NO. 99–1235

In The

Supreme Court of the United States

GREEN TREE FINANCIAL CORP.-ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF CONSUMERS UNION OF U.S. IN SUPPORT OF THE RESPONDENT

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BRIEF *AMICUS CURIAE* OF CONSUMERS UNION OF U.S. IN SUPPORT OF THE RESPONDENT

This *amicus curiae* brief is submitted in support of respondent. By letters filed with the Clerk of the Court, Petitioners and Respondent have consented to the filing of this brief.[1]

[1] Pursuant to Supreme Court Rule 37.6, Consumers Union (CU) states that this brief was prepared in its entirety by CU. No monetary contribution toward the preparation or submission of this brief was made by any person other than CU.

STATEMENT OF INTEREST OF AMICUS CURIAE

Consumers Union, publisher of *Consumer Reports* magazine, is a nonprofit, independent testing and consumer protection organization serving only consumers. Since 1936, CU has been a comprehensive source for unbiased reporting about goods, services, health, personal finance and other consumer concerns. CU engages regularly in consumer advocacy before the executive, judicial, and legislative branches of government. CU is deeply concerned about the proliferation of pre-dispute mandatory binding arbitration clauses in consumer contracts, and the potential of these clauses to deprive consumers of common law and statutory rights and protections.

SUMMARY OF ARGUMENT

The matter before this Court is whether the Eleventh Circuit properly held Green Tree's arbitration agreement to be unenforceable because its terms undermined Ms. Randolph's ability to protect her substantive rights provided by statute. This Court has reaffirmed time and again the strong federal policy favoring arbitration of disputes under the Federal Arbitration Act. In cases involving arbitration of statutory rights, this Court has affirmed an equally strong policy that parties do not forego their substantive rights under the Federal Arbitration Act. The Eleventh Circuit's holding in the present case is entirely consistent with this Court's decisions favoring arbitration, but mandating at the same time that the arbitration process not act as a barrier to the vindication of statutory rights.

Pre-dispute mandatory binding arbitration clauses are increasingly found in preprinted consumer contracts. This brief discusses the distinctions between adjudication and arbitration, highlighting the importance for consumers of making a knowing and informed choice to arbitrate. The public policy favoring arbitration does not require this Court to permit the imposition of unilateral pre-dispute mandatory binding arbitration on all customers, the trend in many consumer contracts. Consumers Union favors dispute resolution as an alternative to litigation when

it is mutually agreed on by the parties. We do not believe it is possible, however, for a consumer to make a knowing, intelligent, pre-dispute waiver.

The mandatory pre-dispute binding arbitration clauses that are proliferating in consumer contracts are buried all too frequently in fine print and written in impenetrable legalese. As a result, consumers may be unaware that they have waived the right to go to court. When presented with arbitration as an alternative to litigation, consumers will frequently find that the steep costs of arbitration or the inconvenience of traveling to an arbitration effectively bars them from seeking a remedy.

In the absence of a truly voluntary waiver of the right to go to court, consumers should be able to choose litigation for violations of consumer protection statutes. Consumers should have access to remedies expressly provided by statute, including punitive damages, and where appropriate, an injunction, or be able to join a class action. Consumer protection statutes contemplate those remedies, and in fostering the "private attorney general concept," they recognize the importance of effective private enforcement, all of which is undermined by mandatory arbitration.

The burden of mandatory arbitration clauses is likely to fall most heavily on consumers who are the least sophisticated, the poorest, and the least educated. This group has benefited, perhaps more than others, from judicial decisions enforcing statutory rights. Those decisions have also served to guide the public about permissible and impermissible practices. Because arbitration decisions are private, they cannot serve this important function.

Pre-dispute mandatory binding arbitration clauses also create the potential of arbitrator bias based on repeat business. When a financial or other institution routinely uses preprinted forms containing arbitration clauses and regularly employs arbitrators to decide disputes with consumers, an individual consumer may be disadvantaged because she or he is not repeatedly in this situation. We are concerned that the presence of

arbitrator bias in some instances may be harming consumer interests and urge judicial scrutiny of this issue.

ARGUMENT

This Court must determine the appropriate boundaries on Petitioner Green Tree Financial Corporation's ("Green Tree") power to require pre-dispute mandatory binding arbitration in its consumer contracts. The clause in the instant case eliminated respondent's right to a trial for violations of the Truth In Lending Act ("TILA"), 15 U.S.C. §1601*et seq*., and the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691-1691f.

Consumers Union[2] files this amicus brief in support of Respondent.

I. The Eleventh Circuit Properly Found The Arbitration Clause Unenforceable Because Of Its Silence On Costs.

The Eleventh Circuit Court of Appeals[3] properly found the mandatory arbitration[4] clause in Ms. Randolph's contract

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[2] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education, and counsel about goods, services, health and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and services, and from noncommercial contributions, grants, and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's publications and services carry no outside advertising and receive no commercial support.

[3] *Randolph v. Green Tree Financial Corp*, 178 F.3d 1149 (11th Cir. 1999).

unenforceable. This Court has articulated a strong federal policy favoring arbitration. "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements...as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration..." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24, 25 (1983).* "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions. *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc*., 473 U.S. 614 (1985)).

This Court has reinforced the notion that arbitration clauses are to be enforced, but that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute. It only submits their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 637.

In reversing the district court's decision in the instant case, the Eleventh Circuit noted that "[W]hile the arbitral forum usually serves just such an alternative, some barriers of access to that forum may render an arbitration clause unenforceable."[5] In reaching its decision, the Eleventh Circuit noted that three federal Courts of Appeal have concluded that substantial, undisclosed fees arising out of arbitration contracts are unconscionable. Considering the practical effects of such fees, they determined that if fees discourage or prevent a party from vindicating statutory rights, the agreement should not be enforced.

In *Cole v. Burns International Security Servs*., 105 F.3d 1465, 1484 (D.C. Cir. 1997), the D.C. Circuit held that an employee could not be required to pay an arbitrator's fee–which the court estimated to range from $500 to $1000 or more, daily–to

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[4] Unless otherwise specified, the term "mandatory arbitration" in this brief means pre-dispute mandatory binding arbitration.

[5] *Id*. at 1159.

pursue his discrimination claims because the fees would discourage such an action and prevent him from vindicating his statutory rights.

The Eleventh Circuit in *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054 (1998), refused to enforce an arbitration clause because of a "troubling infirmity"–the arbitration clause was silent on the issue of costs. The Court found the clause unenforceable because it imposed a $2000.00 filing fee and potential responsibility for a portion of the arbitrator's fees, holding, "Because Avnet makes no promises to pay for an arbitrator, employees may be liable for at least half the hefty cost of an arbitration and must, according to the American Arbitration rules the clause explicitly cites, pay steep filing fees (in this case $2000). We consider costs of this magnitude a legitimate basis for a conclusion that the clause does not comport with statutory policy." *Paladino* 134 F.3d at 1059, 1062 (1998).

The 10th Circuit similarly refused to enforce an arbitration agreement in which a fee-splitting provision substantially limited an employee's use of the arbitral forum. *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3rd 1230 (10th Cir. 1999).

This Court has reaffirmed time and again the strong federal policy favoring arbitration of disputes under the Federal Arbitration Act. In cases involving arbitration of statutory rights, this Court has affirmed an equally strong policy that parties do not forego their substantive rights under the statute. The decisions in the three Courts of Appeal cases discussed above are entirely consistent with this Court's policy. All concluded that non-disclosure of a crucial term, specifically allocation of costs and fees in arbitration, rendered the arbitration clause unenforceable because excessive costs would prevent vindication of statutory rights.

Other courts have similarly found that substantial fees create a significant, if not impossible, roadblock that prevents consumers and workers from pursuing valid claims, and therefore

are unconscionable. *Pitchford v. Oakwood Mobile Homes, Inc.*, Case No. 5:99CV00053, 1999 U.S. Dist. LEXIS 20596. (Stating, "...the risk of incurring substantial expense in arbitration is a functional deterrent to any consumer like plaintiff, who has diminished financial capabilities from the outset."); *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 255-56 (S.D.N.Y. 1998) (stating "arbitration agreement cannot impose financial burdens on plaintiff access to the arbitral forum, 'including steep filing fees and arbitrators' fees); *Patterson v. ITT Consumer Financial Corp.*, 14 Cal. App.4th 1659, 18 Cal. Rptr. 2d 563, 566-67 (Cal. Ct. App. 1993) (refusing to compel arbitration of consumer claims where claimants were required to pay fees on grounds of unconscionability), *review denied*, 1993 Cal. LEXIS 4322 (Aug. 12, 1993), *cert. denied*, 510 U.S. 1176 (1994).

As the number of mandatory arbitration clauses increases, more consumers may face the problem of high arbitration costs. Ray Crawford, featured in a recent *Consumer Reports*[6] article, found himself victim to an arbitration clause he never knew he had signed. When the two halves of his new manufactured home didn't match up, and he was unable to resolve the problem with the manufacturer, he sought legal action. Crawford was dismayed to learn that a mandatory arbitration clause was buried in the fine print of the purchase agreement he had signed. Instead of paying a simple $65 fee to file a claim at his local courthouse, he would have to pay $2,000 to initiate an arbitration process and make a six-hour round trip to the arbitrator's office. "Before I brought this home," Crawford said, "I never heard the word 'arbitration'–didn't have a clue what it meant." [7]

The same article advises consumers that "binding arbitration is touted as a low-cost way to get justice but it can end up costlier than taking a case to court. Consumers may have to pay for the arbitrator's time, which can run $300 or more per hour–

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[6] *The Arbitration Trap*, CONSUMER REPORTS, Aug. 1999, at 64.

[7] *Id.*

effectively ruling out arbitration's usefulness in cases involving small claims. Even when the arbitrator decides in favor of the consumer, awards are often limited to simple restitution for the amount of the loss."[8]

II. Arbitration Clauses Are Proliferating In Consumer Contracts

The very barriers to vindication of statutory rights cited in *Cole, Shankle, and Paladino* created by the costs of arbitration are the same barriers respondent in this case might have faced. Indeed, the Eleventh Circuit here based its decision on Petitioner Green Tree's fatally flawed arbitration clause that failed to mention how costs and fees would be allocated.[9] In fact, many arbitration contracts used by financial institutions are silent as to who pays which costs.[10]

As mandatory arbitration clauses proliferate,[11] the mere act of obtaining a loan, a good or service will bind consumers to

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[8] *Id*. at 64, 65.

[9] "This clause says nothing about the payment of filing fees or the apportionment of the costs of arbitration." *Randolph*, 178 F.3d at 1158.

[10] Mark Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267, 279-280 (1995).

[11] Caroline E. Mayer, *Hidden in Fine Print: 'You Can't Sue Us'*, WASHINGTON POST, May 22, 1999, at A1. (First USA Bank, the largest issuer of Visa cards, with 58 million customers, added mandatory arbitration clauses in its customer contracts in 1997). *See also* Joan Lowy, *Consumers are Losing the Right to Sue Without Knowing it*, THE PLAIN DEALER, May 14, 2000, at 5L. (MBNA America, a credit card issuer with 40 million accounts, inserted a pre-dispute arbitration clause into all of its consumer agreements this year. American Express, Discover, Sears, Saks Fifth Avenue, Hooters restaurant chain, Best Buy, Gateway computers, and H&R Block have done so, as well. Mandatory arbitration clauses are turning up in residential leases, HMO contracts,

arbitrate all future disputes with the party drafting the agreement. Such a result stands on its head the notion of arbitration as a voluntary act.[12] Mandatory arbitration could soon become an involuntary and *exclusive* method of dispute resolution for potentially all consumer contract disputes.[13] With businesses that are subject to far less regulation than the banking or securities industries including mandatory arbitration clauses in their contracts, car dealers or mobile home dealers, for example, greater numbers of consumers will find themselves confronting arbitration as their only option in a dispute.[14] The widespread use of these clauses in consumer contracts represents a major change in market activity that, without adequate disclosure or an opportunity to take advantage of market alternatives, can deny consumers substantive legal rights. This shift toward arbitration should involve public debate and discussion, rather than be imposed on consumers through the unilateral actions of large and potentially monopolistic entities.

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home sales, computer warranties, and services from pest control to security brokerages).

[12] Arbitration has been defined as: "the *voluntary* submission of a dispute to an impartial person or persons for final and binding determination." American Arbitration Association, COMMERCIAL ARBITRATION RULES (1996) (emphasis added).

[13] Placing mandatory arbitration clauses in consumer contracts is a trend that is likely to continue, leaving consumers with little choice but to accept arbitration or stop doing business with financial institutions altogether. The trend is especially problematic in rural or low income areas where choices between financial institutions are often more limited. *See* Budnitz, at 267, 330.

[14] *Id*. at 320.

A. Arbitration Clauses are Often Concealed in Fine Print So That Consumers Are Not Aware They Have Waived Their Right to Go to Court.

Consumers like Ray Crawford often learn about the costs of arbitration only after discovering they have signed an arbitration clause buried in fine print in a legal document, and that in so doing, they have surrendered their right to go to court. A recent article in the *Washington Post* noted the stealth quality of pre-dispute arbitration clauses. "Last month's notice from American Express seemed routine, even innocuous–the typical fine print that's usually stuffed in the same envelope with the monthly bill and often thrown away. But card holders who read the 'F.Y.I.' update closely would have discovered that simply by using their card after June 1, they give up their right to sue the company."[15] Another newspaper reported recently, "...MBNA Corp. sent a dense notice in small type to its 40 million credit card customers informing them that they were giving up their right to go to court in favor of arbitration unless customers responded in writing within the next three weeks."[16]

These concerns are further reinforced by the reality that banks and other commercial entities resort to arbitration in order to reduce their liability exposure, as well as litigation costs.[17] A RAND study found that binding arbitration limited banks' exposure to punitive damages and unpredictable juries.[18]

> "Punitive damages and large verdicts serve both to punish . . . egregious behavior and to deter others from behaving in a similar fashion. To the degree

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[15] *See* Mayer, supra at A1 quoting Mark Budnitz.

[16] *See* Lowy, supra at 5L.

[17] Erik Moller, et.al, RAND, *Private Dispute Resolution in the Banking Industry*, 32 (1993) ("RAND study").

[18] *Id.*

> ADR eliminates these sanctions, justice and deterrence may not be well served.…Courts not only resolve disputes but also establish, reinforce and *revise* standards of conduct through their written opinions.[19] No private ADR mechanism can serve this function. And if whole categories of cases are removed from public scrutiny, how appropriate changes in the common law and statutory interpretation might be accomplished becomes a serious question."[20]

As one commentator noted, "There's no question that arbitration is an excellent, wonder dispute-resolution device." But if it's so good for consumers, then why don't companies make such provisions "very clear and explain everything to consumers, and not try to hide the terms in bill stuffers or a pile of documents."[21]

B. Arbitration Clauses are Contained in Form Contracts or Contracts of Adhesion.

The problem with reconciling fundamental contract principles with the reality of standard form contracts or contracts of adhesion[22] has been well-stated by Professor David Slawson,

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[19] *See* discussion, *infra, pp. 26-27* on impact of non-public decisions in arbitration of statutory claims.

[20] *See* Moller at 32.

[21] *See* Mayer, supra at A1.

[22] Contracts of adhesion have been defined as "a standardized contract form offered to consumers of goods and services on essentially a "take it or leave it" basis without affording the consumer a realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract." BLACK'S LAW DICTIONARY 318 (7th ed. 1999). See also MERRIAM-WEBSTER DICTIONARY OF LAW ("a contract that is not negotiated by the parties and that is usually embodied in a standardized form prepared by the dominant party.") *See also Cubic Corp. v. Marty,* 185 C.A.3d 438, 229 Cal.Rptr.

the Torrey H. Webb Professor of Law at the University of Southern California and a long-time authority on form contracts:

> "Every prominent authority on contract law, from the treatises of Williston and Corbin to the leading cases of [California], sets forth principles from which the conclusion follows that a written instrument is a contract only if it is the parties' mutual manifestation of agreement and only if it means what the parties should reasonably have expected it to mean. The standard form in the typical consumer transaction today meets neither of these requirements. It cannot possibly be the consumer's manifestation of agreement unless the consumer is given a reasonable opportunity to read it understandingly before he chooses to buy. In fact, this opportunity is rarely given, and under the circumstances in which mass contracting occurs, it rarely could be, because normally neither the mass contractor nor the consumer is willing to spend the time."[23]

Professor Slawson criticized "[a]ll of us—judges, lawyers and professors alike" for being "mesmerized by printed forms" and treating them as the equivalent of freely-bargained for contracts, when in fact they are not.[24] Slawson has long urged that

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828, 833 (Cal. Ct. App. 1986); *Standard Oil Co. of Calif. v. Perkins*, 347 F.2d 379, 383 (9th Cir. 1965) (a distinctive feature of an adhesion contract is that weaker party has no realistic choice as to its terms).

[23] W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1, 11-12 (1974).

[24] *Id*. at 4; S*ee also* Arthur A. Leff, *Contract as a Thing*, 19 AM. U. L. REV. 131, 142 (1970).

the writing does not control, but instead "the reasonable expectations [of the parties] *are* the contract."[25]

Classical legal theory viewed form contracts no differently than individually negotiated contracts, and enforced them according to their terms, no matter how harsh or unjust. *See, e.g., Morstad v. Atchinson Topeka and Santa Fe Ry.* (N. M. 1918) 170 P.2d 886, 889 (enforcing waiver of employer's liability signed by injured worker "in awful pain" on way to hospital while not wearing needed glasses). Under the classical theory, courts created a conclusive presumption that the signing party understood the terms.[26] This result was based on the "duty to read" doctrine, which also developed out of the paradigm of individually negotiated contracts.[27] Professor Meyerson noted, however, that the classical theory does not work when applied to standard form contracts:

> "This classical theory has no basis in either reality or justice. Courts had to create a "conclusive" presumption because such a presumption was so counterfactual. The drafters of such contracts knew the signing party had not read the terms. . . ."
>
> "The other problem with the classical theory was that it permitted drafters of form contracts to abuse their power."[28]

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[25] W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 23 (1984).

[26] Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1273 (1993).

[27] *Id*. at 1267.

[28] *Id*. at 1273.

Gradually, legal scholars and courts recognized the fundamental differences between form contracts and the classical model of individually negotiated contracts. Professor Karl Llewellyn noted the importance of protecting the weaker party's reasonable expectations when interpreting form contracts:

> "[F]ree contract presupposes free bargain; and . . . free bargain presupposes free bargaining; and that where bargaining is absent in fact, the conditions and clauses to be read into a bargain are not those which happen to be printed on the unread paper, but are *those which a sane man might reasonably expect* to find on that paper."[29]

Based on these and other arguments raised by legal commentators, the Restatement (Second) of Contracts included a reasonable expectations test for analyzing the enforceability of terms in contracts of adhesion. The Restatement observed that "[a] party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even read the standard terms." RESTATEMENT (SECOND) OF CONTRACTS (1979) § 211 cmt. b. Because the drafting party has no objective expectation that there has been true assent to the terms of the contract, it cannot claim reliance upon such unread terms. Therefore, the Restatement explains the reasonable expectations test as follows: "customers are not bound to unknown terms which are beyond the range of reasonable expectation." *Id*. § 211 cmt. f .[30]

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[29] K.N. Llewellyn, *Book Review*, 52 Harv. L. Rev. 700, 704 (1939).

[30] Some may argue that strict application of the reasonable expectations rule would destroy the use of form contracts since they would become useless if consumers would not be held to their terms. Professor Slawson replies, however, that business entities have continued to use form contracts. *See* W. David Slawson, *Binding Promises: The Late 20th-Century Reformation of Contract Law*, at 68-70 (1996). He notes that the reasonable expectations test has been applied to insurance contracts for over twenty years, yet insurers continue to use form contracts. He notes that businesses will still reap substantial benefits from continued use of form contracts.

C. Consumers Do Not Read Form Contracts for Rational Reasons.

Application of the reasonable expectations test to form contracts is further supported by a significant fact: consumers do not read form contracts for sound, rational reasons. First, consumers realize they cannot negotiate to obtain better terms, leaving little point to reading the terms.[31]

Second, businesses offer form contracts for the very purpose of eliminating individual bargaining, as the Restatement recognizes: "[businesses' purposes for using standardized contracts] would not be served if a substantial number of customers retained counsel and reviewed the standard terms." RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b. In fact, greater economic inefficiencies from the far greater time needed for completing transactions would result if consumers were required to read and understand form contract terms prior to signing.

Third, consumers do not read form terms because they are often written in fine print, or in dense legalese. The instant case is more egregious. Ms. Randolph was actually discouraged by Green Tree's agent from reading the paperwork.

Finally, consumers do not pay attention to form terms because of the low probability of a dispute arising out of the contract.[32] Instead, consumers focus on the transaction as one for the goods or services provided, rather than viewing themselves as entering into a contractual relationship in which they have agreed to every detail in the "fine print."[33]

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31 *See* Meyerson, *supra* at 1270-71.

32 *See* Leff, *supra* at 148-49.

33 *Id.* at 148-49.

The Arizona Supreme Court rejected an arbitration clause in *Broemmer v. Abortion Services of Phoenix* (Ariz. 1992) 840 P.2d 1013. Plaintiff was given forms to sign the night before her abortion procedure, one of which was labeled, "Agreement to Arbitrate." Because plaintiff could not recall signing the arbitration agreement, nor was it explained or called to her attention by the clinic, the court held that the agreement fell outside plaintiff's reasonable expectations and therefore was unenforceable. *Id*. at 1017. *Accord, Obstetrics & Gynecologists v. Pepper* (Nev. 1985) 693 P.2d 1259 (under facts similar to *Broemmer*, Nevada Supreme Court held arbitration agreement unenforceable).

Of course, arbitration may provide benefits to disputants under some circumstances—circumstances absent in this case. The premises underlying the policy favoring arbitration, a voluntary decision by both parties to accept a greater risk of an erroneous decision in return for arbitration's speed, lower costs and finality, simply do not apply to contracts of adhesion such as the one Ms. Randolph was presented with. By filing this brief, Consumers Union does not suggest that litigation is always better for consumers than arbitration. Entry into arbitration, however, should be a fully informed decision, rather than a clause buried in a contract by a party with vastly superior bargaining power, and before a dispute has even arisen.[34] Arbitration may be faster and cheaper than litigation in some cases, but it is no bargain for consumers when it forced upon them on a take-it-or-leave-it basis.

D. Public Policy Favoring Arbitration Does Not Require the Court to Allow Green Tree to Impose Unilaterally Pre-Dispute Mandatory Binding Arbitration on All of Its Customers

Parties may always voluntarily agree to arbitration *after* a dispute arises. But it is impossible for a consumer to make a voluntary, knowing, intelligent, voluntary pre-dispute waiver. Consumers Union urges this Court to examine closely the full

[34] *See supra* note 14.

implications of preprinted mandatory binding arbitration clauses in form contracts, an increasingly common method of imposing involuntary arbitration on unwitting consumers.

E. This Case Raises Significant Issues Regarding The Enforceability Of Mandatory Arbitration Clauses In Contracts Of Adhesion Between Parties Of Greatly Differing Sophistication, Knowledge, And Bargaining Power

Respondent Larketta Randolph lives in rural Alabama. She arranged for a loan to buy a mobile home for $38,000, and was presented with papers by an agent who pressed her to sign quickly so he could turn in the paperwork that day to "prevent the interest rate from going up."[35] Ms. Randolph was not given an opportunity to read the document and did not know about the arbitration clause. Even if she had read it, the clause appears on the back of the document–located midway between 22 other paragraphs–and is in the proverbial fine print. In her affidavit, Ms. Randolph's says that she was not shown the reverse side of the document where the arbitration clause appeared. She said, in fact, she didn't know there was a reverse side.[36]

Green Tree Financial Corp is a multimillion-dollar corporation with abundant legal and other resources. Larketta Randolph is a consumer of modest means who signed a document on whose back side in tiny print is an arbitration clause that removes her right to go to court.[37] The imbalance of power between the parties in consumer mandatory arbitration contracts of this kind calls for judicial scrutiny.

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[35] Joint Appendix at 20-21, *Green Tree Financial Corp.-Ala. V. Randolph*, (No. 99-1235).

[36] *Id.* at 21.

[37] *See* Yvonne W. Rosmarin & Jonathan Sheldon, SALES OF GOODS AND SERVICES 569-70 (1989).

A recent district court decision demonstrated again how arbitration clauses can victimize unsophisticated, low income consumers. This case involved single mother with an 11th grade education, four young children, and an income of $1200 a month. A pre-dispute mandatory binding arbitration contract was part of the loan papers she signed for the purchase of a mobile home. She testified that when she signed the preprinted forms, there was no discussion of an arbitration clause, she had never heard the word "arbitration," and the agreement was "stuck" in front of her to sign. In striking the arbitration clause because its fee structure was "so unfair that it is rendered unconscionable," the district court also noted, "Fees and costs incident to binding arbitration in consumer transactions raise concerns for this court because these transactions most often involve parties of disparate bargaining power. This concern is enhanced in the context of a consumer transaction by the fact that the FAA expressly permits the court to assess the enforceability of arbitration agreements on the basis of fairness and conscionability." *Pitchford v. Oakwood Mobile Homes, Inc.*, Case No. 5:99CV00053, 1999 U.S. Dist. LEXIS 20596.

Law professor Mark Budnitz has described concerns about the imbalance of power in arbitration clauses in consumer contracts:

> "While laissez faire proponents deal with consumers in the aggregate as an economic unit, the consumer advocates focus on individuals who will be deprived of remedies to which they are legally entitled and the resulting hardship to these persons. They are concerned with those most likely not to realize the impact arbitration may have on them: the poor, the uneducated, and the unsophisticated. The consumer advocates feel their concerns are justified by the strategy thus far adopted by financial institutions who have made no effort to explain to customers the benefits and drawbacks of arbitration. The arbitration "agreements" seem designed to ensnare consumers

> who will not realize they are agreeing to anything at all. This is done by including the arbitration contracts as stuffers with the monthly statements rather than requiring the customer's signature on a separate document properly introduced and explained. The inclusion of dragnet clauses illustrates that the bank's strategy seems to be to win consumer acquiescence absent consumers' understanding what they are agreeing to."[38]

Mandatory arbitration clauses deprive the plaintiff of fundamental rights, including the right to trial with fact finding by a jury of one's peers, access to discovery, a resolution of the issues in dispute based on the relevant law, injunctive relief, the right to join with others in a class action, and the right of appeal except on very narrow grounds.

Virtually all transactions between consumers and commercial entities are governed by contracts of adhesion and mandatory arbitration clauses increasingly are inserted into such preprinted contracts.[39] Undoubtedly this practice will increase in the future, especially if this Court upholds the enforceability of the arbitration contract in this case.

III. Pre-Dispute Mandatory Arbitration Clauses Threaten To Undermine Statutory Rights Created By Congress

A. Consumer Protection Statutes Provide Specific Rights That Arbitration is Unequipped to Protect

Mandatory arbitration contracts threaten to undermine statutory rights created by Congress to enforce "society-wide norms."[40] These statutes include the two in the instant case, the

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[38] *See* Budnitz, *supra* at 321.

[39] *See* Fn. 6, *supra*.

[40] Owen Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979).

Truth in Lending Act (TILA),[41] the Equal Credit Opportunity Act, (ECOA),[42] as well as the Fair Credit Billing Act, [43] Electronic Funds Transfer Act, [44] state Small Loans Act,[45] and state Uniform and Deceptive Acts and Practices Acts. It is inappropriate for these claims to be resolved under the current system of arbitration.

Under ECOA, one of two statutes plaintiff claims was violated in this case, Congress provided a private right of action that consumers may pursue in state or federal court, as an individual or class action.[46] Disputes arising out of violations of consumer protection statutes tend to involve documents such as the contract, disclosure forms or a security agreement. Some or all of these documents may be in the possession of the financial institution.[47]

Mandatory arbitration, however, generally limits parties to subpoenas duces tecum, which merely requires the opposing party to bring certain documents to the arbitration. The consumer may be disadvantaged going into the arbitration because he or she lacks the ability to study and review in advance important documents. If the consumer requests additional documents, the arbitrator may be

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[41] 15 U.S.C. §§ 1601 –1665b.

[42] *Id*. §§ 1691-1691f.

[43] *Id*. §§ 1666-1666j.

[44] *Id*. §§ 1693-1693r.

[45] Kevin W. Brown & Kathleen E. Keest, USURY AND CONSUMER CREDIT REGULATION, at 30-35 (1987).

[46] 15 U.S.C. § 1691e.

[47] Richard L. Abel, *The Contradictions of Information Justice*, 1 THE POLITICS OF INFORMAL JUSTICE , 296 (Richard L. Abel ed., 1982). Abel has noted that many consumers do not maintain complete records of their official documents.

resistant to granting the request because it may require rescheduling of the hearing, in conflict with one of the goals of arbitration: limitations on discovery and delays in adjudication.

B. Arbitrators are Not Required to Follow the Law, Yet Their Decisions are Essentially Unappealable.

This Court has held that in arbitration of statutory claims, parties are entitled to enforcement of their substantive statutory rights.[48] Requiring that arbitrators follow the law is not the norm, however,[49] and as a result, arbitrators may instead apply unconscionability or good faith concepts to disputes involving consumer protection statutes. Even if the arbitrator finds in favor of a consumer, she or he may disregard provisions allowing for treble damages or attorneys fees,[50] provisions that are critical to the efficacy of consumer protection statutes. These cases instead may allow arbitrators to follow their own notions of fairness and justice.[51] There is no way to know whether arbitrators, even if they have expertise to do so, will follow the law or reach results far astray from what Congress or state legislatures intended in enacting consumer protection statutes.

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[48] *Gilmer*, 500 U.S. at 28 (1991).

[49] Amicus Brief for the National Arbitration Forum at 6, *Green Tree Financial Corp.-Ala. V. Randolph*, (No. 99-1235). "What sets the Forum apart from many providers of arbitration services is that its arbitrators must apply the relevant substantive law." "The Forum's requirement that cases be decided under the applicable substantive law is a significant addition to the rules common to arbitration organizations."

[50] Jonathan Sheldon, *Unfair and Deceptive Practices*, at 20 (3d ed. 1991).

[51] Kirk Johnson, Public Judges as Private Contractors: A Legal Frontier, N.Y. TIMES, Dec. 10, 1993, at D20. University of Alaska v. Modern Constr., Inc., 522 P.2d 1132, 1140 (Alaska 1974).

C. The Instant Case Can Be Distinguished From Supreme Court Cases Allowing Arbitration of Statutory Rights

This Court has supported arbitration of disputes involving statutory claims.[52] Two of the cases discussed below involve application of arbitration clauses where investors allege statutory violations of securities laws. Another involves a dispute between international corporations, also raising issues of statutory violations. Each of these cases, however, can be distinguished from the instant case.

While Consumers Union opposes pre-dispute mandatory binding arbitration clauses generally, which would likely include the type of clause at issue in *McMahon*, it would be wrong not to grasp the difference between the plaintiffs in *McMahon* and Ms. Randolph, plaintiff in the instant case. Unlike Ms. Randolph, an unsophisticated consumer faced with a contract of adhesion prepared for Green Tree Financial Corp by savvy legal staff, in *McMahon* the plaintiffs were trustees for pension and profit-sharing plans who were presumably well-equipped to understand the terms of the documents they signed. Indeed, this Court tempered the holding in *McMahon* by noting it would uphold such agreements "absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or *excessive economic power* that would provide grounds for revocation of any contract." *McMahon* 482 U.S. at 226 (emphasis added). This Court was further persuaded to support the arbitration process in *McMahon* because the Securities and Exchange Commission had specifically approved the arbitration procedures of the New York Stock Exchange, the American Stock Exchange, and the National Association of Securities Dealers, the organizations mentioned in the arbitration agreement. *McMahon,* 482 U.S. at 235.

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[52] *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220 (1987), *Mitsubishi*, 473 U.S. at 625, *Rodriguez de Quijas v. Shearson/American Exp.Inc.*, 490 U.S. 477 (1989).

Again in *Mitsubishi,* this Court looked favorably upon a clause calling for arbitration of disputes covered by the Sherman Act,[53] involving the distribution and sale of automobiles. "…[w]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims." *Mitsubishi,* 473 U.S. at 625. But Mitsubishi can once again be distinguished. The case involved an agreement between two corporations with equal bargaining power and sophisticated legal resources. Further, the parties in *Mitsubishi* were corporations residing in different countries, and this Court has given deference to arbitration agreements in international transactions that designate the forum in which a future dispute will be decided. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

In overruling *Wilko v. Swan,* 346 U.S. 427 (1958), this Court once again supported an arbitration clause in a contract with securities investors involving statutory rights. *Wilko* was "[i]ncorrectly decided and inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions," *Rodriguez de Quijas v. Shearson/American Exp.Inc.*, 490 U.S. 477 (1989).

Rodriguez must again be distinguished, for the plaintiffs were investors of presumably greater sophistication than the average consumer.

With businesses such as mobile home dealers and used car dealers joining the trend toward including mandatory arbitration clauses in their consumer contracts, industries that are subject to far less regulation than is even the financial industry, it is clear that greater numbers of consumers of modest means will find themselves confronting arbitration as their only option if a dispute arises.[54]

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[53] 15 U.S.C. § 1 et seq.
[54] *Id*. at 320.

D. TILA Cases Are Particularly Inappropriate For Arbitration

Because of the absence of any federal agency approving arbitration procedures under TILA, the complex regulatory scheme of the statute, and its concomitant provision of specific consumer rights, TILA is particularly inappropriate for arbitration. TILA requires specific disclosures and represents "a carefully tailored regulatory scheme which tries to balance the consumer's need for disclosure of certain information against the creditor's need for clear rules and protection from unwarranted liability."[55]

The Eleventh Circuit's decision in *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178 (11th Cir. 1982), reinforced this notion. The court in *Parker* held that a car dealership's payment to plaintiff in exchange for her waiver of rights under TILA was "inconsistent with the public interest in enforcing TILA requirements…Congress passed TILA in part to encourage consistent and fair treatment of borrowers." *Id.* at 1180. The court went on to note, "…the public must rely largely on the efforts of individual consumers acting as "private attorneys general" to achieve the disclosure system envisioned by the Act." *Id.* The court observed, "…[t]hey [the consumer] may be unfairly deceived if we allow such broad language to bar their claims under an Act of which they may be unaware and which was passed for the protection of all borrowers, both gullible and sophisticated." *Id*.

Once again noting TILA's unique purpose, the federal district court in Delaware declined to enforce an arbitration contract in a recent case, stating that "a ruling which compels arbitration seems contrary to the underlying purpose of TILA." *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264 (D.Del. 1999). The court determined that based on the legislative history of TILA, it seemed clear that "Congress was trying to encourage the use of

[55] *See* Budnitz at 317 [citing JOHN SPANOGLE et al., CONSUMER LAW, CASES AND MATERIALS 106-07 (2d ed. 1991).

class actions as a means for enforcing TILA. As a result, the court believes that a strong argument can be made that TILA claims should not be arbitrated since this forum cannot provide the class-wide relief available in the courts." *Id.* at 269. The court found unpersuasive the defendant's argument that Congress had amended TILA in 1980 to curb lawsuits. "In fact, Congress observed when it amended TILA,

> The typical disclosure statement…is not an effective communication device. Most disclosure statements are lengthy, written in legalistic fine print, and have essential truth in lending disclosures scattered among various contractual terms. The result is a piece of paper which appears to be just another legal document instead of the simple, concise disclosure form Congress intended." *Id.* at 274.[56]

As *Parker* stated so emphatically, Congress enacted TILA to address the disparities in state credit disclosure laws and create uniform disclosure rules for the benefit of both creditors and consumers. *Parker*, 673 U.S. at 1180. If an arbitrator were to ignore federal policy and substitute his or her belief as to what is fair to the parties, this would undermine Congressional intent. No matter how fair an arbitrator might be, he or she should not supplant the collective wisdom of Congress or the Federal Reserve Board, each of which have years of experience determining national policy on credit disclosure.

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[56] Quoting from The Truth in Lending Simplification and Reform Act., Pub. L. No. 96-221, § 122(a), 94 Stat.168 (175)(1980)(codified as amended at 15 U.S.C. § 1631(a)(1994). *See also*, *Bantolina v. Aloha Motors, Inc.,* 419 F. Supp. 1116 (1976), in which the District Court for Hawaii certified a class action under TILA, noting "...congressional intent to go beyond actual damages and foster the use of the class-action device as an incentive for voluntary national compliance with the Act..." at 1122, n24.

Finally, because arbitration limits discovery, has no procedure for dealing with class actions, does not require written opinions containing findings of fact and rulings of law, and contains no mechanism for transmitting data to regulatory and enforcement agencies, consumers are inevitably denied the protections enumerated above and guaranteed by Congress in these aptly-named consumer protection laws.

E. Absence of Public Decisions in Arbitration, the Increased Use of Unilaterally Imposed Arbitration May Harm Consumer Interests in Securing Rights Provided By Statute

Most arbitrations are private. The results of arbitration are also private. Most commercial arbitrations conclude only with an award, without disclosing findings or the rationale for the result.[57] The Commercial Arbitration Rules of the American Arbitration Association require secrecy.[58] The secrecy of arbitration means that the deterrence and public education values served by open court proceedings are absent. As one commentator has noted, "arbitration makes it more difficult for a consumer to obtain information about the experiences of others. This not only increases the transaction costs for a consumer who seeks information about a financial institution, it also isolates the consumer." [59] Moreover, when disputes about a practice can be kept secret, the incentive to reevaluate them is reduced.

Commentators have made observations about other areas of law that are apt in this discussion. Our laws address both public and private disputes. In a private dispute, "only the interests and

[57] Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81, 85 (1992).

[58] American Arbitration Ass'n., COMMERCIAL ARBITRATION RULES 25 (1996).

[59] *See* Budnitz, *supra* at 327-28.

behavior of the immediate parties to the dispute are at issue."[60] Because of the localized nature of the dispute, the privacy of arbitration proceedings does not conflict with the interests of society in public decision making forums.[61] In contrast, a public dispute is one involving enforcement of "society-wide norms"[62] involving laws that protect the "public at large."[63] Consumer protection statutes were developed precisely out of this need to protect the public and enforce society-wide norms. Congress and state legislatures have enacted these statutes to protect a defined segment of the public from the documented abuses of a specific industry. Moreover, many of these statutes designate an agency of the government to promulgate regulations, and the agency has regulatory power over that industry. As a result, consumer protection statutes are often an integral part of a comprehensive regulatory scheme. Indeed, the regulatory agency often has the power to investigate the industry to assure compliance with the statute. Allowing an arbitrator, who is generally under no obligation to apply the law, to decide a case, the results of that decision remaining confidential, "tears at the fabric of this regulatory scheme."[64]

IV. Consumers Union Supports Alternative Dispute Resolution That Is Mutually-Agreed On By Parties In A Dispute

In its flagship publication, *Consumer Reports*, Consumers Union has advised consumers to consider mediation and

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[60] *See* Fiss, *supra* at 30.

[61] *Id*. at 30-32.

[62] *Id*. at 31.

[63] Stewart S. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481 (1981).

[64] *See* Budnitz, *supra* at 323.

arbitration, describing both as "often cheaper and faster than litigation."[65] The magazine also stated that: "We think consumers should not have to sign contracts with businesses or professionals that mandate arbitration...because such contracts deprive you of access to the courts..."[66] Consumers Union's policy statement on mandatory arbitration in consumer form contracts is attached in the appendix to this brief.

The Consumers Union policy recognizes that arbitration can be a desirable way to resolve disputes arising out of consumer form contracts, but only if consumers have bona fide opportunity to make an informed choice. This may occur under two scenarios. First, if arbitration is to be binding on the parties, then consumers must be offered the choice to accept binding arbitration, or decline to enter into it, *after* a dispute arises. We believe that consumers cannot make fully informed decisions on the pros and cons of binding arbitration until after a dispute arises. This is particularly true with respect to dragnet clauses that include any and all disputes arising out of a consumer contract, including torts, the contract the consumer executed, statutory and constitutional issues. Consumers cannot possibly know what the nature of the dispute will be, and therefore they cannot know whether they will want a jury trial, will need extensive discovery, or whether they might need injunctive relief.[67]

The Consumers Union policy recommends a different approach for businesses that wish to insert a *pre-dispute* arbitration clause in their form contracts. It suggests that such pre-dispute clauses be limited to agreements for non-binding forms of

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[65] *When You Need a Lawyer*, CONSUMER REP., Feb. 1996, at 35, 38.

[66] *Id*. at 39.

[67] See also Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer*, 5 LOY. CONSUMER L. REP. 112, 119 (1993).

ADR.[68] Given the reality that the consumer will not read the form contract, this alternative preserves the consumer's reasonable expectations of having access to the courthouse.

A. Arbitration, Unlike Litigation, Presents the Danger of "Selection Bias" Against the Consumer.

Organizations that provide private arbitration services are businesses. Just like any other business, an arbitration provider needs customers in order to survive. The serious risk of unintended, and quite possibly inherent, "selection bias," is rooted in the fact that private arbitration services depend on the repeat business of commercial entities. In a published discussion on arbitration, Daniel Weinstein, then the vice chairman and senior judicial officer, Judicial Arbitration & Mediation Services Inc. (JAMS), and former superior court judge, conceded the likelihood of "unconscious as well as the conscious bias toward [the] repeat user."[69] He described the issue of selection bias as "the most profound criticism" of the "whole concept of private arbitrators providing of dispute resolution services."[70]

Consumer Reports, stating that "arbitration should be impartial," reported on the problem of bias when arbitration companies receive significant fees from companies seeking arbitrators. "...the National Arbitration Forum, a private, for-profit

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[68] There is precedent for non-binding ADR of consumer disputes in many states. The state of California's "lemon law" arbitration system for new motor vehicle warranty disputes, for example, provides for non-binding arbitration. *See* Civ. Code § 1793.22(c) ("if the buyer is dissatisfied with [the] third-party [dispute resolution system] decision . . . the buyer may assert the [lemon law] presumption . . . in an *action* to enforce the buyer's rights under subdivision (d) of Section 1793.2") (emphasis added).

[69] *Alternative Dispute Resolution: A Roundtable*, THE RECORDER, Spring 1993, at 11.

[70] *Id*.

corporation, provides arbitrators for and has received revenue from MBNA, H & R Block, First USA, and others. First USA has paid NAF at least $5 million in fees since 1998, according to recent court documents. Edward Anderson, the NAF's managing director, says consumers do better in arbitration than in court. But First USA disclosed in court filings that of some 19,000 disputes arbitrated and resolved over three years through NAF, cardholders prevailed just 87 times."[71]

To the extent that an organization of arbitrators demonstrates a pattern of favoritism toward industry and against consumers, this should call into question its ability to continue hearing cases. Bias in the arbitration system is of critical concern to consumers as mandatory arbitration clauses proliferate, and merits serious judicial scrutiny from this Court.

CONCLUSION

Consumers Union is concerned about the proliferation of pre-dispute mandatory binding arbitration clauses in consumer contracts and the limitations they place on rights created at common law and by the states and Congress in consumer protection statutes. These concerns are compounded by the absence of equal bargaining power between an individual consumer and companies that draft and employ these clauses. For these reasons, we believe that consumer contracts mandatory arbitration clauses merit close scrutiny. We urge the Court to affirm the decision below.

Respectfully submitted,

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[71] *Give up Your Right to Sue?*, CONSUMER REPORTS, May 2000 at 8.

APPENDIX 1A

Consumers Union Policy on Arbitration and Other ADR Clauses in Standard Form Consumer Contracts

Standard form contracts offered to consumers by commercial parties are increasingly likely to contain clauses requiring the consumer to participate in arbitration or another form of alternative dispute resolution (ADR). These clauses have the potential to prevent consumers from having their claims heard in court. Consumers Union's policy on mandatory arbitration and ADR clauses is designed to promote standards for when these clauses should be permitted to be placed in consumer form contracts, or enforced if found in such contracts, and to promote fair procedures in the implementation of ADR clauses.

A. ADR, including arbitration, should not be required in consumer form contracts unless the consumer has the option either to decline to engage in the ADR process after the dispute arises or to reject the results of the ADR process. In other words, ADR clauses should be permitted and enforceable in consumer contracts only if the ADR process is: 1) contractually mandated with non-binding results, 2) optional with binding results, or 3) optional with non-binding results.

B. The ADR process must be fair. The overall fairness of a contractually imposed ADR process should be judged by compliance with the following criteria.

   A. ADR clauses imposed in a consumer form contract must not select an ADR provider if the location of that provider would impose unreasonable travel costs upon the consumer in order to fully participate in the hearing of the claim.

B. Any consumer contract requiring the consumer to submit to ADR should contain a clear, conspicuous, and understandable disclosure describing the degree to which the consumer gives up any rights he or she otherwise possesses to go to court. Whenever the parties or their agents engage in face-to-face discussions leading to formation of the contract, there should also be a clear oral disclosure.

C. ADR clauses should not apply to cases where a consumer is seeking injunctive relief, unless, after the dispute arises, the consumer agrees to the ADR process and the ADR decision maker has the power to order injunctive relief.

D. In order for any ADR provider to be preselected in a consumer form contract, that provider must maintain an index of actions which is open to the public. The index must identify the parties to the disputes it has pending and has resolved in the past five years. The results of its ADR procedures involving individual consumers should also be available, unless the ADR decision maker has found that there is a special need to seal the results of the ADR proceeding.

E. Whenever the result of ADR will be binding or subject only to limited review, all parties should have access to civil discovery to the degree necessary to the claims and defenses presented. In particular, consumers should always have access to the complete file, if any exists, about their claim or dispute, and to evidence indicating that any problem they allege is part of a larger pattern or practice of the business.

F. Standard form consumer contract ADR clauses should be invalid if the preselected ADR provider does

not require that the officer who presides at the ADR proceeding must swear all the witnesses to tell the truth.

G. Standard form contract ADR clauses in consumer contracts should be disallowed unless they provide that the consumer may appeal for review of alleged errors.

H. ADR providers selected in consumer form contracts must provide for waiver of fees and costs for indigent individuals.

I. ADR clauses in consumer form contracts should be invalid if they select an ADR provider which does not have an effective method of internal review to reduce the risk of selection bias. This is of critical importance. State licensing of ADR providers may also be necessary.

J. ADR providers selected in consumer form contracts must provide a written statement of the basis for any decision which is binding when issued.

K. Conflict of interest disclosures should be made by all proposed single ADR decision makers and all who are proposed to serve as a so-called "neutral third." At least the following should be disclosed:

- Names of prior or pending cases involving any party to the ADR agreement or any attorney for any of the parties in which that person is serving or has served as an arbitrator, party or attorney.

- The results of each concluded case involving any of the parties or attorneys for the current case, including the identity of the prevailing party and the date and amount of any award.

After disclosure, the consumer should have the right to reject the proposed decision maker.

L. ADR should never be used to eliminate or delay a consumer's access to a small claims court action, licensing or other administrative proceeding, or a consumer class action.