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The Empire Strikes Back – Consumer Arbitration Under Fire

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AGENDA

Consumer Arbitration and the CFPB

I. Overview
II. The History of the CFPB's Long Standing Resistance to Arbitration
III. Mass Arbitrations
IV. What have the court's done lately?
V. What Does the CFPB's Renewed Attempts at Rulemaking Mean for You?

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Overview

- Arbitration provisions in consumer agreements have become commonplace instruments in managing dispute resolution in consumer finance. Over the past decade, the Supreme Court and Courts of Appeals have affirmed the strength of the Federal Arbitration Act and the validity of class action waiver provisions contained within arbitration agreements.
- Since its inception, the Consumer Financial Protection Bureau has sought to thwart this expansion by eliminating the use of arbitration agreements used by supervised entities in their ordinary course with customers.

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Overview

- In 2017, the CFPB issued a rule banning the use of arbitration agreements by supervised entities altogether. Later that year, Congress voted to repeal the Bureau's rulemaking vis-à-vis the Congressional Review Act.
- This January, the Consumer Financial Protection Bureau renewed its attempt to hamper the use of arbitration agreements, proposing a new rule to create a public registry of form contract terms and conditions used by supervised nonbanks.
- According to the U.S. Chamber of Commerce, the public registry rule is "yet one more attempt [by the Bureau] to try and eliminate the use of arbitration agreements."

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Overview

- What We'll Discuss today:
  - How did the CFPB, courts and Congress get to the consumer arbitration landscape we are today?
  - How do recent court decisions affect your litigation risk?
  - What does the Bureau's new proposed rule mean for the standard arbitration language you use in your form agreements?
  - And what does the CFPB's rule making mean for your business?

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The History of the CFPB's Long Standing Resistance to Arbitration

- Since its inception, the Consumer Financial Protection Bureau has sought to counter the use of arbitration agreements in customer agreements, particularly class action waiver provisions.
- During Bureau's formative years, several Supreme Court cases greatly strengthened the use of consumer arbitration:
  - AT&T Mobility LLC v. Concepcion 563 U.S. 333 (2011)
    - Under the Federal Arbitration Act, California must enforce arbitration agreements even if the agreement requires that consumer complaints be arbitrated individually (instead of on a class-action basis).
  - CompuCredit Corp. v. Greenwood 565 U.S. 95 (2012)
    - Because the Credit Repair Organizations Act is silent on whether claims can proceed in an arbitrable forum, the Federal Arbitration Act requires the arbitration agreement to be enforced according to its terms.
  - Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013)
    - The Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

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The History of the CFPB's Long Standing Resistance to Arbitration

- The Bureau's Response:
  - In 2012, the CFPB initiated a public inquiry into the use of arbitration clauses within consumer finance-related agreements.
  - The Bureau's public inquiry resulted in preliminary findings leading to the Bureau's final report on arbitration in 2015.
  - Seven months after the report, the Bureau released an outline of its proposed rules subject to a Small Business Review Panel, followed by a Final Report of the panel.
  - The proposed rule was released in 2016.

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The History of the CFPB's Long Standing Resistance to Arbitration

- The final rule prohibited covered lenders from using pre-dispute arbitration agreements to block class actions related to covered consumer financial products and services.
- The rule did not forbid arbitration agreements, but providers were precluded from including a provision in an arbitration agreement that would prohibit consumers from leading or participating in a class action.
- The rule also permitted arbitration agreements that provided for class arbitration, provided that a consumer was not required to participate in class arbitration instead of class litigation in court.

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The History of the CFPB's Long Standing Resistance to Arbitration

- The rule also required the following language as part of any consumer arbitration agreement:
  - 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.
- In July 2017, the CFPB issued its final rule.
- And in November 2017, President Trump signed a joint resolution passed by Congress disapproving of the Arbitration Agreements Rule under the Congressional Review Act.

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The History of the CFPB's Long Standing Resistance to Arbitration

- The Congressional Review Act provides that a federal agency may not issue a new rule that is substantially the same as the disapproved rule unless Congress thereafter specifically authorizes the new rule:
  - (1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.
  - (2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.
- 5 USC Sec. 801(b)

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Mass Arbitration

- Since Concepcion and its progeny, in most jurisdictions, including California, a class action waiver is only enforceable when embedded within an agreement to arbitrate.
- Out of concern for unconscionability challenges to the arbitration provisions, most companies include highly pro-consumer/pro-employee provisions in their arbitration agreement, including that the company will bear most of the cost of arbitration.
  - Moreover, the major arbitration forums JAMS and AAA provide in their consumer/employee fairness standards for companies to bear most of the cost. (JAMS: consumer or employee can be required to pay only $250, and may apply for a waiver even of that based on financial hardship.)
- Thus, when a plaintiffs' firm demands immediate commencement of thousands of individual arbitrations, the company can be faced with an immediate bill for millions of dollars in fees, even before a single legal issue is adjudicated.

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The Mass Arbitration Threat

- Plaintiff-side firms assemble large numbers of clients through internet solicitation, and demand large numbers of individual arbitrations
- Major arbitration providers limit the consumer/employee filing fee, requiring defendant to advance thousands for each case before any legal issues are decided
  - Courts have not been sympathetic to company efforts to avoid implications of arbitration agreements they drafted
  - Refusal to pay may create risk of broader waiver of arbitration
  - Waiver risk now increased by *Morgan v. Sundance*

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The Mass Arbitration Threat

- Courts have not been sympathetic to company efforts to avoid implications of arbitration agreements they drafted.
  - See Abernathy v. DoorDash, Inc., 438 F. Supp. 3d 1062, 1067-68 (N.D. Cal. 2020) ("The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a classwide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.")
  - See Uber Tech., Inc. v. American Arb. Ass'n, Inc. (N.Y. App. Div. 1st Dep't Apr. 14, 2022) (denying Uber's motion to enjoin 31,000 arbitrations; court held Uber's remedy against litigation abuse was to seek recovery from each individual claimant in the event the arbitrator later determined the claim was brought in bad faith).

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Mass Arbitration – Defense Strategies

Early Aggressive Engagement

- Demonstrate willingness to engage in arbitration
- Investigate and cast doubt on the plausibility of claims
  - Are claimants suing the right entity?
  - Were claimants actually impacted?
  - Are claimants in bankruptcy?
  - Are claimants even alive? (Yes, this happened.)
  - Did claimants opt out of the arbitration provision?
- Communicate offsets or limitations on claimants' recoveries

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Mass Arbitration – Defense Strategies

Increase Initial Burdens Of Opposing Counsel

- Require individualized arbitration demands that:
  - Identify specific claims (particularly UDAP claims)
  - Identify factual basis for standing/how and when claimants were impacted by the practice at issue
  - Tee-up potential dispositive motions
- Consider reasonable settlement offers made through individualized, but mass-generated, offer letters
  - Create obligation for counsel to individually confer with each client
  - Potentially limit recovery of attorneys' fees if award is less than any offer of judgment or pre-hearing settlement offer

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Mass Arbitration – Defense Strategies

Coordination, Not Consolidation

- Batch arbitrations before each arbitrator
- Compile a standardized set of document discovery
- Present a single witness to address common points of evidence/testimony

Additional Options

- AAA: Resolution of disputes through document submissions (< $25,000)
- AAA: Small Claims option
- Sue arbitral forum for injunctive and declaratory relief???

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What Has the Court Done Lately?

- Morgan v. Sundance, Inc., 142 S. Ct. 1708 (2022).
  - Arbitration provision may be waived by inconsistent litigation conduct, even if the party resisting arbitration was not prejudiced by the conduct allegedly constituting waiver.
  - Ordinary contractual principles of waiver apply, with no special FAA presumption against waiver: "the FAA's 'policy favoring arbitration' does not authorize federal courts to invent special, arbitration-preferring procedural rules."

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What Has the Court Done Lately?

- Badgerow v. Walters, 142 S. Ct. 1310 (2022).
  - After arbitration occurs, proceedings to vacate or enforce the award must occur in state court, unless there is an independent basis for federal jurisdiction on the face of the petition to vacate/confirm.
  - FAA alone does not supply federal jurisdiction.
  - That a federal claim was arbitrated does not supply federal jurisdiction.
  - **A proceeding to confirm or vacate an arbitration award is similar to a proceeding for breach of contract.**
  - Diversity of citizenship (if sufficient amount in controversy) will support federal jurisdiction.
  - Practical Guidance: When compelling arbitration of a case filed in federal court, seek a stay rather than dismissal of the underlying case pending arbitration.

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What Does the CFPB's Renewed Attempts at Rulemaking Mean for You?

- CFPB Public Registry Rule
  - On January 11, the CFPB proposed a rule requiring nonbanks subject to its supervisory authority, with some exceptions, to annually register with the CFPB certain terms and conditions in form contracts for products and services that pose risks to consumers.
    - Nonbanks would be required to register if they use specific terms and conditions defined in the proposed rule that attempt to waive consumers' legal protections, to limit how consumers enforce their rights, or to restrict consumers' ability to file complaints or post reviews.

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What Does the CFPB's Renewed Attempts at Rulemaking Mean for You?

- Key parts of the rule do the following:
  - Create a public registry of terms and conditions used in non-negotiable, "take it or leave it" nonbank form contracts that claim to waive or limit consumer rights and protections.
  - Require supervised nonbank companies to annually report to the CFPB on their use of standard-form contract terms that "seek to waive consumer rights or other legal protections or limit the ability of consumers to enforce or exercise their rights."
  - Address the following types of terms and conditions, among others:
    - liability limits
    - class action bans
    - arbitration agreements
    - liquidated damages clauses

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What Does the CFPB's Renewed Attempts at Rulemaking Mean for You?

- In his statement on the proposed rule, Director Chopra stated that the proposed rule would:
  - Help regulators and law enforcement more easily detect when companies are offering products and services using prohibited, void, and restricted contract terms.
  - Assist the CFPB and the public to understand the types of terms and conditions that are in use in today's marketplace and their effect on the adequacy of underlying consumer financial protection laws that are being waived or limited.
  - Inform how the CFPB conducts its supervision of nonbank financial companies.

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What Does the CFPB's Renewed Attempts at Rulemaking Mean for You?

- The proposed rule appears to be another attempt by the Bureau to regulate arbitration agreements by collecting data.
- According to the U.S. Chamber of Commerce:
  - The "proposal from the Consumer Financial Protection Bureau to establish a public registry for terms and conditions in consumer contracts is yet one more attempt to try and eliminate the use of arbitration agreements – which is why the proposal mentions arbitration 152 times."
- A frequent tactic by the Bureau is to gather information through rulemaking in order to issue more substantive rules later on.

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Back to our Questions

- How did the CFPB, courts and Congress get to the consumer arbitration landscape we are today?
- How do recent court decisions affect your litigation risk, particularly your mass arbitration risk?
- What does the Bureau's new proposed rule mean for the standard arbitration language you use in your form agreements?
- And what does the CFPB's renewed push for rulemaking for arbitration agreements more generally mean for your business?

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Questions

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Thank you!

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