The Cynic's View on the CFPB Arbitration Rule

September 14th, 2017 | and Michael A. Benoit

Michael A. Benoit

On July 10, the Consumer Financial Protection Bureau issued the final version of its arbitration rule banning consumer financial services providers from enforcing federal or state court class-action waivers in pre-dispute arbitration agreements. The rule – which takes effect Sept. 19 and with which compliance will be required in March 2018 – does not prohibit class arbitrations outside the court system, or individual arbitrations.

Providers using pre-dispute arbitration agreements will, after the compliance date, have to report information about arbitrations to the CFPB. The information that will need to be reported includes the initial claim and any counterclaims and the answers thereto; the agreement under which the arbitration is being invoked; the judgment or award issued by the arbitrator; and information regarding a provider's failure to pay required filing fees.

Prior to submitting such information, the providers must redact the following: names of individuals (except for the name of the provider or the arbitrator where either is an individual); addresses of individuals (excluding city, state, and ZIP code); email addresses, telephone numbers, photographs of individuals; account numbers; Social Security and tax identification numbers; driver's license and other government identification numbers; and passport numbers. All of the information submitted to the CFPB will be published on its website and available to the general public.

Interestingly, names of financial services providers are not required to be redacted, causing one to wonder whether an institution's identity could be shielded. After all, arbitrations have been – until now – private contractual matters.

However, it is clear from the materials issued with the rule that the CFPB's intention is to identify financial services providers involved in the arbitrations for the deterrent effect – i.e., financial institutions won't abuse the arbitration process or commit bad acts if they will become public.

The Dodd-Frank Act authorized the CFPB to conduct a study of arbitration in consumer financial services transactions. It also authorized the CFPB to restrict or prohibit arbitration in a manner consistent with the study – provided the restriction or prohibition is both in the public interest and for consumer protection.

The CFPB indicated there was little available information on arbitration outcomes for it to consider in its study, and that it needed more information to fully consider whether arbitration is in the public interest and sufficiently protective of consumers. As such, the CFPB believes the reporting requirements will illuminate the pros and cons of arbitration. But is that really what the CFPB

intends?

There are a couple of narratives, the first being that the CFPB is earnestly engaged in its mission and truly believes its study exposed the harm that class-action waivers visit on consumers. Further, the CFPB really needs more insight into arbitration outcomes in order to determine whether it is in the public interest and for consumer protection.

The cynic might take a different view, assuming that the CFPB went into its study looking for support to ban mandatory pre-dispute arbitration altogether. When there wasn't sufficient data to support that outcome, it had to focus on the heart of arbitration agreements, the class waiver. The cynic would say the CFPB's prohibition on class waivers has less to do with consumers – its own study shows that consumers fare better in arbitration than in class actions – than it does with consumer advocates and the plaintiffs' bar looking to line their pockets with millions of dollars in attorneys' fees generated in class-action lawsuits.

Further, the cynic would see the CFPB – being a partisan creation of a partisan Congress – looking to inflict as much pain as possible on the financial services industry and justify its class waiver prohibition by focusing on the "deterrent" effect of class actions.

A cynic would further point out that the CFPB's study determined the average compensation to consumers in class actions is $32 (paid on average, in two years) and payments to plaintiffs' attorneys in those same class actions exceeded $420 million. Comparing 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 two months – it took some creative analysis for the CFPB to conclude that consumers are better served by $32 class action awards.

But, the cynic would say, it's not much of a stretch for a partisan agency interested in currying favor with consumer advocates and plaintiffs' attorneys by creating new financial opportunities for them. As for the reporting requirements, the cynic would simply laugh.

The cynic would assert that the objective was to eliminate consumer arbitration all along, but there was not enough support for it in the CFPB's study, so the CFPB had to figure out a more creative way to do it.

What better way – under the guise of collecting more data to consider – than to make public the names of financial institutions that lost to consumers in individually arbitrated disputes? That way, the consumer advocates and plaintiffs' attorneys can scour disputes for those ripe for a class-action lawsuit. A financial institution would be crazy to conduct any individual arbitration knowing that if it lost, it was an engraved invitation to the courthouse.

Finally, the cynic would say that it's no coincidence that a CFPB director looking to run for political office might correlate a class-waiver ban with the potential for financial support from the trial attorneys who prosecute class actions. The cynic would recognize how cynical that view really is, but the fact that it occurred to him would constrain him from discounting it.

Are we optimists or cynics? I guess it depends on one's point of view. But either way, consumers are sure to be the ones who lose.

Hudson Cook, LLP provides articles, webinars and other content on its website from time to time provided both by attorneys with Hudson Cook, LLP, and by other outside authors, for information

purposes only. Hudson Cook, LLP does not warrant the accuracy or completeness of the content, and has no duty to correct or update information contained on its website. The views and opinions contained in the content provided on the Hudson Cook, LLP website do not constitute the views and opinion of the firm. Such content does not constitute legal advice from such authors or from Hudson Cook, LLP. For legal advice on a matter, one should seek the advice of counsel.