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Senate Strikes Down CFPB Arbitration Rule

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THE SHORT-LIVED RULE WILL LIKELY BE REMEMBERED AS PART OF THE TRUMP ADMINISTRATION'S DISMANTLING OF THE OBAMA ADMINISTRATION'S LEGACY, AND AS CONTINUING THE TREND OF COURTS STRICTLY ENFORCING AGREEMENTS TO ARBITRATE AS WRITTEN.

On Tuesday, October 24, the U.S. Senate voted 51-50 (with Vice President Pence breaking the tie) to strike down a rule issued by the Consumer Financial Protection Bureau (CFPB) that prevented banks and other financial institutions from including arbitration clauses in consumer contracts that would bar consumer class action lawsuits. The Senate vote follows a 231-190 July vote in the House to overturn the rule.

The proposed rule had a tortured history. In 2010, as part of the Dodd-Frank reforms, Congress created the CFPB and directed the new agency to study and promulgate regulations on the use of mandatory arbitration provisions in consumer financial

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contracts. The CFPB released its study in 2015. It criticized mandatory arbitration provisions and specifically called out the use of class action waivers. In July 2017, the CFPB issued a rule that went far, prohibiting "providers of certain consumer financial products and services" from including class action waivers in arbitration agreements.

The irony and anomaly of the CFPB rule is that the underlying study took so long that by the time the rule was finally issued, a new Administration and new Congress were in power. Once the rule came into effect, the Trump Administration and Congress immediately lashed out against it, resulting in the July House vote.

Even if the Senate had not acted, the rule may have faced its demise in the courts. On September 29, 2017, the U.S. Chamber of Commerce and other organizations filed suit in federal court in Texas claiming the rule violates both the Administrative Procedures Act and the agency's organic act, Dodd-Frank, because it fails to advance the public interest or consumer welfare.

The rule's creation and its quick demise comes at a time when the law on these issues has undergone a transformation. In recent years, fueled by a number of U.S. Supreme Court cases, arbitration clauses have been used to change consumer litigation. Businesses have administered an effective one-two punch, first requiring consumers to agree to arbitration in their contracts (such as credit card, cable TV and cell phone agreements), and second, including language that bars the consumer from joining in a class action over any grievance that may arise under the agreement. No courts, no massive suits – just individual versus business on a single issue and contract. The rule was an attempt to undo that structure within the limited context of the financial services industry.

Arbitration has long been judicially blessed,[1] but its combination with class action waivers is of more recent vintage. Like a hurricane picking up force, arbitration's swallowing up of class action rights came in a series of U.S. Supreme Court opinions beginning in 2011. The first case, *AT&T Mobility LLC v. Concepcion*, faced head-on a California rule designed to prevent precisely what has since occurred. California state law made class action waivers in arbitration agreements unenforceable.[2] The majority found the state rule to be an attack on arbitration that was contrary to the Congressional purpose of the Federal Arbitration Act (FAA) to promote arbitration.[3] Justice Breyer's dissent focused on the disincentives of a lawyer to take on small consumer cases: "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[4] As the Seventh Circuit similarly found, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[5]

The Supreme Court took this further in *Am. Express Co. v. Italian Colors Rest*.[6] In that case, the Court held that courts must enforce class action waivers even when doing so may effectively prevent an individual from being able to meaningfully vindicate his or her rights.[7] The Court upheld the class action waiver anyway, prompting these sharp remarks from Justice Kagan in dissent: "The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad."[8]

The CFPB's rule intended to reverse the course charted by these Supreme Court decisions and to provide greater protection for consumers. The short-lived rule will likely be remembered as part of the Trump Administration's dismantling of the Obama Administration's legacy, and as continuing the trend started by the Supreme Court of strictly enforcing agreements to arbitrate as written. Further, because the Congressional Review Act (CRA) prohibits regulators from issuing rules substantially similar to rules that have been disapproved by Congress, the CFPB may not issue any rule that takes the same approach to prohibiting class action waivers in arbitration clauses.

Endnotes

1. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

2. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011).

3. *Concepcion*, 563 U.S. at 346–47.

4. *Concepcion*, 563 U.S. at 365.

5. *Carnegie* v. *Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in original).

6. 133 S. Ct. 2304 (2013).

7. *Italian Colors*, 133 S. Ct. at 2306; *see also DIRECTV v. Imburgia,* 136 S. Ct. 463 (2015).

8. *Id.* at 2313.