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# More Details On Finance Industry's CFPB Arbitration Rule Lawsuit

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As promised previously, here are further details on the lawsuit filed by industry groups against the CFPB to overturn the final arbitration rule. The complaint largely mirrors our heavy criticism of the rule. (For example, see here, here).

The complaint asserts four principal arguments:

1. The rule is the product of "the unconstitutional structure that Congress gave the CFPB" in the Dodd-Frank Act, which gives the Director "an extraordinary degree of authority that is virtually unique in the federal system, and insulates the Director from control by either the President or Congress." (A similar argument is presently pending before the D.C. Circuit Court of Appeals in *PHH v. CFPB*).

2. The rule violates the Administrative Procedure Act ("APA") because "the CFPB failed to observe procedures required by law when it adopted the conclusions of a deeply flawed study that improperly limited public participation, applied defective methodologies, misapprehended the relevant data, and failed to address key considerations." In directing the CFPB to study the use of arbitration in consumer financial contracts and base any regulation of arbitration on the results of that study, Congress necessarily required the CFPB to conduct a fair, unbiased, and thorough study that that would produce reliable and accurate results. Instead, the CFPB "misstated or disregarded key data, reaching palpably invalid conclusions that understate the demonstrated effectiveness of arbitration and overstate the value of class-action litigation."

3. The rule also violates the APA because "it runs counter to the record before the [CFPB]" and is "the very model of arbitrary and capricious agency action." In particular, the CFPB "failed to address key considerations—among them, whether effectively eliminating arbitration in contracts subject to the CFPB's jurisdiction would injure consumers." Moreover, the rule "is premised on conclusions that run counter to the administrative record before the [CFPB], which establishes that arbitration is effective in providing relief to consumers and that class-action litigation generally is not.

4. The rule violates the Dodd-Frank Act because “it fails to advance either the public interest or consumer welfare: it precludes the use of a dispute resolution mechanism that generally benefits consumers (i.e., arbitration) in favor of one that typically does not (i.e., class-action litigation).” The rule “effectively precludes use of an arbitration mechanism that provides the only realistic method by which consumers may obtain relief for the types of individualized claims that they typically regard as most important. And it does so in the interest of encouraging class-action litigation, a procedure that provides substantial rewards to class-action lawyers but almost never produces meaningful relief for individual consumers.”

The complaint alleges that the CFPB reached a “preordained conclusion” to ban class action waivers which “ignored the data before it that demonstrated both the benefits of arbitration to consumers and the failure of class-action lawsuits to provide consumers with meaningful benefits.” In addition, the CFPB failed to address “key policy questions,” including whether a rule mandating the availability of class-action litigation would lead to the complete abandonment of arbitration,” and made no serious effort “to weigh the comparative costs and benefits of implementing a regime that substitutes costly class-action litigation for efficient arbitration.” The “inevitable practical consequence” of the rule, plaintiffs allege, is that businesses will abandon arbitration altogether” since they will face “the certainty of high litigation costs associated with class-action suits and therefore will not go to the expense of creating an alternative arbitration mechanism—for which business shoulders the lion’s share of the costs.”

The complaint seeks entry of a judgment vacating the arbitration rule and entry of orders staying the rule’s implementation pending the conclusion of judicial review and enjoining the CFPB and Director Cordray from enforcing the rule. If the rule goes into effect, plaintiffs aver, “it will inflict immediate, irreparable injury” because “[p]roviders of consumer financial products and services will incur significant legal and compliance costs in adapting their businesses to the new rule,” and “the vast majority of these costs will be wasted, and not recoverable, if the [r]ule ultimately is deemed to be contrary to law.” Moreover, “so long as the effects of the [r]ule are being felt, providers of such services will both be denied the benefits of arbitration and exposed to expensive class-action litigation.”



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