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**“WHIMSY LITTLE CONTRACTS” WITH UNEXPECTED
CONSEQUENCES: AN EMPIRICAL ANALYSIS OF CONSUMER
UNDERSTANDING OF ARBITRATION AGREEMENTS**

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Abstract

Arbitration clauses have become ubiquitous in consumer contracts. These arbitration clauses require consumers to waive the constitutional right to a civil jury, access to court, and, increasingly, the procedural remedy of class representation. Because those rights cannot be divested without consent, the validity of arbitration agreements rests on the premise of consent. Consumers who do not want to arbitrate or waive their class rights can simply decline to purchase the products or services covered by an arbitration agreement. But the premise of consent is undermined if consumers do not understand the effect on their procedural rights of clicking a box or accepting a product.

This article reports on an empirical study exploring the extent to which consumers are aware of and understand the

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effect of arbitration clauses in consumer contracts. We conducted an online survey of 668 consumers, approximately reflecting the population of adult Americans with respect to race/ethnicity, level of education, amount of family income, and age. Respondents were shown a typical credit card contract with an arbitration clause containing a class action waiver and printed in bold and with portions in italics and ALLCAPS. Respondents were then asked questions about the sample contract as well as about a hypothetical contract containing what was described as a “properly-worded” arbitration clause. Finally, respondents were asked about their own experiences with actual consumer contracts.

The survey results suggest a profound lack of understanding about the existence and effect of arbitration agreements among consumers. While 43% of the respondents recognized that the sample contract included an arbitration clause, 61% of those believed that consumers would, nevertheless, have a right to have a court decide a dispute too large for a small claims court. Less than 9% realized both that the contract had an arbitration clause and that it would prevent consumers from proceeding in court. With respect to the class waiver, four times as many respondents thought the contract did not block them from participating in a class action as realized that it did, even though the class action waiver was printed twice in bold in the sample contract, including one time in italics and ALLCAPS. Overall, of the more than 5,000 answers we recorded to questions offering right and wrong answers, only a quarter were correct.

Turning to respondents’ own lives, the survey asked if they had ever entered into contracts with arbitration clauses. Of the 303 respondents who claimed never to have done so and who also answered a question asking whether they had accounts with certain companies that include arbitration clauses in their contracts, 264, or 87%, did indeed have at least one account subject to an arbitration clause.

These and other findings reported in this Article should cause concern among judges and policy-makers

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considering mandatory pre-dispute consumer arbitration agreements. Our results suggest that many citizens assume that they have a right to judicial process that they cannot lose as a result of their acquiescence in a form consumer contract. They believe that this right to judicial process will outweigh what one respondent referred to as a “whimsy little contract.” Our results suggest further that citizens are giving up these rights unknowingly, either because they do not realize they have entered into an arbitration agreement or because they do not understand the legal consequences of doing so. Given the degree of misunderstanding the results demonstrate, we question whether meaningful consent is possible in the consumer arbitration context.

I. INTRODUCTION

The default mechanism for resolving civil disputes in the United States is the court system. The Federal Constitution and the constitutions of all fifty states and the District of Columbia guarantee a right to a jury trial in civil cases. Through news stories about lawsuits and TV dramas about courtroom lawyers, popular culture conveys the message that people with grievances—legitimate or otherwise—can and do pursue those grievances through litigation in the court system. But parties to civil disputes have the option of waiving their rights to adjudicative process by agreeing to have an arbitrator decide their disputes. Under the Federal Arbitration Act, parties can agree by contract to arbitrate disputes before those disputes arise, and courts must enforce those agreements even if one of the parties wishes to proceed in court.¹

Many companies include arbitration clauses in their consumer contracts. Consumers who agree to these contracts waive their rights to proceed in court, to a jury trial, and to appeal. Often, these arbitration agreements also provide that the parties waive their right to participate in class actions, either in court or in arbitration. The contracts themselves can be quite lengthy.

The legal regime supporting arbitration—and justifying the waiver of constitutionally-protected procedural rights implicit in it—rests on the principle of consent. Parties to an arbitration agreement are held to their bargain because they have consented to forego the procedural rights they

¹ See 9 U.S.C. §§2-4.

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would otherwise have.² Given the complexity of arbitration clauses and the burgeoning literature about consumer understanding of consumer contracts, however, it is not clear to what extent consumers actually know they are agreeing to arbitrate and understand what that agreement entails--a matter that has not been studied until now. If consumers—citizens—are unwittingly being stripped of procedural rights that they value and believe they retain, serious questions arise about the assumptions underlying the law of arbitration.

To test consumer awareness and understanding of arbitration in consumer contracts, we conducted an online survey of 668 consumers, in a pool reflecting the demographics of American society as a whole. We displayed a credit card contract with an arbitration clause and then asked respondents eight questions about the sample contract and an imaginary contract containing a “properly-worded” arbitration clause. Our findings suggest that consumers lack awareness of arbitration agreements and do not understand those agreements when they are aware of them, and that many expect to have access to the judicial system and collective action regardless of what they sign. To give just one example of the many ways consumers misapprehend arbitration agreements, we found that only 43% of the respondents recognized that the sample contract included an arbitration clause, and less than 9% realized both that the contract had an arbitration clause and that it would prevent consumers from suing in court.

Even when they are told they have entered into enforceable arbitration agreements, many respondents do not believe they will be held to those agreements. For example, far more respondents believed that an arbitrator’s decision was not final than thought it was, even when the question said that the arbitrator’s decision was final. Similarly, many consumers are not convinced that contract terms will be enforced as written. Thus, when told the contract stated that they could not participate in a class action, more than 70% of the respondents failed to realize that they could not.

Overall, only two respondents, or less than one percent, answered all eight questions correctly out of the 663 who responded to all eight, while 117, or 18%, did not answer any of the questions correctly—more than answered at least half the questions right. Respondents gave 44% more incorrect answers than correct ones. Not one of the eight questions

² See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“Arbitration under the [Federal Arbitration] Act is a matter of consent . . .”).

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elicited a majority of correct answers, though on one a majority of the respondents gave wrong answers.³ Put another way, almost none of the respondents understood the effect of the arbitration clause and many who thought they did were simply wrong.

These and other findings in the survey raise troubling issues about whether consumer consent to arbitration is informed in any sense of the word. That in turn calls into question whether consumers should be bound by agreements they cannot comprehend but which strip them of constitutional rights.

The remainder of the article reports more fully on these and other findings. Part II describes the use of arbitration in consumer contracts. Part III reviews previous studies on consumer understanding of disclosures and contract terms. Part IV describes the study methodology and the limits to that methodology. Part V presents and analyzes the survey results. Part VI offers some brief comments on the findings. Part VII concludes.

II. THE LANDSCAPE OF ARBITRATION IN CONSUMER CONTRACTS

A. *The Legal Regime Supporting Arbitration of Consumer Disputes*

Arbitration has existed in various forms for centuries. At the time of America's founding, arbitration was widespread among the colonies, often fed by anti-lawyer sentiment.⁴ Merchants routinely used arbitration to avoid the costs and delays of common-law litigation,⁵ with the most important merchants in the colonies making arbitration a key function of the New York Chamber of Commerce formed in 1768.⁶ Even George

³ Overall, more respondents gave correct answers than incorrect answers on only two of the questions; on two questions the percentage of correct and incorrect answers was within the survey's margin of error; and on four of the questions more respondents gave wrong answers than right, sometimes by margins of three or four to one.

⁴ See Carli N. Conklin, *Lost Options for Mutual Gain? The Lawyer, the Layperson, and Dispute Resolution in Early America*, 28 OHIO ST. J. ON DISP. RESOL. 581, 584 (2013).

⁵ See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 70.

⁶ See Imre Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* 17 (2013).

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Washington famously included a provision in his will requiring arbitration of disputes among his heirs.⁷

Prior to the twentieth century, however, courts viewed arbitration with skepticism, taking the position that an agreement to arbitrate could not “oust” a court of its jurisdiction.⁸ Pre-dispute arbitration agreements were widely understood to be revocable at will by either party.⁹ With courts refusing specific enforcement of pre-dispute arbitration agreements, a party to an arbitration agreement could, at most, sue at law for breach of the agreement.¹⁰ But damages were too small and speculative for breach of contract to provide a meaningful enforcement mechanism, severely curtailing the utility of arbitration agreements.¹¹

In the first decades of the twentieth century, the business community, led by the New York Chamber of Commerce, began a sustained legislative effort to overcome the judicial hostility to arbitration.¹² That effort—part of a broader initiative to reform the nation’s fragmented and sclerotic system of court procedure¹³—led first to

⁷ See Stephen Wills Murphy, *Enforceable Arbitration Clauses in Wills and Trusts: A Critique*, 26 OHIO ST. J. ON DISP. RESOL. 627, 630-31 (2011).

⁸ See *Vynior’s Case*, 77 Eng. Rep. 595 (K.B. 1609); *Thompson v. Charnock*, 8 Term, 139 (Kenyon, C.J.) (“It is not necessary, now, to say how this point ought to be determined if it were *res integra*, it having been decided again and again that an agreement to refer matters in difference to arbitration, is not sufficient to oust courts of law and equity of their jurisdiction.”); *Hurst v. Litchfield*, 39 N.Y. 377, 379 (N.Y. 1868); *Meacham v. Jamestown, F. & C. R. Co.*, 211 N.Y. 346, 354 (N.Y. 1914) (Cardozo, J.) (“If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary.”).

⁹ See *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845). In the words of Justice Story: “It is certainly the policy of the common law, not to compel men to submit their rights and interests to arbitration, or to enforce agreements for such a purpose. Nay, the common law goes farther, and even if a submission has been made to arbitrators, who are named, by deed or otherwise, with an express stipulation, that the submission shall be irrevocable, it still is revocable and countermandable, by either party, before the award is actually made, although not afterwards.”

¹⁰ See Schwartz, *supra* note 5, at 73-74.

¹¹ See Schwartz, *supra* note 5, at 74.

¹² See SZALAI, *supra* note 6, at 122-31.

¹³ See Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. __ (2014).

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the passage of the New York Arbitration Act and ultimately, in 1925, to the enactment of the Federal Arbitration Act (the “FAA”), the statute that governs arbitration at both the state and federal level today.¹⁴

The core of the FAA is Section 2, which provides that “a written provision . . . in a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁵ This provision abrogated the “revocability” doctrine created by courts that had to that point stymied the enforcement of predispute arbitration agreements. Section 2 is given teeth by Section 3, which requires any federal court to stay litigation and refer the parties to arbitration where the subject of a lawsuit is covered by an arbitration agreement,¹⁶ and Section 4, which requires federal courts to compel arbitration where one party to an arbitration agreement has failed to comply with it.¹⁷

For the first half-century of the FAA’s existence, courts interpreted it narrowly. The most prominent example of that understanding was the Supreme Court’s 1953 decision in *Wilko v. Swan*,¹⁸ in which the Court refused to compel arbitration of claims arising under the Securities Act of 1933. Focusing on the inadequacy of arbitration as a substitute for formal adjudication, the Court emphasized that the arbitrators would not have a judge to instruct them on the law and, even conceding their obligation to apply the law, would be under no obligation to produce a reasoned opinion allowing for meaningful judicial review.

Wilko was widely understood to bar the enforcement of arbitration agreements involving claims arising under federal statutory law. Over the next three decades, courts repeatedly refused to enforce arbitration agreements with respect to statutory claims, including claims arising under

¹⁴ See STEPHEN J. WARE, PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION 23 (2nd ed. 2007).

¹⁵ 9 U.S.C. § 2.

¹⁶ 9 U.S.C. § 3.

¹⁷ 9 U.S.C. § 4.

¹⁸ 346 U.S. 427 (1953).

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federal laws addressing antitrust, securities, RICO, patent, copyright, bankruptcy, discrimination, and ERISA.¹⁹

Beginning in the 1980s, however, the Supreme Court shifted course and began to promote the use of arbitration by reading the FAA more expansively. First, in *Moses Cone Meml. Hosp. v. Mercury Const. Corp.*,²⁰ the Court declared that Section 2 of the FAA “is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”²¹ It relied on that policy rationale to then announce that “[t]he effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.”²²

The following year, in *Southland Corp. v. Keating*,²³ the Court affirmed the preemptive effect of the FAA, holding that state laws prohibiting enforcement of arbitration agreements with respect to certain claims violate the Supremacy Clause.²⁴ “In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”²⁵ Then, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,²⁶ the Court opened

¹⁹ See WARE, *supra* note 14, at 72-73 (citing cases). See also Judith Resnik, Fairness in Numbers: A Comment on *AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers*, 125 HARV. L. REV. 78, 115 (2011) (“Between 1953 and 1983, the Court heard fifteen cases in which arbitration was at issue, and in the four in which an individual (as contrasted with a corporation) objected, the Court declined to require arbitration.”).

²⁰ 460 U.S. 1 (1983).

²¹ *Moses H. Cone Meml. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

²² *Id.*

²³ 465 U.S. 1 (1984).

²⁴ *Id.* at 10. The state law at issue was the California Franchise Investment Law, which had been held by the California Supreme Court to require judicial consideration of claims arising under it. *Id.*

²⁵ *Id.*

²⁶ 473 U.S. 614 (1985).

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the door to mandatory arbitration of statutory claims²⁷ by enforcing an arbitration agreement in a dispute arising under U.S. antitrust law.²⁸

After *Mitsubishi*, the Court rapidly expanded the reach of the FAA and the availability of mandatory arbitration. Two years later, in *Shearson/American Express v. McMahon*,²⁹ the Court enforced an arbitration clause in a case alleging garden-variety fraud claims against a securities broker under the Securities Exchange Act of 1934 and RICO.³⁰ Two years after that, in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,³¹ the Court overruled *Wilko* by holding claims under the Securities Act of 1933 arbitrable. And in 1991, in *Gilmer v. Interstate/Johnson Lane Corp.*,³² the Court enforced an arbitration clause in a dispute involving employment discrimination claims under the Age Discrimination in Employment Act of 1967.³³ Since then, whenever the issue of arbitrability has been presented, the Court has found the claim subject to arbitration, regardless of its legal basis.³⁴

Businesses responded to the Supreme Court's expansive arbitration jurisprudence by adding arbitration clauses to their contracts with consumers. Many of the clauses included "class waivers"—provisions in the arbitration agreement purporting to waive the right to seek collective

²⁷ The Supreme Court had permitted arbitration of a federal statutory claim in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), a case seeking relief under § 10 of the Securities Exchange Act of 1934. But the effect of that decision had been muted because, in the same year, the Court held that claims arising under Title VII of the Civil Rights Act of 1964 were not arbitrable. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

²⁸ *Id.* at 624-25.

²⁹ 482 U.S. 220 (1987).

³⁰ *Id.* at 223. The aggrieved investors alleged "fraudulent, excessive trading on respondents' accounts and [] making false statements and omitting material facts from the advice given to respondents." *Id.*

³¹ 490 U.S. 477 (1989).

³² 500 U.S. 20 (1991).

³³ 29 U.S.C. § 621 (2005).

³⁴ See *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 670 (2012) (holding that language in Credit Repair Organizations Act providing consumers with a "right" to bring an action in court and using terms "action," "class action," and "court" do not indicate Congressional intent to require judicial enforcement of claims arising under the Act).

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or class relief.³⁵ A lopsided split developed in the federal circuit courts, with the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh upholding arbitral class waivers and the First and Ninth refusing to enforce them, typically on grounds of state law unconscionability.³⁶

In 2011, in *AT&T Mobility, LLC v. Concepcion*,³⁷ the Supreme Court resolved the split in favor of the majority of circuits allowing class waivers.³⁸ The Court in *Concepcion* held that the FAA preempted a California rule nullifying class waivers in contracts of adhesion where consumers seek small amounts of individual damages and allege a scheme to defraud large numbers of consumers out of such small amounts.³⁹ The Court concluded that Congress intended to promote arbitration in a form designed to achieve the traditional arbitral goals of efficiency, confidentiality, decisional expertise, and procedural flexibility.⁴⁰ Because class arbitration would frustrate those goals,⁴¹ and because the California rule effectively required either class arbitration or no arbitration at all, the California rule could not stand.⁴²

In sum, the Supreme Court's arbitration jurisprudence establishes that any claim is potentially subject to arbitration absent an express Congressional declaration that arbitration is prohibited. A disparity in bargaining power—such as that between consumers and businesses—does not change that result. Arbitration agreements in contracts of adhesion are enforceable. Further, an arbitration agreement in a contract of adhesion

³⁵ See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 6 (2000) (“Increasingly, potential defendants are drafting arbitration clauses that explicitly bar class actions, hoping that these will facilitate favorable court rulings.”).

³⁶ See Byron Rice, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 HOUS. L. REV. 215, 226 (2008).

³⁷ 131 S. Ct. 1740 (2011).

³⁸ See Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INTL. ARB. 323, 377ff. (2011) (analyzing *Concepcion* decision and its impact).

³⁹ *Concepcion*, 131 S. Ct. at 1748.

⁴⁰ *Id.* at 1750-51.

⁴¹ *Id.*

⁴² *Id.* at 1753.

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can require a waiver of the right to join with others in pursuing aggregate claims.

Once in arbitration, parties are subject to the normal rules of arbitration, including rules of finality that allow for judicial review of arbitral awards only upon a narrow set of grounds tied to arbitrator misconduct.⁴³ The Supreme Court has held that the statutory grounds for vacatur of arbitral awards in the FAA are exclusive, effectively precluding judicial attempts to intervene in the arbitration process to correct legally erroneous awards.⁴⁴ Regardless of their relative positions and circumstances, regardless of their claims, parties who agree to arbitration forfeit the right to judicial process; if that agreement includes a class waiver, they forfeit their right to join with others similarly situated; and they have no recourse to a court if they are unhappy with the results.

⁴³ See 9 U.S.C. § 10. The FAA permits a court to vacate an arbitral award only on the following grounds:

- (1) Where the award was procured by corruption, fraud, or undue means;
- (2) Where there was evidence partiality or corruption in the arbitrators, or either of them;
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Id.

⁴⁴ *Hall Street Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2007). The Court in *Hall Street* suggested without deciding that judge-made grounds for vacatur, most notably “manifest disregard of the law,” were inconsistent with the FAA. *Id.* at 1403-04. See Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN ST. L. REV. 1103, 1140 (2009) (“By holding that the statutory grounds are “exclusive,” the Supreme Court appears to have precluded the lower courts from considering arguments that an arbitral award may be vacated on non-statutory grounds.”). Cf. Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 180 (2011) (finding splits within the federal circuits and among the states on the issue of whether manifest disregard survives as an independent grounds of review after *Hall Street*).

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B. The Prevalence of Business-Consumer Arbitration Agreements and Class Waivers

The business community has responded to the Supreme Court's expansive arbitration jurisprudence by adding arbitration clauses to many common consumer contracts.⁴⁵ With prominent companies including AT&T Wireless, Verizon, Sprint, and PayPal all incorporating arbitration agreements into their standard contracts, American consumers routinely agree to arbitrate product-related disputes. Often, when they agree to arbitrate with a company, they are also agreeing to forego the right to join in a class action with other consumers against that company. These trends are especially pronounced in the financial services industry. The following research provides empirical support for those propositions.

1. Prevalence of Arbitration Agreements in Consumer Contracts

In a study of consumer arbitration published in 2004, Linda Demaine and Deborah Hensler researched the arbitration policies of the major businesses in thirty-seven industries.⁴⁶ They found that more than 35% of the 161 businesses they surveyed included arbitration clauses in their consumer contracts.⁴⁷ Unsurprisingly, the numbers were highest in industries, such as financial services, in which businesses and customers interact in ongoing relationships governed by written contracts. Demaine and Hensler found that almost 70% of the businesses in the financial sector required customers to arbitrate.⁴⁸ In contrast, none of the businesses

⁴⁵ See, e.g., CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS 54, Dec. 12, 2013, available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf ("Only limited data on changes in checking account contracts since Conception are available, but those data reveal a noticeable increase in the inclusion of arbitration clauses among large banks since mid-2012."); Pew Charitable Trusts, Checks and Balances 33 (2014) (finding decline in number of banks in study eschewing mandatory arbitration clauses from 2013 to 2014), available at <http://www.pewtrusts.org/~media/Assets/2014/04/09/ChecksandBalancesReport2014.pdf>.

⁴⁶ Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate through Predispute Arbitration Clauses: The Average Consumer's Experience, 67-SPG LAW & CONTEMP. PROBS. 55, 58-59 (2004).

⁴⁷ Id. at 62.

⁴⁸ Id.

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in the food and entertainment industry provided for arbitration with customers.⁴⁹

A 2008 study by Ted Eisenberg, Geoffrey Miller and Emily Sherwin confirmed the prevalence of arbitration in industries where written contracts with large numbers of consumers are the norm.⁵⁰ Eisenberg and his colleagues analyzed 26 consumer contracts drafted by 21 major companies in the telecommunications and finance industries.⁵¹ They found that over 75% of those contracts included an arbitration clause.⁵² Amy Schmitz reached similar results in her analysis of credit card and mobile phone contracts, finding that ten of thirteen credit card contracts and all nine mobile phone contracts she analyzed included arbitration clauses.⁵³

In a more comprehensive study of the extent of arbitration in the credit card industry, Peter Rutledge and Chris Drahozal found that, by 2009, over 95% of outstanding credit card loans were covered by an arbitration agreement.⁵⁴ In 2009, however, two events caused a dramatic reduction in the use of arbitration agreements in credit card contracts. First, the National Arbitration Forum (NAF), which at the time was the largest provider of consumer credit arbitrations nationwide, ceased administering new consumer credit arbitrations as part of its settlement of a consumer fraud lawsuit filed by the Minnesota Attorney General.⁵⁵ Second, four of the largest issuers of credit cards agreed to remove the

⁴⁹ *Id.*

⁵⁰ Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882-83 (2008).

⁵¹ *Id.* at 881.

⁵² *Id.* at 882-83. In contrast to the high prevalence of arbitration in their consumer contracts, less than 10% of those companies nonconsumer negotiated contracts contained an arbitration clause. *Id.*

⁵³ Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 145-47 (2010).

⁵⁴ Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 17-18.

⁵⁵ *Id.* at 18-19. The lawsuit alleged that the NAF, a for-profit entity with financial ties to attorneys who represented banks in the arbitrations NAF conducted, had systematically rubber-stamped the demands of banks in debt collection arbitrations. See Ameet Sachdev, *Arbitration Firm Agrees to Get Out of Credit Card Disputes*, CHICAGO TRIBUNE, July 21, 2009, at 19.

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arbitration provisions from their credit card agreements for three and a half years as part of the settlement of an antitrust lawsuit alleging that the banks conspired to force consumers to accept arbitration agreements containing class waivers.⁵⁶ As a consequence, by the end of 2010 the percentage of outstanding credit card loans subject to an arbitration agreement had dropped to 48%.⁵⁷

That figure had increased only slightly as of 2012, when the Consumer Financial Protection Bureau, the agency created by the Dodd-Frank legislation to oversee the financial services industry,⁵⁸ undertook a large-scale study of arbitration agreements in credit card contracts, checking account contracts, and general purpose reloadable (GPR) pre-paid cards.⁵⁹ The CFPB found that just over half of outstanding credit card loans were covered by an arbitration agreement, while just under half of insured deposits at banks were.⁶⁰ In contrast, more than 68% of the dollar amount loaded on prepaid cards was covered by an arbitration agreement.⁶¹ The wide disparity between credit cards and prepaid cards seems to be explained by the antitrust settlement. The four issuers that agreed to remove their arbitration clauses account for almost 87% of the outstanding credit card debt not covered by an arbitration clause.⁶² The CFPB estimates that if those issuers had not removed their arbitration

⁵⁶ *Id.* at 19. The settling banks were Bank of America, Chase, Capital One, and HSBC. *Id.* See also *Ross v. Bank of America*, 524 F.3d 217 (2d Cir. 2008); Erin Holmes, Recent Developments: *Ross v. Bank of America*, 24 OHIO ST. J. ON DISP. RESOL. 387 (2009). . For an example of one of the consent decrees, see *Ross v. Bank of America, Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and Chase Bank USA, N.A.* (February 23, 2010), available at <http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-chase.pdf>

⁵⁷ *Id.* at 18.

⁵⁸ See Lydia Depillis, A Watchdog Grows Up: The Inside Story of the Consumer Financial Products Board, WASH. POST, Jan. 11, 2014.

⁵⁹ CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS, Dec. 12, 2013, available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf (hereinafter “CFPB Preliminary Study”).

⁶⁰ CFPB Preliminary Study, *supra* note 59, at 19.

⁶¹ CFPB Preliminary Study, *supra* note 59, at 27.

⁶² CFPB Preliminary Study, *supra* note 59, at 23.

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clauses, more than 94% of outstanding credit card debt would be covered by an arbitration agreement.⁶³

2. The Incorporation of Class Waivers in Arbitration Agreements

Eisenberg, Miller, and Sherwin found that three quarters of the consumer contracts they studied included an arbitration agreement, and that every one of the consumer contracts mandating arbitration included a class waiver.⁶⁴ Drahozal and Rutledge found that 99.9% of credit card loans subject to an arbitration agreement were also covered by a class waiver.⁶⁵ The CFPB, looking only at consumer contracts, identified class waivers in 99.9% of the arbitration agreements covering outstanding credit card loans, 97.1% of the agreements covering insured deposits, and 100% of the agreements covering dollar amounts loaded on prepaid cards.⁶⁶

Businesses that offer similar products to large numbers of consumers have powerful incentives to limit their exposure to aggregate claims.⁶⁷ Especially now that the Supreme Court has validated the inclusion of class waivers in arbitration agreements, arbitration provides a mechanism to do that. As prime targets for class litigation, credit card issuers are among the businesses most likely to favor arbitral class waivers. Indeed, but for the 2009 antitrust settlement, all but a small percentage of outstanding credit card debt would be covered by an arbitration agreement containing a class waiver. Absent legislation, regulation, or further litigation, as the effects of the settlement wear off, class arbitration waivers will likely return to their former ubiquity in credit card agreements.⁶⁸

⁶³ Id.

⁶⁴ Eisenberg et al.'s, *supra* note 50, at 876, research compared the contracts businesses impose on consumers with the same businesses' negotiated, non-consumer, non-employee contracts. While, less than 10% of the other contracts provided for arbitration of disputes.

⁶⁵ Rutledge & Drahozal, *supra* note 54, at 25.

⁶⁶ CFPB Preliminary Study, *supra* note 59, at 37.

⁶⁷ See Eisenberg et al., *supra* note 50, at 891-92 (suggesting that variations in the use of arbitration can be explained by industrial concentration and corresponding exposure to high volume, low value claims).

⁶⁸ See Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After AT&T Mobility vs. Concepcion*, 88 NOTRE DAME L. REV. __ (forthcoming 2013). Professor Gilles examined 37 arbitration clauses from major companies in a range of industries, including telecommunications, consumer banking and

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III. REVIEW OF EXISTING LITERATURE

Some research has been conducted into consumers' understanding of contract terms generally; more limited research has studied consumers' understanding of arbitration agreements specifically. In this section, we survey the existing literature on these subjects.

A. *Research into Consumer Understanding of Contract Terms Generally*

Consumers may not understand the terms they accept for two reasons. First, consumers may not read contracts at all. Second, even when they read contracts, consumers may not understand the terms contained in those contracts. Here we review the existing literature on each of those issues.

1. Likelihood that Consumers Read Contracts

Several studies have found that most consumers do not read or barely read contracts. For example, a study of 45,091 households visiting the websites of 66 online software companies found that "only one or two out of every thousand retail software shoppers chooses to access the license agreement, and those few that do spend too little time, on average, to have read more than a small portion of the license text."⁶⁹ The authors

credit cards, e-commerce, and entertainment, and found that every one included a class waiver.

69 See Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts, 43 J. Legal Stud. 1, 2 (forthcoming 2014) ("All sides in this debate realize that some majority of buyers, in some majority of circumstances, does not read the fine print. It is too long, too hard to understand, or seemingly unimportant to take the time to read and give meaningful assent."); id. at 36 ("we estimate the fraction of retail software shoppers that accesses EULAs at between 0.05% and 0.22%, and the very few shoppers that do access it do not, on average, spend enough time on it to have digested more than fraction of its content. . . . Even under generous assumptions, it is hard to estimate the probability that EULAs are read, and understood, growing even to 1%."). See also Florencia Marotta-Wurgler, Does Disclosure Matter? available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713860 (A study of clickstream data on web sites found that less than .5% of consumers read EULAs for at least one second); 7,500 Online Shoppers Unknowingly Sold Their Souls, Fox News, Apr. 15, 2000, available at <http://www.foxnews.com/scitech/2010/04/15/online-shoppers-unknowingly-sold-souls/> (consumers agreeing to computer game company's EULA promised to surrender their "immortal soul" upon demand; 88% of consumers shown the contract agreed to it even though they were offered the option of clicking on a box which would have enabled them to retain their souls, as well as receiving a voucher for five British pounds); Victoria C. Plaut & Robert P. Bartlett, III, Blind Consent? A Social

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also reported that “shoppers are more likely to access the [End User License Agreements] of smaller companies or companies that offer ex ante somewhat suspicious products such as freeware.”⁷⁰ Because arbitration clauses appear in the contracts of many large well-known companies, such as Citibank and Verizon Wireless, it may be that consumers are less likely to read and notice such arbitration clauses. Of particular relevance to this article is that a survey of 92 law students produced 54, or 59% who reported that under some circumstances they might read an e-purchase contract beyond the price and description of the goods.⁷¹ Of these, 16 said that the nature of a term might prompt them to read the contract, and of these 16, only one said that an arbitration clause would cause them to read the contract.⁷²

Consumer financial contracts fare little better. A study commissioned by the Federal Reserve reported that “When shown a sample cardholder agreement, few of the [focus group] participants said they would read the entire document if they received it. . . . In each group about half of participants said that they would not look at the cardholder

Psychological Investigation of Non-Readership of Click-Through Agreements, *Law & Human Behavior* 15 (2011) (survey of consumers found that 80% said they either did not read click-through contracts at all or did not really read anything; 16.5% said they skimmed such agreements; 89.4% described themselves as non-readers of such agreements).

⁷⁰See Yannis Bakos, Florencia Marotta-Wurgler, & David R. Trossen, Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts, 43 *J. Legal Stud.* 1, 4 (forthcoming 2014).

⁷¹ See Robert A. Hillman, On-Line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications 2, 7 (2005) (footnotes omitted):

[A survey of 92 law students finds that 4% read] their e-standard forms beyond price and description of the goods or services ‘as a general matter.’ Further, beyond price and description, a large minority of respondents do not read their forms at all. However, more than a third of the respondents read their forms when the value of the contract is high and more than a third read when the vendor is unknown. Further, a small cadre of respondents read particular terms beyond price and description, primarily warranties and product information warnings.

⁷² Robert A. Hillman, On-Line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications 10-12 (2005). Of course, law students can be expected to pay more attention to contracts than others, something the author of the study pointed out. *Id.* at 5.

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agreement at all.”⁷³ The study also noted that “[p]articipants indicated that they would be unlikely to read a change-in-terms insert that was included with their periodic statement and would probably throw it away. . . .”⁷⁴ A survey of mortgage brokers found that half stated that less than 10% of consumers receiving the final Truth in Lending Act (“TILA”) mortgage disclosures—which are the only TILA forms required to disclose the actual loan terms—devoted more than a minute to the disclosures; more than two-thirds of the brokers reported that less than 30% of the borrowers spent more than a minute on the disclosures.⁷⁵

Some consumers seem unwilling to read standard forms even after being given a lesson in the dangers of not reading them. In one experiment, test subjects were given a dummy consent form that counseled against signing the form as against the subjects’ best interests; the forms obliged subjects to administer electric shocks to people, among

⁷³ MACRO INTERNATIONAL INC., DESIGN AND TESTING OF EFFECTIVE TRUTH IN LENDING DISCLOSURES 6, 11 (May 16, 2007) (report submitted to Fed. Reserve Bd.) (“Participants paid very little attention to the cardholder agreement; only a few participants looked at it at all, and these only skimmed it briefly. When asked, a vast majority of participants indicated that they generally do not look at their cardholder agreements.”). See also Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction* 12 (unpublished manuscript) (Aug. 7, 2009), available at <http://ssrn.com/abstract=1443908> (survey finds that many consumers report not reading standard form contracts for car rental, laundry services, or opening a bank account but more stated they would read a nursery school placement contract; many consumers said they would skim the contracts before signing them). [CHECK] Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & Bus. 617, 694-95, 699-700 (2009) (more than a fifth of consumers in survey acknowledged not reading a contract to purchase a home; 71% stated they did not read all the terms in car rental contracts; 95% reported not reading all the terms when downloading software; 43% acknowledged not reading all the terms in an apartment rental agreement; 6% said they did not read any of the terms in their mortgage loan documents while 77% stated that they had not read all the terms). [CHECK]

⁷⁴ MACRO INTERNATIONAL INC., DESIGN AND TESTING OF EFFECTIVE TRUTH IN LENDING DISCLOSURES 6, (May 16, 2007) (report submitted to Fed. Reserve Bd.).

⁷⁵ See Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 Ohio St. L. J. 761, 783-84 (2010). See also Thomas A. Durkin & Gregory Elliehausen, *Disclosure as a Consumer Protection*, in *THE IMPACT OF PUBLIC POLICY ON CONSUMER CREDIT* 129 (Thomas A. Durkin & Michael E. Staten eds., 2002) (reporting on surveys of consumers over different years finding that 33 to 38% of respondents somewhat disagree with the statement “Most People Read Their Truth-in-Lending Statements Carefully,” and 27 to 34% of respondents disagree strongly with it.)

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other discomfoting tasks.⁷⁶ Over 95% of the subjects agreed to the dummy consent, after which they were told about the deception.⁷⁷ Upon being asked to sign a genuine consent, the average subject then spent only sixteen seconds reading it; only a fifth read the form through; and more than a third did not bother to read any of it.⁷⁸

Many disclosure critics argue that it is rational for consumers not to read disclosures.⁷⁹ The quantity of fine print alone is a barrier.⁸⁰ For

⁷⁶ See Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & Bus. 617, 679 (2009).

⁷⁷ Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & Bus. 617, 681 (2009).

⁷⁸ Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & Bus. 617, 680-82 (2009). Some people evidently believe that they would be more likely to read contract terms printed in bold or highlighted in other ways. See Robert A. Hillman, On-Line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications 13 (2005)(survey of 92 law students finds that “more respondents thought that they would read bold or otherwise highlighted text (42% or 39/92) than either when the terms appear in a pop-up window (24% or 22/92) or when the terms appear on the screen as a series of individual windows that must be clicked (23% or 21/92).”). Still others were influenced by being given certain statements before being shown a click-through agreement. In one study, consumers spent an average of 14 seconds more reading such contracts after being told that the contract was relevant to them; 62 seconds more when told that the contract had different terms from other such contracts; and 24 seconds more when told that they could modify the contract. Victoria C. Plaut & Robert P. Bartlett, III, Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements, *Law & Human Behavior* 28 (2011). In contrast, telling consumers that most people read the agreement or that the agreement was offered by a reputable vendor did not produce a difference in reading time that was statistically significant. *Id.* at 28-29. Giving consumers a version of the click-through contract with the suggestion that it was short and skimmable also increased the time they spent reading. Victoria C. Plaut & Robert P. Bartlett, III, Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements, *Law & Human Behavior* 33 (2011).

⁷⁹ Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600 (1990) (“It is, therefore, rational for even a conscientious consumer to pay little, if any, attention to subordinate contract terms.”); Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 309 (1986) (“[C]onsumers who are faced with ... form contracts ... refus[e] to read, and ... it is reasonable for them to do so.”); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 717 (1992) (“[P]urchasers would be acting irrationally if they incurred the costs required to fully comprehend all contract terms.”); Omri Ben-Shahar & Carl E.

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example, the iTunes contract is reportedly 32 feet long, even when printed in 8 font type.⁸¹ And that is only one contract. Consumers choosing among credit cards by examining the associated contracts may need to read dozens of pages of fine print. Even then, the task is not finished because, scholars argue, contract terms frequently change and so must be periodically re-read.⁸²

Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 10 (2014) (“[E]xperience teaches people how little they may gain from studying disclosures and how little they may lose by ignoring them. In short, people often calculate that a well-informed decision’s benefits poorly justify its costs.”). And Ben-Shahar & Carl E. Schneider add at 61:

In the [disclosurite] world (1) people recognize that unfamiliar and complex decisions matter and depend on their own interests and circumstances and (2) learn enough to make informed and considered decisions that promote their interests and preferences. In the real world, however, people in surprising numbers and circumstances (1) resist making even significant decisions and (2) make them with incomplete information and inconsiderable effort. People are, loosely and broadly, decision averse. They are therefore unlikely to seek out or study disclosures

⁸⁰ See Robert A. Hillman, *On-Line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications* 2 (2005) (“impatience accounts most often for the failure of respondents to read their forms.”)

⁸¹ Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 24 (2014). Ben-Shahar & Schneider compiled a list of reasons why consumers ignore disclosures, including:

[T]hey think they know what they say, . . . [T]hey look irrelevant. . . [T]hey think that what they get and how they are treated depend more on the person or place they’re dealing with than any disclosure . . . [T]hey think transactions are safe. . . Why read a disclosure if it just keeps you from getting what you have to have? . . . [C]ompanies use fine print to protect themselves . . . Disclosees soon learn (to paraphrase Thurber) that disclosures tell them more about penguins than they want to know, but incomprehensibly. . . Disclosees do not always recognize that they are being given information they are supposed to study and use. . . Boring!

Id. at 75-77

⁸² Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 73 (2014) (“disclosures can change rapidly.”). For example, the Consumer Financial Protection Bureau reported that some credit card issuers filed new contracts every quarter, implying frequent alterations in contract terms. See Consumer Financial Protection Bureau, *Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date* 132 (2013), available at

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One reason contracts are so long is that they include terms addressing improbable contingencies—such as provisions for resolution of disputes. Consumers who read contracts may find provisions dealing with unlikely events particularly valueless, and so skip over them.⁸³

In addition to their sheer length, consumer contracts are typically drafted in dense language, discouraging all but the most intrepid from reading the fine print. In Tess Wilkinson-Ryan's words "Not only are form contracts unread, they are functionally unreadable (or at least indigestible) for consumers with bounded cognitive capacity—i.e., everyone."⁸⁴ Anecdotal reports suggest that even the brightest legal minds do not read boilerplate. Both Chief Justice John Roberts and Judge Posner have acknowledged signing contracts without perusing the fine print.⁸⁵

http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

⁸³ See Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 717 (1992) ("The costs of obtaining and understanding information about contract terms are especially daunting when the form terms involve risks that are unlikely to occur."); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1226 (1983) ("[M]any of the terms [in standard form contracts] concern risks that in any individual transaction are unlikely to eventuate. It is notoriously difficult for most people, who lack legal advice and broad experience concerning the particular transaction type, to appraise these sorts of contingencies.").

⁸⁴ See Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 Iowa L. Rev. 1745, 1749 (2014). See also Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 309 (1986) ("The average consumer knows that he probably will be unable to fully understand the dense text of a form contract"); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 436 (2002) "[T]he consumer would not understand much of the language of the boilerplate even if she took the time to read it.").

⁸⁵ See Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print, ABA Journal (Oct 20, 2010), available at http://www.abajournal.com/weekly/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email; Judge Posner Admits He Didn't Read Boilerplate for Home Equity Loan, ABA J. (Jun 23, 2010), available at http://www.abajournal.com/weekly/article/judge_posner_admits_he_didnt_read_boilerplate_for_home_equity_loan.

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2. Consumers' Comprehension of Contract Terms

Many contract terms are subject to disclosure laws mandating that some terms be disclosed clearly and conspicuously in specified formats.⁸⁶ Businesses also frequently wish to include in their contracts additional terms not subject to these disclosure mandates. Depending on the particular contract, these documents—disclosures and other terms—may be provided separately or combined into a single contract. The credit card contract we provided to consumers was an example of the latter: it opened with the so-called Schumer Box—that is, a set of credit card disclosures mandated by the federal Truth in Lending Act and its implementing regulations⁸⁷—followed by other contract terms.

Strictly speaking, arbitration clauses fit into the “other terms” category, largely because the United States Supreme Court has turned back state attempts to mandate conspicuous disclosure of arbitration clauses and the FAA does not mandate disclosure requirements for arbitration clauses.⁸⁸ Nevertheless, in many consumer contracts, arbitration clauses are more conspicuous than other contract terms. Thus, the arbitration clause in the contract we used was printed in bold type and portions appeared in italics and ALLCAPS. In addition, the contract included at the beginning of the textual portion appearing on page two (the first page was devoted entirely to the Schumer Box disclosures) a boldface reference to the arbitration clause.⁸⁹ Accordingly, the arbitration clause in our contract, as is true of many such clauses, is a hybrid, more conspicuous than conventional terms but less than required disclosures.

⁸⁶ See, e.g., 12 C.F.R. § 1026.18 (closed-end consumer loans); 15 U.S.C. § 2302 (consumer warranties), . Some laws use other language to increase the likelihood that consumers notice mandated disclosures. See, e.g., 15 U.S.C. § 1692g (communications may not “overshadow” debt collection disclosure); 15 U.S.C. § 2308(b) (limitation on duration of implied warranties to be “prominently displayed”).

⁸⁷ See 15 U.S.C. § 1637; 12 C.F.R. § 1026.6(b). The Schumer Box is named after then-representative Charles Schumer. As can be seen from the sample contract appended to this article, it includes a variety of disclosures law-makers thought would be of the greatest concern to the typical consumer shopping for a credit card, such as the APR, annual fee, penalty fees, and the like.

⁸⁸ *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (state law requiring arbitration terms to be conspicuous was preempted by FAA).

⁸⁹ The reference read: “**This Agreement contains an arbitration provision (including a class action arbitration waiver). “It is important that you read the entire Arbitration Provision section carefully.”**

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As a result, our review of the literature includes studies of both mandated disclosures and other terms.

Numerous commentators have noted the linguistic and legal complexity of typical consumer contracts. Alan M. White and Cathy Lesser Mansfield have written that “[t]he degree of literacy required to comprehend the average disclosure form and key contract terms simply is not within reach of the majority of American adults.”⁹⁰ Judge Posner has explained “not all persons are capable of being careful readers.”⁹¹ Former Federal Reserve Chair Ben S. Bernanke, whose agency was responsible during his tenure for administering the Truth in Lending disclosures, among others, has said that “not even the best disclosures are always adequate. . . . [S]ome aspects of increasingly complex products simply cannot be adequately understood or evaluated by most consumers, no matter how clear the disclosure.”⁹² And noted scholar and now-Senator Elizabeth Warren, who conceived the idea of the Consumer Financial Protection Bureau, has been quoted as saying about a credit card disclosure: “I teach contract law at Harvard, and I can’t understand half of what it says.”⁹³

Those observations have been confirmed by empirical research. Debra Pogrund Stark & Jessica M. Choplin have identified fourteen “cognitive and social psychological factors that cause disclosure forms to be ineffective.”⁹⁴ In a landmark 2007 study of Truth in Lending mortgage

⁹⁰ Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 237-39 (2002) (“[L]arge numbers of adults have limited quantitative literacy skills. . . .96% of American adults cannot extract and compute credit cost information from contract and disclosure documents. . . .”); see also Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 79 (2014) (“Many people cannot read many disclosures because they are not literate or numerate enough to decipher them with reasonable effort.”).

⁹¹ *Emery v. Am. Gen. Fin.*, 71 F.3d 1343, 1347 (7th Cir. 1995).

⁹² Ben S. Bernanke, Address at the Federal Reserve System’s Biennial Community Affairs Research Conference (Apr. 17, 2009), *available at* <http://www.federalreserve.gov/newsevents/speech/bernanke20090417a.htm>.

⁹³ Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 7-8 (2014). See also Joan Warrington, On Durkin & Elliehausen, in *THE IMPACT OF PUBLIC POLICY ON CONSUMER CREDIT* 145, 146 (Thomas A. Durkin & Michael E. Staten eds., 2002) (“Even with a law degree and a career in consumer credit, I still have problems understanding many of the disclosures that I see.”).

⁹⁴ See Debra Pogrund Stark & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16, 85, 97 (2010).

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disclosures, the Federal Trade Commission staff found that many consumers could not understand key loan terms even while reading the forms.⁹⁵ Mortgage borrowers have a significant incentive to master their loan terms because for most a mortgage is the largest financial obligation they will ever assume. Yet other reports confirm that many consumers did not understand their mortgage terms—presumably disclosed via the TILA forms.⁹⁶

A 1977 study sheds some light on consumer awareness of arbitration clauses in particular, albeit clauses that, unlike the arbitration clauses frequently in use today and employed in our study, were not binding.⁹⁷ The researcher showed consumers two versions of a credit card contract, one simpler than the other, and then a warranty on the sale of a

⁹⁵ See JAMES M. LACKO & JANIS K. PAPPALARDO, FEDERAL TRADE COMMISSION BUREAU OF ECONOMICS, STAFF REPORT, IMPROVING CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE MORTGAGE DISCLOSURE FORMS 122 (2007) *available at* <http://www.ftc.gov/os/2007/06/P025505MortgageDisclosurereport.pdf>:

About a fifth of the respondents viewing the current disclosure forms could not correctly identify the APR of the loan, the amount of the case due at closing, or the monthly payment About a third could not identify the interest rate or which of two loans was less expensive, and third did not recognize that the loan included a large balloon payment Half could not correctly identify the loan amount. Two-thirds did not recognize that they would be charged a prepayment penalty if in two years they refinanced with another lender. . . . Three-quarters did not recognize that substantial charges for optional credit insurance were included in the loan. . . . [N]early nine-tenths could not identify the total amount of up-front charges in the loan.

⁹⁶ See, e.g., Brian Bucks & Karen Pence, *Do Homeowners Know Their House Values and Mortgage Terms* 2 (FEDS Working Paper No. 2006-03, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899152 (“a sizable number of adjustable-rate borrowers report that they do not know the terms of their contracts.”); IRA J. GOLDSTEIN, THE REINVESTMENT FUND, LOST VALUES: A STUDY OF PREDATORY LENDING IN PHILADELPHIA 17 (2007), *available at* http://trfund.com/resource/downloads/policypubs/lost_values.pdf (“Several borrowers interviewed. . . reported thinking that they have one loan when they have two.”). See also Victoria C. Plaut & Robert P. Bartlett, III, Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements, *Law & Human Behavior* 19 (2011) (survey finds that consumers “have little comprehension of the terms to which they have agreed.”).

⁹⁷ See Jeffrey Davis, Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts, 63 Va. L. Rev. 841 (1977).

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refrigerator that included an arbitration clause.⁹⁸ The “long” credit card contract was about four pages in length while the short version was less than two; the warranty spanned a page, meaning that consumers in the long contract condition read approximately five pages and those in the short contract condition read less than three.⁹⁹ The survey then asked a series of questions about the documents, including one which tested awareness and understanding of the arbitration clause.¹⁰⁰ More than 60% of the consumers who had seen the simplified credit card contract answered the arbitration question correctly, while nearly half of those who

⁹⁸ Professor Davis reported that he did not try to secure a sample that represented the nation’s demographics but simply visited a suburban grocery store and an urban one. Jeffrey Davis, Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts, 63 Va. L. Rev. 841, 868 (1977). The arbitration clause said:

In the event of a Dispute—XYZ is a subscriber to an arbitration agreement which is made available for all consumers who are unable to have their warranty claims satisfactorily settled through us. You are obligated to submit to this arbitration procedure after unsuccessful attempts to settle any warranty claim before attempting to satisfy your claim through litigation. Id. at 914 (italics in original).

⁹⁹ Jeffrey Davis, Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts, 63 Va. L. Rev. 841, 908 -14 (1977). Today’s credit card contracts that include arbitration clauses are usually longer, see *supra* note – and accompanying text.

¹⁰⁰ The question read:

If the refrigerator fails during the warranty period, and XYZ refuses to fix it, claiming that the damage was your fault:

There is nothing you can do to force XYZ to honor its warranty.

Your only hope is to try to force XYZ to honor its warranty by such action as calling the Better Business Bureau, complaining to local officials, writing to newspapers, picketing, etc.

You can bring suit immediately to force XYZ to honor its warranty.

You may bring suit, but only after you have first submitted to an arbitration provider.

Jeffrey Davis, Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts, 63 Va. L. Rev. 841, 916-17 (1977).

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had seen the more complex credit card contract were able to choose the right response.¹⁰¹

A more recent study surveyed 37 employees of a company that required the employees to sign a mandatory arbitration agreement.¹⁰² While 67% of the employees recalled signing the agreement, only three of the employees remembered that the agreement required arbitration.¹⁰³ Nearly a third believed that the provision blocking them from suing in court would not be enforced by a court.¹⁰⁴ When the same researcher surveyed 115 MBA students at a prestigious East Coast business school,¹⁰⁵ more than half believed that an arbitration clause barring them from suing in court would not be enforceable.¹⁰⁶

Nor are consumers necessarily aware of their confusion. Indeed, consumers sometimes believe they understand contracts better than is actually the case. Thus, one survey found that the median consumer who acknowledged not having read click-through agreements nevertheless

¹⁰¹ Jeffrey Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 Va. L. Rev. 841, 876 (1977). Professor Davis observed that lower-income shoppers showed a more dramatic improvement from the long contract to the short contract, with a 17% increase in correct responses to the arbitration question while high-income shoppers improved only about 8% from the complex contract to the simple. *Id.* at 877). On all questions, consumers seeing the shorter contract answered an average of 56% of the questions correctly while those who were shown the longer version scored 45 on average, a difference of 11%. *Id.* at 876. Again the improvement from the complex contract to the simple was more pronounced among low-income shoppers (18.5% improvement) versus high-income shoppers (6.5%). *Id.* at 876-77.

¹⁰² See Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 Conn. L. Rev. 383, 409 (2008).

¹⁰³ See Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 Conn. L. Rev. 383, 401, 418 (2008).

¹⁰⁴ See Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 Conn. L. Rev. 383, 418 (2008).

¹⁰⁵ See Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 Conn. L. Rev. 383, 419 (2008).

¹⁰⁶ See Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 Conn. L. Rev. 383, 420 (2008).

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rated his or her understanding of those contracts as a three on a six point scale.¹⁰⁷ In fact, those who claimed to read such contracts fared no better in answering questions correctly about the contract than those who confessed that they did not read the contracts.¹⁰⁸

In sum, existing research seems to confirm what the anecdotal evidence suggests: consumers struggle to read and understand consumer contracts. Length and density deter consumers from attempting to read contract terms at all, and the terms are unintelligible for most people who attempt to read them.

B. Research into Consumer Understanding of Arbitration Agreements

While substantial empirical research has been conducted into both the prevalence of arbitration clauses in consumer contracts and consumer understanding of contract terms generally,¹⁰⁹ very little research has been done into consumers' understanding of and attitudes toward either arbitration as a process or arbitration agreements in consumer contracts.¹¹⁰

In 2012, the Pew Charitable Trusts commissioned a national survey of checking account holders to determine their attitudes about

¹⁰⁷ Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, *Law & Human Behavior* 16 (2011). In fact, the study found that consumers had “little comprehension of the terms” *Id.* at 19. The study also found that respondents did better on a quiz when given a shorter form of the contract than a longer form. *Id.* at 31.

¹⁰⁸ Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, *Law & Human Behavior* 16 (2011).

¹⁰⁹ See *supra* Section III(A).

¹¹⁰ Several industry-funded studies have surveyed individuals who had participated in arbitration to assess their perceptions of the process. See Peter B. Rutledge, *Whither Arbitration?* 6 *GEO. J. L. & PUB. POL'Y* 549, 560-61 (2008)(citing and describing studies). The surveys found that solid majorities were satisfied with the arbitration process. *Id.* Most of the individuals surveyed, however, had voluntarily entered into arbitration. See Taylor Lincoln & David Arkush, *The Arbitration Debate Trap: How Opponents of Corporate Accountability Distort the Debate on Arbitration* 19-22 (Public Citizen 2008), available at [http://www.citizen.org/documents/ArbitrationDebateTrap\(Final\).pdf](http://www.citizen.org/documents/ArbitrationDebateTrap(Final).pdf). None of the studies addressed consumer understanding of pre-dispute mandatory arbitration agreements or their effects.

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mandatory pre-dispute arbitration agreements.¹¹¹ The survey found that, of 603 consumers surveyed, 68% believed they should have a choice between arbitrating and taking a dispute to court.¹¹² Further, 89% of the respondents reported dissatisfaction with the lack of judicial review of arbitral awards.¹¹³

The consumer advocacy group Public Citizen and the Employee Rights Advocacy Institute for Law & Policy commissioned a national phone survey of 800 likely voters in 2010 to assess attitudes toward mandatory arbitration.¹¹⁴ Fifty-nine percent of survey respondents, when given a description of mandatory binding arbitration, responded that they opposed it.¹¹⁵ Without giving respondents an agreement to read, the survey also asked respondents whether they remembered seeing an arbitration agreement in an employment or consumer contract. Approximately two-thirds replied that they had not.¹¹⁶

¹¹¹ Pew Charitable Trusts, *Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution* (Nov. 2012), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_arbitration_report.pdf. The Pew study also examined account agreements for 92 of the 100 largest financial institutions in the U.S. and found that 43% included arbitration agreements in the contracts with consumers, with 75% of those barring class claims. *Id.* at 3-4.

¹¹² *Id.* at 7.

¹¹³ *Id.*

¹¹⁴ See Lake Research Partners, *National Study of Public Attitudes on Forced Arbitration*, April 2009, available at <http://www.citizen.org/documents/lake-research-national-study-of-public-attitudes-forced-arbitration.pdf>.

¹¹⁵ *Id.* at 4. The respondents were asked the following question:

Next I'm going to read you a short description of binding mandatory arbitration. Binding mandatory arbitration requires both sides to submit any future disputes to binding arbitration as a condition of having a job or buying a product or service. Binding mandatory arbitration is written into many Terms of Employment and Terms of Agreement for goods and services that you buy, including for insurance, home-building, car loans and leases, credit cards, retirement accounts, investment accounts, and nursing facilities, to name a few. Binding mandatory arbitration means that consumers waive their rights to sue, to participate in class action lawsuits, or to appeal. Having heard that, do you favor or oppose binding mandatory arbitration, or are you unsure?

Id.

¹¹⁶ *Id.* at 15. The survey did not attempt to determine whether the respondents had in fact entered into any specific agreements containing arbitration clauses.

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The CFPB is in the process of conducting a national phone survey of 1000 credit card consumers to explore their awareness of and assumptions about the dispute resolution options in those agreements. The respondents will be asked about the terms in the contracts covering their most recently-obtained credit cards. The CFPB survey will assess the extent to which consumers correctly perceive the dispute resolution options open to them under their agreements and their beliefs regarding dispute resolution methods, including what the different processes entail and when they would be available.¹¹⁷

IV. METHODOLOGY

Our goal in this study was to assess the extent to which consumers both read and understand arbitration agreements in credit card contracts. We hoped to recreate a typical business-consumer exchange, both in terms of the type of agreement respondents were given and the circumstances in which they received the contract. In addition, we sought to assess consumers' understanding of arbitration agreements generally and their awareness of arbitration agreements in their existing business-consumer relationships. Here we describe the methodology we used to achieve those goals.

A. *Survey Design and Structure*

We concluded that it would be impracticable to attempt to survey consumers in person. Among other things, it would have been prohibitively expensive to get a sufficiently large and representative sample either by going door-to-door or surveying people in public. Because we wanted respondents to see and answer questions about a written contract, a phone survey would also have been impracticable. Consequently, we chose to conduct a web-based survey, using the Qualtrics platform.

After survey respondents completed the required consent form to participate, they were shown a representative sample consumer contract and then asked a series of questions about the contract and about arbitration more generally.¹¹⁸ The survey questions fell into four types: questions about awareness and understanding of the arbitration clause in the sample consumer contract participants were shown; questions about respondents' awareness and understanding of arbitration clauses in

¹¹⁷ See CCH Federal Banking Law Reporter

¹¹⁸ A copy of one version of the survey appears in an appendix.

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consumer contracts generally; questions about respondents' experiences with contracts; and questions about participants' demographics.

While many consumer contracts include an arbitration clause, we chose a credit card contract for our sample contract for two reasons.¹¹⁹ First, the survey results have more value if based on a contract that is a commonplace in contemporary life.¹²⁰ Approximately 176.8 million Americans have credit cards.¹²¹ Second, a publicly-accessible database maintained by the Consumer Financial Protection Bureau includes credit card contracts in use by more than three hundred issuers.¹²² The database not only provided access to an actual contract to use in the survey, but also enabled us to determine how the contract compared with other credit card contracts.

We used the sample credit card contract we did for several reasons. First, its arbitration clause is typical of arbitration clauses commonly found in credit card contracts with arbitration clauses.¹²³ The arbitration

¹¹⁹ Arbitration clauses are also used in many other contracts. Companies that have worked their way into the tissues of contemporary American life and whose non-credit card contracts contain arbitration clauses include Verizon Wireless, AT&T Mobility, Sprint, Skype, and PayPal. See note – and accompanying text *supra*.

¹²⁰ Credit cards have been used in the United States since the 1950s. See Tom Brown & Lacey Plache, *Paying with Plastic: Maybe Not So Crazy*, 73 U. Chi. L. Rev. 63, 68-70 (2006) (history of credit cards).

¹²¹ See KEVIN FOSTER ET AL., FEDERAL RESERVE BANK OF BOSTON, *THE 2008 SURVEY OF CONSUMER PAYMENT CHOICE* 56 (2008) (estimating that 176.8 million American consumers have credit cards). The percentage of American households with a general purpose credit card varied from 60 to 74% during 2009-2011. During the same period, between a third and 41% of households had a private label revolving store card. See Mercator Advisory Group, *U.S. Credit Cardholders: Waiting for a Rebound* 9 (2011). Americans held more than 750 million Visa and MasterCard accounts alone in 2011. Mercator Advisory Group, *U.S. Credit Cardholders: Waiting for a Rebound* 10 (2011).

¹²² The database, mandated by 12 U.S.C. section 1632(d), is available at <http://www.consumerfinance.gov/credit-cards/agreements/>. Issuers with fewer than 10,000 open credit card accounts are not required to provide copies to the Bureau. 12 CFR § 1026.58(c)(5)(i).

¹²³ The CFPB found that half of all credit card loans outstanding as of the end of 2012 were on cards subject to arbitration clauses. See Consumer Financial Protection Bureau, *Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date* 54 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf. As discussed *supra* note –, the number might have been higher but for a consent decree entered into by certain banks which had collectively issued 86.8% of the credit cards without arbitration clauses. The consent decree blocked

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clause included a small claims court exclusion,¹²⁴ class action waiver,¹²⁵ jury trial waiver,¹²⁶ choice of AAA or JAMS as the arbitration provider,¹²⁷ and designation of the FAA as governing law.

Second, we wanted to use both an arbitration agreement and a survey instrument that were not unduly difficult to read. In particular, we wanted an arbitration clause that would be no harder for consumers to read than the typical credit card arbitration clause. The CFPB study of credit card arbitration clauses found the mean length to be 1,098 words and the median 1,074 words.¹²⁸ The arbitration clause in our contract contained

signatory credit card issuers from inserting arbitration clauses in their credit card contracts. See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 54-55 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf. The relevant portions of the consent decree have since expired and we do not know if the banks involved have added arbitration clauses to their credit card contracts. The Bureau also reported that 17% of credit card issuers include arbitration clauses while 83% did not; the disparity between the number of issuers using arbitration clauses and the percentage of credit card loans subject to arbitration clauses is accounted for by the fact that larger credit card issuers are more likely to use arbitration clauses. *Id.* at 21.

¹²⁴ The CFPB found that 66.7% of the credit card arbitration clauses it examined included small claims carve-outs. See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 32 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

¹²⁵ The CFPB study found that 93.9% of the credit card arbitration clauses included class action waivers. See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 37 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

¹²⁶ The CFPB study found that 92.5% of credit card arbitration clauses stated that arbitration precluded jury trials. See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 52 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

¹²⁷ The CFPB study found that 83.3% of the credit card arbitration clauses listed AAA as a provider and 40.9% listed JAMS as a provider. See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 34 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

¹²⁸ See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 28 (2013), available at

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615 words and so would require less reading time than the average credit card arbitration clause. We also tested the contract using the Flesch Reading Ease Formula¹²⁹ and the Flesch-Kincaid Grade Level Score,¹³⁰ two widely-used tests of readability. The contract we selected was slightly more readable than both the mean and median credit card arbitration clause, according to the CFPB data, on each scale.¹³¹

We also wanted to use a contract that was not excessively lengthy. The agreement we selected covered seven pages. In comparison, a Boeing Employees Credit Union contract runs 21 pages,¹³² while a USAA Savings Bank agreement spans 19 pages.¹³³ To determine if our contract was of a typical length, we asked two research assistants to record the length of credit card contracts in the CFPB database that included arbitration

http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

¹²⁹ See Rudolf Flesch, A New Readability Yardstick, 32 J. Applied Psych. 221, 230 (1948). The Flesch Formula produces a score based on such factors as the average number of words per sentence and the average number of syllables per word.

¹³⁰ See generally Peter J. Kincaid, et al., Derivation of New Readability Formulas (Automated Readability Index, Fog Count and Flesch Reading Ease Formula) for Navy Enlisted Personnel, Nat'l Technical Info. Serv., RBR-8-75, 4, 14 (Feb. 1975), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a006655.pdf>; Norman E. Plate, *Do as I Say, Not as I Do: A Report Card on Plain Language in the United States Supreme Court*, 13 T.M. Cooley J. Prac. & Clinical L. 79, 93-94 (2010). The Flesch-Kincaid Grade Level uses the same inputs as the Flesch Formula but assigns texts a grade level based on difficulty.

¹³¹ A Flesch score below 50 is considered difficult reading; 50 to 60 is regarded as fairly difficult while scores in the sixties are labeled standard. See Rudolf Flesch, A New Readability Yardstick, 32 J. Applied Psych. 221, 230 (1948). The Bureau found that the mean Flesch readability test score for arbitration clauses was 34.5 and the median was 33.7. See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 28-29 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf. Our arbitration clause came in at 35.4, meaning that it is slightly more readable than both the mean and median credit card arbitration clause. The Bureau reported that the mean Flesch-Kincaid grade level for credit card arbitration clauses was 14.2 and the median grade level was 14.7. Our arbitration clause's Flesch-Kincaid grade level was 14.0, again indicating it is slightly more readable than both the mean and median credit card contract arbitration clause.

¹³² The contract is available at http://files.consumerfinance.gov/a/assets/credit-card-agreements/pdf/creditcardagreement_9599.pdf

¹³³ The contract is available at http://files.consumerfinance.gov/a/assets/credit-card-agreements/pdf/creditcardagreement_6316.pdf.

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clauses; for issuers with multiple contracts in the database, we asked the research assistants to use only the first contract in the database. According to their research, the mean length of the contracts with arbitration clauses was 9.15 pages while the median was seven.¹³⁴

We sought a contract in which the arbitration clause was at least as conspicuous as that in a typical credit card contract. The clause in our contract was printed in bold, and the provisions informing consumers that they waive the rights to sue in court, participate in a class action, have a jury trial, and to appeal the arbitrator's decision appeared in italics and ALLCAPS. The second page of our contract (the first page of text after the so-called Schumer Box disclosures) also included a bold face reference to the arbitration clause and class action waiver and urged consumers to read the arbitration clause carefully. Our research assistants' survey of arbitration clauses found that only 14% had such a statement early in the contract. The arbitration clause in our contract began on page six, as compared to a mean beginning page in the credit card contracts checked of 5.8 and a median beginning page of four. The research assistants reported that in 37% of the contracts, the arbitration clause began after page six.¹³⁵

We were also concerned with the readability of the survey itself, as well as of the consent form. Both the consent form and survey questions had readability scores indicating that they should be easily comprehensible by tenth graders and seventh graders, respectively.¹³⁶ They are considerably more readable than credit card contracts with arbitration

¹³⁴ We tested the portion of the contract other than the arbitration agreement for readability, as well. The CFPB found the mean Flesch readability score for the non-arbitration clause portion of credit card contracts with arbitration clauses to be 52.2 and the median 51.6. Ours was 46.5, signaling somewhat harder reading. The CFPB reported the mean Flesch-Kincaid grade level for the non-arbitration term portions of credit card contracts with arbitration clauses was 10.8 with a median of 11. Ours was 12.6, again meaning that it was somewhat harder reading. We judged these differences to be acceptable because we were concerned with the arbitration clause rather than the rest of the contract and also because the balance of the sample contract was still easier going than arbitration clauses.

¹³⁵ We found it necessary to make some formatting changes in the sample contract. We replaced the name of the issuing bank with ABC Bank, and redacted the issuing bank's contact information. To accommodate the limitations of the survey software, we had to change the pagination of certain sections of the contract. None of the formatting changes altered the arbitration clause or its placement within the contract.

¹³⁶ The consent form's Flesch readability score was 48.2, while the survey's was 67.5. The Flesch-Kincaid grade levels were 10.1 and 7.1, respectively.

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clauses.¹³⁷ We also put the survey through two rounds of tests before deploying it broadly. In the first phase, we administered the survey to 85 friends, family members and acquaintances to whom we had not previously mentioned that we were studying arbitration clauses.¹³⁸ We were particularly concerned about the length of the questions, which were longer than we would have preferred, despite our collective decades of experience drafting examination questions for law students.¹³⁹ Nevertheless, no respondents indicated that they found the survey questions confusing or that they did not understand them.

Most of the respondents in the first phase had taken at least some college courses. That left us concerned that we had not adequately tested whether less educated consumers might have difficulty understanding the survey questions. Accordingly, for phase two we asked Qualtrics to supply a panel of respondents who had not gone beyond completing high school. Qualtrics found 26 respondents to take the survey in phase two, of whom three had not graduated from high school; the remainder had not progressed beyond a high school diploma. Again, the respondents did not indicate difficulty understanding the questions.

Finally, we had concerns about the appearance of the contract. The process of reproducing the contract in the survey necessarily made the appearance of the printed text marginally less “crisp” than it appears on the printed page, though we note that we found it completely readable. While the font on the screen when not zoomed in was small, it was slightly larger than the font of the actual contract in the CFPB database when printed out. We dealt with this by instructing respondents to enlarge the text on their monitor if they had difficulty reading.¹⁴⁰ In any event, of the 668 respondents, only 34, or 5%, complained about the print.¹⁴¹

¹³⁷ See *supra* note 131 and accompanying text.

¹³⁸ We offered to compensate phase one respondents by paying them \$5 for their responses, though not all took us up on the offer.

¹³⁹ In the first phase, the survey included the following instruction: “We are still perfecting the survey, so if you see anything that confuses you or you don’t understand, please indicate that in the places for comments.”

¹⁴⁰ Specifically, the instructions stated: “If you need to make the print size bigger, please use your browser’s controls to do so (in Explorer, click “View” and then use “Zoom” to make your selection).”

¹⁴¹ We are not sure how seriously to take those complaints. Some may reflect a certain tedium respondents felt in responding to the survey rather a genuine difficulty reading the font. For example, one respondent noted: “Too many pages, small print,

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B. Survey Implementation

We obtained a sample of survey participants that was demographically representative of the approximately 246,513,378 people over 18 residing in the United States¹⁴² with respect to age,¹⁴³ education,¹⁴⁴ income¹⁴⁵ and ethnicity.¹⁴⁶ Figures 1 through 4 provide additional information about the demographics of the respondents. Because our goal was to determine consumers' understanding of arbitration clauses generally, rather than the understanding of only credit card holders, we did not attempt to obtain a sample that reflects credit card holders specifically. Ultimately, we obtained 668 responses, though not all respondents answered every multiple choice question. If our sample was truly random, that number of respondents should give us a 95% confidence level of a 4% margin of error.¹⁴⁷

We know, of course, that our sample was not truly random. Any survey necessarily excludes people who refuse to answer surveys. In

found my mind wondering about other things while I was trying to read, Just started to [sic] things so I could hurry and finish.” Another respondent wrote that “Font size made it more challenging to see details,” but also claimed to have read and understood most of the contract; when asked to identify five items from the contract, that respondent recalled ten, including the arbitration clause and several other terms that appeared in the text, as opposed to the Schumer Box. We were not present to see the contract on the monitors of the respondents and so cannot be certain how it appeared. Thus, it is possible that some responses were affected by the print quality.

¹⁴² See U.S. CENSUS BUREAU, DATA ACCESS TOOLS, *available at* <http://quickfacts.census.gov/qfd/states/00000.html> (last visited June 24, 2014).

¹⁴³ See U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION IN THE UNITED STATES: 2012, *available at* <https://www.census.gov/population/age/data/2012comp.html> (last visited June 18, 2014).

¹⁴⁴ See U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2013 – DETAILED TABLES, *available at* <http://www.census.gov/hhes/socdemo/education/data/cps/2013/tables.html> (last visited June 18, 2014).

¹⁴⁵ See Linda Levine, CONG. RESEARCH SERV. RS20811, THE DISTRIBUTION OF HOUSEHOLD INCOME AND THE MIDDLE CLASS (2012), *available at* http://assets.opencrs.com/rpts/RS20811_20121113.pdf (last visited June 18, 2014).

¹⁴⁶ See U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS, *available at* <http://quickfacts.census.gov/qfd/states/00000.html> (last visited June 18, 2014).

¹⁴⁷ Insert footnote based on http://help.surveymonkey.com/articles/en_US/kb/How-many-respondents-do-I-need. And <http://www.surveysystem.com/sscalc.htm>.

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addition, as with most web-based surveys, selection bias in the sample population of survey participants might distort the results.¹⁴⁸ A web-based survey excludes the 15% of adults who do not use the internet at all. That population is skewed towards older Americans because 44% of those over sixty-five don't use the internet.¹⁴⁹ While our respondents include approximately the same percentage of elderly people as the general population, we cannot be certain that non-web users would respond in the same way as web-users. Nevertheless, because internet-users represent such an enormous share of the general population, even in the event that those who do not use the internet understand arbitration clauses better than internet-users, the level of understanding of internet-users is worth studying and may itself serve as a basis for formulating public policy.¹⁵⁰

Another concern is that the 583 respondents supplied by Qualtrics—87% of the total—had previously expressed a willingness to answer online surveys for compensation. We do not know what percentage of American adults have made such a declaration, but it is surely a much smaller proportion than 87%. Nor do we know how the people who have stated that they are available to respond to surveys for remuneration might differ from the general population. But we were reassured when we tested for differences between the answers from the respondents we found and the respondents Qualtrics found on the eight questions that had right and wrong answers: a t-test indicated that the differences were not statistically significant at the .05 level.¹⁵¹

Because the survey put respondents in an artificial situation—they were not actually making a financial commitment based on the contract we gave them, among other things—we cannot be certain whether they gave the contract the same degree of care they would give a similar

¹⁴⁸ Jeckle Bethlehem, *Selection Bias in Web Surveys*, International Statistical Review (2010), 78, 2, 161–188 doi:10.1111/j.1751-5823.2010.00112.x.

¹⁴⁹ Kathryn Zickurr, *Who's Not Online and Why*, PEW RESEARCH INTERNET PROJECT (Sept. 25, 2013), <http://www.pewinternet.org/2013/09/25/whos-not-online-and-why/> (last visited June 15, 2014).

¹⁵⁰ To the extent that web users may be more sophisticated than non-web users, our respondents may also have been more sophisticated than the population as a whole, suggesting a greater likelihood of comprehension of the contract than would be seen in the general population.

¹⁵¹ The average percent of correct answers for our respondents was 27% while for the Qualtrics respondents it was 25%.

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contract they received as part of a real-world transaction. The survey provided the following instructions immediately before the contract:

Imagine that you obtained a credit card and the credit card company has provided you with the credit card contract we are about to show you, perhaps online or through the mail. If you have a credit card, you have been given a contract like this for your credit card in the past. Some consumers read contracts like this while others may not, and still others may read some parts and not other parts. Please give this contract the exact same amount of attention you would if it had just been provided to you, along with your new credit card. This is not a test. Rather, we want to learn what you and other consumers take away from consumer contracts in your everyday life.

Despite those instructions, respondents may have read the contract with more or less care than they would have read a real credit card contract. They might have read it with greater care because the survey called their attention to the contract in a way that doesn't typically occur when consumers receive a credit card.¹⁵² Or they might have read it with less care because this was a simulation and did not directly impact them. And, of course, consumers may not accurately assess how carefully they read credit card contracts in their daily lives.¹⁵³

We also feared that the Qualtrics respondents might rush through the survey in an attempt to collect their compensation—Qualtrics compensated each respondent it supplied who completed the survey out of

¹⁵² Compare the Macro Study, *supra* note 73, reporting that few consumers reported that they read credit card contracts in their entirety and about half stated that they did not read them at all.

¹⁵³ See Jeffrey Davis, Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts, 63 Va. L. Rev. 841, 895 (1977). Similar to our study, the researcher in that study asked respondents to read the contract "as carefully as they would have read it under actual . . . circumstances." The author later asked the respondents whether they had read the contract more or less carefully than they would have done in an actual transaction, and reported that 49% claimed to have read it more carefully while 13% said they read it less carefully. *Id.* The answers find some support in that those who claimed to have read the contract more carefully also understood the contract better than those who acknowledged reading it with less care. We cannot say whether Davis's results are generalizable to our population. If a similar pattern held with our respondents, however, we would expect that the responses to our survey *overstate* consumer understanding of the contract.

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the seven dollars we paid them—with a minimal time investment. The version of the survey administered to the Qualtrics respondents had two main safeguards to insure that the respondents gave honest answers. First, at Qualtrics' recommendation, we included two "dummy" questions within that version of the survey to verify that respondents were giving the survey appropriate attention. The first, asked shortly after respondents saw the credit card contract, inquired what kind of document the respondent had reviewed; possible answers besides credit card contract included non-compete form, non-disclosure agreement, and cell phone contract. The 928 respondents who failed to provide the correct answer were excluded from the survey. By so doing, it is possible that we eliminated some respondents who might have skipped over the contract because they don't read such contracts and were complying with the instruction to give the contract the same level of attention they would have had it been a real contract, but otherwise were taking the survey seriously, with the consequence that our results *overstate* comprehension of the contract. Nevertheless, we felt it best to follow Qualtrics's advice given their greater experience with their respondents. The second, displayed much further along in the survey, directed respondents to select "No" among the answers "Yes," "No," and "Sometimes." Only 34 respondents failed to click "No," suggesting that the first attention check question caught most of those who were answering questions without reading them.

In addition, we identified five criteria that we believe raised questions about whether the respondent had taken the survey seriously. The five criteria were:

- Spent less than 4.5 minutes on the survey.
- Entered gibberish.
- Finished question 11 in less than 3 seconds.
- Finished question 19 in less than 7 seconds.
- Finished question 21 in less than 12 seconds.

Those time thresholds were based on reading speed. They were intended to catch responses given too quickly to have allowed the respondent to read and answer the questions with any degree of care. We discarded any responses displaying at least two of the five criteria, ultimately discarding a total of 52 responses.

V. ANALYSIS OF SURVEY RESULTS

We sought to test consumer understanding of arbitration agreements in three ways. First, we gave consumers a sample credit card

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contract with an arbitration clause and asked them questions about the sample contract. Next, we asked consumers a series of questions about a hypothetical “properly-worded” credit card contract containing an arbitration agreement. Finally, we asked consumers about arbitration agreements in actual contracts they have entered into. At each step, we gave respondents space to add comments. For each of those three contexts, the survey results show significant misunderstandings about what consumers have agreed to and what effect those agreements have for consumers’ procedural rights.

We begin our analysis by examining the extent to which our respondents read the sample contract and focused on the arbitration clause. Then we turn to the terms of the sample contract and a set of questions that explored respondents’ understanding and beliefs about the dispute resolution terms to which that agreement would obligate them. Next, we turn to questions that asked consumers about a hypothetical contract containing a “properly-worded” arbitration clause, as opposed to the sample contract. Finally, we discuss questions we asked about whether consumers had previously entered into arbitration agreements.

A. The Extent to Which Consumers Read the Agreement and Focused on the Arbitration Clause

Respondents were given the sample contract before seeing any questions and with no prompting to focus on any particular provisions in the contract. We asked them to spend the same amount of time reading the contract as they would any other consumer contract they might encounter in their real-world transactions.¹⁵⁴ The results suggest most respondents did not read the contract in detail, and few focused on the arbitration clause.

¹⁵⁴ The survey provided respondents the following instructions about reading the contract:

Imagine that you obtained a credit card and the credit card company has provided you with the credit card contract we are about to show you, perhaps online or through the mail. If you have a credit card, you have been given a contract like this for your credit card in the past. Some consumers read contracts like this while others may not, and still others may read some parts and not other parts. Please give this contract the exact same amount of attention you would if it had just been provided to you, along with your new credit card. This is not a test. Rather, we want to learn what you and other consumers take away from consumer contracts in your everyday life.

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1. Did Respondents Read the Contract?

The contract as a whole contained 9,118 words. The average adult is reported to read less than 300 words of prose per minute.¹⁵⁵ Assuming a reading speed of 300 words per minute, a person should have taken more than thirty minutes to read the contract in full. But that may be misleading because a consumer reading the contract might be expected to skip over some sections after reading the caption, depending on how the consumer planned to use a credit card. For example, a consumer who rarely traveled overseas might reasonably not read the section captioned “Using Your Card for International Transactions,” while a consumer who did not expect to write checks against the account would probably see little value in perusing the section headed “Convenience Checks.” In any event, respondents spent an average of 263.2 seconds, or something over four minutes, on the pages containing the contract. That translates into enough time to read 1,311.6 words, or 14% of the contract, assuming a reading speed of 300 words per minute.¹⁵⁶

Even that may overstate the amount of time respondents spent reading the contract. While the survey platform timed how long respondents spent on each page of the contract, we can’t determine how much of that time was spent reading the contract. Respondents could, for example, have clicked to open a page, and then shifted their attention to something other than the page on the screen. We have at least two reasons for believing some respondents did so. First, some respondents took hours—even a day—from the time they first opened the survey to the time

¹⁵⁵ See Mark Thomas, What is the Average Reading Speed and the Best Rate of Reading, Health Guidance, available at <http://www.healthguidance.org/entry/13263/1/What-Is-the-Average-Reading-Speed-and-the-Best-Rate-of-Reading.html> (“On a broader spectrum, an adult reads about 250 words per minute on an average. On the other hand, a college student reads about 300 words per minute on an average.”); Jessica Love, Reading Fast and Slow, The American Scholar (Spring 2012), available at <http://theamericanscholar.org/reading-fast-and-slow/#.U72muagm5l8> (“In practice, most of us read about 250 words per minute.”)

¹⁵⁶ This contrasts with the results of a survey reported in Tess Wilkinson-Ryan, A Psychological Account of Consent to Fine Print, 99 Iowa L. Rev. 1745, 1774 (2014). In that survey, respondents were asked to estimate how long they would spend reading a three-page credit card contract. It appears that they were not given a copy of the contract. The mean amount of time respondents said they would devote to reading the contract was 10.6 minutes and they said they would read about two-thirds of the contract; they also estimated that the average consumer would read it for 6.1 minutes and read one-third. The average respondent also stated that he or she would spend 12.4 minutes reading a six-page computer contract and 14.2 minutes reading a twenty-page car warranty.

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they finished it.¹⁵⁷ It seems obvious that those respondents were not devoting all that time continuously to the survey. Second, the average respondent spent more time on the last page of the contract than any other—100 seconds, or more than four times as much as several other pages—despite the fact that the last page contained less text than the other pages of text.¹⁵⁸ A likely explanation is that many respondents took a break after reading as much of that page as they chose to. In any event, we can put an outer limit on the amount of time respondents spent reading the contract, though we can't determine how much time they actually devoted to reading it.

Figure 5 shows the breakdown of average time spent per page on the contract, how many words appeared on each page, and what percentage of the page someone reading 300 words per minute could have read in the time the average respondent spent on the page. On average, respondents spent 34.03 seconds on page two of the contract, which included a bolded reference to the arbitration clause, 19.27 seconds on page six of the contract, which contained the first part of the arbitration clause, and 100 seconds on the last page, which included the remainder of the arbitration clause, for a total of 153.3 seconds, or more than two and a half minutes, on pages referring to arbitration. But again, that number is probably inflated by respondents who took a break upon reaching the last page of the contract. Even the amount of time respondents spent on one page of the contract compares favorably with the amount of time some studies have found that consumers spend reading contracts in real transactions. For example, one study found that less than half a percent of consumers spent even one second on EULAs,¹⁵⁹ while another reported that about half the participants stated that they did not read credit card contracts at all.¹⁶⁰ Thus, it may be that respondents spent more time with

¹⁵⁷ For example, some respondents took the following length of time to complete the survey: 1 day, 4 hours, 25 minutes; 5 hours, 49 minutes; 1 day, 10 hours, 20 minutes; 15 hours, 5 minutes; 5 hours, 10 minutes; 7 hours, 12 minutes.

¹⁵⁸ The first page of text (page two of the contract) had 1,174 words. The succeeding pages had 1,574, 1,705, 1,583, 1,617, and 1,001 words, respectively. The last page told respondents “When you are finished with this page, please click the arrow at the bottom right of the survey to move on to the survey questions” so respondents would have been able to tell it was the final page of the contract..

¹⁵⁹ Florencia Marotta-Wurgler, Does Disclosure Matter? available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1713860.

¹⁶⁰ See *supra* notes 73-74 and accompanying text.

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the contract than consumers normally do and that respondent responses actually overstate consumer understanding of arbitration clauses.

It is impossible to know how much time respondents spent specifically on the arbitration clause. The instructions respondents encountered before reading the contract did not refer to the arbitration clause, and so, just as with any arbitration term in a credit card contract, respondents would have had no special reason to pay attention to the arbitration clause—except that this contract included a boldface reference to the arbitration clause on page two of the contract. Page two also advised respondents that **“It is important that you read the entire Arbitration Provision section carefully.”** The arbitration clause ran 615 words. At 300 words per minute, it would have taken just over two minutes to read. Page six included 383 words of the arbitration clause and 232 more appeared on page seven. We can infer from the fact that the average respondent spent no more than 19.27 seconds reading page six that the average respondent did not read all the arbitration provision, much less heed the advice to read it “carefully,” since reading the portion of the arbitration clause that appeared on page six in its entirety would have taken a 300-word-a-minute reader something more than a minute and fifteen seconds, or nearly four times as much as the average respondent spent on page six—even assuming that such a respondent read nothing else on page six.

We cannot, however, determine whether the average respondent read the entire segment of the arbitration clause that appeared on page seven because the 100 seconds the average respondent devoted to that page would have been more than enough to read the page-seven portion of the arbitration clause. It seems unlikely, however, that a respondent would speed through the page six fragment of the arbitration clause and then read the page seven part carefully. Perhaps more importantly, the key parts of the arbitration clause—at least for purposes of this study—all appear on page six. Specifically, the text barring suit in a non-small claims court, blocking class actions, prohibiting jury trials, and addressing the finality of the arbitrator’s decision appeared on page six. And we would expect that if respondents spent more time on one part of the arbitration clause than another, it would be on the parts that appeared in italics and ALLCAPS, all of which were on page six.

We also asked respondents about how long they would spend reading a contract like the sample contract.¹⁶¹ Figure 6 shows the

¹⁶¹ Question 15 asked respondents the following:

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distribution of responses. We found a weak but significant correlation (at the .05 level) between the actual time spent reading the contract and the time reported by respondents (correlation coefficient = 0.25). Because respondents answered question 15 after reading the contract, their answers might have been affected by their perception of how long they spent reading it.

FIGURE 6 GOES AROUND HERE.

The comments are instructive about the respondents' attitudes toward consumer contracts, suggesting several reasons why consumers do not carefully read contracts. Some examples follow, with the amount of time they said they would spend reading contracts of this type appearing in brackets after each quote:

- I would loose [sic] attention before I finished reading the contract. [less than one minute]
- I know it's irresponsible not to fully read contracts, but unfortunately I assume that there would be nothing in there that would be unusual or that I would never need to think about it [one to three minutes]
- bunch of meaningless crap [would not read]
- i would probably ask questions to the issuer rather than reading the contract word by word [one to three minutes]
- Focus mostly on the first page. You cannot live (really) without credit cards, and you cannot get one without agreeing - so... not much you can do about it anyway [one to three minutes]

Before you use a credit card, the company should provide you with a contract like the one you just saw. If the contract is the same length as the one you just saw, we would like to know how much time you would spend reading it. Which of the following is true?

I would probably not read the contract.

I would probably spend a minute or less reading the contract.

I would probably spend more than one minute but no more than three minutes reading the contract.

I would probably spend more than three minutes reading the contract.

I don't know.

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- I trust the laws of the land to not permit a business to take advantage of consumers, so I do trust that, in good faith, the contracts are not very detrimental [one to three minutes]
- I would spend time reading it but I wouldn't necessarily know what a lot of it meant. [more than three minutes]
- I feel like I know what to look for in this type of an agreement and would speak with a banker as well about it. [one to three]
- i guess it really depends. i don't have a credit card so i might feel a little more dedicated if i knew it was real. (sorry, i know you told me to pretend.) [one to three]
- contract is much too long, they could probably make it shorter so people could understand it [one to three]

As noted above, the survey also asked respondents how much of the contract they had read and understood. We found a significant (at the 0.05 level) but very weak correlation between the actual time spent and the amount reportedly read and understood (correlation coefficient = 0.15).

In sum, it appears that many respondents did not spend enough time on the contract to read it carefully, and that many respondents did not read the arbitration clause carefully despite the contract's admonition to do so.

2. Did Respondents Notice and Recall the Arbitration Clause?

Even if consumers only skim boilerplate, they might have a particular interest in arbitration or in their dispute resolution options more generally. They might pay more attention to arbitration clauses than to other provisions. Or the converse might be true: consumers may focus more on other terms than on arbitration, suggesting that dispute resolution procedures are not an important factor in consumer decision-making.

To test the salience of the arbitration clause within the contract, we asked an open-ended question about which terms the respondents recalled. The first question respondents saw after the contract read as follows:

The credit card contract you just saw said many things. We would like to know what you remember. Please put down a word or phrase for five items you recall. You do not need to repeat the actual words. For example, if you remember seeing the annual fee

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term, you can simply write “annual fee.” If you don't remember five items, please mention as many or as few as you do remember.

Respondents collectively made 1,975 entries, or recorded an average number of just under three items. That includes references to nineteen items that do not actually appear in the contract.¹⁶²

We had a research assistant tabulate and collate the responses. That task necessarily involved some interpretation, and we recognize that others might have coded the responses differently.¹⁶³ In any event, we counted mentions of 263 different items from the contract, though only 119 of those were listed by more than one respondent. Only eighteen respondents explicitly referred to arbitration, though five others cited items that seem drawn from the arbitration clause: “class action info,” “you or we can’t go to jury or trial,” “federal court decisions for disputes,” “You do not have a right as a representative . . .,” and “JAMS as a contact.”¹⁶⁴ Including those as references to the arbitration clause results in 23 mentions of it, or references to it by about 3% of the respondents, or about 1% of the total mentions. Arbitration tied for fourteenth in frequency of the items referred to. Figure 3 lists the twenty items most often mentioned.

As might have been expected, nearly all the most frequently listed items appeared in the Schumer Box, which took up the first page of the contract. Two items that did not appear in the Schumer Box were cited as often as or more frequently than arbitration. One was cancellation, which drew 26 mentions. Its heading was bolded, though the term was not otherwise in bold print. The other item was the minimum payment, which appeared on page 4; neither its heading nor the term itself appeared in bold print. Some 23 respondents mentioned it—one more than cited the arbitration clause.

¹⁶² Two such examples are “401k,” and “ARM.”

¹⁶³ For example, we coded references to APR, DPR, and interest rates without more as “interest rate (unspecified).” We thought that more accurate than coding them as three different items.

¹⁶⁴ JAMS was an authorized arbitration provider under the arbitration clause. “Federal court decisions for disputes” could be a reference to the provision in the arbitration clause stating that “**This Arbitration Provision shall be governed by federal law, including the Federal Arbitration Act**” You do not have a right as a representative” could be a reference to the arbitration clause statement that “**YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS**”

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Taken together, these findings suggest that dispute resolution terms—including arbitration clauses and class waivers—are not among the more important provisions to consumers. There are several possible explanations for that. Consumers may not have strong preferences among dispute resolution mechanisms because they believe that the likelihood of ending up in a dispute is very small, or because they believe all dispute resolution mechanisms are basically similar. Alternatively, consumers may have preferences as to dispute resolution processes but may feel powerless to effect those preferences and so accept whatever terms are offered. Or they may mistakenly believe that their preferences will be honored regardless of the text of the agreement. We believe the results described in the next two sections suggest that consumers do have preferences, which they express in terms of expectations—consumers expect to have access to court regardless of the terms of their agreements.

Compounding the problem is the phenomenon of information overload—the tendency of consumer decision-making to degrade when consumers making a choice consider too many items.¹⁶⁵ While the exact

¹⁶⁵ See, e.g., Byung-Kwan Lee & Wei-Na Lee, *The Effect of Information Overload on Consumer Choice Quality in an On-Line Environment*, 21 PSYCHOL. & MKTG. 159, 177 (2004) (finding that increasing “the number of attributes from 9 to 18 significantly imposed information overload on subjects and led to negative effects on choice quality”); See generally John C. Bergstrom & John R. Stoll, *An Analysis of Information Overload with Implications for Survey Design Research*, 12 LEISURE SCI. 265 (1990); Kevin Lane Keller & Richard Staelin, *Effects of Quality and Quantity of Information on Decision Effectiveness*, 14 J. CONSUMER RES. 200, 211 (1987); Naresh K. Malhotra, *Information Load and Consumer Decision Making*, 8 J. CONSUMER RES. 419 (1982). Early studies included Jacob Jacoby et al., *Brand Choice Behavior as a Function of Information Load: Replication and Extension*, 1 J. CONSUMER RES. 33 (1974), and Jacob Jacoby et al., *Brand Choice Behavior as a Function of Information Load*, 11 J. MARKETING RES. 63 (1974). For criticism of the early Jacoby studies, see, e.g., Naresh K. Malhotra, *Reflections on the Information Overload Paradigm in Consumer Decision Making*, 10 J. CONSUMER RES. 436 (1984) (suggesting that information overload does occur, but that the early Jacoby studies did not demonstrate it); J. Edward Russo, *More Information is Better: A Reevaluation of Jacoby, Speller and Kohn*, 1 J. CONSUMER RES. 68 (1974); John O. Summers, *Less Information Is Better?*, 11 J. MARKETING RES. 467 (1974); William L. Wilkie, *Analysis of Effects of Information Load*, 11 J. MARKETING RES. 462 (1974). For Jacoby’s replies, see Jacob Jacoby et al., *Constructive Criticism and Programmatic Research: Reply to Russo*, 2 J. CONSUMER RES. 154 (1975), and Jacob Jacoby, *Information Load and Decision Quality: Some Contested Issues*, 14 J. MARKETING RES. 569 (1977). For studies rebutting the information overload effect, see Naresh K. Malhotra et al., *The Information Overload Controversy: An Alternative Viewpoint*, 46 J. MARKETING 27 (1982); Thomas E. Muller, *Buyer Response to Variations in Product Information Load*, 69 J. APPLIED PSYCHOL. 300 (1984); Debra L. Scammon, *“Information Load” and Consumers*, 4 J.

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number of such items varies across studies, and may even vary from consumer to consumer, the problem itself is well-documented.¹⁶⁶ At least for credit card agreements, with the number of terms already required in the Schumer Box, consumers may simply face too much information to absorb and understand arbitration terms. The available research suggests that consumers choosing among credit cards are unlikely to consider fourteen card attributes, and so it is improbable that consumers will think about arbitration clauses in deciding which agreement to enter.

B. Consumer Understanding of the Sample Agreement

The most important provisions in the arbitration clause of the sample contract were, first, the basic requirement that disputes be resolved in arbitration and the concomitant prohibition on litigation in court, with the exception of litigation in small claims court; and second, the preclusion of class actions and other mechanisms for pursuing multiple claims in a single proceeding. We found deep misunderstandings on both those points.

CONSUMER RES. 148 (1977). For criticism of these last studies, see Jacob Jacoby, *Perspectives on Information Overload*, 10 J. CONSUMER RES. 432 (1984). For criticism of the Keller & Staelin study cited above, see Robert J. Meyer & Eric J. Johnson, *Information Overload and the Nonrobustness of Linear Models: A Comment on Keller and Staelin*, 15 J. CONSUMER RES. 498 (1989). Keller and Staelin's response appears at *Assessing Biases in Measuring Decision Effectiveness and Information Overload*, 15 J. CONSUMER RES. 504 (1989).

¹⁶⁶ See, e.g., Naresh K. Malhotra, *Information Load and Consumer Decision Making*, 8 J. CONSUMER RES. 419, 427 (1982) ("it seems that individuals cannot optimally handle more than ten items (attributes) of information simultaneously. . . . There exists some evidence to suggest that individuals can optimally process a maximum of only six alternatives"); Hume Winzar & Preben Savik, *Measuring the Information Overload on the World Wide Web*, 13 AM. MKTG. ASS'N, 439, 439 (2002) ("Estimates of optimal number of attributes have ranged from 4 to 15. . . ."); Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 767-68 (2006) (Subjects typically consider a maximum of five attributes In marketing studies designed to determine which attributes consumers consider in making real-world product purchasing decisions, under more realistic search and information processing cost conditions, consumers consider even fewer attributes."); David M. Grether, Alan Schwartz & Louis L. Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 279 (1986) ("Taking consumers at their word, several studies show that the number of salient or determinate product attributes--those considered at the final stage--does not exceed five, and often is less.").

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1. Do Consumers Understand They Will Be Precluded from Court Adjudication?

As an initial matter, we wanted to test whether consumers recognized (or assumed) that the contract they saw required them to arbitrate disputes they might have with the credit card company. The sample credit card contract provided for arbitration of all disputes arising out of the contract, and included a small-claims carve out, allowing disputes to be heard in small claims court but not courts having jurisdiction over larger claims. Specifically, the contract provided in pertinent part:¹⁶⁷

You agree that either you or we can choose to have binding arbitration resolve any claim, dispute or controversy between you and us that arises from or relates to this Agreement or the Account and credit issued thereunder (individually and collectively, a "Claim"). This does not apply to any Claim in which the relief sought is within the jurisdictional limits of, and is filed in, a small claims court. If arbitration is chosen by any party, the following will apply:

(1) NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE A CLAIM IN COURT¹⁶⁸

The contract in the survey gave respondents several opportunities to notice the arbitration clause. The existence of the arbitration clause was pointed out on the contract's second page (the first page of contract text) and the clause itself was spread over two other pages, meaning that the arbitration clause appeared on or was referred to on three of the contract's seven pages. The arbitration clause, as well as the reference to it on page two, was printed entirely in bold print, while portions of the clause appeared in

¹⁶⁷ Bold, italics, and ALLCAPS appeared in the original.

¹⁶⁸ Such small claims carve-outs are common in arbitration clauses, perhaps because the rules of the American Arbitration Association provide for such a carve-out. See Supplementary Procedures for the Resolution of Consumer-Related Disputes C-1(d) ("Parties can still take their claims to a small claims court."), available at https://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADIRSTG_015806&_afzLoop=1888689910117153&_afzWindowMode=0&_afzWindowId=liurbfiox_75#%40%3F_afzWindowId%3Dliurbfiox_75%26_afzLoop%3D1888689910117153%26doc%3DADIRSTG_015806%26_afzWindowMode%3D0%26_adf.ctrl-state%3Dliurbfiox_135.

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ALLCAPS and italics, as illustrated in the quote from the contract just above.

The survey's questions about this aspect of the sample arbitration clause were intended to determine (1) if respondents understood that under the contract, claims that could not meet the jurisdictional limits of a small claims court could be heard only in arbitration; and (2) if they understood that under the contract, claims could be heard in a small claims court.

Question 11 was designed to assess whether respondents understood that they had agreed to arbitrate disputes too large for small claims court. In other words, this question went to the most basic point—whether consumers realized that they had entered into an arbitration agreement at all. Question 11 asked:

If you and the credit card company have a dispute that is too large to be brought in a small claims court, did the contract you just saw say you have agreed to arbitrate it?¹⁶⁹

As shown in Figure 7, 43% of the respondents stated that they had agreed to arbitrate such a dispute.¹⁷⁰ A majority of the respondents either thought that they had not agreed to arbitrate, or did not know.

FIGURE 7 GOES AROUND HERE.

Question 7 addressed the existence of an arbitration requirement in a slightly different way, by asking about the procedural effect of the agreement in the context of a specific dispute. The question read as follows:

Suppose after you paid your credit card bill, you realized the credit card company overcharged you. The credit card

¹⁶⁹ As discussed more fully below, see note — and accompanying text *infra*, the arbitration clause included a carve-out for small claims court proceedings.

¹⁷⁰ Our findings thus conflict with the findings in See Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 Conn. L. Rev. 383 (2008), discussed *supra* note --- and accompanying text, reporting that only three of 37 employees recalled that their employment agreement included an arbitration clause. The different results may have several explanations, including that we asked our questions immediately after showing respondents the contract; the arbitration clause in our contract and the page 2 reference to it appeared in bold print and spilled over three of the seven pages of the contract; and the small sample in the Eigen study—37 employees of a single company—may have rendered the results atypical.

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company, however, believes it has not overcharged you and refuses to give you your money back. The dispute is too large to be decided by a small claims court. Under the terms of the contract you just saw, if the amount of the dispute was large enough, would you have a right to have a court decide the dispute even if the credit card company didn't want a court to decide the dispute?¹⁷¹

As noted above, the credit card contract unequivocally stated that such a dispute could not be heard in court and could be decided only by an arbitrator. Yet, as shown in Figure 8, only 14% of the respondents realized that the contract banned litigation in court. Nearly half—or more than three times as many as recognized they did not have a right to sue in court—wrongly believed the contract gave them a right to sue in court, and when those who selected “I don't know” are added in, consumers failed to understand that they had surrendered their right to sue in court by a margin of more than six to one.¹⁷²

FIGURE 8 GOES AROUND HERE.

In conjunction, questions 11 and 7 show that many respondents who either realized or assumed that the contract provided for arbitration were confused about what that meant. Of the 43% who said that the contract provided for arbitration, 61% also believed that consumers would have a right to have a court decide the dispute, according to their answers to question 7. Nearly a fifth of those who believed that the contract mandated arbitration checked “I don't know” when asked if consumers would have a right to sue in court by question 7[8]. In short, only 59 respondents—less than 9% of the total—realized that the contract both provided for arbitration and precluded litigation in court.¹⁷³ An even

¹⁷¹ By using the phrase, “under the terms of the contract you just saw,” we sought to focus respondents’ attention on the wording of the contract rather than questions about enforceability.

¹⁷² Cf. Debra Pogrund Stark, Jessica M. Choplin, & Eileen Linnabery, *Dysfunctional Contracts and the Laws and Practices that Enable Them: An Empirical Analysis*, 46 *Indiana L. Rev.* 797, 799 (2013) (study finds that “a very large percentage of laypersons believed they were entitled to remedies that were ‘clearly’ (at least to an attorney or judge’s eyes) excluded in the contract clause.”).

¹⁷³ Similarly, of the 43% who understood that the contract specified that disputes would be resolved through arbitration, only 80 realized that they could not obtain a jury trial, meaning that only 12% of the total understood both that the contract provided for arbitration and that it precluded a jury trial of disputes.

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smaller subset of the 43%, 46 (less than 7% of the total), recognized that the contract foreclosed participation in a class action, and that it included an arbitration clause.¹⁷⁴

The comments provided by some respondents confirm that many were confused about the right to go to court under the contract. While many reported skipping over the arbitration section of the contract, some respondents clearly suffered from misconceptions:

- “It would be decided by a mediator.”
- “You always have a right to pursue legal action when someone has wronged you. It is not up to one party or another to decide whether or not they will take away that right.
- I did not read this information but I would expect that [suing in a non-small claims court] would be my right as a free citizen of the US.
- I feel it would be necessary and very legal to do so [sue in a non-small claims court].
- I believe it is your American right to sue in larger court systems. . .

Significantly, respondents were much more likely to believe that smaller value disputes could be peremptorily diverted to arbitration. Question 5 asked consumers about the small-claims exclusion contained in the contract:

Suppose after you paid your credit card bill, you realized the credit card company overcharged you. The credit card company, however, believes it has not overcharged you and refuses to give you your money back. Under the terms of

¹⁷⁴ For anecdotal evidence that consumers do not understand arbitration agreements, see Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 42 (2010):

Many consumer advocates at the roundtables stated that consumers generally do not know that their contracts contain arbitration provisions. . . . Other roundtable participants questioned whether consumers who are aware of the arbitration provisions in their contracts actually understand them.

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the contract you just saw, would you have the right to sue the credit card company in small claims court?

Figure 9 shows the responses to the question. Though more respondents clicked no than yes, the difference is within the survey's margin of error. But when the respondents who chose "I don't know" are added to those incorrectly denying small claims court jurisdiction, the number of respondents who realized that they could sue in small claims court was outweighed by the number who did not by nearly three-to-one: 72% to 28%.¹⁷⁵

FIGURE 9 GOES AROUND HERE.

Thus, the survey respondents had it exactly backward. Though the arbitration clause barred consumers from suing in a non-small claims court and allowed suit in small claims courts, many respondents seemed to believe the reverse was true. Twice as many respondents incorrectly thought they were blocked from suing in court for small claims as correctly realized they were precluded from suing in court for claims too large for small claims court. Similarly, nearly twice as many incorrectly thought they could sue in court for larger claims as believed, correctly, that they could sue in court for smaller claims. Only ten, or less than 2%, of the 667 respondents answering both questions understood correctly that the contract took away the right to sue in court for larger claims while preserving the right to sue in court for small claims.

A question we asked about the right to a jury trial further demonstrates that our respondents did not understand the effect of the arbitration agreement. The contract specified that litigants would not be entitled to a jury trial in the following words, printed in bold, italics, and ALLCAPS:

NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE A CLAIM IN COURT OR TO HAVE A JURY TRIAL ON A CLAIM, OR TO ENGAGE IN PRE-ARBITRATION DISCOVERY, EXCEPT AS PROVIDED FOR IN THE APPLICABLE ARBITRATION RULES.

¹⁷⁵ To clarify, those answering "I don't know" evidently do not realize that they could not sue.

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The survey asked respondents the following question about jury trials:

Suppose after you use the credit card, the credit card company says you owe them more than you think you owe them. Suppose also you refuse to pay the amount they say you owe, and they bring a claim against you to collect that amount. Assume the dispute is too large to be decided by a small claims court. Under the terms of the contract you just saw, would you have a right to a jury trial if the amount was large enough?

As Figure 10 illustrates, less than one in five respondents recognized that those agreeing to the contract surrendered their right to a jury trial. Nearly twice as many incorrectly answered yes as correctly answered no. Again, many respondents stated in their comments that they had not read that portion of the contract but some of the comments suggest that respondents did not realize that they could waive their right to a jury trial:

- It is your right as an American to have a trial by a jury of your peers.
- Binding arbitrators are stipulated, right? I GUESS that stipulation could be contested, THEN we'd get a jury trial. . . .

FIGURE 10 GOES AROUND HERE.

2. Do Consumers Understand They Cannot Participate in Class Actions?

The supplied contract addressed class actions on two different pages. On the second page (the first page of text), the second paragraph opened with the bolded words:

This Agreement contains an arbitration provision (including a class action arbitration waiver).

And on page six, in bold, italics, and ALLCAPS, appeared:

YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS, OR AS A PRIVATE ATTORNEY GENERAL.

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To test respondents' understanding of class action waivers, we asked Question 13:

Suppose that you and many other consumers had the same kind of dispute with the credit card company. Under the terms of the contract you just saw, could you be included with the other consumers in a single lawsuit (that is, a class action) against the credit card company?

In light of the terms reprinted above, the correct answer to question 13 is no. Nevertheless, as shown in Figure 11, four times as many respondents chose "yes" as "no." Only one out of eight respondents understood that they could not participate in a class action if they signed a contract with such a clause.¹⁷⁶

FIGURE 11 GOES AROUND HERE.

C. Consumer Understanding of a Hypothetical "Properly-Worded" Arbitration Agreement

In an effort to test not only respondents' understanding of the sample contract, but also whether respondents thought courts would enforce a generic arbitration clause, and to obtain views from those who might not have read the arbitration clause, the survey asked consumers three questions about an arbitration clause described as "properly-worded." The three questions dealt with whether a court would enforce an arbitration clause, the effect of a class action waiver, and the finality of an arbitral award.

1. Enforcement of Arbitration Clauses in General

After we heard reports that some consumers believe clauses taking away their right to sue in court would be unenforceable,¹⁷⁷ we decided to ask Question 19:

Suppose you agreed to a credit card contract that included a properly-worded clause saying that if you and the company

¹⁷⁶ We also asked respondents about the effect of a class waiver in a "properly-worded" arbitration agreement. The responses are discussed below in Section V(B)(2).

¹⁷⁷ In particular, David Arkush had suggested a question along the lines we posed.

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had a dispute, you couldn't sue them in court but that disputes could be resolved only in arbitration. You think the credit card company has overcharged you by \$5,000, but the company disagrees. How likely do you think it is that a court would throw out the arbitration clause and decide your dispute?

The Supreme Court's arbitration jurisprudence forecloses most attacks on properly-worded arbitration agreements, including attacks based on state law doctrines such as unconscionability.¹⁷⁸ Because the question posited a "properly-worded" arbitration clause, a court should not invalidate the clause absent evidence of fraud in the inducement of the arbitration agreement itself. Accordingly, the best answer among the choices offered was "very unlikely." In fact, about one in six respondents chose this answer, as seen in Figure 12. Collectively, 43% of the respondents selected "very unlikely" or "unlikely," as compared with 32% who opted for "very likely" or "likely," making this one of only two questions which more respondents answered correctly than incorrectly. But when the respondents choosing "I don't know" are added to those with wrong answers, it appears that respondents failing to recognize that a properly-written arbitration clause is enforceable amounted to a sizable 57% majority of respondents.¹⁷⁹

FIGURE 12 GOES AROUND HERE.

2. Enforcement of Class Action Waivers

Question 23 asked about class actions, not in connection with the supplied contract, but with a "properly-worded" contract clause. The question read:

¹⁷⁸ See *Perry v. Thomas*, 482 U. S. 483, 493, n. 9 (1987) (noting that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable").

¹⁷⁹ Cf. Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 Conn. L. Rev. 383 (2008) (finding that nearly a third of the 37 surveyed employees who had signed an employment contract containing an arbitration clause and a majority of 115 MBA students surveyed think employment contract arbitration clauses would be unenforceable), discussed *supra* note – and accompanying text.

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Again, suppose you had agreed to a credit card contract that included a properly-worded clause saying that if you and the company had a dispute, you couldn't sue them in court but that disputes could be resolved only in arbitration. You think the credit card company has overcharged you. Many other consumers have a similar dispute against the credit card company. The company says it has not overcharged anyone. Suppose the contract said you could not join with other consumers to bring a class action. Could you be included in a class action against the credit card company, either in court or arbitration or both?

Though 8% more respondents incorrectly thought they could participate in a class action than correctly thought they could not, as demonstrated in Figure 13, that difference is just within the survey's margin of error. But the total of those clicking "I don't know" or yes add up to 71%, or more than twice as many as the 29% who correctly answered no.

FIGURE 13 GOES AROUND HERE.

Putting the responses to this question together with the responses to Question 13, which asked about the class action waiver in the sample contract, demonstrates the confusion about the effect of class action waivers. Only 41 respondents, or 6%, correctly responded negatively to both questions. That is, only 6% of respondents understood both that the sample agreement precluded their participation in a class and that a class waiver in a generic arbitration agreement would be enforced. In contrast, 172, or more than a quarter, wrongly responded affirmatively to both questions.

Some of the written comments on those two questions shed additional light on respondents' thinking:

- I don't see how they could preclude us from filing a class action suit through a whimsy little contract
- I believe that would be my rights as a citizen
- JUST BECAUSE THE CONTRACT SAYS IT DON'T MEAN A JUDGE CAN'T OVERRULE IT ESPECIALLY A CIRCUIT

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COURT PANEL - BUT WHO WANTS TO GO THROUGH ALL THAT !!!

- Based on my memory of what I think I've read has happened. And an old cliché, "You can't sign away your rights."
- no way they can tell me that they can screw up and then I have no recourse

In sum, many of the respondents seemed not to realize that they could sign away their rights to join a class, and nearly 90% did not appreciate that this contract did just that,¹⁸⁰ despite the repeated notice and the bolding, italics and ALLCAPS of the class action waiver.

3. The Finality of Arbitral Awards

Arbitral awards are normally final and binding. The Supreme Court has held that the grounds listed in the FAA for vacating an arbitral award are exclusive.¹⁸¹ Those grounds are extremely limited. They do not, for example, permit a court to vacate an award on the grounds that the arbitrator made a legal error.

To test whether consumers understand that an arbitral award cannot be challenged on substantive grounds in a court of law, Question 21 described the following scenario:

Suppose you had agreed to a credit card contract that included a properly-worded clause saying that if you and the company had a dispute, you couldn't sue them in court but that disputes could be resolved only in arbitration and the arbitrator's decision is final. Just as in the last question, you think the credit card company has overcharged you by \$5,000, but the company disagrees. Assume also you brought an arbitration proceeding against the company and the arbitrator decided against you and ruled you had to pay the \$5,000. Assume that the arbitrator had unintentionally made a mistake about the law and so ruled against you, but that otherwise had conducted the arbitration properly.

¹⁸⁰ See *supra* note 176 and accompanying text.

¹⁸¹ See *supra* note 44 and accompanying text.

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The correct answer among the available choices was “Nothing. I would still have to pay the money.” More than three times as many respondents chose an incorrect answer as chose the correct answer. Nearly half the respondents thought that they could appeal from the arbitrator’s decision to one or more arbitrators,¹⁸² and overall a majority of the respondents clung to their view that the arbitrator’s decision would not be final even though the question told them that the contract said it was final. Less than a fifth realized that the decision would in fact be final. Figure 14 shows the distribution of answers.

FIGURE 14 GOES AROUND HERE.

The comments confirm that many respondents did not appreciate that an arbitrator’s decision can be final. For example, respondents who clicked that consumers could appeal to an arbitrator or arbitrators wrote:

- [S]eems only fair that you could appeal
- I will fight for my right.
- If that did not work I would take them to court
- I would have it overlooked by another arbitrator or appeal to a higher court.
- Its [sic]my right
- [B]ecause the arbitrator unintentionally made a mistake, I feel that my rights were not handle in the best way possible for me to retrieve my money, therefore the contract could not be binding, I feel like I was misrepresented and if I can show proof that a mistake was made the I deserve a retrial [sic]

¹⁸² Some arbitration clauses do in fact provide for an appeal to a panel of arbitrators, see, e.g., the Comenity Bank, Wilmington Delaware Giant Eagle contract at http://files.consumerfinance.gov/a/assets/credit-card-agreements/pdf/creditcardagreement_10261.pdf, but the contract provided to respondents at the outset of the survey did not include such a right of appeal; indeed, it stated in boldface: **The arbitrator’s decision will generally be final and binding, except for the limited right of appeal provided by the Federal Arbitration Act.** Accordingly, consumers should not have been confused by the sample contract. In any event, the sample contract was not relevant to the question.

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Other research has found that consumers sometimes disregard disclosed information that contradicts their preconceptions.¹⁸³ This may be another example of such a case. Additional studies are needed to determine more conclusively whether consumers are able to take in the fact that an arbitrator's decision based on an error cannot be appealed if a contract so provides, but certainly the responses raise questions about whether that is the case.

D. Consumer Awareness of Arbitration Agreements in Their Own Contracts

We attempted to assess consumers' awareness of arbitration agreements in their own commercial interactions by first asking respondents, in question 25, whether they have entered into "a consumer contract with any company that said you have to arbitrate any disputes and can't sue the company" and then asking respondents if they had an account with several businesses whose consumer contracts include arbitration clauses. Specifically, question 27 asked if respondents had accounts with PayPal,¹⁸⁴ Skype,¹⁸⁵ or a cell phone account with Verizon Wireless,¹⁸⁶ AT&T Mobility,¹⁸⁷ or Sprint¹⁸⁸ on which the respondent is the

¹⁸³ MACRO INTERNATIONAL, INC., CONSUMER TESTING OF MORTGAGE BROKER DISCLOSURES 12-26 (July 10, 2008) (report submitted to Fed. Reserve Bd.), *available at* <http://www.federalreserve.gov/newsevents/press/bcreg/20080714regzconstest.pdf>. Cf. Debra Pogrud Stark, Jessica M. Choplin, & Eileen Linnabery, *Dysfunctional Contracts and the Laws and Practices that Enable Them: An Empirical Analysis*, 46 *Indiana L. Rev.* 797, 843 (2013) (reporting on results of study: "most consumers, even if they carefully read the limitation-of-remedies clause in the contracts presented to them, will not understand what rights they have waived.").

¹⁸⁴ The arbitration clause appears in section 14.3 at <https://www.paypal.com/webapps/mpp/ua/useragreement-full#12>.

¹⁸⁵ The arbitration clause appears in paragraph 21 at <http://www.skype.com/en/legal/tou-usa/#21>.

¹⁸⁶ The arbitration clause can be found on page 2 at http://www.verizonwireless.com/settlement/National_CA.pdf.

¹⁸⁷ The arbitration clause can be found in section 2.0 at <http://www.att.com/shop/en/legalterms.html?toskey=wirelessCustomerAgreement#disputeResolutionByBindingArb>.

¹⁸⁸ The arbitration clause appears on page 8 at http://www.sprint.com/business/resources/ratesandterms/Standard_Terms_and_Conditions_for_Communications_Services.pdf.

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primary person on the account and signed the contract.¹⁸⁹ Each of those contracts includes an arbitration clause.

Six hundred forty-eight respondents answered both of those questions, as shown in Figure 15.¹⁹⁰ Of those, 303 respondents said they had never entered into a consumer contract with an arbitration clause. And of those, 264, or 87%, did indeed have at least one account subject to an arbitration clause, meaning that they did not realize they had agreed to an arbitration clause.¹⁹¹ In total, a minimum of 40% of respondents answering both questions mistakenly believed they had not agreed to an arbitration clause when they had in fact agreed to at least one arbitration clause.¹⁹² Furthermore, another 244 respondents, or 38% of the total who answered both questions, did not know whether they had entered into an arbitration agreement or not. And 218 of those—89%—had in fact entered into at least one arbitration agreement.

FIGURE 15 GOES AROUND HERE.

¹⁸⁹ Because many people are part of a family plan under which one person—perhaps a parent or spouse—signs the cell phone contract on behalf of other members of the family, it is possible to have a cell phone without having had an opportunity to see or agree to the contract. Hence the question’s wording.

¹⁹⁰ Question 27 asked respondents if they had an account with one of several companies that include arbitration clauses in their consumer contracts. During phase one, question 27 did not offer as an option “none of the above.” Instead, the survey asked respondents to click on any of the accounts they had, and if they didn’t click on any, that indicated that they had none of the listed accounts. During phase 2, Qualtrics set up that question (along with the other multiple choice questions) to compel a response. One person clicked one of the items in question 27 but wrote in the comments that he (or she) didn’t actually have such an account but was required to click on an item to advance in the survey. At that point, for the remaining respondents, we added the none of the above option. We also went back to the Qualtrics panelists who had already answered that question and excluded the answers for those who had clicked only one account in answering question 27 on the theory that they might not actually have had an account with that company (we didn’t do that for people who had clicked two or more items because they were not compelled to click two items and so must have believed they had two such accounts). As a result, we collected only 649 responses to question 27. Six hundred forty-eight also answered question 25.

¹⁹¹ Of those, 105 had two such accounts, and 33 had three.

¹⁹² In all likelihood, the percentage is even higher than that. The 13% of those who said they had not entered into a consumer arbitration contract and did not have a contract with one of the companies we asked about may have agreed to other contracts (credit card, checking account, etc.) including an arbitration clause.

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Some of the respondents' comments on these questions make it even clearer that they did not realize that they had signed such contracts. One respondent wrote "i wo uld[sic] never never up my right to [sue the company]." The respondent had agreed to two of the listed contracts. Another commenter explained: "i [sic] am a person to read about this before signing anything, i have never seen or read anything like this i see n mostly read,very surprising," That respondent too had agreed to a contract with an arbitration clause. One respondent who had denied entering into a contract with an arbitration clause added "please tell me i haven't entered into such a contract." The respondent had.

The survey also asked respondents "Before entering into a contract, do you look to see if the contract says you have to arbitrate any disputes and can't sue the company?" Of the 176 respondents who said they did look for an arbitration clause, 98 also said they had never entered into a contract with an arbitration clause. Of those, 83, or 85%, had in fact agreed to at least one contract including an arbitration clause.¹⁹³ Of those who said they did *not* look to see if contracts contain an arbitration clause but also denied having entered into a contract with such a clause, 87% had actually agreed to an arbitration clause.¹⁹⁴ In other words, people who think they have not agreed to arbitration *and claim to check contracts for arbitration clauses* are about as likely to have actually agreed to at least one arbitration clause as those who think they have not agreed to arbitration *and do not check contracts for arbitration clauses*.

VI. DISCUSSION

Our research suggests that typical consumers do not realize when they have agreed to arbitrate and do not understand the consequences of agreeing to arbitrate. While that finding may be unsurprising on its face, the depth of consumer misunderstanding did surprise us. Even those respondents who claimed to read and understand the contract got the most basic questions about the nature and effect of the arbitration clause wrong.

¹⁹³ Again, we do not know whether the remaining 15 had not agreed to a contract with an arbitration clause—only that they had not entered into a contract with any of the entities listed in the survey.

¹⁹⁴ Of the 301 people who said they did not look to see if contracts include arbitration clauses, 122 claimed never to have entered into a contract with an arbitration clause, and 106 of those had done so. Of course, if they did not look for arbitration clauses, it is hard to know the basis for their claim that they had never entered into a contract with an arbitration clause.

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A large majority of the respondents who realized that the sample contract included an arbitration clause still did not appreciate what arbitration entails, evoking Nobel-prize winning physicist Richard Feynman's observation that knowing the name of something is not the same as knowing it.¹⁹⁵ It is not an exaggeration to say that consumers have no idea what they are agreeing to when they enter into contracts containing arbitration clauses. Beyond that basic level of misunderstanding, we believe our results also indicate an expectation on the part of many consumers that court will be available to them, if only as a last resort.

We believe that this persistent misunderstanding, coupled with the reasonable expectations for adjudicative process that our respondents demonstrated, suggest a need for Congress, the courts, and agencies to reexamine mandatory predispute arbitration in the consumer context. In the remainder of this section, we explain our reasons in more detail and then raise and respond to several possible arguments for why our findings should *not* provoke such a reexamination.

A. Implications for the Regulation of Consumer Arbitration

1. Deep Consumer Misunderstanding of Arbitration and Its Effects

To put the survey results in terms familiar to academics, our respondents would have failed miserably had this been a test of their understanding of arbitration. We asked eight questions that had clear right and wrong answers. Not one of those eight questions elicited a majority of correct responses. Only two questions garnered more correct answers than incorrect answers. On four questions, in contrast, more respondents gave incorrect answers than correct answers, in some cases by margins of three- or even four-to one. In other words, the responses suggest that a majority of respondents did not realize what rights they give up when they agree to arbitration, and many of the respondents who did think they understood were more likely to be wrong than right.¹⁹⁶

¹⁹⁵ Richard P. Feynman, *What Do You Care What Other People Think?* 14 (1988) (“I learned very early the difference between knowing the name of something and knowing something.”).

¹⁹⁶ Available anecdotal evidence offers some confirmation of these findings. See F. Paul Bland, Jr. Executive Director Public Justice, Comments of Public Justice to the Consumer Financial Protection Bureau on the Proposed New Information Collection, titled “Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements,” Docket ID: CFPB-2014-0011 (June 30, 2014), available at <http://www.regulations.gov/#!documentDetail;D=CFPB->

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The survey illustrated this lack of understanding of arbitration clauses in other ways. Of the more than 5,000 answers that respondents provided to the eight questions with right and wrong answers, only a quarter were correct, as shown in Figure 16. Only two people—less than one percent—got all eight questions right, out of the 663 who responded to all eight questions. In contrast, 117 respondents, or 18%, did not get a single correct answer—more than got at least half the questions right. If this had been a test with a passing grade of 65, as was common when we were high school students, 96% of the respondents would have failed. Only 23 respondents, or less than 4%, would have passed.¹⁹⁷

If the number of correct answers (or lack thereof) provides a rough indication of the number of respondents who understood what the arbitration clause entailed, the level of outright misconceptions is indicated by the number of incorrect answers, as displayed in Figure 16.¹⁹⁸ More than half the respondents got at least three answers wrong, demonstrating that numerous respondents suffer from multiple mistaken beliefs about arbitration clauses. Overall, respondents gave 44% more wrong answers than right answers, as shown in Figure 16.¹⁹⁹

2014-0011-0012 (“Our experience of speaking with a large number of consumers supports the proposition that only a tiny fraction read these fine print provisions [arbitration clauses] stripping them of their rights, and even fewer accurately comprehend these provisions.”). At least one industry organization has also concluded that consumers do not read credit card contracts. See Letter from Bill Himpler, American Financial Services Association to CFPB re Telephone Survey Exploring Consumer Awareness of and Perceptions Regarding Dispute Resolution Provisions in Credit Card Agreements dated Aug. 6, 2013 (“The results of the [proposed CFPB] Survey will undoubtedly show that the vast majority of consumers are not aware of most of the provisions in their card agreements. . . . studies have shown that consumers do not generally read contracts. Accordingly, if consumers do not read contracts generally, there is no reason to assume that they may read an arbitration provision, in particular. . . . the [proposed CFPB telephone] Survey is likely to show that consumers are not generally aware of the arbitration provision in their credit card agreement”) available at http://www.afsaonline.org/library/files/legal/comment_letters/CFPBArbitrationSurvey.pdf.

¹⁹⁷ The instructions told respondents that “This is not a test.” Perhaps it was a good thing that it was not.

¹⁹⁸ The numbers of respondents with correct and incorrect responses do not mirror each other because the answer “I don’t know” is scored neither as correct nor incorrect.

¹⁹⁹ Figure 16 shows that we recorded 1352 correct answers and 1950 incorrect answers, or 598 more incorrect answers than correct ones, representing 44% more incorrect answers.

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FIGURE 16 GOES AROUND HERE.

Even respondents who believed they understood the contract fared poorly. Question 3 of the survey asked respondents “How much of the contract did you read and understand?” Figure 17 shows the responses. Using regression analysis, we found that those who reported reading and understanding more of the contract had a higher percentage of correct answers, and that the difference was significant at the .05 level.²⁰⁰ Figure 18 shows the percentage of correct answers compared with how much the respondent claimed to have read and understood. But respondents who reported reading and understanding the entire contract still averaged correct responses to only 28% of the questions while those who described themselves as reading and understanding most of the contract clicked the right answer to only 30% of the questions. This may be especially troubling because consumers who believe they understand a contract may place greater trust in that supposed understanding when making decisions—and yet the percentage of correct answers indicates that the respondents who claimed greater comprehension were only slightly less confused than the average respondent, and still were a long way from mastery of the meaning of the arbitration clause.

FIGURE 17 GOES AROUND HERE.

Furthermore, those who reported reading and understanding more of the contract were much more likely to answer the eight questions incorrectly than those who professed less understanding, as shown in Figure 19.²⁰¹ For example, those who said they read and understood all

²⁰⁰ Regression analysis found several other significant predictors at the 0.05 level. Higher total annual household income correlated with a higher percentage of correct answers, as did spending more time on page six of the contract (the page which included the key provisions of the arbitration clause), and more time on the first six pages of the contract. The twelve respondents who identified themselves as lawyers or law students averaged correct answers 54% of the time, as compared with the remaining respondents, who averaged correct answers 25% of the time. In addition, those 60 or over answered more questions correctly, on average, than those below the age of 60, as shown in Figure [xx]. Other factors that were not significant predictors of correct answers included amount of time reading the contract; highest level of education attained; whether the respondent had ever been involved in an arbitration; and whether the respondent had worked for a bank, credit union, savings and loan, or cell phone company within the previous five years.

²⁰¹ For purposes of this statement, as with all statements about right and wrong answers, an answer of “I don’t know” is scored as neither correct nor incorrect.

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the contract were more than twice as likely to record wrong answers as those who reported reading and understanding very little of the contract. Those who claimed greater understanding were emboldened to attempt answering more questions, rather than to select “I don’t know,” but their confidence in their understanding was misplaced. Indeed, respondents saying they read and understood all of the contract gave twice as many wrong answers as right ones.

FIGURE 19 GOES AROUND HERE.

Finally, our respondents demonstrated a lack of understanding about arbitration agreements in their real-world consumer contracts. Although the overwhelming majority of our respondents had entered into at least one consumer contract with an arbitration agreement, less than 16% realized they had done so. Our results thus suggest that consumers are routinely signing away constitutional rights without knowing it.

In short, the survey raises serious questions about whether the consent consumers provide to arbitration is informed in any meaningful sense of the word, and therefore whether there is consent at all.²⁰² As a practical matter, if consumers are not aware of arbitration clauses, do not interpret them correctly, think they will not be enforced, or some combination of all three, businesses are free to draft those terms in whatever ways serve their own interests, at the consumer’s expense.²⁰³

2. Consumer Expectations Regarding Access to Court

Our research suggests that many people view participation in a public adjudicative process as an option that cannot be divested through contractual boilerplate. Almost half of our respondents thought the sample agreement would allow them to pursue in court a claim too large for small

²⁰² Cf. Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 45 (2011) (The Commission concludes that consumers should, but generally do not, have a meaningful choice regarding mandatory pre-dispute arbitration provisions in consumer credit contracts. To give consumers such choice, they must have: (1) a basic understanding of arbitration and its consequences; . . .”)

²⁰³ See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 688-89 (1996) (“If the consumer is not aware of the existence or significance of [a] clause, the supplier is free to impose a term that benefits the supplier but significantly harms the consumer.”).

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claims court, and only 14% recognized that the contract banned litigation of larger claims in court.²⁰⁴ Less than 20% of respondents recognized that the contract would prevent them from defending before a jury a claim too large for small claims court. Even when told in the question that a properly-worded arbitration clause applied, almost one third of our respondents thought it likely or very likely that a court would ignore the arbitration agreement and decide a dispute with \$5,000 at stake.²⁰⁵

The comments show that many survey participants believed that access to court is such a fundamental right that a judge would not enforce a consumer contract denying the right to pursue adjudication. For example, in response to question [7], asking respondents whether they could pursue a claim for overpayments in court, we received the following comments:

- “You always have a right to pursue legal action when someone has wronged you, it is not up to one party or another to determine whether or not they will take away that right.”
- “It depends on the amount involved and the level of fairness in the charge. If the amount overcharged is high enough to be considered predatory, I would definitely consider suing.”
- “I imagine that this would fall under interstate commerce laws as well and the user/cardholder would apple to take this to court.”
- “I believe it is your American right to sue in larger court systems.”
- “Doesn’t matter to them what the contract says, why should it matter to me? You get enough money on the table and I’ll always be able to find a lawyer willing to sue. If he’s any good he’ll get to court no matter what the contract says.”

Similarly, in response to question 9, which asked about survey participants’ right to a jury trial on a claim brought against them by the credit card company, we received these comments:

²⁰⁴ See *supra* note 172 and accompanying text.

²⁰⁵ See *supra* note 177 and accompanying text.

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- “A jury trial. Hmmm. Maybe in the contract they specified I waive my right to a jury? But I’m not sure if legally they can put that in a contract. I feel like that may be pre-empted by law. But I’m speculated and not a lawyer. I don’t know the answer”
- “Binding arbitrators are stipulated, right? I GUESS that stipulation could be contested, THEN we’d get a jury trial. It’s also why I avoid putting very much on credit cards.”
- “I did not read that section. I would assume I would be able to have a jury trial or go to arbitration”
- “Disputes are better settled in court.”
- “I would again expect that I would have the same rights of all other citizens of the United States and that as a corporation the credit card company would have the ‘right of compensation’ for charges not able to prove were fall.”
- “You have wright to fight for money.”
- “Yes the dispute can be settled in court with all rights reserved. If the company was notified The Fair Credit Billings Act required the company to acknowledge in 30 day and resolve the dispute in approx. 90 days. From there they violated laws explained in the Federal Trade Comission website.”

To be sure, we cannot say why all or even most of our respondents gave the answers they did, because so many did not give explanatory comments. Respondents who gave answers indicating that they thought they would have access to court may have been relying on a default assumption that they do not find particularly meaningful. That is, even if they expect to go to court, they may not prefer to go to court. Focusing as we were on consumer understanding, we did not ask respondents whether they prefer litigation to arbitration. And we did not study consumers’ perceptions of any actual arbitration process. Our survey was not designed to shed light on whether consumers who assume they will have access to court would embrace arbitration once a real dispute arose.²⁰⁶

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Nevertheless, we find it significant that many consumers seem to expect to have access to court, even if they have agreed to arbitrate. Public expectations about access to judicial process deserve respect and protection, given the deep roots the civil jury trial has in American constitutional history. The federal constitution and the constitutions of all fifty states guarantee a right to a jury trial in civil cases. The deprivation of the right to a jury trial was specifically noted by the Second Continental Congress in the Declaration of the Causes and Necessity of Taking Up Arms²⁰⁷ and by Thomas Jefferson in the Declaration of Independence.²⁰⁸ The failure to include a right to a civil jury in the Constitution gave antifederalists some of their best ammunition in the ratification debates, as Alexander Hamilton acknowledged in the *Federalist* No. 83.²⁰⁹ The backlash ultimately resulted in the inclusion of the Seventh Amendment in the Bill of Rights. Notably, the cases that most concerned the antifederalists were debt collection cases—precisely the kind of claim a credit card company is most likely to pursue against its customer.²¹⁰

Coupled with those constitutional guarantees of a jury right, we believe our findings regarding consumer expectations for judicial process shift the burden onto those who argue that no regulation of mandatory predispute arbitration agreements in consumer contracts is justified. We note that a variety of legislative and regulatory responses have been considered and some already enacted. Congress has enacted several laws barring the use of pre-dispute arbitration clauses in particular consumer contracts, outlawing pre-dispute arbitration clauses in mortgages and other loans secured by a consumer's principal dwelling²¹¹ and in certain

²⁰⁷ Declaration of the Causes and Necessity of Taking up Arms (July 6, 1775).

²⁰⁸ The Declaration of Independence para.19 (U.S. 1776).

²⁰⁹ See *Federalist Papers* No. 83 (Alexander Hamilton) (“the objection to the plan of the convention, which has met with most success in this state, and perhaps in several of the other states, is that relative to the want of a constitutional provision for the trial by jury in civil cases.”).

²¹⁰ See Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 *Iowa L. Rev.* 145, 188 (2001).

²¹¹ See 15 U.S.C. section 1639c(e) (residential mortgage loans and open end credit loans secured by the consumer's principal dwelling), as implemented by 12 C.F.R. section 1026.36(h) (ban also applies to home equity lines of credit secured by the consumer's principal dwelling). The ban does not apply to mortgages issued before June 1, 2013, though as the two mammoth government-sponsored enterprises that buy mortgages in the secondary market previously refused to purchase mortgages containing arbitration clauses, many mortgages issued earlier lack arbitration clauses.

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obligations incurred by soldiers and their families.²¹² In the 2010 Dodd-Frank Act, Congress authorized the Consumer Financial Protection Bureau to bar or limit the use of arbitration clauses in consumer financial contracts if the Bureau finds such regulation “in the public interest and for the protection of consumers” and “consistent with [a] study”²¹³ of arbitration. Dodd-Frank directed the Bureau to conduct.²¹⁴ The Bureau is currently conducting that study.²¹⁵ Finally, various members of Congress have sponsored the proposed Arbitration Fairness Act, which would invalidate pre-dispute arbitration clauses in consumer and employment contracts.²¹⁶ We believe both legislators and regulators, as well as courts, should consider consumer understanding of arbitration agreements as an important factor in the decision whether to further limit or ban consumer arbitration agreements. In the following section, we respond to several arguments that arbitration proponents may make in urging lawmakers not to rely on results such as these to regulate or ban consumer arbitration agreements.²¹⁷

B. Responses to Possible Objections

We see three main objections to greater oversight or the outright banning of consumer arbitration. First, some may argue that regulation is unnecessary because market forces will ensure fairness for consumers. Second, arbitration proponents may argue that arbitration offers a superior

²¹² See 10 U.S.C. section 987(e)(3), as implemented by 32 C.F.R. section 232.8(a)(3).

²¹³ Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 2004 section 1028(b) (2010), codified at 12 USC 5518.

²¹⁴ Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 2004 section 1028(a) (2010), codified at 12 USC 5518.

²¹⁵ See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf; [CFPB arbitration study to be completed this year](#), CFPB Monitor (Apr. 30, 2014), available at <http://www.cfpbmonitor.com/2014/04/30/cfpb-arbitration-study-to-be-completed-this-year/>.

²¹⁶ See, e.g., S. 878, 113th Cong., (2013-14).

²¹⁷ We did not survey consumers on their understanding of other contract provisions, though others have done so. [INSERT CITES] Whatever merit there may be to providing that consumers, once they have signed the contract or otherwise signified assent, are subject to other contract terms they may not be able to understand, arbitration clauses differ, in our view, because they involve waiver of constitutional rights like the right to jury trial.

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option for consumers, and so should be left unregulated. Finally, some may argue that increased disclosure or opt-outs are sufficient to address any problems with consumer understanding.

1. Market Forces as a Guarantor of Fairness for Consumers in Arbitration

In an influential law review article, Alan Schwartz and Louis L. Wilde argued that companies would not take undue advantage of consumers in drafting contract terms as long as enough consumers whose business the companies want would refuse to enter into contracts containing those terms.²¹⁸ If businesses cannot distinguish between consumers who care about the term and consumers who don't, the theory goes, the businesses will draft their contracts to avoid alienating the consumers who care about the term, and all consumers, whether or not they care about the term, will reap the benefits.²¹⁹ Applied to consumer arbitration, Schwartz and Wilde's theory predicts that market forces will ensure that consumers are not harmed by the dispute resolution processes dictated by the companies they contract with. Consequently, under this theory, regulation of consumer arbitration is unnecessary.

Whatever merit this theory may have in other contexts,²²⁰ its validity in the arbitration context is questionable at best. The evidence from our research suggests that consumer awareness of arbitration is too low to incentivize companies to take consumer preferences into account in drafting dispute resolution clauses. As discussed above, when we asked respondents to recall five terms from the credit card contract, only 23, or about 3%, of the respondents mentioned the arbitration clause.²²¹ Arbitration tied for fourteenth on the list of items recalled by the respondents. Even assuming that all 23 of those respondents would spurn contracts including arbitration clauses, it is hard to believe that merchants would resist using arbitration clauses to attract the business of only three

²¹⁸ See Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979).

²¹⁹ See Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979).

²²⁰ For a compilation of criticisms of Schwartz & Wilde's theory, see Jeff Sovern, *Towards a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 William & Mary Law Review 1635 (2006).

²²¹ See *supra* notes 163-164 and accompanying text.

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percent of the population at large, or, for that matter, a number three times as large.²²²

Adherents of the Schwartz & Wilde thesis might respond that the fact that consumers do not notice arbitration clauses or, by extrapolation, make purchasing decisions based on their inclusion, indicates that arbitration is working tolerably well for consumers. If the arbitration practices of a company were causing serious consumer harm, in theory, consumers would learn about that and punish the company by taking their business elsewhere. The problem is that arbitration, by its very nature, inhibits the dissemination of information about the arbitration process. One of the key features of arbitration is that it is confidential. The process is not open to the public and the results are not published. Consumers thus often have no way of learning whether a company's dispute resolution policy is favorable to consumers or not, so that the market will not function efficiently to regulate those policies.²²³ Nor do businesses shunning arbitration clauses have much incentive to educate consumers about the value of court litigation: such an effort would require the business to acknowledge that its dissatisfied consumers might sue it—hardly a selling point.

Class waivers compound the problem. Class actions are an important means of publicizing information about corporate wrongdoing. They generate media interest, both when they are filed and when settlements are announced, and consumers are notified through the class action process that their rights have been affected. Cutting off class actions

²²² See Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 691 (1996) ("[With regard to arbitration] it seems likely that the 'knowledgeable minority' is an extremely small minority. . . . If the knowledgeable minority is sufficiently small, the supplier may well make enough money from taking advantage of the majority to more than justify losing the minority's business."); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1270-71 (1993):

[Schwartz and Wilde's] assumptions are unrealistic. Although it may be true that there are some markets at some times and places where sellers have generally changed their forms to please the relatively few informed and powerful buyers, Schwartz and Wilde offer no evidence to support their conclusion that such markets are typical.

²²³ Cf. Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 595 (1990) ("[I]nefficient transactions occur because consumers do not read form contracts, or do not understand the terms, and are thus unaware of their contents.").

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is, among other things, a way for companies to hide the grievances against them, making it less likely that consumers will learn about grievances at all, and therefore about the fairness of the company-dictated procedures used to resolve them. Arbitration agreements thus inhibit the very market regulation that is supposed to protect consumers from unfair arbitration agreements.

2. Arbitration as a Superior Procedural Option for Consumers

One of the most common arguments that arbitration proponents make is that arbitration offers a superior procedural option for consumers. Arbitration proponents take the position that arbitration meets or exceeds litigation at providing effective access to justice. Justice Scalia's opinion for the Court in *Concepcion* rests largely on his view that Congress in the FAA sought to promote arbitration over litigation because arbitration offers a superior process.²²⁴

To be sure, litigation can be expensive, time-consuming, and frustrating.²²⁵ Under the right circumstances, arbitration can offer a better process. But the benefits arbitration offers for commercial actors of roughly equal power may not carry over to arbitration between business entities and their customers. Many arbitration skeptics believe that arbitrators are influenced by a repeat-player effect, either consciously or subconsciously favoring parties and lawyers they encounter in repeated proceedings.²²⁶ Relatedly, skeptics contend that, because businesses select

²²⁴ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (“The overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”).

²²⁵ See Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1786-87 (2001).

²²⁶ Attempts to study the repeat-player effect have produced mixed results. See Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 *Hous. L. Rev.* 1237, 1256-58 (2001):

The limited empirical data . . . suggests that arbitration favors the repeat-player. . . . Although little hard data is available to support or refute the allegation of repeat-player bias in pre-dispute mandatory arbitration, the repeat-player clearly comes out ahead by controlling the decision to arbitrate and benefiting from the processes surrounding arbitration. Additionally, even though anecdotal, the evidence seems to support the conclusion that, consciously or not, arbitrators tend to favor the repeat-player whose continued business is essential for their financial success.

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the arbitration service when they write contracts, arbitration providers have an incentive to find for businesses so that the businesses continue to choose that arbitration service. The NAF settlement gives some justification for that concern. Many banks had used NAF, and at least some evidence suggested that they chose NAF because it promised speedy decisions in their favor.²²⁷

We will not attempt to resolve the debate over the comparative advantages of arbitration and litigation in this article. Again, we acknowledge the benefits arbitration can provide under the right circumstances. We see no objection to arbitration where the consumer is given the option of choosing it *after* the dispute arises. At that point, consumers are in a better position to make informed choices about the available procedural options. But our research suggests that consumers are not able to make informed choices—choices that deprive them of important procedural rights—at the pre-dispute contracting stage. They simply do not understand what arbitration entails, even when they realize they are agreeing to it. Many assume that they will have access to court regardless of what they sign.

Given the depth of misunderstanding and the expectations of access to court our research uncovered, we believe that arguments about the efficacy of arbitration miss the mark. Even if arbitration offers an unquestionably better process, if consumers are unable to make an informed decision choosing it over litigation then arbitration loses the legitimacy that is critical to procedural justice.²²⁸ Arguments about the

²²⁷ Even where outside observers conclude that an arbitration process is fair to the weaker party, the weaker party may not perceive it to be fair. That was the finding of Barbara Black and Jill Gross in their research into participant perceptions of securities arbitration conducted through the Financial Industry Regulatory Authority (FINRA). *See supra* note 206. Although they both concluded that FINRA arbitration satisfied basic standards of procedural fairness at least as well as adjudication, large majorities of surveyed customers who had experienced both litigation and arbitration thought the arbitration process was unfair and expressed dissatisfaction with the outcome. *Id.*

²²⁸ *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 278 (2004). In Solum's words:

[I]n the case of adjudication, as in the case of legislation, we regard legitimacy as a political good. The goodness of legitimacy flows from an intuitively appealing principle of political morality: each citizen who is to be bound by an official proceeding for the resolution of a civil dispute should be able to regard the procedure as a legitimate source of binding authority creating a content independent obligation of political morality for the parties to the dispute.

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efficacy of arbitration may provide good reason to encourage post-dispute arbitration, but they do not answer the question of whether companies should be able to require consumers to sign pre-dispute arbitration agreements.

Of course, the question of whether individual arbitration is superior to individual litigation ignores one of the central issues in the modern arbitration debate: class actions. Companies use arbitration to divert claimants away from class litigation and into individual arbitration. Some claim arbitration provides a superior forum for the resolution of small disputes than class action litigation. For example, the Supreme Court in *Concepcion* asserted that an injured consumer might be better off with AT&T's arbitration process than with membership in a class, because a class action would likely take longer than an individual arbitration and result in an award to an individual consumer significantly less than the \$7500 minimum award AT&T was obligated to pay if it lost at arbitration.²²⁹

We express no opinion here about the efficacy of class actions, a subject of heated debate. But we believe that, just as our research raises serious questions about the legitimacy of consumer agreement to arbitration, it also generates doubt about the legitimacy of the class action waivers contained in arbitration clauses. Four times as many respondents believed that they could still participate in a class action after agreeing to a class action waiver than recognized that they could not, and even when the question told respondents that they not join a class action, less than 30% understood that they could not be included in a class action. Again, we believe that evidence of arbitration's efficacy cannot suffice to justify class waivers if those waivers rest on a consent based on misconceptions.

3. Disclosure and Opt-Outs as Protection for Consumer Rights

A further possible response to our findings about consumer expectations regarding their process options is to advocate better disclosure of the existence, nature, and effect of arbitration agreements, perhaps backed by language allowing consumers to opt out of those agreements. If consumers have mistaken impressions about the legal effect of the contracts they sign, this argument might go, the solution is to

Id.

²²⁹ AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1753 (2011).

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disabuse them of those notions and/or give them the ability to select different processes.

We tested only one contract, and it is possible that the format and/or the language of the contract we tested could be modified in ways that would improve understanding, for example by including dispute resolution terms in the Schumer Box. But we think our results cast doubt on the utility of disclosures regardless of how they are presented.

First, in the sample contract we used, arbitration was arguably the most prominent term in the contract text, with more mentions than any other term and with a variety of formatting, including italics, bold, and ALLCAPS to call attention to it. Nevertheless, arbitration tied for the fourteenth most cited term in the question asking respondents what they remembered about the agreement. Arbitration was not even the most commonly-remembered term among terms not already included in the Schumer Box. One other term—involving cancellation—was noted more often than arbitration; another term—minimum payment—was cited as many times as arbitration. Neither of those terms was highlighted to the same extent as arbitration. Even when we specifically referred in our questions to common terms, such as those barring class actions, jury trials, and appeal, respondents did not recognize their effect. In light of those findings, it seems unlikely that any amount of highlighting would succeed in making consumers aware of the rights they forego by agreeing to contracts providing for arbitration.

Second, comparison of the answers of those who spent more time with the contract with those who spent less suggests that better disclosure would not solve the problem. Theoretically, enhanced disclosure should result in consumers becoming more aware of the disclosed items, just as spending more time with the contract should result in respondents developing a similar awareness, and so by comparing those two groups, we should arrive at a rough approximation of the effect greater disclosure would have.²³⁰ As to each of three categories—the amount of time spent on the entire contract, the amount of time spent on page six,²³¹ and the amount of time spent on the first six pages of the contract—we compared

²³⁰ While it is possible that respondents who spent more time with the contract did so because they read more slowly, we think it more plausible to think that they read with greater care.

²³¹ Page six contained the first part of the arbitration clause, including the italicized and capitalized portions that stated that consumers could not litigate in non-small claims courts, participate in a class action, or have a jury trial.

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the 25% of the respondents who spent the most time with the quarter who spent the least time. In not one of the three categories was the difference in the percentage of wrong answers statistically significant, suggesting that greater disclosure would not reduce respondent misconceptions.²³² Respondents who spent more time did have a statistically significant increase in correct answers, at the .05 level. But, as indicated in Figure [xx], the mean percentage of correct answers among those who were in the top category of reading time in all three categories never reached as high as 30%. Spending more time with the contract only marginally improved comprehension of the arbitration terms. While we cannot definitively conclude that enhanced disclosures would have no effect—because we did not test alternative disclosures—our results suggest little reason for optimism about the efficacy of disclosures.

Our findings also cast doubt on the utility of arbitration opt-outs, another possible method for protecting consumers from unduly burdensome arbitration agreements. The CFPB arbitration study found that 27.3% of the arbitration clauses in the credit cards it studied included opt-out provisions, permitting card holders to opt out of arbitration of disputes arising at a later time if they submitted a signed writing, typically within 30 to 60 days of the opening of the account.²³³ The Bureau noted that it does not know how many consumers opt out,²³⁴ and neither do we. We were not able to test in this survey consumer understanding of opt-out provisions in arbitration clauses. But from the information we were able to collect, we infer that opt-out rates are low, for two reasons.

First, our study strongly suggests that consumers are not aware of the rights they waive in arbitration clauses. It thus seems unlikely that they are aware of the rights *included* in arbitration clauses, such as the right to opt out. If consumers do not know of their right to opt out, they are unlikely to assert it. Second, even consumers who notice that the contract permits an arbitration opt-out are unlikely to avail themselves of that option if they fail to appreciate that the arbitration clause strips them of

²³² We used a t test to measure significance for all the data discussed in this paragraph.

²³³ See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 31 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

²³⁴ See Consumer Financial Protection Bureau, Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date 31, n. 77 (2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf

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any rights. Many of the respondents seemed to believe arbitration supplements court litigation, rather than supplanting it. Accordingly, it is difficult to see why consumers would bother to prepare and send a letter opting out of arbitration.²³⁵ But all of this is speculation on our part. Credit card companies offering opt-outs undoubtedly know how many consumers have opted out. We hope that they will make that information available.

VII. CONCLUSION

Omri Ben-Shahar and Carl E. Schneider conclude their important book, *More Than You Wanted to Know: The Failure of Mandated Disclosure* by recalling how sixteenth century Spaniards delivered a speech in Spanish to New World audiences that did not understand Spanish.²³⁶ The speech threatened war if the listeners failed to follow instructions, and as the listeners did not understand the speech, what followed was not pretty. So it may be with arbitration clauses. Though the arbitration clause in our contract was written in English, it seems to have been little more effective than it would have been in a foreign language—or even nonsense.

Sizable majorities of respondents did not understand that the contract they had been given: (a) required them to arbitrate; (b) deprived them of the right to a jury trial on a claim of \$5,000; (c) prevented them participating in a class; and (d) would almost certainly be enforced by a court. Leaving the sample contract aside, large majorities did not grasp that a “properly worded” arbitration agreement foreclosing judicial process, waiving class relief and providing that the arbitrator’s decision was final would be enforced by a court. And in their own lives, only a small percentage correctly understood that they were already parties to at least one arbitration agreement.

²³⁵ See also Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 43-44 (2011) (footnotes omitted):

[S]ome roundtable participants stated that, for a variety of reasons, consumers rarely exercise . . . opt-out rights. Many consumer advocates asserted that, if consumers were aware of that option, they would choose to do so. In contrast, an attorney for creditors opined that few consumers would choose to opt out of arbitration because they prefer it to court litigation.

²³⁶ Omri Ben-Shahar & Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* 195 (2014).

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As the Supreme Court has noted, arbitration must be a creature of consent.²³⁷ But our study raises serious questions about whether the consent consumers provide when they enter into a contract containing an arbitration clause is a knowing consent, and therefore whether it should be considered consent at all. Those questions justify, at a minimum, greater Congressional, regulatory, and judicial scrutiny of arbitration agreements in consumer contracts.

²³⁷ *See supra* note 2.

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APPENDIX

Survey

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Q1: St. John's University School of Law is conducting a survey into consumer understanding of contract terms. Thank you so much for taking the time to participate in this research. First, we are going to show you a consumer contract. Then we will ask you some questions about consumer contracts, including contracts you might already have agreed to in your everyday life. [We are still perfecting the survey, so if you see anything that confuses you or you don't understand, please indicate that in the places for comments.]²³⁸ If you need to make the print size bigger, please use your browser's controls to do so (in Explorer, click "View" and then use "Zoom" to make your selection).

Before we can ask you the questions, we are required to show you a consent form and ask you to read it and click on the box that says you are willing to answer our questions.

By clicking "Yes" below, you agree to participate in this survey of your own free will. You may refuse to participate or withdraw at any time. If at any time you decide not to participate, you will not be penalized in any way, except that you will not get paid for your time. You have the right to skip a question. You have a right not to answer any question you prefer not to answer. There are no known risks associated with your participation in this research beyond the risks of everyday life. There are two benefits you will receive if you complete the survey. First, [if you have a PayPal account and tell us the associated email address, we will deposit \$5 into the account]²³⁹ (you will receive the promised benefit after you complete the survey). Second, your answers may help consumers and researchers. Your identity will remain confidential. We will not make public your participation.

Is there anything about the study or your participation in it that is unclear or you do not understand? If so, please contact Professor Jeff Sovern at [phone number redacted] or [email address redacted] or through St. John's University at 8000 Utopia Parkway, Jamaica, New York, 11349. If you have any questions about your rights as a research participant, please

²³⁸ The bracketed sentence appeared only during the first two phases of the survey administration.

²³⁹ The bracketed sentence appeared only during the first phase of the survey administration while the portion of the sentence in parentheses did not appear during that phase.

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contact the University's Human Subjects Review Board, [phone number redacted].

Do you consent to answer the questions?

☐ Yes

Imagine that you obtained a credit card and the credit card company has provided you with the credit card contract we are about to show you, perhaps online or through the mail. If you have a credit card, you have been given a contract like this for your credit card in the past. Some consumers read contracts like this while others may not, and still others may read some parts and not other parts. Please give this contract the exact same amount of attention you would if it had just been provided to you, along with your new credit card. This is not a test. Rather, we want to learn what you and other consumers take away from consumer contracts in your everyday life. After you are finished with each page, please click the arrow at the bottom right of the survey to move forward.²⁴⁰

²⁴⁰ Because of formatting issues involved in converting the contract from an online survey instrument to a Word document, the contract on the following pages is in slightly smaller text and slightly less clear than it was in the survey instrument when the survey was not zoomed in (i.e., when it was viewed at 100%).

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Cardmember Agreement for ABC Bank Classic, Gold and Platinum Accounts	
This credit card program is issued and administered by ABC Bank. This information is accurate as of June 30, 2013. PLEASE NOTE that this information is provided for general information purposes only and is not specific to your Account. See the Agreement that was provided for your Account and Card for more detailed information, including contact information.	
PRICING INFORMATION: Actual pricing will vary from one Cardmember to another (APR = Annual Percentage Rate) (DPR = Daily Periodic Rate)	
Annual Percentage Rates for Purchases	
This APR will vary with the Market based on the Prime Rate.	Prime + 21.74% (APR) 24.99% (DPR) 0.068466%
Annual Percentage Rates for Balance Transfers	
This APR will vary with the Market based on the Prime Rate.	Prime + 1.90% to Prime + 21.74% (APR) 5.15% to 24.99% (DPR) 0.014110% to 0.068466%
This APR will not vary with the Market based on the Prime Rate.	(APR) 5.99% to 15.99% (DPR) 0.016411% to 0.043808%
Annual Percentage Rates for Cash Advances	
This APR will vary with the Market based on the Prime Rate.	Prime + 21.99% (APR) 25.24% (DPR) 0.069151%
Minimum Interest Charge	If you are charged interest, then the Minimum Interest Charge will be no less than \$2.00
For Credit Card Tips from the Consumer Financial Protection Bureau	To learn more about factors to consider when applying for or using a credit card, visit the website of the Consumer Financial Protection Bureau at http://www.consumerfinance.gov/learnmore .
Set Up and Maintenance Fees	NOTICE: Some of these set-up and maintenance fees will be assessed before you begin using your Card and based on your Credit Limit, your initial available credit will be less. You may still reject this Account, provided that you have not yet used it or paid a fee after receiving a billing statement. If you do reject the Account, you are not responsible for any fees or charges.
• Annual Fee	\$80
• Travel Fee	\$55 annually
Transaction Fees	
• Balance Transfer Advance Fee	\$10 or 4% of the Transfer or Advance amount, whichever is greater (No Maximum).
• Convenience Check Advance Fee	\$10 or 4% of the Advance amount, whichever is greater (No Maximum).
• Financial Institution Cash Advance Fee	\$10 or 4% of the Advance amount, whichever is greater (No Maximum).
• Cash Equivalent Advance Fee	\$20 or 5% of the Advance amount, whichever is greater (No Maximum).
• Cash Advance Overdraft Protection Fee	NONE
• Cash Advance ATM Fee	\$10 or 5% of the Advance amount, whichever is greater (No Maximum).
• Foreign Transaction Fee	Up to 3%
Account Fees	
• Late Fee	Up to \$35
• Overlimit Fee	NONE
• Return Payment Fee	\$0 to \$35

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Cardmember Agreement

This is a cardmember agreement and disclosure statement ("Agreement") between you and the Issuer containing the terms that will apply to your Credit Card Account ("Account") effective June 30, 2013. In this Agreement, "you", "your" and "Cardmember" means each individual accepting a solicitation or applying for the Account or otherwise agreeing to be responsible for the Account. "We", "us", "our", and "the Issuer" means ABC Bank, the issuer of the Card and your Account creditor. Please read this Agreement carefully and keep it in a safe place to make the best use of the credit cards we issue with this Account ("Card"). The Agreement becomes effective as soon as you or someone authorized by you uses the Card or Account, but no later than 30 calendar days after we issue and you fail to return the Card. This web Agreement does not replace the Agreement that is provided with the Account and Card.

This Agreement contains an arbitration provision (including a class action arbitration waiver). It is important that you read the entire Arbitration Provision section carefully.

ACCOUNT FEATURES AND YOUR USE OF THE ACCOUNT

1. **Personal Use:** You may use the Account only for personal, family or household purposes. Federal or state consumer protection laws may not apply if you use the Account for other than personal, family or household purposes.

2. **Purchases:** You may use the Account to buy, lease or otherwise obtain goods or services from participating merchants (including transactions you initiate by mail, telephone or over the Internet), or take advantage of special promotional Balance Transfer offers that post as Purchase transactions ("Purchases"). We will, in connection with any promotional offer we make from time to time, provide information on your Card carrier or in additional materials (the "Offer Materials") that explain whether those transactions will post and be treated as a Purchase. Even if you have not signed a sales draft or the merchant has not supplied you with a written receipt or other proof of sale, you are responsible for all Purchases made through your Account, except as expressly limited by applicable law (see Your Billing Rights section below for more details).

3. **Advances:** "Advances" are transactions other than Purchases that allow you direct access to funds available through your Account. Advances may include Account transactions such as cash advances you obtain directly from us, automated teller machines ("ATMs") or other participating financial institutions ("Cash Advances"). ATM and financial institution Advances include phone (automated phone system and 24 Hour customer service assisted) and Internet transfers. Advances also include some Balance Transfers, Convenience Checks, FastCash, Overdraft Protection Advances and Cash Equivalent Advances. "Cash Equivalent Advances" include transactions to acquire or initiate wire transfers, travelers checks, cashier's checks, money orders, foreign cash transactions, casino gaming and betting transactions and lottery tickets. Monthly Account statements we issue may refer to Advances as an Advance, Cash, Cash Advances, or by the product or device you used to obtain an Advance. Refer to the Account Fees section for details on Advance Transaction Fees.

4. **Advance Limits:** Only a portion of the Credit Limit (defined below) is available for Advances and that portion may vary from time to time. Although you may have credit available under your Account, we may be unable to authorize an Advance. You may contact Cardmember Service to learn the portion of your Credit Limit which is available for Advances.

5. **Convenience Checks:** From time to time, we may supply Convenience Checks for use by the person(s) or drawer named on those checks. "Convenience Checks" are drafts that look like other checks, but are drawn on credit available in your Account. Convenience Checks may not be offered for all Account types. We will, in connection with any Convenience Check we provide, include Offer Materials that will explain whether the Convenience Check will post and be treated as an Advance or as a Balance Transfer. Convenience Checks must be written in U.S. Dollars. We may return a Convenience Check unpaid if:

(a) the credit available under your Credit Limit is less than the Convenience Check amount;

(b) the Account is in Default; or

(c) the Convenience Check is improperly endorsed or otherwise fails to conform to our regularly accepted standards for check payment.

Convenience Checks may not be used to pay your Account or any obligation you owe us or our affiliates.

6. **Paying and Stopping Payment on Convenience Checks:** You must write to us or call to request that payment be stopped on a Convenience Check. You must call us promptly with an oral stop payment request and then provide us with a written confirmation of the stop payment request within 14 calendar days. Any written stop payment request we receive will remain in effect for 6 months, unless you renew the request in writing before the end of that time. We may pay Convenience Checks more than 6 months old. There may be circumstances under which a Convenience Check must be paid, even if we have received a stop payment request from you. We will not be liable to you if we do not honor your stop payment request under those circumstances. If it is determined that a Convenience Check should have been paid, but was not, we will not be liable for any consequential, punitive or incidental damages if we acted in good faith. Our only obligation under those circumstances will be to pay the designated payee the amount of the Convenience Check and cancel any charges assessed against your Account as a result of any wrongful failure to honor the Convenience Check.

7. **Balance Transfers:** We may permit you to transfer balances and obligations that you owe other companies or financial institutions to your Account, subject to the terms and conditions disclosed in the Offer Materials ("Balance Transfers"). Balance Transfers will post to your Account and be separately reflected on monthly Account statements as a Balance Transfer, or, depending upon the offer, may post to the Account and be treated as a Purchase or an Advance. We will, in connection with any Balance Transfer offer we make, provide you with materials that explain how the Balance Transfer will post to your Account and be reflected on monthly Account statements. You may not request Balance Transfers on existing obligations you owe us or our affiliates. If you request a Balance Transfer that would cause your Account to exceed its Credit Limit, we may, at our option, (a) post the entire Balance Transfer requested to your Account and assess an Overlimit Fee; (b) post only a portion of the Balance Transfer requested to your Account up to the amount of credit available under the Credit Limit; or (c) refuse to process the entire amount of the Balance Transfer requested.

8. **Overdraft Protection:** This section is part of the Agreement only if you have specifically requested and have obtained Overdraft Protection linking the Account with a designated checking account at a financial institution with which we are affiliated or with which we have a correspondent relationship. An "Overdraft Protection Advance" is an advance of funds to your designated checking account.

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from this Account that will prevent overdrafts on your checking account. You authorize us to make Overdraft Protection Advances from the Account as provided in this Agreement. Any Overdraft Protection Advance will post and be disclosed as either a "Financial Institution Cash Advance" or an "Overdraft Protection Advance" on your periodic statement, and will be subject to either a Financial Institution Cash Advance fee or an Overdraft Protection Advance fee, depending on how the Advance is processed. An Overdraft Protection Advance will be made only once per day, and will be made in the amount determined by your financial institution (regardless of the specific overdraft amount). Please

verify the amount of the Overdraft Protection Advance with your financial institution. We may cancel Overdraft Protection privileges under the Account, even if the Account remains open for other purposes.

Note: For Young Adult Accounts, the young adult's name and cosigner's name must both be named on the linked checking account in order to have Overdraft Protection.

INTEREST CHARGES AND ACCOUNT FEES

9. Account **INTEREST CHARGES**: **INTEREST CHARGES** reflect the cost of credit. Your total **INTEREST CHARGE** for any billing cycle will equal the amount of any (a) periodic rate **INTEREST CHARGES** (sometimes referred to as "interest" in this Agreement and on monthly Account statements); (b) Advance Transaction Fees; and (c) any other transaction fees that are considered **INTEREST CHARGES**.

10. Interest Rate: In this Agreement, we have abbreviated the terms "daily periodic rate" as DPR, "average daily balance" as ADB, and "ANNUAL PERCENTAGE RATE" as APR.

(a) Standard Interest Rates- Rate for "Purchases" and "Balance Transfers": The DPR for transactions posting as Purchases and Balance Transfers is equal to 1/365th of its corresponding APR. Rate for "Advances": The DPR and corresponding APR for transactions posting to the Account as Advances is equal to 1/365th of its corresponding APR.

(b) Your Variable APRs are calculated by adding a margin to the Index. Your Variable DPR is equal to 1/365th of the corresponding APR. Your DPR and corresponding APR may increase or decrease from time to time according to the movements up or down of the Index, which is the Prime Rate published in the "Money Rates" section of the Midwest Edition of The Wall Street Journal on the last publication day before the date on which the billing cycle closed (in other words, the "statement date"). Any variable rate adjustment based on an Index change will be effective as of the first day of the current billing cycle, and will apply to the new and outstanding Account balances and transactions subject to that variable rate. We reserve the right to choose a comparable new index if The Wall Street Journal ceases to publish a Prime Rate. The margin is the percentage we add to the Index to calculate the APR. The current applied Index value for your Account is 3.25%.

Introductory and Promotional Rates: We may, at our option, offer you for a limited time introductory or promotional interest rates for all or part of new Purchase, Advance, or Balance Transfers posted to your Account. We will tell you in the Offer Materials the introductory or promotional rate and the period of time during which that rate will be in effect and any conditions or requirements of the offer. Unless the Offer Materials state otherwise, an introductory or promotional rate will remain in effect until the last day of the billing cycle in which the introductory or promotional rate expires. Any introductory or promotional rate that applies to new or outstanding Account balances will increase to the standard rate that would otherwise apply, or, when appropriate under the terms of this Agreement, a Penalty Rate due to an Adjustment Event (as indicated above).

11. **INTEREST CHARGE**: Method of Computing Balance Subject to Interest Rate: We calculate the periodic rate or interest portion of the **INTEREST CHARGE** by multiplying the applicable DPR by the ADB (including new transactions) of the Purchase, Advance and Balance Transfer categories subject to interest, and then adding together the resulting interest from each category. We determine the ADB separately for the Purchases, Advances and Balance Transfer categories. To get the ADB in each category, we add together the daily balances in those categories for the billing cycle and divide the result by the number of days in the billing cycle. We determine the daily balances each day by taking the beginning balance of those Account categories (including any billed but unpaid interest, fees, credit insurance and other charges), adding any new interest, fees, and charges, and subtracting any payments or credits applied against your Account balances that day. We add a Purchase, Advance or Balance Transfer to the appropriate balances for those categories on the later of the transaction date or the first day of the statement period. Billed but unpaid interest on Purchases, Advances and Balance Transfers is added to the appropriate balances for those categories each month on the statement date. Billed but unpaid Advance Transaction Fees are added to the Advance balance of your Account on the date they are charged to your Account. Any billed but unpaid fees on Purchases, credit insurance charges, and other charges are added to the Purchase balance of the Account on the date they are charged to the Account. Billed but unpaid fees on Balance Transfers are added to the Balance Transfer balance of the Account on the date they are charged to the

Account. In other words, billed and unpaid interest, fees, and charges will be included in the ADB of your Account that accrues interest and will reduce the amount of credit available to you. Credit insurance charges are not included in the ADB calculation for Purchases until the first day of the billing cycle following the date the credit insurance premium is charged to the Account. Prior statement balances subject to an interest-free period that have been paid on or before the payment due date in the current billing cycle are not included in the ADB calculation. There may be a minimum **INTEREST CHARGE** Fee in any billing cycle in which an **INTEREST CHARGE** is due. As described above, this Agreement provides for the compounding of interest on your Account.

12. Paying Interest: You have a 24 to 30 day interest-free period for Purchases provided you have paid your previous balance in full by the Payment Due Date shown on your monthly Account statement. In order to avoid additional **INTEREST CHARGES** on Purchases, you must pay your new balance in full by the Payment Due Date shown on the front of your monthly Account statement. There is no interest-free period for transactions that post to the Account as Advances or Balance Transfers except as provided in any Offer Materials. Those transactions are subject to interest from the date they post to the Account until the date they are paid in full.

13. Advance Account Fees: You agree to pay the following Account fees and **INTEREST CHARGES**:

(a) We may add an Advance Transaction Fee **INTEREST CHARGE** to the Advance balance of the Account for each Advance you obtain during a billing cycle in addition to the interest that accrues on Advances. The Advance Transaction Fee imposed will equal the greater of either a percentage of each Advance or the minimum dollar amount, subject to the maximum dollar amount.

(b) We may add a Balance Transfer Fee **INTEREST CHARGE** to the Purchase balance of the Account except where Offer Materials specify otherwise.

(c) We may add a Convenience Check Fee **INTEREST CHARGE** to the Advance balance of your Account except where Offer Materials specify otherwise.

(d) We may add an Overdraft Fee **INTEREST CHARGE** to the Advance balance of your Account, except where Offer Materials specify otherwise.

14. Account Fees:

(a) We may add a Promotional Discount Transaction Fee **INTEREST CHARGE** for each Promotional Discount you receive during the billing cycle, as outlined in any Offer Materials.

(b) Annual Membership Fee. Each year, the Account may be subject to your payment in advance of an Annual Membership Fee **INTEREST CHARGE** which will compensate us for maintaining and servicing the Account for the following year. This fee will be charged to the Purchase balance of your Account.

(c) We may add a Late Payment Fee to the Purchase balance of the Account if your Minimum Payment is not received by the Payment Due Date shown on the monthly Account statement.

(d) You can request that we cover overlimit transactions by opting in as instructed below. If you opt in and we permit you to go over your Credit Limit, we will add an Overlimit Fee to the Purchase balance of the Account if you exceed your Credit Limit. You will only pay one fee per billing cycle, even if you go over your Credit Limit multiple times in the same cycle. You may also revoke your decision to opt in for future transactions at any time.

Your decision to opt in does not solely determine whether we will authorize transactions to go over your Credit Limit. For example, even if you opt in, we still may decline any transaction that would cause you to go over your Credit Limit, such as if you are past due or significantly over your Credit Limit. In addition, we have discretion to authorize transactions that go over your Credit Limit even if you do not opt in, but you will not incur a fee for these transactions.

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You may opt in, or revoke your decision to opt in, in one of the following ways at any time by: (1) calling us, (2) visiting us at the website listed on your periodic statement, or (3) writing to us.

(e) We may add a Returned Payment Fee to the Purchase balance of the Account if any payment on the Account is not honored or if we must return it to you because it cannot be processed. A check that is returned unpaid will be sent for collection.

(f) We will add a Duplicate Documentation Fee to the Purchase balance of the Account for each copy of a monthly statement, sales slip, refund slip, or Advance slip that you request. There will be no charge for documentation requests made in connection with a billing error notice, if our investigation indicates a billing error occurred.

(g) We may add a service charge to the Purchase balance of the Account if you call us to make a payment on your Account and are assisted by a Cardmember Service Representative to make the payment. You will be provided with confirmation of the service charge before the payment transaction is authorized.

(h) We may add a Stop Payment Check Fee to the Purchase balance of your Account if you request a stop payment on a Convenience Check. (See "Paying and Stopping Payment on Convenience Checks" section above for more details.)

Under no circumstances will your Late Payment Fee or Returned Payment Fee ever be greater than your Minimum Payment due and under no circumstance will your Overlimit Fee ever be greater than the amount your balance is overlimit.

IMPORTANT INFORMATION ABOUT USING YOUR ACCOUNT

15. **BalanceShield or Insurance Charges:** Your purchase of BalanceShield debt cancellation or credit life insurance and disability is optional. Whether or not you purchase BalanceShield or credit insurance will not affect your application for credit or the terms of any existing credit agreement you have with us. If you elect to purchase BalanceShield or credit insurance and are eligible to participate, the monthly program fee or premium (at the rate disclosed to you) will be added to the Purchase balance as of the closing date of each billing cycle based upon the Account balance (including accrued **INTEREST CHARGES**). The terms of your BalanceShield coverage will be summarized in the BalanceShield Debt Cancellation Program Agreement, which will be provided to you upon enrollment. For credit insurance, the terms of your insurance coverage will be summarized in the Certificate of Insurance, which will be provided to you. These features are not offered for Secured Accounts.

16. **Credit Limit:** The Account Credit Limit is the maximum amount of credit available under the Account at any time. Under certain circumstances, your Account may exceed the Credit Limit and you will be responsible for the full amount of the Credit Limit as well as any amounts owed that exceed the Credit Limit, including fees and **INTEREST CHARGES**. You may not request or obtain additional Advances or Balance Transfers once you have reached your Credit Limit. The initial Credit Limit is shown on the Card carrier and will also appear on your monthly Account statements. We reserve the right to review your Account at any time and increase or decrease your Credit Limit. Cosigner consent is required for Credit Limit increases. You may not increase your Credit Limit by carrying credit balances over the Credit Limit we make available to you. (Also see the "Advance Limits" section above for more information about limits on Cash Advance, Cash Equivalent Advance and telephone transfer transactions).

17. **Payment:** You must pay us in U.S. Dollars with checks or similar payment instruments drawn on a financial institution located in the United States. We will also accept payment in U.S. Dollars via the Internet or phone or previously established automatic payment transaction. We may, at our option, choose to accept a payment drawn on a foreign financial institution. However, you will be charged and agree to pay any collection fees required in connection with such a transaction. The date you mail a payment is different than the date we receive that payment. For purposes of this Agreement, the payment date is the day we receive your check or money order at the address specified on your monthly Account statement or the day we receive your electronic or phone payment. If you mail your payment without a payment coupon or to an incorrect address, it may result in a delayed credit to your Account, additional **INTEREST CHARGES**, fees, and possible suspension of your Account.

18. **Minimum Payment:** Each month, you must pay at least the Minimum Payment and any past due Minimum Payment(s) by the Payment Due Date shown on your monthly Account statement. You may, at your option, pay more than the Minimum Payment or pay the New Balance (as stated on your monthly Account statement) in full to reduce or avoid the **INTEREST CHARGE** for the Account. Your Minimum Payment will be calculated as follows: first we determine the "Base Minimum Payment," which is the greater of \$30.00 or 1% of your New Balance not including items (1) and (2) below. To the Base Minimum Payment, we may add one or more of the following items, as incurred on your Account: (1) any late, annual and/or any other Account related fee, (2) the **INTEREST CHARGE**, and (3) if your Account is over the Credit Limit, some or all of the balance amount over your Credit Limit. If the resulting Minimum Payment is greater than \$30.00, the total is then rounded to the next highest dollar not to exceed your New Balance. Any Minimum Payment or additional amount you pay each month will not prepay any future Minimum Payments required, or change your obligation to make at least a Minimum Payment by the Payment Due Date.

19. **Payment Application:** If we cannot collect on your check or other payment item you send us to pay on your Account, we may post as an Advance transaction an amount equal to the credit previously given to you for such check or payment item and we may charge interest on this amount from the date your Account originally was credited for the payment. After a payment has been made, we reserve the right to withhold available credit in the amount of the payment for 7 business days. Any credit available before the payment is made will continue to be available for use during this time.

20. **Skip Payment Option:** We may, at our option, occasionally offer you an opportunity to skip your obligation to make the Minimum Payment due. You may not skip payments unless we make this offer to you. If we offer you an opportunity to skip a payment more than once in a 12 month period, you will not be permitted to skip payments required in consecutive months. You cannot accept a skip payment offer if your Account is delinquent, or is in Default. When you take advantage of a skip payment offer, the interest will continue to accrue on the entire unpaid balance of your Account.

21. **Change of Address:** Your monthly Account statements and notices about your Account will be sent to the address you provided in your application or your response to our Account solicitation. To change your address, you must call or write to us. We must receive this information 21 days before the date a billing cycle closes to provide your monthly Account statement at your new address. If you have an address change within 45 days of the expiration date of your Card(s), please contact Cardmember Service with your new address so your new Card(s) can be mailed to your new address.

22. **Authorized Users:** You agree not to allow access to your Card, Account number, Convenience Checks, or personal identification number (PIN) to anyone else to use your Account, except by asking us to issue a card to grant Account access to another person. If you allow access to your Card or Account information, you will be liable for any charges made by that person, unless and except as expressly required by applicable law. You agree to be responsible for all Account transactions made by a Cardmember, or anyone who you have authorized by (a) asking us to issue a Card to grant Account access to another person; (b) lending your Card to or allowing Account access by another person; or (c) any other way in which you would be legally considered to have allowed another person to use your Account or to be legally prevented from denying that you did so. Be cautious when allowing another person to become an authorized user of your Account; once you allow authority to any authorized user you cannot limit that authority unless the Account is closed to future transactions. You, as a primary or joint Cardmember must call or write us with any request to cancel and remove a person's authority. We will not provide any Account information to anyone other than you and any Authorized Users. Authorized Users have no right to make any Account changes.

23. **Lost or Stolen Card or Other Information:** You must notify us immediately by telephone or in writing if your Card, Convenience Checks, or PIN is lost or stolen or there is possible unauthorized use of your Card, Account, or PIN. You will not be liable for unauthorized use of your Account. If this happens, we will ask you and all other persons given Account access to return all Cards and unused Convenience Checks to us. In addition, we have the right to close your Account and open a new Account. If we do so, new Cards will be issued. If requested, we may issue a new PIN and new Convenience Checks for your new Account.

24. **Using Your Card for International Transactions:**

Visa: You may use your Card for retail Purchases at foreign merchants and for cash withdrawals from foreign ATMs. Some merchant and ATM transactions, even if you and/or the merchant or ATM are located in the United States, are considered foreign transactions under the applicable rules, in which case we will add the Foreign Transaction Fee **INTEREST CHARGE** described in the

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addendum to those transactions. We do not control how these merchants, ATMs, and transactions are classified for this purpose. The exchange rate in effect when the transaction is processed may differ from the rate in effect on the date of the transaction or the date of the posting of the transaction to your Account.

If you use your Card at a merchant or an ATM that bears the Visa logo (and no PLUS System logo), the transaction will be processed through the Visa system and will be converted to U.S. Dollars according to the applicable rules established by Visa from time to time. Currently, the currency conversion rate used by Visa to determine the foreign currency transaction amount in U.S. Dollars is determined by multiplying the amount of the foreign currency transaction times (a) a rate selected by Visa from the range of rates available in wholesale currency markets for the applicable central processing date, which rate may vary from the rate Visa itself receives, or (b) the government-mandated rate in effect for the applicable central processing date. If your foreign transaction is in foreign currency prior to being processed by Visa, we will add a Foreign Transaction Fee **INTEREST CHARGE** of up to 3.00% of the Purchase transaction or up to 3.00% of the ATM transaction. If your foreign transaction is in or converted to U.S. Dollars prior to being processed by Visa, we will add a Foreign Transaction Fee **INTEREST CHARGE** of up to 3.00% of the Purchase transaction or up to 3.00% of the ATM transaction. If you use your Card at an ATM that bears only the PLUS System logo (and no Visa logo), the transaction will be processed through the PLUS System and will be converted into U.S. Dollars at the exchange rate established, from time to time, by the operator of that ATM. To the converted transaction we will not add a Foreign Transaction Fee **INTEREST CHARGE**. If you use your Card at an ATM that bears both the Visa and PLUS System logos, the ATM operator will determine whether to send your transaction over the Visa or PLUS System network using such network's respective currency conversion rules then in effect (as explained above).

MasterCard: You may use your Card for retail Purchases at foreign merchants and for cash withdrawals from foreign ATMs that bear either the PLUS System or the MasterCard logo. Some merchant and ATM transactions, even if you and/or the merchant or ATM are located in the United States, are considered foreign transactions under the applicable MasterCard rules, in which case we will add

the Foreign Transaction Fee **INTEREST CHARGE** described in this section to those transactions. We do not control how these merchants, ATMs, and transactions are classified for this purpose. The currency conversion rate in effect on the processing date may differ from the rate that would have been used on the date of the transaction or the date of the posting of the transaction to your Account.

If you effect a transaction at a merchant or an ATM that bears the MasterCard logo (and no PLUS System logo) with your MasterCard Card in a currency other than U.S. Dollars, MasterCard International Incorporated will convert the transaction into a U.S. Dollar amount using its currency conversion procedure, which is disclosed to institutions that issue MasterCard cards. Currently, the currency conversion rate used by MasterCard International to determine the foreign currency transaction amount in U.S. Dollars for such transactions is generally either a government mandated rate or a wholesale rate determined by MasterCard International for the processing cycle in which the transaction is processed. If your foreign transaction is in foreign currency prior to being processed by MasterCard, we will add a Foreign Transaction Fee **INTEREST CHARGE** of up to 3.00% of the Purchase transaction or up to 3.00% of the ATM transaction. If your foreign transaction is in or converted to U.S. Dollars prior to being processed by MasterCard, we will add a Foreign Transaction Fee **INTEREST CHARGE** of up to 3.00% of the Purchase transaction or up to 3.00% of the ATM transaction.

If you use your Card at an ATM that bears only the PLUS System logo (and no MasterCard logo), the transaction will be processed through the PLUS System and will be converted into U.S. Dollars at the exchange rate established, from time to time, by the operator of that ATM. To the converted transaction we will add a Foreign Transaction Fee **INTEREST CHARGE**.

If you use your Card at an ATM that bears both the MasterCard and PLUS System logos, the ATM operator will determine whether to send your transaction over the MasterCard or PLUS System network using such network's respective currency conversion rules then in effect (as explained above).

YOUR LEGAL RESPONSIBILITY IN THIS AGREEMENT

25. Responsibility to Pay: You agree to pay us for all Purchases, Advances, Balance Transfers, **INTEREST CHARGES**, Account Fees and charges, any other transaction charges as provided in this Agreement and, to the extent permitted under applicable law, attorneys fees and collection costs we incur enforcing this Agreement against you. This is the case even if your Account is only used by one of you, or is used by someone authorized by only one of you. If there is more than one Cardmember, each of you is responsible, together and separately, for the full amount owed on your Account. Your obligation to pay the Account balance continues even though an agreement, divorce decree, court judgment, or other document to which we are not a party may direct another person responsible to pay the Account.

26. Intent to Repay: Every time you use your Account, you represent to us that you intend to and have the ability to repay your Account obligations. We rely on this representation every time you use your Account.

27. Settling a Disputed Balance; Payment in Full: If you want to settle a disagreement with us about any amount you owe by sending a check on which you have written "Payment in Full" or similar language, you must send us a written explanation of the disagreement or dispute and any such check to Cardmember Service. (See Your Billing Rights section below for complete details.) This address is different than the address you use to make Account payments. Writing "Payment in Full" or similar language on the check will not be enough to resolve the dispute. If we collect a check or any payment instrument marked "Payment in Full" that you sent to an address other than the one provided in the Cardmember Agreement issued with your Card (such as the address at which you normally make payments), we will not have waived our

right to collect any remaining amount you owe us under the terms of your Account.

28. Default: You and your Account will be in Default if:

- (a) we do not receive the Minimum Payment by the Payment Due Date disclosed on the monthly Account statement;
- (b) you violate any other provision of this Agreement;
- (c) you die without a surviving joint Cardmember;
- (d) you become insolvent, assign any property to your creditors, or go into bankruptcy or receivership;
- (e) you have made false statements on your Account application or in the maintenance of your Account;
- (f) we have any reason to believe that your Account is in danger of, or is being used for fraud;
- (g) you are a married community property state resident and you or we receive a written termination notice of this Agreement from your spouse;
- (h) your Account becomes inactive;
- (i) anything happens that we believe in good faith materially increases the risk that you will not live up to your payment and other obligations under this Agreement; or
- (j) this is a joint Account and one of you notifies us that he or she wants the Account closed or will no longer be liable on the Account.

You and your Account may also be in Default if you make transactions which go over your Credit Limit.

29. Illegal Purchases: You agree that you will not use or permit an Authorized User to use the Card or Account for any unlawful purpose, such as funding any account that is set up to facilitate online gambling.

OUR LEGAL RIGHT TO CHANGE OR CANCEL THIS AGREEMENT

30. Ownership of this Account: Your Card and any other Account access devices that we supply to you are our property and must be immediately returned to us or our designated agent or otherwise destroyed or surrendered as we instruct.

31. Changes to your Account: Account and Agreement terms are not guaranteed for any period of time; we may change the terms of your Agreement, including APRs and fees, in accordance with applicable law and the terms of your Agreement. Your transactional experience with us may also cause a change,

including an increase in the margin that is added to the Index, an increase in fees, or a decrease in the Credit Limit. Factors considered in determining the increased rate or Credit Limit decrease may include your general credit profile, existence, seriousness and timing of the defaults under any agreement that you have with us, and other indications of the Account usage and performance. We will give you the written notice of any such change in the manner required by law. Any Agreement changes to APRs and fees will apply to all new Account balances you owe under your Account as of the effective date indicated in the

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notice or otherwise permitted by applicable law. All other Agreement changes will apply to all new and outstanding Account balances you owe under your Account as of the effective date indicated in the notice or otherwise permitted by applicable law. If the change in terms notice provides, you may choose not to accept the changes, in which case you must provide us with written notice at the address contained in the change in terms notice no later than 25 days after the effective date of the change. In this case, we will close your Account and permit you to pay off the outstanding Account balances in full at that time or under the terms of your existing Agreement. You will have accepted any proposed change if your Account is used after the effective date of the changed terms, even if 25 days has not elapsed after any such effective date.

32. Cancellation of Your Account: We may cancel your Account or suspend your ability to obtain Account credit immediately, without notice, if your Account is in Default. Even if you are not in Default, we may cancel your Account by providing notice to you. You may cancel your Account by notifying us by telephone or in writing. If you have a secured Account, your termination request must be made in writing. If this is a joint Account, we will honor a request by either of you to cancel the Account. After the Account is cancelled, you will not be able to obtain

additional Account credit, except that, (a) the Account may continue to receive recurring charges for items and services until you contact and cancel delivery with the company providing the item or service, or (b) under certain circumstances if you use your Account for a transaction, the transaction may be posted to your Account. After your Account is cancelled, all amounts outstanding on your Account will be due and payable without notice or demand from us. You must cut all Cards and Convenience Checks in half and return them to us. If you do not pay the amount you owe under this Agreement, you will be liable for our collection costs including our reasonable attorney fees and expenses of legal actions, to the extent permitted by applicable law.

33. Assignment of Your Account to Another Creditor: We may assign, sell or transfer your Account and amounts owed by you to another creditor at any time. If we do, this Agreement will still be in effect unless and until amended, and any references made in this Agreement to "we", "us", or "our" will refer to the creditor to which we assigned, sold or transferred your Account or amounts owed under your Account. You may not delegate your obligations and responsibilities to us to any third party without our express written consent.

THE ISSUER'S LEGAL RIGHTS AND OBLIGATIONS

34. Collecting Credit Information about You: You authorize us to make any credit, employment and investigative inquiries we feel are appropriate related to giving you credit or collecting amounts owed on your Account. You agree that a consumer credit report may be requested periodically from one or more consumer reporting agencies ("Credit Bureaus") and used in connection with your application and any update, renewal or extension of credit. We will provide information about you, your Account or your credit history to Credit Bureaus and others who may properly receive that information.

35. Credit Bureau Disputes: If you believe we inaccurately reported credit history information about you or your Account to a Credit Bureau, call us at 1-xxx-xxx-xxx or write to the [address].

36. Privacy Pledge and Disclosure of Account Information: A copy of our Privacy Pledge was included with your original Agreement. You will also receive a copy at least once annually while you remain our customer. We also keep copies of our Privacy Pledge in financial institution offices and post it on our web site. Our Privacy Pledge describes how we collect, protect and use confidential financial and other information about you and the circumstances in which we might share information about you with members of our corporate family and with unaffiliated third parties. Our Privacy Pledge also tells you how you can (a) limit the ways we share certain kinds of information about you and (b) request corrections to the information we maintain about you.

37. Refusal to Honor Transactions: We and our agents are not responsible if anyone refuses to honor your Card or a Convenience Check, or if authorization for a particular transaction is not given. Although you may have credit available under your Account, we may be unable to authorize credit for a particular transaction. The number of transactions you make in one day may be limited, and the limit per day may vary. These restrictions are for security reasons and as a result we cannot explain the details of how this system works. If your Account is over the Credit Limit or delinquent, authorization of credit for transactions may be declined. We are not responsible for anything purchased with your Card or a Convenience Check, except as expressly required by applicable law (see Your Billing Rights section below for more details). You must return goods you purchased with the Card or Account to the merchant and not to us.

38. Third Party Offers: From time to time, third parties may provide you with benefits not related to the extension of Account credit. We are not liable for these features, services and enhancements, as they are the sole responsibility of the third party provider. We and/or a third party may add, change or delete entirely these benefits without notice or liability to you, to the extent permitted by applicable law. You agree to hold us harmless from any claims, actions or damages resulting from your use of any of these features, services or enhancements, where permitted by applicable law.

39. Monitoring and Recording Communications: You understand and agree that we, and anyone acting on our behalf, may monitor and/or record any communications between you, or anyone acting on your behalf, and us, or anyone acting on our behalf, for quality control and other purposes. You also understand and agree that this monitoring or recording may be done without any further notice to you or anyone acting on your behalf. The communications that may be monitored or recorded include telephone calls, cellular or mobile phone calls, and any other communications in any form.

40. Severability: If a court of competent jurisdiction finds any part of this Agreement illegal or unenforceable, the remaining portions of the Agreement will remain in effect as written after any such illegal or unenforceable portion is amended in conformance with applicable law or, if necessary, voided.

41. Entire Agreement: This version of the web Agreement replaces any previous versions of the web Agreement. The Agreement, as modified by any change in terms we may deliver from time to time in accordance with applicable law, constitutes the entire agreement between you and us, and supersedes any prior negotiation, agreement, or understanding between you and us concerning the subject matter of the Agreement.

42. Waiver: We do not give up our rights under the Agreement or applicable law when we fail to exercise or delay exercising those rights. Our failure or delay to exercise any right or remedy we have against you does not mean that we waive that right.

43. Arbitration Provision:

(a) You agree that either you or we can choose to have binding arbitration resolve any claim, dispute or controversy between you and us that arises from or relates to this Agreement or the Account and credit issued thereunder (individually and collectively, a "Claim"). This does not apply to any Claim in which the relief sought is within the jurisdictional limits of, and is filed in, a small claims court. If arbitration is chosen by any party, the following will apply:

(1) **NEITHER YOU NOR WE WILL HAVE THE RIGHT TO LITIGATE A CLAIM IN COURT OR TO HAVE A JURY TRIAL ON A CLAIM, OR TO ENGAGE IN PRE-ARBITRATION DISCOVERY, EXCEPT AS PROVIDED FOR IN THE APPLICABLE ARBITRATION RULES.**

(2) Arbitration will only decide our or your Claim, and you may not consolidate or join the claims of other persons who may have similar claims. **YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS, OR AS A PRIVATE ATTORNEY GENERAL, PERTAINING TO ANY CLAIM SUBJECT TO ARBITRATION.**

(3) The arbitration will be performed in accordance with this Arbitration Provision and the rules of the chosen arbitrator in effect when the Claim is filed.

(4) The arbitrator's decision will generally be final and binding, except for the limited right of appeal provided by the Federal Arbitration Act.

(5) Other rights that you would have if you went to court might also not be available in arbitration.

(b) The party commencing the arbitration may select to use either JAMS or the American Arbitration Association ("AAA") (or, if neither of these arbitration organizations will serve, then a comparable substitute arbitration organization agreed upon by the parties or, if the parties cannot agree, chosen by a court of competent jurisdiction). If JAMS is selected, the arbitration will be handled according to its Streamlined Arbitration Rules unless the Claim is for \$250,000 or more, in which case its Comprehensive Arbitration Rules shall apply. If the AAA is selected, the arbitration will be handled according to its Commercial Arbitration Rules. You may obtain rules and forms for JAMS by contacting JAMS at 1-800-352-5267 or www.jamsadr.com and for the AAA by contacting the AAA at 1-800-778-7879 or www.adr.org. Any arbitration hearing that you attend will

CONSUMER UNDERSTANDING OF ARBITRATION

When you are finished with this page, please click the arrow at the bottom right of the survey to move on to the survey questions.

take place in the federal judicial district where you reside. At your request, we will advance your filing and hearing fees for any Claim you may file against us. If you prevail on your Claim, we will pay your arbitration costs and fees, other than attorney, expert and witness fees and expenses. We will also pay any fees or expenses that applicable law requires us to pay. The arbitrator shall apply applicable substantive law consistent with the Federal Arbitration Act, 9 U.S.C. §§ 1 through 16, including but not limited to applicable statutes of limitation, and shall honor claims of privilege recognized at law. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

(c) This Arbitration Provision shall survive repayment of your extension of credit and termination of your Account. This Arbitration Provision shall be governed by federal law, including the Federal Arbitration Act, and by Ohio law, without regard to its internal conflict of law principles, to the extent such state law does not conflict with federal law or this Arbitration Provision. Notwithstanding any language of this Agreement to the contrary, should any portion of this Arbitration Provision be held invalid or unenforceable by a court or other body of competent jurisdiction, this entire Arbitration Provision shall be automatically terminated and all other provisions of this Agreement shall remain in full force and effect.

YOUR BILLING RIGHTS

Keep this document for future use. This notice tells you about your rights and our responsibilities under the Fair Credit Billing Act.

What to Do If You Find a Mistake on Your Statement:

If you think there is an error on your statement, call or write to us.

In your letter or call, give us the following information:

- Account information: Your name and Account number.
- Dollar amount: The dollar amount of the suspected error.
- Description of problem: If you think there is an error on your bill, describe what you believe is wrong and why you believe it is a mistake.

You must contact us:

- Within 60 days after the error appeared on your statement.
- At least 3 business days before an automated payment is scheduled, if you want to stop payment on the amount you think is wrong.

What Will Happen After We Receive Your Letter or Call:

When we receive your letter or call, we must do two things:

1. Within 30 days of receiving your letter or call, we must tell you that we received your letter. We will also tell you if we have already corrected the error.
2. Within 90 days of receiving your letter or call, we must either correct the error or explain to you why we believe the bill is correct. While we investigate whether or not there has been an error:
 - We cannot try to collect the amount in question, or report you as delinquent on that amount.
 - The charge in question may remain on your statement, and we may continue to charge you interest on that amount.
 - While you do not have to pay the amount in question, you are responsible for the remainder of your balance.
 - We can apply any unpaid amount against your Credit Limit.

After We Finish Our Investigation, One of Two Things Will Happen:

- If we made a mistake, you will not have to pay the amount in question or any interest or other fees related to that amount.
- If we do not believe there was a mistake, you will have to pay the amount in question, along with applicable interest and fees. We will send you a statement of the amount you owe and the date payment is due. We may then report you as delinquent if you do not pay the amount we think you

owe. If you receive our explanation but still believe your bill is wrong, you must write to us within 10 days telling us that you still refuse to pay. If you do so, we cannot report you as delinquent without also reporting that you are questioning your bill. We must tell you the name of anyone to whom we reported you as delinquent, and we must let those organizations know when the matter has been settled between us.

If we do not follow all of the rules above, you do not have to pay the first \$50 of the amount you question even if your bill is correct.

Your Rights If You Are Dissatisfied With Your Credit Card Purchases:

If you are dissatisfied with the goods or services that you have purchased with your Card, and you have tried in good faith to correct the problem with the merchant, you may have the right not to pay the remaining amount due on the purchase. To use this right, all of the following must be true:

1. The purchase must have been made in your home state or within 100 miles of your current mailing address, and the purchase price must have been more than \$50. (Note: Neither of these are necessary if your purchase was based on an advertisement we mailed to you, or if we own the company that sold you the goods or services.)
2. You must have used your credit card for the purchase. Purchases made with cash advances from an ATM or with a check that accesses your credit card Account do not qualify.
3. You must not yet have fully paid for the purchase.

If all of the criteria above are met and you are still dissatisfied with the purchase, contact us in writing. While we investigate, the same rules apply to the disputed amount as discussed above. After we finish our investigation, we will tell you our decision. At that point, if we think you owe an amount and you do not pay, we may report you as delinquent.

SPECIAL RULES FOR CREDIT CARD PURCHASES DO NOT APPLY TO PURCHASES MADE WITH CONVENIENCE CHECKS OR BALANCE TRANSFER CHECKS.

CONSUMER UNDERSTANDING OF ARBITRATION

Q2: The credit card contract you just saw said many things. We would like to know what you remember. Please put down a word or phrase for five items you recall. You do not need to repeat the actual words. For example, if you remember seeing the annual fee term, you can simply write “annual fee.” If you don't remember five items, please mention as many or as few as you do remember.²⁴¹

Q3: How much of the contract did you read and understand?

- ☐ All of the contract.
- ☐ Most of the contract.
- ☐ Some of the contract.
- ☐ Very little or none of the contract.

Q4: If you wish to say more about your answer, you may do so here:

Q5: Suppose after you paid your credit card bill, you realized the credit card company overcharged you. The credit card company, however, believes it has not overcharged you and refuses to give you your money back. Under the terms of the contract you just saw, would you have the right to sue the credit card company in small claims court?

- ☐ Yes
- ☐ No
- ☐ I don't know.

Q6: If you wish to say more about your answer, you may do so here:

²⁴¹ In the version of the survey given to the Qualtrics respondents, the demographics questions (Q 29-30, Q35-39 appeared at this point, and the remaining questions appeared after the demographic questions.

CONSUMER UNDERSTANDING OF ARBITRATION

Q7: Suppose after you paid your credit card bill, you realized the credit card company overcharged you. The credit card company, however, believes it has not overcharged you and refuses to give you your money back. The dispute is too large to be decided by a small claims court. Under the terms of the contract you just saw, if the amount of the dispute was large enough, would you have a right to have a court decide the dispute even if the credit card company didn't want a court to decide the dispute?

- ☐ Yes
- ☐ No
- ☐ I don't know

Q8: If you wish to say more about your answer, you may do so here:

Q9: Suppose after you use the credit card, the credit card company says you owe them more than you think you owe them. Suppose also you refuse to pay the amount they say you owe, and they bring a claim against you to collect that amount. Assume the dispute is too large to be decided by a small claims court. Under the terms of the contract you just saw, would you have a right to a jury trial if the amount was large enough?

- ☐ Yes
- ☐ No
- ☐ I don't know

Q10: If you wish to say more about your answer, you may do so here:

Q11: If you and the credit card company have a dispute that is too large to be brought in a small claims court, did the contract you just saw say you have agreed to arbitrate it?

- ☐ Yes
- ☐ No
- ☐ I don't know

Q12: If you wish to say more about your answer, you may do so here:

Q13: Suppose that you and many other consumers had the same kind of dispute with the credit card company. Under the terms of the contract you just saw, could you be included with the other consumers in a single lawsuit (that is, a class action) against the credit card company?

CONSUMER UNDERSTANDING OF ARBITRATION

- ☐ Yes
- ☐ No
- ☐ I don't know.

Q14: If you wish to say more about your answer, you may do so here:

Q15: Before you use a credit card, the company should provide you with a contract like the one you just saw. If the contract is the same length as the one you just saw, we would like to know how much time you would spend reading it. Which of the following is true?

- ☐ I would probably not read the contract.
- ☐ I would probably spend a minute or less reading the contract.
- ☐ I would probably spend more than one minute but no more than three minutes reading the contract.
- ☐ I would probably spend more than three minutes reading the contract.
- ☐ I don't know.

Q16: If you wish to say more about your answer, you may do so here:

Q17: We will now ask you some general questions about your own understanding and personal preferences about consumer contracts. Before entering into a contract, do you look to see if the contract says you have to arbitrate any disputes and can't sue the company?

- ☐ Yes
- ☐ No
- ☐ Sometimes

Q18: If you wish to say more about your answer, you may do so here:

CONSUMER UNDERSTANDING OF ARBITRATION

Q19: Suppose you agreed to a credit card contract that included a properly-worded clause saying that if you and the company had a dispute, you couldn't sue them in court but that disputes could be resolved only in arbitration. You think the credit card company has overcharged you by \$5,000, but the company disagrees. How likely do you think it is that a court would throw out the arbitration clause and decide your dispute?

- ☐ Very Likely
- ☐ Likely
- ☐ Unlikely
- ☐ Very Unlikely
- ☐ I don't know.

Q20: If you wish to say more about your answer, you may do so here:

Q21: Suppose you had agreed to a credit card contract that included a properly-worded clause saying that if you and the company had a dispute, you couldn't sue them in court but that disputes could be resolved only in arbitration and the arbitrator's decision is final. Just as in the last question, you think the credit card company has overcharged you by \$5,000, but the company disagrees. Assume also you brought an arbitration proceeding against the company and the arbitrator decided against you and ruled you had to pay the \$5,000. Assume that the arbitrator had unintentionally made a mistake about the law and so ruled against you, but that otherwise had conducted the arbitration properly. Which of the following options would be available to you?

- ☐ Nothing. I would still have to pay the money.
- ☐ I could ignore what the arbitrator said and not pay.
- ☐ I could appeal to another arbitrator or arbitrators.
- ☐ I could ignore the arbitrator and start all over again in court.
- ☐ I don't know.

Q22: If you wish to say more about your answer, you may do so here:

Q23: Again, suppose you had agreed to a credit card contract that included a properly-worded clause saying that if you and the company had a dispute, you couldn't sue them in court but that disputes could be resolved only in arbitration. You think the credit card company has overcharged you. Many other consumers have a similar dispute against the credit card company. The company says it has not overcharged

CONSUMER UNDERSTANDING OF ARBITRATION

anyone. Suppose the contract said you could not join with other consumers to bring a class action. Could you be included in a class action against the credit card company, either in court or arbitration or both?

- ☐ Yes
- ☐ No
- ☐ I don't know.

Q24: If you wish to say more about your answer, you may do so here:

Q25: We appreciate you taking the time to complete this survey. We would like to ask you some questions about you. Have you ever entered into a consumer contract with any company that said you have to arbitrate any disputes and can't sue the company?

- ☐ Yes
- ☐ No
- ☐ I don't know.

Q26: If you wish to say more about your answer, you may do so here:

Q27: Please click the box for any of the following statements that are true:

- ☐ I have a cell phone from Verizon Wireless, AT&T Mobility, or Sprint on which I am the primary person on the account and signed the contract (as opposed to being an authorized user on somebody else's cell phone account, as some people arrange for family members).
- ☐ I have a PayPal account.
- ☐ I have an iTunes account.
- ☐ I have a Skype account.

Q28: If you wish to say more about your answer, you may do so here:

Q29: Which is the highest level of education you have attained?

- ☐ Did not graduate from high school.
- ☐ High school graduate or GED.
- ☐ Some college or post-secondary work.
- ☐ College graduate.
- ☐ Post-graduate work.

CONSUMER UNDERSTANDING OF ARBITRATION

Q30: If you wish to say more about your last answer, you may do so here:

Q31: Do you work or in the last five years have you worked for a bank, credit union, savings and loan or cell phone company?

- ☐ Yes, a bank, credit union, or savings and loan
- ☐ Yes, a cell phone company.
- ☐ No

Q32: If you wish to say more about your answer, you may do so here:

Q33: Are you an attorney or law student?

- ☐ Yes
- ☐ No

Q34: If you wish to say more about your answer, you may do so here:

Q35: Please tell us your age.

Q36: Which racial or ethnic group in this list best describes you? You can select more than one. There are eight choices:

- ☐ White (including Middle Eastern or Arab)
- ☐ Black/African-American
- ☐ Hispanic/Latino/a
- ☐ Asian
- ☐ American Indian/Alaska Native
- ☐ Native Hawaiian/Other Pacific Islander
- ☐ Other
- ☐ Prefer not to answer.

CONSUMER UNDERSTANDING OF ARBITRATION

Q37: If you wish to say more about your answer, you may do so here:

Q38: We will now ask about your total annual household income. There are six choices:

- ☐ Less than \$24,000.
- ☐ At least \$24,000 but less than \$51,000.
- ☐ At least \$51,000 but less than \$81,000.
- ☐ At least \$81,000 but less than \$144,000.
- ☐ At least \$144,000.
- ☐ Prefer not to answer.

Q39: If you wish to say more about your answer, you may do so here:

Q40: Have you ever been a party to or otherwise involved in an arbitration?

- ☐ Yes
- ☐ No
- ☐ I don't know

Q41: If you wish to say more about your answer, you may do so here:

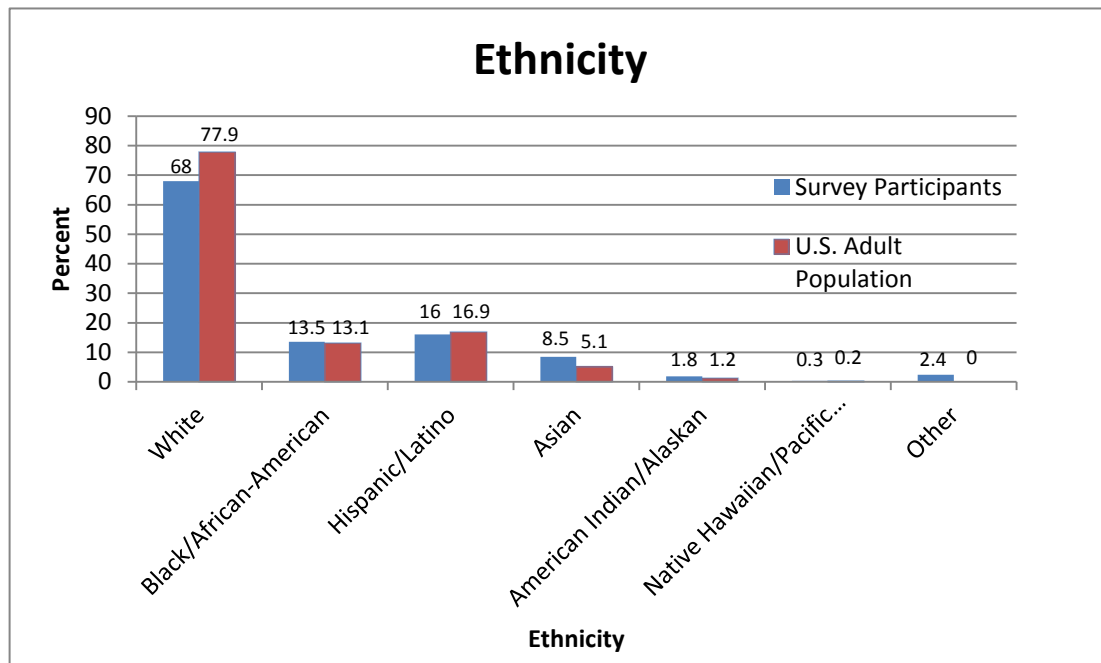
Thank you again for your help in this project.

METHODOLOGY: DEMOGRAPHIC COMPARISON OF SURVEY PARTICIPANTS COMPARED TO BROADER U.S. POPULATION

FIGURE 1

Ethnicity Survey Participants

	White	68
	Black/African-American	13.5
	Hispanic/Latino	16
	Asian	8.5
	American Indian/Alaskan	1.8
	Native Hawaiian/Pacific Islander	0.3
	Other	2.4
	U.S. Adult Population	
	White	77.9
	Black/African-American	13.1
	Hispanic/Latino	16.9
	Asian	5.1
	American Indian/Alaskan	1.2
	Native Hawaiian/Pacific Islander	0.2
	Other	0



See U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS, available at <http://quickfacts.census.gov/qfd/states/00000.html> (last visited July 24, 2014).

When comparing the demographics of U.S. citizens old enough to qualify for credit cards to those of the participants in our survey or age, ethnicity, income, and level of education, we find that the participants in our survey are highly representative of the American adult population. For example, according to the U.S. Census data, 77.8% of the U.S. population identifies as White compared to 68% of the participants in our study. 13.1% of the U.S. population identifies as Black/African-American compared to 13.5% of the participants in our study. 16.9% of the U.S. population identifies as Hispanic/Latino compared to 16% of the participants in our study. 5.1% of the U.S. population identifies as Asian compared to 8.5% of the participants in our study. 1.2% of the U.S. population identifies as American Indian/Alaskan compared to 1.8% of the participants in our study. Finally, 0.2% of the U.S. population identifies as Native Hawaiian/Pacific Islander compared to 0.3% of the participants in our study. Of particular mention, 2.4% of the participants in our study identified as “Other,” while the U.S. Census does not provide data for this category. Because some people identify as more than one ethnicity, the percentages exceed 100%.

FIGURE 2

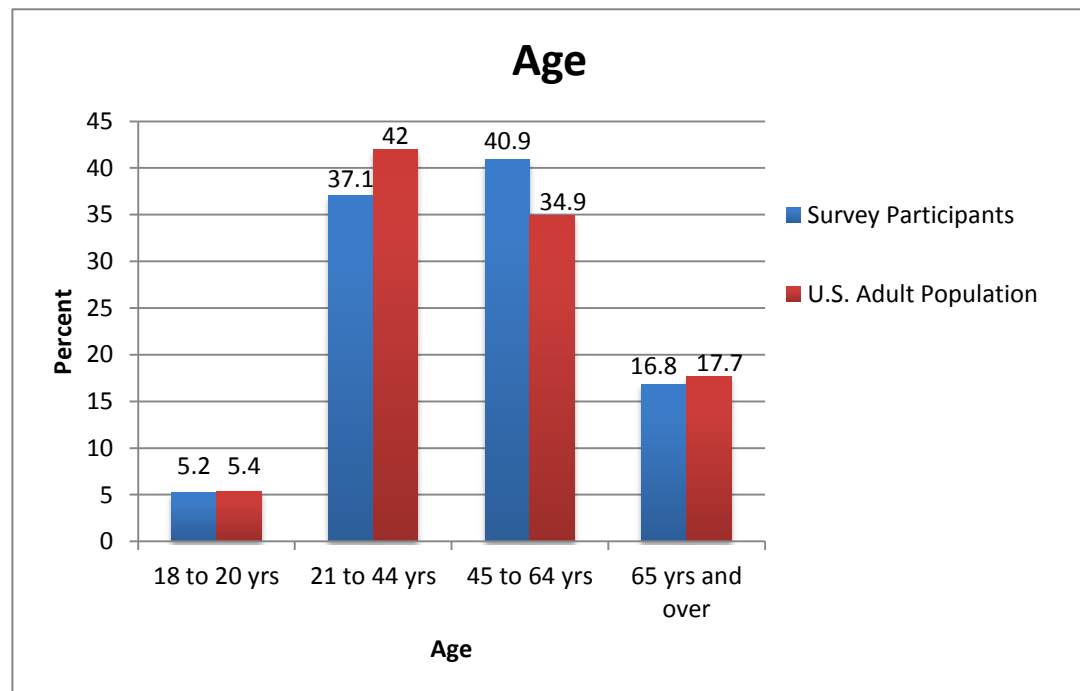
Age

Survey Participants

18 to 20 yrs	5.2
21 to 44 yrs	37.1
45 to 64 yrs	40.9
65 yrs and over	16.8

U.S. Adult Population

18 to 20 yrs	5.4
21 to 44 yrs	42
45 to 64 yrs	34.9
65 yrs and over	17.7



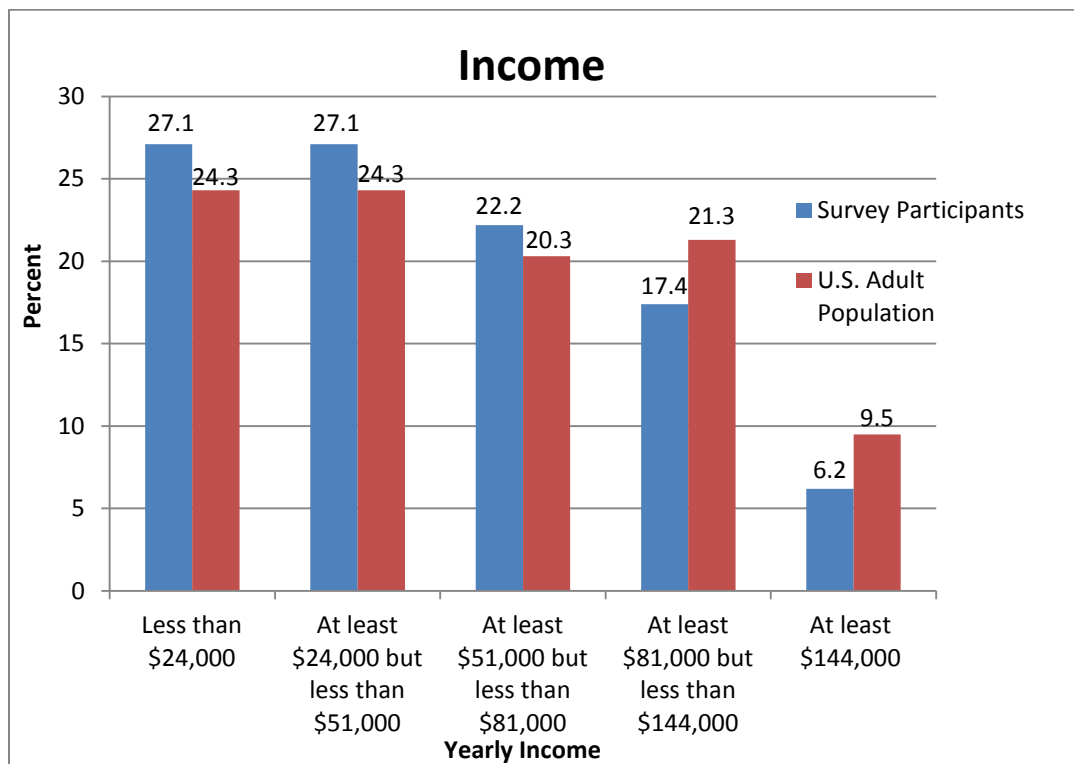
See U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION IN THE UNITED STATES: 2012, *available at* <http://www.census.gov/population/age/data/2012comp.html> (last visited July 24, 2014).

In assessing age, the U.S. Census reports that for those U.S. citizens old enough to qualify for credit cards, 5.4% are 18 to 20-years-old, while in our study 5.2% of the participants were 18 to 20-years-old. Further, 42% of U.S. citizens old enough to qualify for credit cards are 21 to 44-years-old, while 37.1% of the participants in our study were 21 to 44-years-old. 34.9% of U.S. citizens old enough to qualify for credit cards are 45 to 64-years-old, while 40.9% of the participants in our survey were within this age range. Finally, 17.7% of U.S. citizens old enough to qualify for a credit card are 65-years-old and over, while 16.8% of the participants in our survey were 65-years-old and over.

FIGURE 3

Income
Survey Participants

	Less than \$24,000	27.1
	At least \$24,000 but less than \$51,000	27.1
	At least \$51,000 but less than \$81,000	22.2
	At least \$81,000 but less than \$144,000	17.4
	At least \$144,000	6.2
	U.S. Adult Population	
	Less than \$24,000	24.3
	At least \$24,000 but less than \$51,000	24.3
	At least \$51,000 but less than \$81,000	20.3
	At least \$81,000 but less than \$144,000	21.3
	At least \$144,000	9.5



See Linda Levine, CONG. RESEARCH SERV. RS20811, THE DISTRIBUTION OF HOUSEHOLD INCOME AND THE MIDDLE CLASS (2012), available at http://assets.opencrs.com/rpts/RS20811_20121113pdf (last visited July 24, 2014).

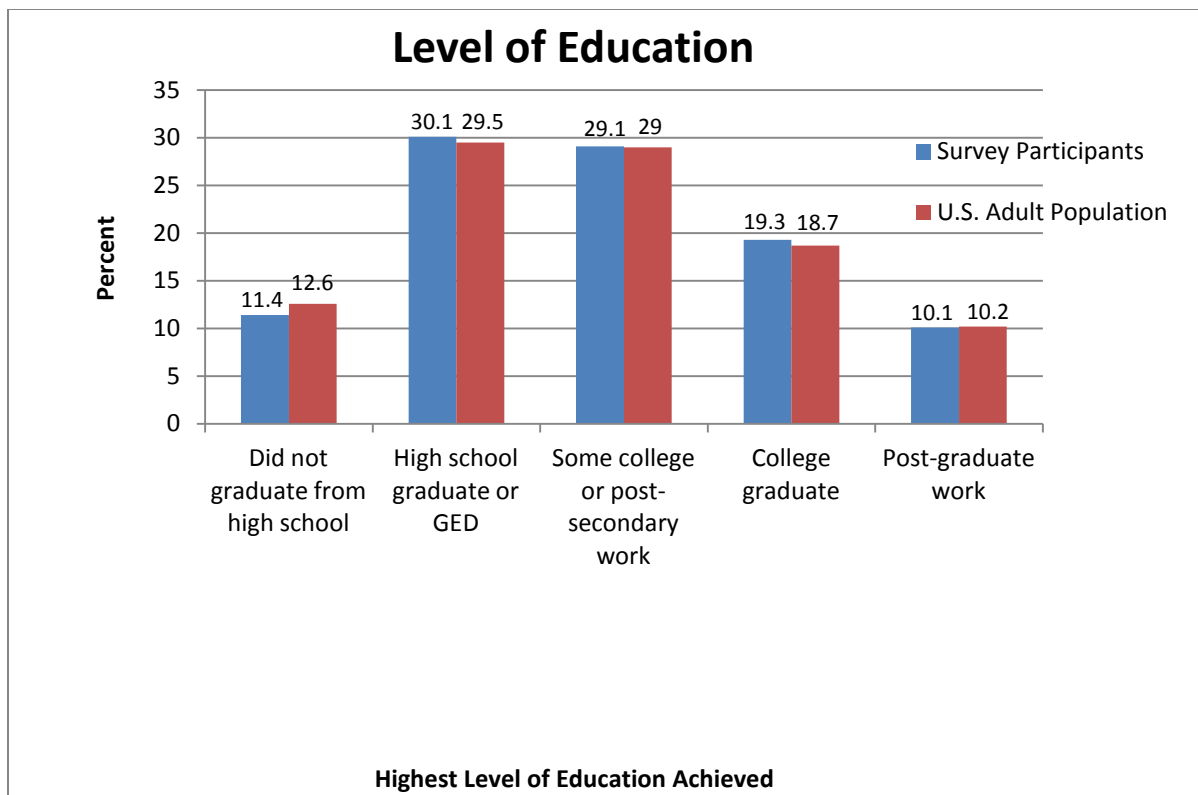
Next, when testing for income, 24.3% of the American adult population reports making less than \$24,000 a year, while 27.1% of the participants in our survey reported making the same amount. Additionally, 24.3% of the American adult population reports making at least \$24,000, but less than \$51,000 a year, while 27.1% of the participants in our survey reported making the same amount. 20.3% of the American adult population reports making at least \$51,000, but less than \$81,000, while 22.2% of the participants in our survey reported making the same amount. 21.3% of the American adult population reports making at least \$81,000, but less than \$144,000, while 17.4% of the participants in our survey reported making the same amount. Finally, 9.5% of the American adult population reports making at least \$144,000, while 6.2% of the participants in our survey reported making the same income level.

FIGURE 4**Level of Education****Survey Participants**

	Did not graduate from high school	11.4
	High school graduate or GED	30.1
	Some college or post-secondary work	29.1
	College graduate	19.3
	Post-graduate work	10.1

U.S. Adult Population

	Did not graduate from high school	12.6
	High school graduate or GED	29.5
	Some college or post-secondary work	29
	College graduate	18.7
	Post-graduate work	10.2



See U.S. CENSUS BUREAU, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2013 – DETAILED TABLES, *available at* <http://www.census.gov/hhes/socdemo/education/data/cps/2013/tables.html> (last visited July 24, 2014).

Lastly, when examining the highest level of education achieved, the U.S. Census finds that 12.6% of the U.S. population over the age of 18-years-old did not graduate from high school compared to 11.4% of the participants in our survey. 29.5% of the U.S. population reports having graduated from high school, or getting a GED, compared to 30.1% of the participants in our survey. 29% of the U.S. population reports having done some college or post-secondary work compared to 29.1% of the participants in our study. 18.7% of the U.S. population reports having graduated from college compared to 19.3% of the participants in our study. Finally, 10.2% of the U.S. population reports having done some post-graduate work compared to 10.1% of the participants in our study.

QUALITY OF SURVEY RESPONSE

How Much Time Did The Survey Participants Actually Spend Reading The Contract?

FIGURE 5

Time spent reading the contract

Page of the Contract	# of words on the page	Time (seconds) needed to read the page at a speed of 300 words per minute	Average time (actual seconds) with the page open	Time needed minus actual time used (seconds)
Page 1	464	92.8	35.56	57.24
Page 2	1174	234.8	34.03	200.77
Page 3	1574	314.8	23.50	291.30
Page 4	1705	341	32.70	308.30
Page 5	1583	316.6	17.14	299.46
Page 6	1617	323.4	19.27	304.13
Page 7	1001	200.2	100.00	100.20
All above 7 pages	9118	1823.6	263.20	1560.40

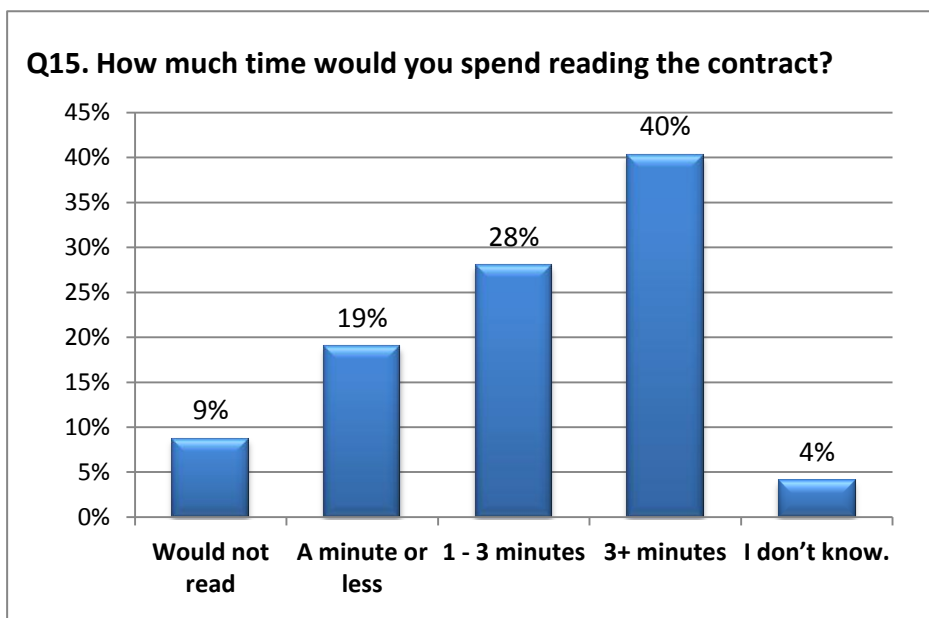
CONSUMER UNDERSTANDING OF ARBITRATION:

How Much Time Do Survey Participants Typically Spend Reading Similar Consumer Contracts?

FIGURE 6

Before you use a credit card, the company should provide you with a contract like the one you just saw. If the contract is the same length as the one you just saw, we would like to know how much time you would spend reading it. Which of the following is true?

1	I would probably not read the contract.	Would not read	9%	58
2	I would probably spend a minute or less reading the contract.	A minute or less	19%	127
3	I would probably spend more than one minute but no more than three minutes reading the contract.	1 - 3 minutes	28%	187
4	I would probably spend more than three minutes reading the contract.	3+ minutes	40%	269
5	I don't know.	I don't know.	4%	27
	Total	Total	100%	668



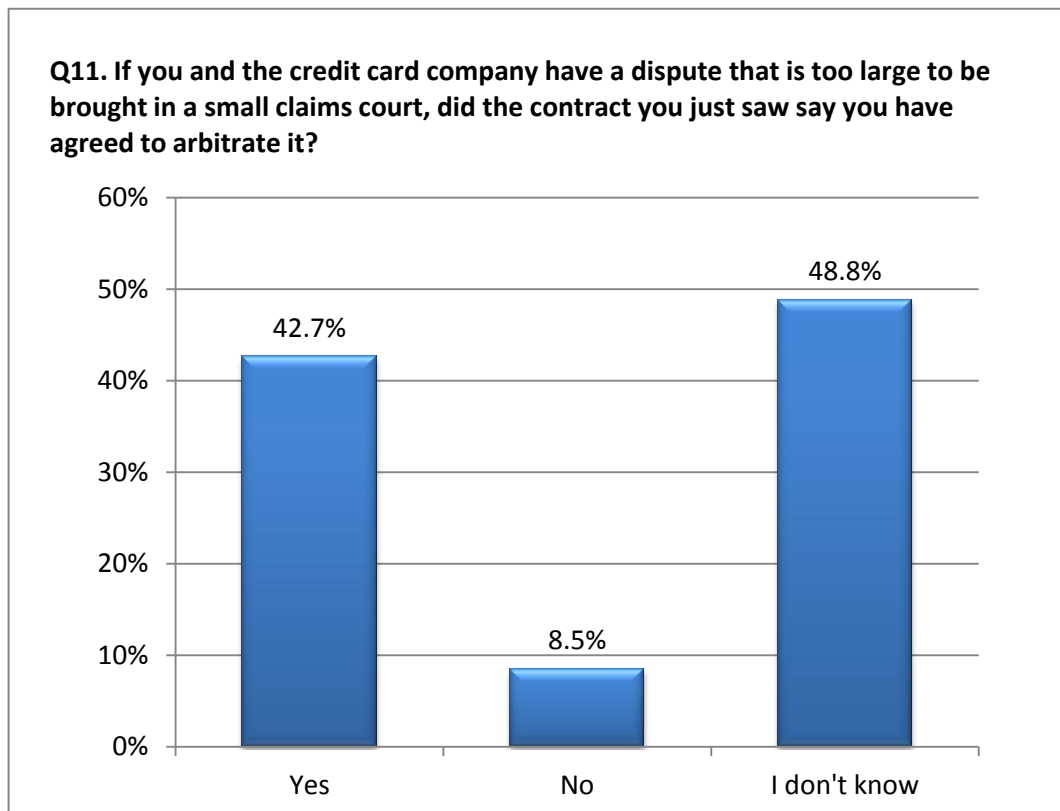
CONSUMER UNDERSTANDING OF THE SAMPLE CONTRACT:

Do Survey Participants Understand That They Have Entered Into An Arbitration Contract?

FIGURE 7

Q11. If you and the credit card company have a dispute that is too large to be brought in a small claims court, did the contract you just saw say you have agreed to arbitrate it?

1	Yes	42.7%	285
2	No	8.5%	57
3	I don't know	48.8%	326
	Total	100%	668



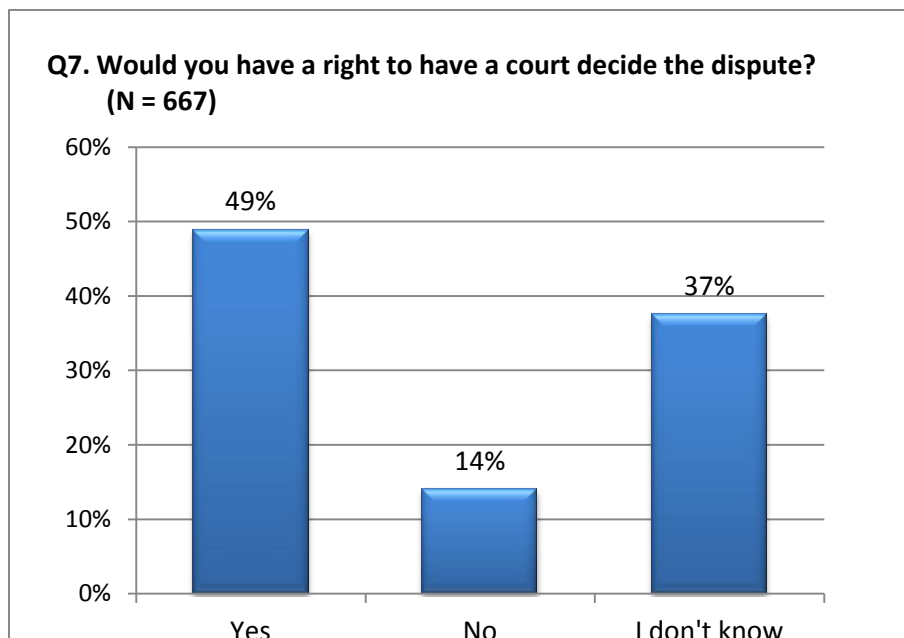
CONSUMER UNDERSTANDING OF THE SAMPLE CONTRACT:

Do Survey Participants Understand That Under The Sample Contract, They Are Precluded From Court Adjudication?

FIGURE 8

Q7. Suppose after you paid your credit card bill, you realized the credit card company overcharged you. The credit card company, however, believes it has not overcharged you and refuses to give you your money back. The dispute is too large to be decided by a small claims court. Under the terms of the contract you just saw, if the amount of the dispute was large enough, would you have a right to have a court decide the dispute even if the credit card company didn't want a court to decide the dispute?

1	Yes	49%	326
2	No	14%	91
3	I don't know	37%	250
	Total	100%	667



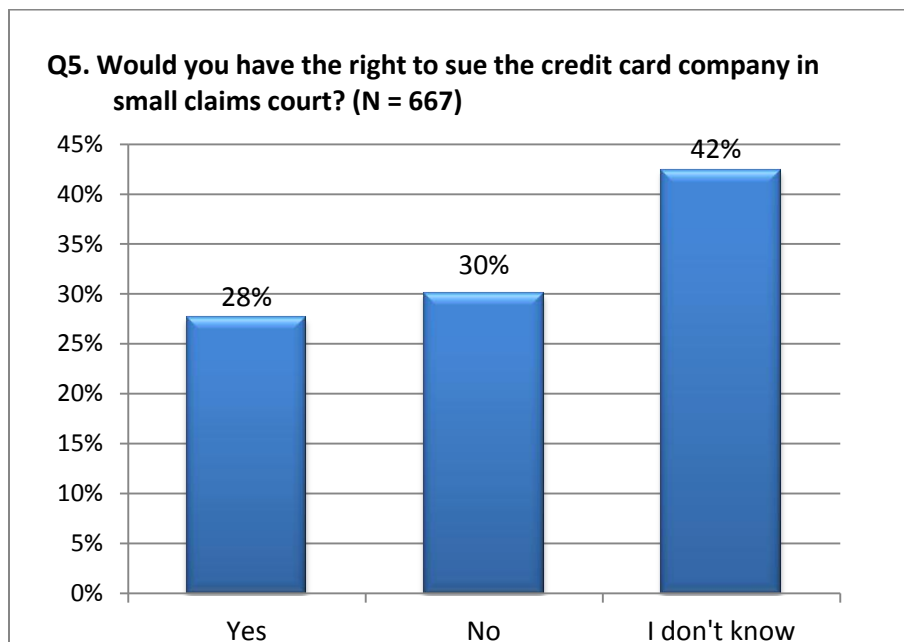
CONSUMER UNDERSTANDING OF THE SAMPLE CONTRACT:

Do Survey Participants Understand That They Still Have A Right To Litigate Their Claim In Small Claims Court?

FIGURE 9

Q5. Suppose after you paid your credit card bill, you realized the credit card company overcharged you. The credit card company, however, believes it has not overcharged you and refuses to give you your money back. Under the terms of the contract you just saw, would you have the right to sue the credit card company in small claims court?

1	Yes	28%	184
2	No	30%	200
3	I don't know	42%	283
	Total	100%	667



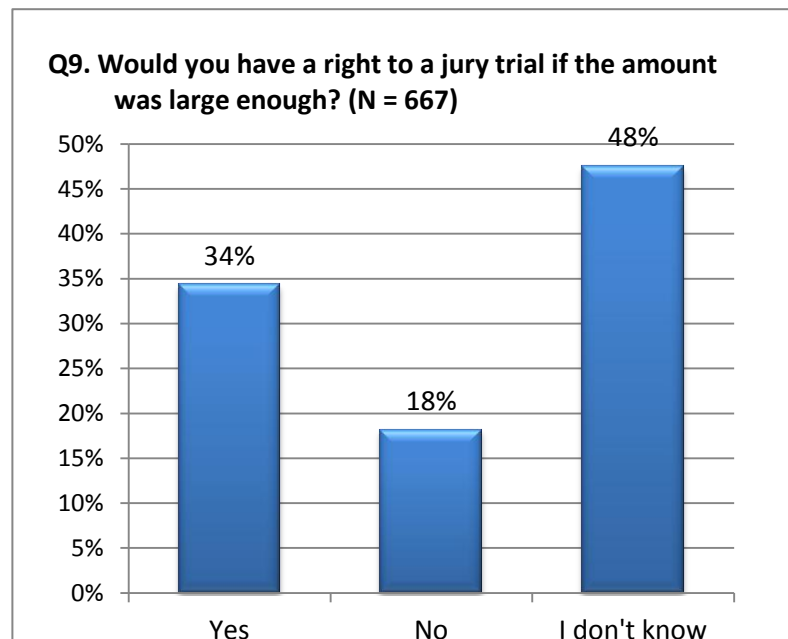
CONSUMER UNDERSTANDING OF ARBITRATION UNDER THE SAMPLE CONTRACT:

Do Survey Participants Understand They Have Waived The Right To A Jury Trial?

FIGURE 10

Q9. Suppose after you use the credit card, the credit card company says you owe them more than you think you owe them. Suppose also you refuse to pay the amount they say you owe, and they bring a claim against you to collect that amount. Assume the dispute is too large to be decided by a small claims court. Under the terms of the contract you just saw, would you have a right to a jury trial if the amount was large enough?

1	Yes	34%	229
2	No	18%	121
3	I don't know	48%	317
	Total	100%	667



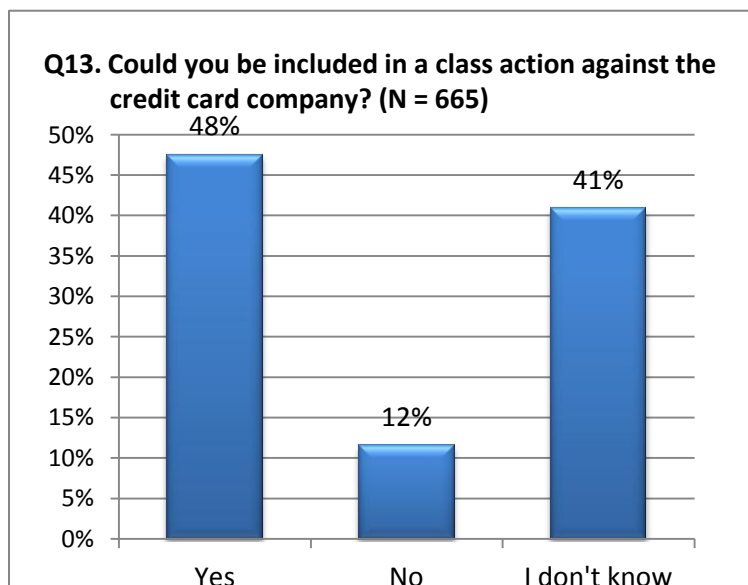
CONSUMER UNDERSTANDING OF THE SAMPLE CONTRACT:

Do Survey Participants Understand They Have Waived Their Right To Participate In A Class Action Suit?

FIGURE 11

Q13. Suppose that you and many other consumers had the same kind of dispute with the credit card company. Under the terms of the contract you just saw, could you be included with the other consumers in a single lawsuit (that is, a class action) against the credit card company?

1	Yes	48%	316
2	No	12%	77
3	I don't know	41%	272
	Total	100%	665



CONSUMER UNDERSTANDING OF ARBITRATION IN HYPOTHETICAL CONSUMER CONTRACT:

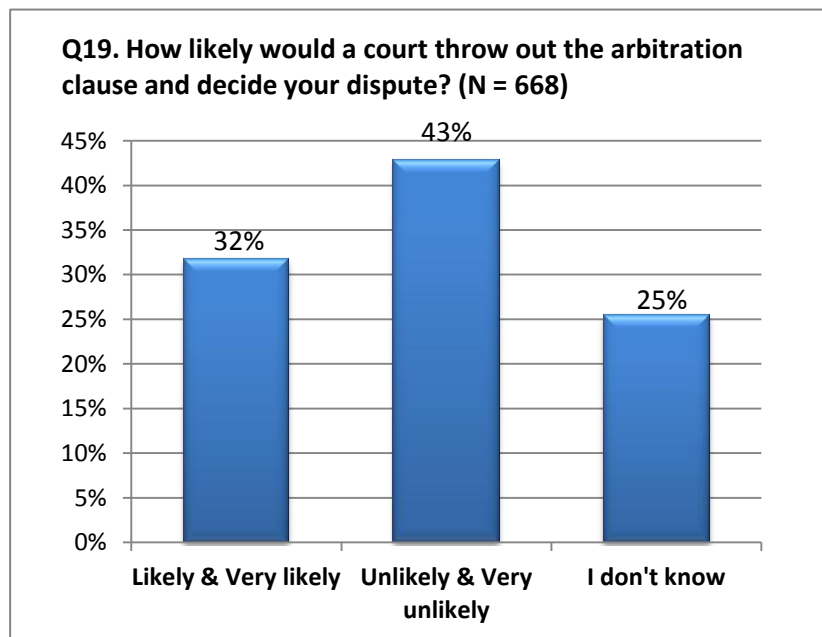
Do Survey Participants Understand That A Court Will Enforce The Arbitration Clause?

FIGURE 12

19. Suppose you agreed to a credit card contract that included a properly-worded clause saying that if you and the company had a dispute, you couldn't sue them in court but that disputes could be resolved only in arbitration. You think the credit card company has overcharged you by \$5,000, but the company disagrees. How likely do you think it is that a court would throw out the arbitration clause and decide your dispute?

Answer		Response	%
Very Likely		63	9.43%
Likely		149	22.31%
Unlikely		177	26.50%
Very Unlikely		109	16.32%
I don't know.		170	25.45%
Total		688	100.00%

1	Likely & Very Likely	32%	212
2	Unlikely & Very Unlikely	43%	286
3	I don't know	25%	170
	Total	100%	668



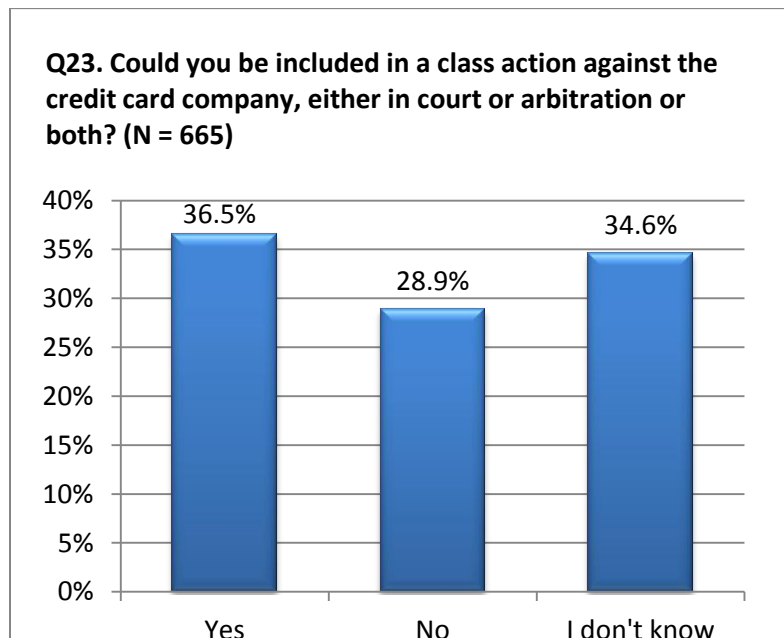
CONSUMER UNDERSTANDING OF ARBITRATION IN HYPOTHETICAL CONSUMER CONTRACT:

Do Survey Participants Understand They Have Waived Their Right To Participate In A Class Action?

FIGURE 13

Q23. Again, suppose you had agreed to a credit card contract that included a properly-worded clause saying that if you and the company had a dispute, you couldn't sue them in court but that disputes could be resolved only in arbitration. You think the credit card company has overcharged you. Many other consumers have a similar dispute against the credit card company. The company says it has not overcharged anyone. Suppose the contract said you could not join with other consumers to bring a class action. Could you be included in a class action against the credit card company, either in court or arbitration or both?

1	Yes	36.5%	243
2	No	28.9%	192
3	I don't know	34.6%	230
	Total	100%	665



CONSUMER UNDERSTANDING OF ARBITRATION IN HYPOTHETICAL CONSUMER CONTRACT:

Do Survey Participants Understand That An Arbitrator's Decision Is Final?

FIGURE 14

Q21. Suppose you had agreed to a credit card contract that included a properly-worded clause saying that if you and the company had a dispute, you couldn't sue them in court but that disputes could be resolved only in arbitration and the arbitrator's decision is final. Just as in the last question, you think the credit card company has overcharged you by \$5,000, but the company disagrees. Assume also you brought an arbitration proceeding against the company and the arbitrator decided against you and ruled you had to pay the \$5,000. Assume that the arbitrator had unintentionally made a mistake about the law and so ruled against you, but that otherwise had conducted the arbitration properly. Which of the following options would be available to you?

1	Nothing, still have to pay	17.4%	116
2	Ignore the arbitrator and not pay	3.0%	20
3	Appeal to other arbitrators	42.5%	283
4	Ignore the arbitrator and start again in court	9.6%	64
5	I don't know	27.5%	183
	Total	100%	668

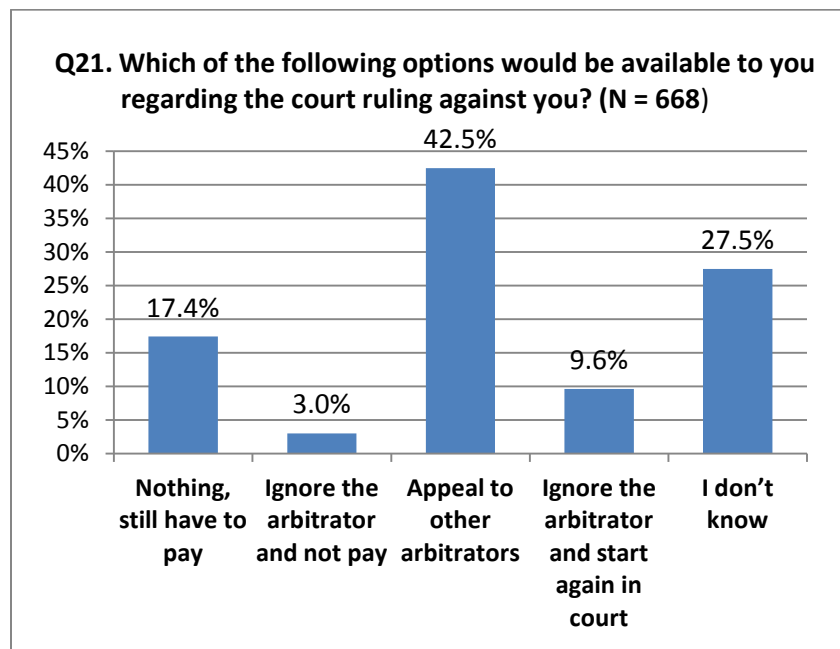


FIGURE 15

Table 2. Cross Tabulation: Q27 (Do you have any of the accounts listed below?) and Q25 (Have you ever entered into a consumer contract with arbitration terms)						
			Q25. Have you ever entered into a consumer contract with arbitration terms?			Total
			Yes	No	I do not know	
Q27. Do you have any of the accounts listed below?	Have an account with one or more of Skype, PayPal, Verizon Wireless, AT&T Mobility, or Sprint.	Count	95	264	218	577
		% within Q27.	16%	46%	38%	100%
		% within Q25.	94%	87%	89%	89%
	Do not have an account with an arbitration clause.	Count	6	39	26	71
		% within Q27.	8%	55%	37%	100%
		% within Q25.	6%	13%	11%	11%
Total		Count	101	303	244	648
		% within Q27.	16%	47%	38%	100%
		% within Q25.	100%	100%	100%	100%

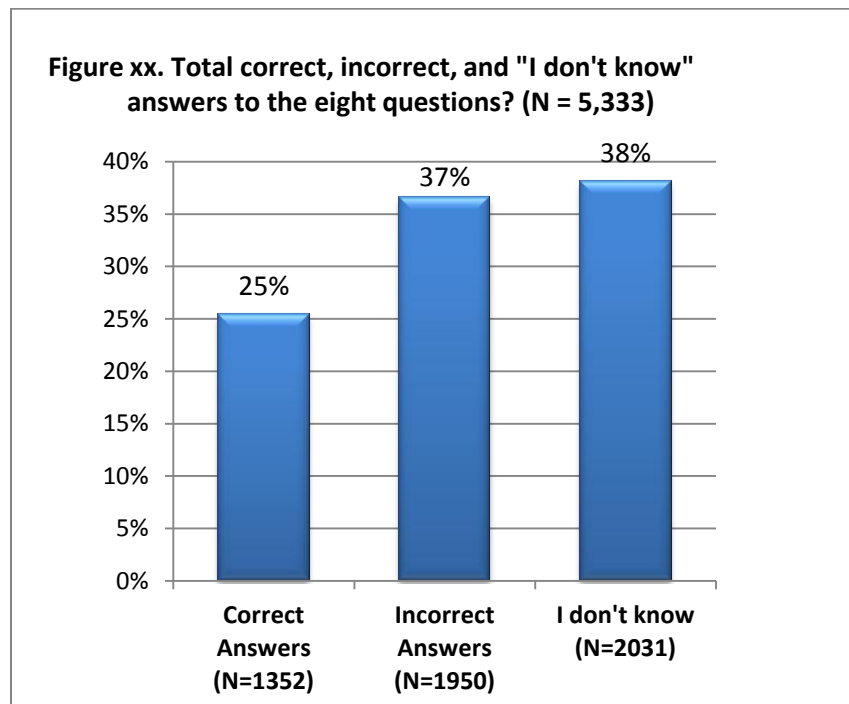
CONSUMER UNDERSTANDING OF ARBITRATION:
How Many Questions Did Survey Participants Answer Correctly?

FIGURE 16

CORRECT SCORES

Total correct, incorrect, and "I don't know" answers to the eight questions

1	Correct Answers (N=1352)	25%	1352
2	Incorrect Answers (N=1950)	37%	1950
3	I don't know (N=2031)	38%	2031
	Total	100%	5333



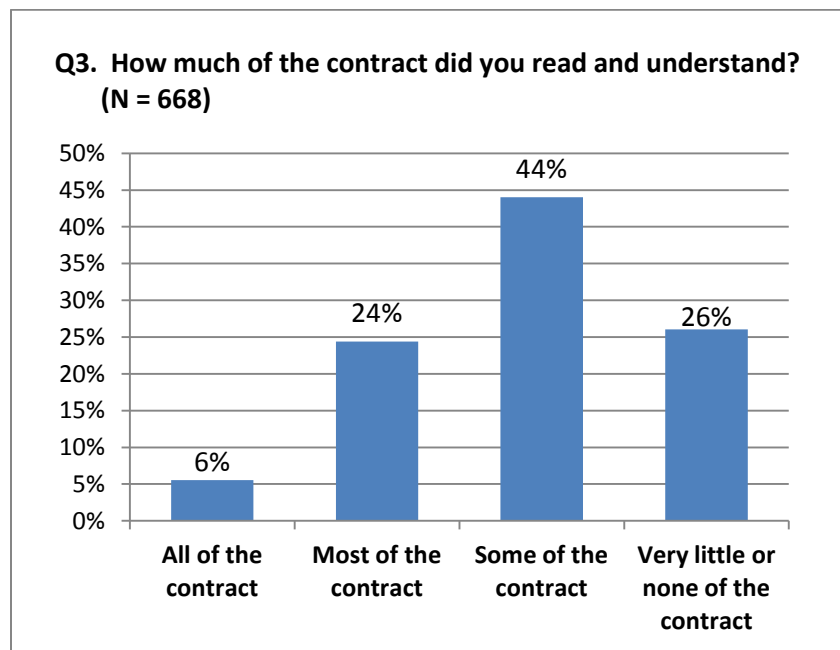
CONSUMER UNDERSTANDING OF ARBITRATION:

WHAT IS THE CORRELATION BETWEEN SURVEY PARTICIPANTS' REPORTED UNDERSTANDING OF ARBITRATION AND THE NUMBER OF SAMPLE QUESTIONS ANSWERED CORRECTLY?

FIGURE 17

HOW MUCH OF THE CONTRACT DID YOU READ AND UNDERSTAND?

1	All of the contract.	6%	37
2	Most of the contract.	24%	163
3	Some of the contract.	44%	294
4	Very little or none of the contract.	26%	174
	Total	100%	668



CONSUMER UNDERSTANDING OF ARBITRATION:

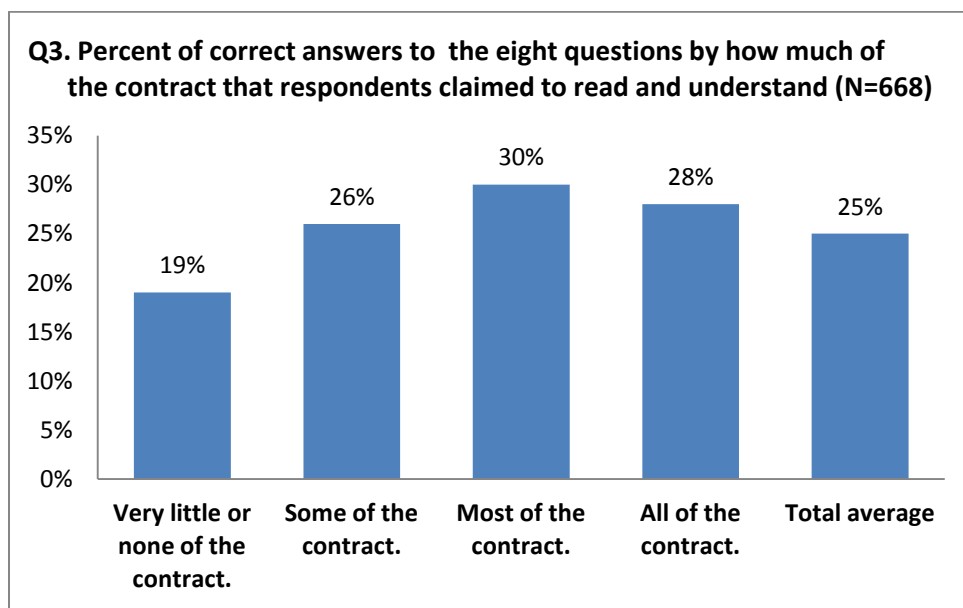
WHAT IS THE CORRELATION BETWEEN SURVEY PARTICIPANTS' REPORTED UNDERSTANDING OF ARBITRATION AND THE NUMBER OF SAMPLE QUESTIONS ANSWERED CORRECTLY?

FIGURE 18

CORRELATION BETWEEN *CORRECT* SCORES AND REPORTED UNDERSTANDING

Average percent of correct answers to the 8 questions: By Q3
(The 8 questions are: Q16, Q19, Q22, Q25, Q28, Q37, Q40, and Q43)

	Q3. How much of the contract did you read and understand?	% of correct answers
4	Very little or none of the contract.	19%
3	Some of the contract.	26%
2	Most of the contract.	30%
1	All of the contract.	28%
	Total average	25%



CONSUMER UNDERSTANDING OF ARBITRATION:
How Many Questions Did Survey Participants Answer Incorrectly?

FIGURE 19

CORRELATION BETWEEN *INCORRECT* SCORES AND REPORTED UNDERSTANDING

Average percent of incorrect answers to the 8 questions: By Q3
(The 8 questions are: Q16, Q19, Q22, Q25, Q28, Q37, Q40, and Q43)

Q3. How much of the contract did you read and understand?	% of incorrect answers
Very little or none of the contract.	26%
Some of the contract.	36%
Most of the contract.	44%
All of the contract.	57%
Total average	37%

