CFPB's New Arbitration Rule – Round 2

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In a previous article, I covered the Consumer Financial Protection Bureau's new Arbitration Rule, giving you a summary of some of the things you need to know about the new Rule and its chances of being nullified by the Senate by use of the Congressional Review Act (CRA) and a possible lawsuit(s) by industry trade group(s) to try and get the courts to throw out the Rule. Since that article, things have gotten very interesting.

At the end of September, the U.S. Chamber of Commerce, the American Bankers Association, the American Financial Services Association, the Consumer Bankers Association, the Financial Services Roundtable, the Texas Association of Business, the Texas Bankers Association, and nine Chambers of Commerce located throughout Texas filed a legal challenge to the CFPB's anti-arbitration rule. The suit was likely filed as a prudent measure in the event the Senate isn't able to whip enough votes under the CRA to get the Rule overturned. The general consensus is that the Senate vote on the CRA measure must take place no later than November 16th or else the Rule will stand.

In filing the lawsuit, the coalition issued this joint statement:

"For years, our organizations have tried to work with the CFPB to promote strong consumer protection while maintaining a functional arbitration system. The CFPB's own study found that arbitration provides more benefits to consumers than class action lawsuits. Unfortunately, the CFPB chose to instead finalize a rule that will harm consumers and businesses by effectively banning arbitration and increasing speculative class action litigation. As Congress continues to consider action within its purview, we are filing this challenge to ensure all legal remedies are utilized to preserve arbitration for consumers. Ultimately, we hope this legal challenge will compel the CFPB to take this misguided rule back to the drawing board. If left unchecked, the CFPB's rule will harm consumers and businesses alike while providing a financial windfall to the class action plaintiffs' bar."

The legal challenges primarily rest on the following grounds:

- The Rule is fatally unconstitutional because it was promulgated under a structure established in the Dodd-Frank Act that renders the CFPB Director unaccountable to and effectively insulated from control by, the President and Congress. This constitutional argument has been previously raised in the *PHH Corp. v. CFPB* case which is still pending in the U.S. Court of Appeals for the District of Columbia;

- The Rule violates the requirements of the Dodd-Frank Act because the study conducted by the CFPB was flawed and it misstated or disregarded key data;
- The Rule is arbitrary and capricious action in violation of the Administrative Procedure Act (APA) because it failed to address key considerations – among them, whether effectively eliminating arbitration in contracts subject to the CFPB's jurisdiction would injure consumers; and
- The Arbitration Rule departs from the requirements of the Dodd-Frank Act because it is not "in the public interest and for the protection of consumers."

The Plaintiffs asked the Court to:

- Provide for expeditious proceedings in this action in light of the Arbitration Rule's effective date and its impending compliance date of March 19, 2018;
- Stay implementation of the Arbitration Rule or otherwise preliminarily enjoin the CFPB Director, his employees, and his agents from implementing and enforcing the Arbitration Rule in any respect, pending this Court's entry of a final judgment;
- Enter final judgment in favor of Plaintiffs;
- Declare that the Arbitration Rule is unlawful because it is contrary to constitutional right, power, privilege, or immunity; not promulgated by observance of procedures required by law; arbitrary, capricious, or otherwise contrary to law; and promulgated in excess of statutory jurisdiction, authority, or limitations;
- Vacate and set aside the Arbitration Rule;
- Permanently enjoin the Director, his employees, and his agents from implementing or enforcing the Arbitration Rule; and
- Grant Plaintiffs such other relief as the Court deems just and proper.

I could be wrong, but the Plaintiff's greatest chance of success may be the third prong – that the Rule violates the APA for the reason that it runs counter to the record before the CFPB. The Bureau's own study showed that consumers fare better in arbitration than in class actions. The CFPB's study determined the average compensation to consumers in class actions is $32 (paid on average, in 2 years) and payments to plaintiffs' attorneys in those same class actions exceeded $420 million! If you were to compare that to the low cost of arbitration, relative to other forms of private litigation, and the fact that the average consumer award in the CFPB's study exceeded $5,000 and was paid in 2 months (a substantially shorter time period than had it gone to litigation), the CFPB certainly used some creative thinking to conclude that consumers are better served by $32 class action awards.

The Plaintiff's point of attack on the CFPB being unconstitutional may be another winner since that question is still pending before the court in the *PHH Corp. v. CFPB.*

The case was assigned to Judge Sidney A. Fitzwater, a Reagan appointee, and former (before his appointment to the Bench) Director of the Dallas County Republican Men's Club and a former member of the Executive Committee for the Dallas County Republican Party. I understand he is a very detail-oriented and fair-minded judge. It appears the Plaintiffs chose their battlefield very

wisely.

It’s been an interesting time in Congress recently with hearings on the Equifax security breach and the Wells Fargo account matters taking place. Some of the questioning has surrounded both parties use of arbitration agreements. The Dems are certainly whipping up enough animosity towards the use of arbitration agreements in these hearings and it remains to be seen if the dust will have settled by mid-November so that a vote under the CRA can take place with enough votes to overturn the Rule. If the vote doesn’t take place, does that mean we can count on the lawsuit to kill the Rule? Not necessarily; litigation takes time and companies would still have to get ready to comply with the Rule in the interim. Non-exempt dealers, banks and finance companies should be prepared for compliance with the Rule this coming March.