Consumer Law

The CFPB's Recent Arbitration Agreements Rule Likely to Face Numerous Challenges Ahead

By: Kali Bracey and Jeremy M. Creelan

On July 10, the Consumer Financial Protection Bureau (CFPB) issued a final rule under Section 1028(b) of the Dodd-Frank Act that governs the use of arbitration by providers of a wide swath of consumer financial products and services.[1] Once in effect, the rule will preclude providers of these financial products and services from including class action waivers in their pre-dispute agreements. But the rule's future in the face of potential legal challenges and in Congress is far from certain.

Coming after the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*—which held that the Federal Arbitration Act (FAA) preempts state laws that bar the use of classwide arbitration waivers[2]—the CFPB's rule operates as an exception to the FAA.[3] The rule consists of three main provisions. First, it prohibits providers and their affiliates from relying on mandatory pre-dispute arbitration agreements to bar consumer participation in class action suits concerning covered financial products and services.[4] The CFPB's definition of "covered products and services" reaches financial products and services that are offered or provided to consumers primarily for personal, family or household purposes, including providing consumer asset accounts, extending consumer credit, providing credit reporting and processing consumer payments using financial or banking data accepted "directly from a consumer . . . ."[5]

Second, the rule requires covered entities that use pre-dispute arbitration agreements to include specific language notifying consumers that they retain the ability to participate in class actions: "We agree that neither we nor anyone else will rely on this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action filed by someone else."[6] Third, the rule prescribes that covered providers submit certain arbitration-related records to the CFPB. Specifically, covered providers must furnish copies of the initial claim and any answers and counterclaim associated therewith, the pre-dispute arbitration agreement and the judgment or award, among other documents, to the CFPB for eventual online publication.[7]

Certain commentators have suggested that the CFPB's congressionally mandated study[8] comparing arbitration and class actions may not support the idea that class actions typically result in better outcomes for consumers, much less the *right* result.[9] Such arguments are likely to be the basis for legal challenges—specifically, that in promulgating the rule, the CFPB exceeded its statutory authority to restrict pre-dispute arbitration in a manner "consistent with the study" and in the "public interest . . . ."[10]

Even before such challenges arise, however, Congress may nullify the rule within the 60-day window provided for it to do so by the Congressional Review Act.[11] Two US senators have already declared their intention to do just that.[12] This effort comes just weeks after the US House of Representatives passed a bill that would strip the CFPB of its authority to regulate the use of arbitration agreements.[13] Additionally, the Financial Stability Oversight Council—a creation of Dodd-Frank chaired by the secretary of the Treasury—could veto the CFPB's rule if it finds the rule "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk."[14]

The legal status of the CFPB itself is also in jeopardy, as the US Court of Appeals for the District of Columbia could find the agency to be unconstitutional in its rehearing *en banc* of a panel decision in *PHH Corp. v. CFPB*.[15] In ruling on a challenge to CFPB's status as an independent agency, the panel held that the CFPB's structure violated Article II of the Constitution, though it applied the doctrine of severability to grant a remedy well short of striking down the CFPB entirely.[16]

The future of the CFPB's rule is uncertain. Ignoring calls to delay,[17] the CFPB published the rule in the Federal Register on July 19, 2017. The rule is scheduled to go into effect on September 18, 2017, and will apply only to arbitration agreements entered into on or after March 19, 2018.

The full text of the CFPB's final rule may be accessed here.

Thanks to law clerk Nicolas G. Keller for his assistance in writing this alert.

Contact Us

Kali Bracey

kbracey@jenner.com | Download V-Card

Jeremy M. Creelan

jcreelan@jenner.com | Download V-Card

Visit Jenner & Block's *Consumer Law Round-Up*

[1] *See* Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040).

[2] 563 U.S. 333, 339-40 (2011); *see also American Express Company v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013).

[3] *See* Arbitration Agreements, 82 Fed. Reg. at 33,309 ("Nor does the Bureau believe that the rule creates any uncertainty as to the scope of preemption under the Federal Arbitration Act, since the Supreme Court has been quite clear that Congress can authorize exceptions to the FAA by statute as Congress did in section 1028" of Dodd-Frank).

[4] *See id.* at 33,429 (to be codified at 12 C.F.R. pt. 1040.4(a)(1)).

[5] *See id.* at 33,428-29 (to be codified at 12 C.F.R. pt. 1040.3(a)(8)); *see also* 12 U.S.C. § 5481(15)(A)(vii)(I) ("financial product or service" includes "providing payments or other financial data processing products or services *to a consumer*" (emphasis added)). It should be noted that the rule exempts the processing of consumer payments by entities selling or marketing nonfinancial products or services for which the payments are processed. *See* Arbitration Agreements, 82 Fed. Reg. at 33,428-29 (to be codified at 12 C.F.R. pt. 1040.3(a)(8)). Furthermore, the CFPB's rule cannot—and does not purport to—apply to entities falling outside of the CFPB's rulemaking authority. *See id.* at 33,429 (to be codified at 12 C.F.R. pt. 1040.3(b)(6)); *see also* 12 C.F.R. § § 1517, 1519.

[6] *See id.* at 33,428 (to be codified at 12 C.F.R. pt. 1040.4(a)(2)(i)).

[7] *See id.* at 33,429 (to be codified at 12 C.F.R. pt. 1040.4(b)).

[8] Consumer Finance Protection Bureau, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (Mar. 2015), *available at* http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

[9] *See, e.g.*, Travis Norton & Matt Webb, *CFPB's Arbitration Rule: By the Numbers*, Above the Fold (Aug. 18, 2016), www.uschamber.com/above-the-fold/cfpb-s-arbitration-rule-the-numbers.

[10] 12 U.S.C.A. § 5518(b).

[11] 5 U.S.C. § 802.

[12] *See* Kevin Freking, *Republicans Say They'll Move to Halt Consumer Watchdog Rule*, Associated Press (July 12, 2017), *available at* www.chicagotribune.com/business/sns-bc-us--congress-consumers-arbitration-ban-20170711-story.html.

[13] *See* H.R. 10, 115th Cong. § 737(a) (as passed by House, June 8, 2017) ("Section 1028 of the Consumer Financial Protection Act of 2010 (12 U.S.C. 5518) is hereby repealed.").

[14] 12 U.S.C.A. § 5513.

[15] *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017).

[16] *Id.* at 37.

[17] *See* C. Ryan Barber, *'Dear Rich,' 'Dear Keith': Friendly in Their Letters, Foes Over Arbitration*, The National Law Journal (July 17, 2017), www.nationallawjournal.com/id=1202793200633/Dear-Rich-Dear-Keith-Friendly-in-Their-Letters-Foes-Over-Arbitration?mcode=1202615432818&curindex=1.