1.
[88] *Id.*
[89] *A Review of the Securities Arbitration System Before the House Subcommittee on Capital Markets, Insurance, and Government Sponsored Enterprises, House Committee on Financial Services*, 109th Cong. 3 (2005) (statement of William Francis Galvin, Secretary of the Commonwealth of Massachusetts).

Figure VII: Use of Forced Arbitration by Brokerages

Provider	Does provider include arbitration terms in contract?	Does contract ban class actions?	Does provider share contract with prospective customers?
Charles Schwab	Yes	Yes	Yes
Edward Jones	Yes	Yes	Yes
Raymond James	Yes	Yes	Yes
Wells Fargo Advisers	Yes	Yes	Yes
Morgan Stanley Smith Barney	Yes	Yes	Yes
Prudential Financial	Yes	Yes	Yes
Merrill Lynch	Yes	Yes	Yes
Fidelity Investments	Yes	Yes	Yes
LPL Financial Services	Yes	Yes	Yes
Ameriprise	Yes	Yes	Yes

VIII. Home Builders

In May, Public Citizen published a report ("Home Court Advantage: How the Building Industry Uses Forced Arbitration to Evade Accountability"), which demonstrated the near ubiquitous use of forced arbitration by major home builders. Of the nation's 10 largest homebuilders, at least nine include binding mandatory arbitration clauses in purchase contracts, warranties, or both. Meritage Homes, which this year broke into *Builder* magazine's top 10, did not respond to several inquiries from Public Citizen. [See Figure 9]

Figure IX: Use of Forced Arbitration by Home Builders

Builder	Does builder's contract terms require arbitration?	Does warranty require arbitration?
D.R. Horton[90]	Unknown	Yes
Pulte Homes[91]	Unknown	Yes
Centex Corp.[92]	Yes	Yes
Lennar Corp.[93]	Unknown	Yes
KB Home[94]	Yes*	No
Hovnanian Enterprises[95]	Unknown	Yes
NVR (Ryan)[96]	Unknown	Yes
The Ryland Group[97]	No (optional)	Yes
Beazer Homes[98]	Unknown	Yes**
Meritage Homes Corp.[99]	Unknown	Unknown

*Arbitration is mandatory for non-warranty disputes; optional for disputes over warranted matters, as agreed to by company in consent decree filed with the Federal Trade Commission.

** Certain warranties issued in certain jurisdictions and for certain types of loans do not include mandatory binding arbitration.

[90] D.R. Horton "Performance Standards of Material and Workmanship." Also, Residential Warranty Company LLC Limited Warranty, *available at*, http://www05.drhorton.com/website/denver/Warranty/10YearWarranty.pdf.
[91] Pulte Homes Home Protection Plan, at 9 (on file with author).
[92] Centex Homes, New Home Sale Agreement (on file with author).
[93] Lennar Customer Care Department, Warranty Request, *available at* http://www.northgatehighlands.org/files.
[94] KB Home Warranty explanation of arbitration clause on KB Web site, *available at* http://www.kbhome.com/Page~PageID~325.aspx#Warranty4 and KB Home purchase agreement (on file with author).
[95] K Hovnanian Homes Web page for The Hamptons at Woodmore (Prince George's County, Md.), *available at* http://www.khov.com/Home/MD/WO/IncludedInYourHome.htm. And e-mail from K Hovnanian spokesman Douglas Fenichel, March 24, 2009 (on file with author).
[96] Ryan Homeowners Manual, at 92.
[97] E-mail from Ryland Senior Vice President Eric Elder, March 25, 2009 (on file with author).
[98] E-mail from Beazer Vice President, Investor Relations & Corporate Communications Leslie H. Kratcoski, March 25, 2009 (on file with author).
[99] Public Citizen placed several calls to Meritage and formally requested information on the firms' policy regarding binding mandatory arbitration, but did not receive a response.