

Consumer Arbitration Agreements (2006 Supplement)

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- Toppings v. Meritech Mortgage Services, Inc.*—Reply Brief
- Wells v. Chevy Chase Bank*—Arbitration Clause Added As a “Bill Stuffer”; Unconscionability Based on “Loser Pays Rule,” Excessive Arbitration Fees, and Denial of Class Action Remedy
- Wells v. Chevy Chase Bank*—Reply Brief

Link to additional pleadings from Trial Lawyers for Public Justice (www.tlpj.org)

Information About American Arbitration Association (AAA), National Arbitration Forum (NAF)

American Arbitration Association (AAA)

Summary of Information on AAA (Appendix I.2)

Transcript of a Hearing in the U.S. District Court for the Southern District of New York, Relating to a Motion to Compel AAA to Provide Certain Information (Nov. 18, 2004)

AAA Federal Tax Return Form 990 for the Year 2000

AAA's Documents in Its AT & T File (AAA000001 to AAA000115):

Correspondence between AT & T and AAA, and notes by AAA employees relating to their relationship with AT & T, including AT & T hiring AAA to help set up its arbitration program

Affidavits of AAA Officers

Affidavits Indicating Hours and Hourly Rates in AAA Arbitrations (Feb. 27, 2004)

Affidavit: AAA Conflict of Interest (Sept.–Oct., 2002)

Affidavit of Christine Newhall, Vice President, Case Administration of the AAA, on April 18, 2001 (AAA 000309-311): Arbitrator Charges in Indiana and Fee Waivers

Affidavit of Frank Zotto, Vice President, Case Administration of the AAA, on June 25, 2001 (AAA 000452-454): Fees and Waivers

Affidavit of Frank Zotto, Vice President, Case Administration of the AAA, on June 28, 2001 (AAA 000387-389): Application of Consumer Rules, Denver Arbitrator Charges

Affidavit of Frank Zotto, Vice President, Case Administration of the AAA, on July 9, 2001 (AAA 000119-122): Application of Consumer Rules, Chicago Arbitrator Charges

Affidavit of Chris Heelan, Vice President of Finance of the AAA, on August 1, 2001 (AAA 000116-118): Waivers Under Consumer and Commercial Rules

Affidavit of Frank Zotto, Vice President, Case Administration of the AAA, on August 15, 2001 (AAA 000188-189): Fees, Arbitrator Costs in Ohio, and Waivers

Affidavit of Chris Heelan, Vice President of Finance of the AAA, on August 28, 2001 (AAA 000218-219): Fee Waivers

Affidavit of Chris Heelan, Vice President of Finance of the AAA, on September 18, 2001 (AAA 000220-222): Fee Waivers

Affidavit of Frank Zotto, Vice President, Case Administration of the AAA, on September 18, 2001 (AAA 000223-224): Fee Waivers

Affidavit of Frank Zotto, Vice President, Case Administration of the AAA, on September 4, 2001 (AAA 000225-228): Application of Consumer Rules, Chicago Arbitrator Charges, Fee Waivers

Affidavit of Frank Zotto, Vice President, Case Administration of the AAA, on October 4, 2001 (AAA 000478-480): Filing Fees and Arbitrator Charges for Virginia, North Carolina, Maryland, and D.C.

Affidavit of Chris Heelan, Vice President of Finance of the AAA, on October 5, 2001 (AAA 000517-519): Fee Waivers

Depositions of AAA Officers

Deposition of Gerald Strathmann (Aug. 18, 2004)—Applicability of AAA Rules to *Scott v. Cingular Wireless Arbitration*

Deposition of Molly Bargaquest on December 16, 2003

Deposition of Frank Zotto, Vice President, Case Administration of the AAA, on October 4, 2001: Fee Waivers

new material

Deposition of Chris Heelan, Vice President of Finance of the AAA, on October 4, 2001: Fee Waivers

Deposition of Christine Newhall, Vice President, Case Administration of the AAA, on October 4, 2001: Information Available on AAA's Computers and in Its Files to Track Cases

new material

Letters from AAA Notifying Household Finance and Counsel of Arbitration Rejection

National Arbitration Forum (NAF)

McQuillan Brief and Related NAF Exhibits

McQuillan v. Check 'N' Go of North Carolina, Inc., Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration, North Carolina Superior Court (Appendix H.1)

Affidavit of Richard Fisher, Dated August 6, 2005, Indicating NAF's Failure to Appear for a Deposition (McQuillan Ex. 14)

Deposition of Edward Anderson Taken in *Toppings* Concerning the Workings of NAF (McQuillan Ex. 15)

Deposition of Edward Anderson taken in *Hubbert v. Dell* Concerning the Workings of NAF (McQuillan Ex. 16)

Affidavit of Paul Bland Dated August 8, 2005, with Exhibits, Concerning NAF Marketing to Corporations and Other Aspects of NAF (McQuillan Ex. 17)

Letter from Brown to Banks, January 14, 1999, Concerning NAF Marketing to Corporations (McQuillan Ex. 18)

Letter from Haydock to Kaplinsky, Concerning NAF Marketing to Corporations (McQuillan Ex. 19)

Affidavit of Geist, Concerning NAF Marketing to Corporations (McQuillan Ex. 20)

NAF Advertisement Labeled "Professionals and the National Arbitration Forum" (McQuillan Ex. 21)

NAF News Release Listing "Lenders Adopting Forum Agreements" (McQuillan Ex. 22)

Duhl Affidavit Discussing NAF Bias (McQuillan Ex. 25)

Pomponio Affidavit Discussing NAF Bias (McQuillan Ex. 26)

Excerpts of Clinton Walker Deposition Discussing NAF Marketing to Corporations (McQuillan Ex. 27)

California Superior Court Decision in *Klussman v. Cross-Country Bank*, Discussing NAF's Lack of Compliance with California Law Requiring NAF to Make Certain Disclosures (McQuillan Ex. 29)

Baxter and Raymond Affidavit Discussing Questionable NAF Procedures (McQuillan Ex. 30)

Curtis Affidavit Discussing Questionable NAF Procedures (McQuillan Ex. 31)

Perry Affidavit Discussing Questionable NAF Procedures (McQuillan Ex. 32)

Maese Affidavit Discussing Questionable NAF Procedures (McQuillan Ex. 33)

Faulkner Affidavit Discussing Questionable NAF Procedures (McQuillan Ex. 34)

DeSalvo Affidavit Discussing Questionable NAF Procedures (McQuillan Ex. 36)

Other *McQuillan* Exhibits (*Consumer Impact* section)

Affidavits Indicating Hours and Hourly Rates in AAA Arbitrations (Feb. 27, 2004)

Deposition of Edward Anderson (Sept. 29, 2003)

Complaint alleging NAF violates California Disclosure Law

- NAF solicitation listing “Lenders Adopting Forum Agreements” and “Information Resources,” a list of lenders and lender counsel considered by NAF to be its clients
- A letter from Curtis Brown, Director of Development of the NAF, encouraging Richard Shephard, General Counsel of Saxon Mortgage (a subsidiary of Meritech), to add arbitration language to Saxon’s contracts
- A letter from Leif Stennes of the NAF to Richard Shephard, General Counsel of Saxon Mortgage, encouraging him to use the NAF as his arbitration provider
- A letter from Ed Anderson, Managing Director of the NAF, to Richard Shephard, General Counsel of Saxon Mortgage, chastising him for invoking the rules of “the other guys” (referring to the American Arbitration Association) in his arbitration agreement and encouraging him to redraft the agreement
- The NAF Fee Schedule (in effect on March 1, 1996)
- The NAF “Starter Kit”—This pamphlet is sent to companies by the NAF, which encourages them to “plan now [and ensure] no lawsuits, no exorbitant legal fees, no court delays, no irrational jury verdicts” by including “a simple clause—an arbitration clause—in every contract.” The kit includes sample arbitration clauses for standard business, employment, and credit contracts, as well as consumer credit contracts.
- An NAF marketing document entitled “All Arbitration is Not the Same,” indicating the differences between the NAF and the American Arbitration Association (AAA)—for instance, in the NAF “consolidation [is] permitted only with agreement of all parties” whereas the rules in other forums are silent as to consolidation, and in the NAF the failure of a party to respond to a claim results in admission of the claim whereas in other forums there is a mandatory hearing even if the other party does not respond
- An NAF marketing document that begins by describing the NAF as “The Alternative to the Million Dollar Lawsuit”
- A letter from Curtis Brown, Vice President and General Counsel of the NAF, to Robert Banks, encouraging him to use arbitration because it eliminates class actions and “will make a positive impact on the bottom line”
- A letter from Roger Haydock, Director of Arbitration of the NAF, to Alan Kaplinsky, encouraging him to use arbitration to resolve Y2K class actions and characterizing the plaintiff’s bar as the “class action” bar
- NAF Advertisement in *Corporate Counsel* stating, “Arbitration can save up to 66% of your collection costs”
- Letters from Charles DiSalvo, Martin Glasser, and the Hon. Thomas McHugh, indicating that they have become aware that they are listed by the NAF in a federal court filing as neutral arbitrators for NAF but that NAF’s representations to the court are not true—that in fact they have never agreed to arbitrate for the NAF
- Answers to interrogatories from First U.S.A. Bank in the case, *Bownes v. First USA Bank*, in the Circuit Court of Montgomery County, Ala., indicating in a chart on the final page that First USA prevailed in 98% of almost 20,000 bank/cardmember arbitrations that had proceeded to a final resolution
- NAF marketing document summarizing the NAF Code of Procedure and stating benefits of the NAF such as limited awards, cost control, “little or no discovery,” confidentiality, and loser pays provisions requiring consumers to pay the corporation’s attorney fees

- Interview of Ed Anderson in *Metropolitan Corporate Counsel*, including observations by Anderson that arbitration can reduce the possibility of punitive damages and extensive discovery; also that arbitration agreements can include “loser pays” provisions
- July 16, 2001, deposition of Ed Anderson, Managing Director of the NAF, in *Toppings v. Meritech*—deposition includes information about Anderson’s previous involvement as a shareholder of Equilaw, a wholly owned subsidiary of NAF, at the same time he was counsel for ITT Financial, a company that used NAF arbitration and also discusses arbitrator selection, arbitration fees, and the NAF Code of Procedure
- Letter dated October 20, 1997, from Ed Anderson, Managing Director of the NAF, to an undisclosed recipient, urging this person to put arbitration agreements in his/her contracts and stating that “there is no reason for your clients to be exposed to the costs and risks of the jury system”
- Article by Alan Kaplinsky entitled “Excuse Me, but Who’s the Predator?” discussing ways in which “banks can use arbitration clauses as a defense”—Kaplinsky is listed by the NAF as one of its “Information Resources” on a document it sends to corporate counsel (listed above)
- A legal memorandum from NAF counsel to undisclosed recipients, regarding “Arbitration and Class Actions in Financing,” concluding that “Forum Arbitrations may not be consolidated into class actions unless all parties consent”
- Professor Michael Giest’s study of NAF arbitrator bias in the Internet Corporation for Assigned Names and Numbers (ICANN) process, entitled “Fair.com? An Examination of the Allegations of Systematic Unfairness in the ICANN UDRP” (UDRP is the Uniform Domain Name Dispute Resolution Policy)—study finds that complainants win in arbitration before the NAF nearly 83% of the time, due primarily to the fact that “despite claims of impartial random case allocation as well as a large roster of 131 panelists, the majority of NAF single panel cases are actually assigned to little more than a handful of panelists”; the study also mentions the NAF’s marketing strategy of sending out a newsletter highlighting cases in which complainants have won in arbitration (see DomainNews articles referenced below)
- Articles from DomainNews, the news service of the National Arbitration Forum, highlighting cases in which a high-profile complainant won a domain name dispute in arbitration—examples include “Master of Domains: metallica.org,” “Rose Bowl Kicks out Squatter,” and “Johnny Unitas Wins Another One”
- Letter brief from TLPJ to the California Supreme Court in *Mercuro v. Superior Court*, opposing NAF’s request for depublication of that case on the grounds that the case involves an issue of continuing public interest and that the court in *Mercuro* correctly characterized the NAF as being subject to repeat player bias
- Amicus brief filed by NAF in the U.S. District Court (N.D. Tex.) in *Marsh v. First USA Bank*—the NAF brief is filed on behalf of neither side but makes the same arguments as the defendant in that case: namely, that “arbitration is pro-consumer,” that arbitration is important in the modern economy, that arbitration provisions should be enforced, and that the NAF is not a biased forum
- June 1, 1994, deposition of Ed Anderson in *ITT Commercial Finance v. Wangerin*, demonstrating the connection between the NAF and Equilaw, Inc., the decision of ITT (where Anderson was employed) to use Equilaw for arbitration, and Mr. Anderson’s involvement as a shareholder of Equilaw

Declaration Concerning Debtor's Schedules filed in U.S. Bankruptcy Court in 1994 by Ed Anderson on behalf of Equilaw and indicating that at that time Mr. Anderson was director, officer, and major shareholder of Equilaw

November 27, 2002, deposition of Ed Anderson, Managing Director of the NAF, in *Ebarle v. Household Retail Services*—deposition includes discussion of NAF's solicitations comparing NAF and AAA, NAF's arbitrator selection process, the application of NAF rules where they conflict with the language in the parties' contract, and NAF's relationship with Household

Other Material on Impact of Arbitration on Consumers

McQuillan Brief and Related Exhibits

McQuillan v. Check 'N' Go of North Carolina, Inc., Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration, North Carolina Superior Court (Appendix H.1)

Compilation of Payday Lending Contracts Showing Consumer Lack of Choice (McQuillan Ex. 7)

Weir Affidavit of August 5, 2005, Detailing the Readability of the Arbitration Clause (McQuillan Ex. 9)

Rossman Affidavit of July 15, 2005, Indicating the Impact of the Arbitration Clause Limiting Class Actions (McQuillan Ex. 10)

Series of Affidavits Indicating That Arbitration Clause and Requirement for Individual Appearance Before an Arbitrator Makes Litigation Impractical (McQuillan Exs. 11a–11i)

Series of Affidavits Indicating Impracticality for Legal Aid Offices to Handle the Consumer's Dispute (McQuillan Exs. 12a–12d)

Illustrative List of Arbitration Court Decisions (McQuillan Ex. 38)

Other *McQuillan* Exhibits (NAF section)

Letter to Mr. Phil Goldsmith from opposing counsel representing Beneficial, indicating that Beneficial will opt for AAA arbitration and suggesting a resolution of the dispute, which Beneficial counsel indicates would be in the consumer's best interest because "in my experience . . . arbitration through the AAA can be quite expensive, especially for your client"

Transcript of November 7, 2002, H & R Block conference call discussing judicial ruling's effect on H & R Block, indicating that, for years after arbitration agreement went into effect, exposure to liability would be largely eliminated

Letter: Law Firm Solicits Car Dealers for Arbitration Services

Unreported Decisions

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Cheatham v. Air System Engineering Co., Clearinghouse No. 51,969 (Cal. Super. Ct. Apr. 30, 1997)

Commonwealth v. Metro Chrysler-Plymouth Jeep-Eagle, Inc., Clearinghouse No. 52,028 (Pa. Commw. Ct. 1997)

Discover v. Shea, Clearinghouse No. 53,553 (N.J. Super. Ct. Law Div. Oct. 26, 2001)

Gutierrez v. Auto West, No 317755 (Cal Superior Ct, July 21, 2005)

Harris v. Montgomery Catalog Sales, Clearinghouse No. 52,505 (Ala. Cir. Ct. May 21, 1999), *aff'd sub nom. Alabama Catalog Sales v. Harris*, 794 So. 2d 312 (Ala. 2000)

Hong v. First Alliance Mortgage Co., Clearinghouse No. 52,122 (Cal. Super. Ct. Dec. 3, 1997)

Horenstein v. Mortgage Market, (D. Ore., Jan. 11, 1999)

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Mirza v. National Standard Mortgage Corp., Clearinghouse No. 52,514 (N.Y. City Ct. Apr. 28, 1999)

Nefores v. Branddirect Marketing, Inc., Clearinghouse No. 53,552 (Ohio C.P. Richland County Jan. 28, 2002)

Neighbors v. Lynn Hickey Dodge, Clearinghouse No. 51,616B (Okla. Ct. App. Aug. 6, 1996) Op. La. Att’y Gen. No. 98-380, Clearinghouse No. 53,554, at 2 (Mar. 28, 1999)

Williams v. Showmethemoney Check Cashers, Clearinghouse No. 52,500 (Ark. Cir. Ct. Aug. 26, 1999), *aff’d on related grounds*, 342 Ark. 112, 27 S.W.3d 361 (Ark. 2000)

Woods v. Harris Financial Recovery, No C04-1836C (W.D. Wash. Jan. 24, 2005)

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