Insight

CFPB Finalizes Rule to Bolster Trial Lawyers, Hurt Consumers

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On Monday, the Bureau of Consumer Financial Protection (CFPB) finalized its arbitration rule. As with other landmark rules from the CFPB, this one was rushed through the administrative rulemaking process, taking just over a year from initial proposal to final publication. However, unlike some of those other quickly moving rules, the arbitration rule will have a widespread and costly impact to both consumers and financial firms. By its own calculations, the CFPB estimates that this rule will increase annual costs to the over 50,000 firms affected by this rule by over $17,000 per firm. Unfortunately, it relies on its own internal study when estimating the costs to consumers and comes to the conclusion that there is insufficient data available to formulate any consumer costs estimates. This is yet another example of bureaucratic tomfoolery at its finest and why the CFPB is the epitome of unaccountable government overreach.

In effect, CFPB's arbitration rule prevents financial services providers from sending their customer disputes to arbitration, and, instead, encourages disgruntled customers to take their complaints to court, ideally in the form of a class action lawsuit. The CFPB argues that the rule "will restore the ability of groups of people to file or join group lawsuits…People who would otherwise have to go it alone or give up, will be able to join with others to pursue justice and some remedy for their harm." Unfortunately, precluding arbitration agreements, and encouraging litigation, especially class action lawsuits, hurts the consumer and costs all parties time and money.

According to data from the U.S. District Courts, in 2016 the median length of time from filing to a decision was 25.9 months, whereas the median length of time from filing to an award decision for consumer financial services arbitration cases during the same period that were not settled was 6.3 months, based on data from the American Arbitration Association. Further, in 2016, the average attorney's fee in consumer financial services arbitration was $1,442.70, whereas the average payout for a class action attorney is $1 million per settled case.

Although the trial attorneys do not benefit from arbitration, consumers certainly do, largely due to the fact that they are spending so much less on attorney fees. The average recovery for a consumer in an arbitration proceeding is $5,389 compared to an average recovery of $32 in a class action lawsuit. With these numbers in mind, it's astounding that the CFPB could rationalize a final rule that encourages class action lawsuits and discourages arbitration. Of course the trial lawyers are thrilled with this new rule, but shouldn't the Bureau of *Consumer* Financial Protection be more concerned with the financial wellbeing of consumers?

Now that the rule is final, there are a few paths to repealing it, none of which are easy. First, Congress could repeal it with the Congressional Review Act (CRA) as it has done with 14 Obama-era rules this year. However, the CRA resolution must be passed within 60 legislative days and, with everything else happening on the Hill right now, this may fall to the bottom of the priority list. Second, affected groups and individuals could sue the CFPB (if only administrative matters could be arbitrated…). These lawsuits will almost certainly be filed, and will be filed soon, but as we have seen in the past with lawsuits against federal government rules, that is a long process. Lastly, the CFPB itself could write a new rule overturning or significantly revising this rule. The only way that would happen, though, is if the current director, Richard Cordray, is replaced with someone who provides the CFPB with a vision for administrative procedure and consumer protection. Until then, this rule stands as final. The quickest method of repeal is through the CRA, and Congress should consider this a top priority even amidst everything else happening right now.