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Business Groups File Federal Lawsuit to Challenge CFPB Arbitration Rule

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On September 29, 2017, the U.S. Chamber of Commerce, the Texas Association of Business, and various other national and Texas statewide business organizations and trade groups (together, Plaintiffs) filed a federal lawsuit in Dallas, Texas challenging the constitutionality of a Consumer Financial Protection Bureau (CFPB) rule designed to prohibit providers of certain consumer financial products and services from using class waivers in pre-dispute arbitration agreements (Arbitration Rule). The Arbitration Rule, which was issued in July 2017 but which will not go into effect until March 2018, is already facing congressional challenge, with a joint resolution presently before the Senate to overturn the rule under the Congressional Review Act.

Plaintiffs' lawsuit claims that the Arbitration Rule is invalid because it: 1) is a product of the CFPB's unconstitutional structure; 2) violates the Administrative Procedure Act (APA); and 3) was adopted in violation of the requirements of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). The lawsuit names the CFPB and Richard Cordray, in his official capacity as director of the CFPB, as defendants.

With respect to the first claim, Plaintiffs allege—consistent with arguments made in various other cases, such as the *PHH* case currently being reviewed *en banc* by the D.C. Circuit Court of Appeals[1]—that the aberrant structure of the CFPB, including the extraordinary degree of authority conferred upon the CFPB's director, is unconstitutional. Therefore, Plaintiffs allege, any regulations issued from the CFPB are necessarily "infected" by the agency's unconstitutional character and must be vacated.

Plaintiffs also allege that the Arbitration Rule violates the APA because the CFPB's study of arbitration clauses related to financial products and services, upon which the agency based its Arbitration Rule, was flawed and the rule's promulgation was otherwise arbitrary and capricious for failing to take into account all aspects of the alleged problem. For example, Plaintiffs allege that the CFPB ignored data demonstrating the benefits of arbitration and that "class members very rarely gain benefits from class-action suits."

Finally, Plaintiffs allege that the Arbitration Rule failed to advance the public interest or consumer welfare as required by provisions of the Dodd–Frank Act that empowered the CFPB to study and restrict arbitration agreements in the first place. Plaintiffs contend that the rule effectively precludes the use of an arbitration mechanism that is the "*only* realistic method by which consumers may obtain relief for the types of individualized claims that they typically regard as most important," and does so in the interest of encouraging class action litigation, which provides greater rewards to class action lawyers than individual consumers.

Plaintiffs seek a stay of the Arbitration Rule until the lawsuit is resolved, final judgment in their favor, and court action to prevent the CFPB from implementing the Arbitration Rule. The defendants have not responded to the lawsuit but Mr. Cordray has been publicly vocal in defense of the CFPB's controversial study and Arbitration Rule.

The case is *Chamber of Commerce of the United States of America v. Consumer Financial Protection Bureau*, Case No. 3:17-cv-02670 (N.D. Tex.).

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[1] *PHH Corporation v. Consumer Financial Protection Bureau*, Case No. 15-1177 (D.C. Cir.).

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