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### **Why the NAF Wants Courts to Lower the Burden of Proof on Debt Collectors**

by Paul Bland

Several of the principals of the for-profit [National Arbitration Forum](#), a Minnesota-based company that aggressively advertises offers a more corporate-friendly system of private judging than other private arbitration firms, have been writing and publishing articles arguing in essence that courts should not ask any questions – and particularly not demand any evidence or proof – in cases where debt collectors are trying to turn arbitration awards against consumers into court judgments. For example, see Susan Wiens & Roger Haydock, [Confirming Arbitration Awards: Taking the Mystery out of a Summary Proceeding](#), 33 Wm. Mitchell L. Rev. 1293 (2007). Similar articles by NAF authors have also appeared in several state bar journals and the like. Where is this push coming from? Have courts been unreasonably refusing to turn arbitrators' awards into judgments, or is something else afoot. The answer, which is obvious to any consumer lawyer, is the latter.

The NAF's interest in making it easier for debt collectors to make money in arbitration is pretty easy to figure out. Last fall, Public Citizen issued a [statistical analysis](#) of EVERY SINGLE consumer case that the NAF has decided in California in the last several years. (California is the only state in the country to require arbitration companies to disclose information about the consumer arbitration cases it handles.) It turns out that out of about 34,000 consumer cases decided by the NAF in California, only 118 were brought by consumers. The other 99.6% of the cases handled by NAF were debt collection cases brought by creditors against consumers. In other words, NAF's financial success depends overwhelmingly on debt collection. Put another way, the NAF's financial success depends upon whether it can make debt collectors choose the NAF's system over either the court system or other arbitration companies.

A surprisingly large number of debt collectors have a problem, though: they cannot even prove that a given consumer owes them any money (much less the often-padded sums that the debt collectors claim that they are owed). Sometimes this problem arises because the consumer actually does not owe the debt collector anything (the number of identity theft victims in the United States is high and rising rapidly), and sometimes it arises because of lousy record-keeping by credit card companies. In literally hundreds of thousands of cases, however, the debt collector cannot prove its case because it does not have (and never has had) any evidence.

How can this be true? It has come about because of the changing nature of debt collectors. It is common for credit card companies to sell the right to pursue debts

allegedly owed to them on a secondary market. On this market, so-called debt buyers pay surprisingly small sums (often only a few cents on the dollar, and sometimes a fraction of a single cent) for the right to pursue debts.

In a great many (if not the vast majority) of cases, these "debt buyer" companies are actually mis-named. What they really buy from the credit card companies is a few bare-bone lines of account information. In most cases, debt buyers pay the credit card issuers to give them a list with three items: (a) the names of consumers who supposedly owe the credit card company money; (b) the account numbers of these consumers; and (c) a total figure supposedly owed (usually with little or no specifics as to the breakdown or components of that figure). These debt buyers typically have none of the records that a normal creditor would have (and would need, in court, to prove a case), such as a copy of a signed application for a credit card or copies of the monthly statements.

How do these debt buyers expect to make any money when they don't have any of the normal evidentiary proof that would be required in court? What they largely count on is that when they file a case against a consumer in arbitration (and the only arbitration company doing any significant volume of debt collection work is the NAF), that most consumers not respond in the very specific ways set forth in the NAF Code within the very tight deadlines set forth in the NAF Code, and thus will default. Then, in the vast percentage of cases, the NAF arbitrator will enter an award for the debt collector in the full amount it claims.

In my work, I've spoke and e-mailed with a huge number of consumers who have been targeted by debt collectors before NAF. In the overwhelming majority of cases, the consumers never responded to the complaint against them before NAF. When I ask consumers "why didn't you fight back in the arbitration?", I get certain answers again and again:

"I didn't understand what the notice was. I didn't know what arbitration is."

"I'd never heard of NAF or the debt collector. I knew I'd had a credit card with a bank, but when I got a piece of mail with these unfamiliar names, I thought it was junk and I threw it out."

"I don't think I ever agreed to arbitration, so I refused to participate. If I responded in arbitration, I was afraid people would think it meant that I'd agreed to it."

So when a consumer doesn't respond in time in a way that the NAF expects, and the NAF enters an award against the consumer, is that the end of it? It turns out that the answer is more and more frequently "no." It used to be that courts almost always confirmed almost all arbitrators' awards, turning them into court judgments. But things have changed.

As tens of thousands of cases are being filed in courts around the country trying to confirm NAF arbitration awards and as consumers (who finally realize what's going on and that they're in trouble once a court case has been filed) begin to fight back, a rapidly

growing number of trial courts and appellate courts around the country have begun to reject NAF arbitration awards. These courts have begun to ask basic questions like "what proof is there that this consumer ever had a contract that gives any rights to this debt collector?", and have refused to rubber stamp awards for debt collectors who didn't have any proof. The landscape of case law has changed overnight – just a few years ago, there were almost no cases of courts refusing to confirm arbitrators' awards, and now there are a boat load of these cases (all involving NAF awards to debt collectors).

So this background explains the recent rash of articles by Roger Haydock and other NAF fundraisers, arguing that courts should demand less (ideally no) proof before confirming arbitrators' awards. It's the only answer to the currently growing three part threat to NAF's financial well being:

- (1) NAF only thrives when debt collectors thrive;
- (2) because most debt buyers don't have any records or evidence to prove that their claims are valid, they can only win their cases if no one asks them for any evidence, and
- (3) courts are increasingly getting wise to this scam and are refusing to confirm awards where there's no evidence of an agreement.

If courts and/or legislators follow the NAF's call for lowering (or eliminating) all standards of proof in debt collection cases, it will be a great day for the handful of people who own stock in the NAF, but a really lousy day for American consumers.

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