



3-1-2018

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Recommended Citation

Rebecca D. Floyd, *Populist Conundrum: Big Banks or Plaintiffs' Bar? Banks Win as Congress Overrides the CFPB Rule Banning Class Action Waivers in Arbitration Agreements*, 22 N.C. BANKING INST. 165 (2018).

Available at: <http://scholarship.law.unc.edu/ncbi/vol22/iss1/11>

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Populist Conundrum: Big Banks or Plaintiffs' Bar? Banks Win as Congress Overrides the CFPB Rule Banning Class Action Waivers in Arbitration Agreements

I. INTRODUCTION

Americans have distrusted ambulance-chasing plaintiffs' attorneys and money-hungry financial service providers for years.¹ The Consumer Financial Protection Bureau's ("CFPB" or "the Bureau") Final Rule on Arbitration Agreements ("Final Rule") pitted these two groups against each other.² The CFPB exercised its authority to limit or prohibit the use of pre-dispute arbitration agreements granted by Section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") by publishing the Final Rule to the Federal Register on July 19, 2017.³ The Final Rule prohibited the use of arbitration agreements that bar consumers from participating in class actions, but did not prohibit the use of arbitration altogether.⁴ The rule became effective on September 18, 2017, and would have applied to contracts entered into

1. See Nicholas M. Gess et al., *Christmas in July for Plaintiffs Bar—CFPB Arbitration Rule to Take Effect*, NAT'L L. REV. (July 14, 2017), <https://www.natlawreview.com/article/christmas-july-plaintiffs-bar-cfpb-arbitration-rule-to-take-effect> ("All of these eventualities must be viewed against a political backdrop in which the significant concerns of the business community about the Rule will run up against a federal agency that has substantial support from consumers who are constituents and voters, and who harbor a strong distrust of the financial services sector."); Kenny Stein, *Stop President Obama's Trial Lawyer Giveaway*, FREEDOMWORKS (June 27, 2016), <http://www.freedomworks.org/content/stop-president-obamas-trial-lawyer-giveaway> (urging readers of a conservative blog to submit public comments on the CFPB's Proposed Rule).

2. See Arbitration Agreements, 12 C.F.R. § 1040.4 (repealed 2017) (limiting arbitration agreements to exclude class action waivers and establishing a monitoring provision to allow the CFPB to continue observing the use of arbitration in consumer financial services).

3. Arbitration Agreements, 82 Fed. Reg. 33210, 33320 (July 19, 2017) (codified at 12 C.F.R. § 1040); 12 U.S.C. § 5518(b) (2016) ("The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.").

4. 12 C.F.R. 1040.4 (repealed 2017).

after March 19, 2018.⁵ However, the Final Rule was short-lived.⁶ Congress used the Congressional Review Act (“CRA”)⁷ to overturn the rule when the Senate passed a resolution of disapproval by a narrow 51-50 vote on October 24, 2017, with Vice President Mike Pence voting as the tie breaker.⁸ The Final Rule would have provided a valuable tool to improve private enforcement through litigation by allowing consumers to bring class actions against financial service providers.⁹ Additionally, the monitoring provision would have increased transparency in the arbitration process to further aid in the Bureau’s mission for consumer protection and keep the opportunity to expedite claims through arbitration open for consumers who still wish to use it.¹⁰ However, concerns about the costs to the financial services industry and poor popular opinions of class action lawyers ultimately led to the demise of the Final Rule.¹¹

This Note examines the Final Rule and concludes that, despite some flaws, it would have helped consumers and evened the playing field between consumers and financial service providers. Part II provides a brief overview of the decades-long debate over the practice of arbitration.¹² Part III analyzes the Final Rule in conjunction with the Arbitration Study (“the Study”) and argues for why it was ultimately good for consumers.¹³ Part IV examines the political climate in which the Final Rule went into effect and the imperfections that led to its repeal.¹⁴ Part V briefly summarizes and concludes the Note.¹⁵

5. Arbitration Agreements, 82 Fed. Reg. at 33210.

6. Ian McKendry, *Senate Votes to Repeal CFPB Arbitration Rule in Win for Financial Institutions*, AM. BANKER, Oct. 24, 2017, at 1.

7. Congressional Review Act, 5 U.S.C. § 802 (2016) (allowing both houses of Congress to pass a joint resolution of disapproval of agency rulemaking to repeal a final rule).

8. Ian McKendry, *supra* note 6, at 2.

9. 12 C.F.R. § 1040.4(a).

10. *Id.* § 1040.4(b).

11. McKendry, *supra* note 6, at 3 (quoting Sen. John Cornyn saying, “There is no reason for us to enrich a class of lawyers who . . . bring these lawsuits and see consumers getting pennies on the dollar, which is what the status quo would permit . . .”).

12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See infra* Part V.

II. BACKGROUND ON THE ARBITRATION DEBATE

A. *Protections of Arbitration Agreements in the United States*

The Federal Arbitration Act of 1925 (“FAA”) made arbitration agreements in contract-related disputes valid and enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”¹⁶ Over the years, arbitration has become a contentious practice, particularly when pre-dispute arbitration clauses are written into contracts between parties with unequal bargaining power.¹⁷ Issues arise when consumers are locked into shrinkwrap agreements without knowing they are agreeing to resolve any disputes against the company through arbitration—in which the normal rules of evidence, discovery, and appeals are surrendered in favor of a quick and private proceeding.¹⁸

One of the most controversial aspects of standard arbitration agreements is that many involve class action waivers, preventing consumers from joining together to litigate claims that involve small amounts of harm to a large number of people.¹⁹ This is troublesome when individual consumers are unlikely to bring a claim at all if the value is not large enough to make the costs associated with proceeding individually worth it and are also unable to join a class action.²⁰

16. Federal Arbitration Act of 1925 (“FAA”), 9 U.S.C. § 2 (2016).

17. *See, e.g.*, *AT&T Mobility v. Concepcion*, 563 U.S. 333, 352 (2011) (holding in a controversial decision that the FAA preempted California’s rule on the unconscionability of class action waivers in consumer contracts); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting) (“It has become routine, in a large part due to this Court’s decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-action arbitration clauses.”); Letter from Judith Resnik, Professor of Law, Yale Law School, to the Hon. Richard Cordray, Dir., CFPB (Aug. 12, 2016) (“But the clauses in consumer services and on job application forms do not merit the term ‘contract.’ They are neither bargained for nor bargainable.”).

18. *See* Richard Frankel, “*What We Lose in Sales, We Make Up in Volume*”: *The Faulty Logic of The Financial Service Industry’s Response to the Consumer Financial Protection Bureau’s Proposed Rule Prohibiting Class Action Bans in Arbitration Clauses*, 48 ST. MARY’S L. J. 283, 284–87 (2016) (examining the Final Rule when it was proposed by the CFPB and arguing that financial service providers are the only parties that benefit from class action waivers).

19. *See id.* at 284 (“[I]n the area of consumer financial services—such as banking, credit cards, and lending agreements—virtually every company that imposes a mandatory arbitration clause on its customers also includes a provision barring the customer from participating in a class action or any other joint proceeding.”).

20. *Id.* at 285.

Those in support of class action waivers argue that the class action system is costly and ineffective, and provides little benefit to consumers at an individual level.²¹ For individuals, arbitration tends to be more efficient and provide larger awards than consumers would be able to get from class actions.²² Many supporters of class action waivers argue that the bulk of class settlements are the attorneys' fees rather than relief for the consumers.²³ Additionally, critics of the Final Rule argue that the legal system is overburdened already, and that an increase in class action litigation will only benefit trial attorneys by generating multi-million dollar legal fees.²⁴

In *Discover Bank v. Superior Court of L.A.*, the California Supreme Court pushed back against the practice of including class action waivers, and held that class action waivers in consumer contracts were unconscionable.²⁵ Several years later, in *AT&T Mobility v. Concepcion*,²⁶ the U.S. Supreme Court held in a controversial 5-4 decision that California's *Discover Bank* rule was preempted by the FAA.²⁷ *Concepcion* limits a state's ability to pass legislation that interferes with the FAA, but Congress can still act, and has previously acted to limit arbitration agreements in mortgage loans, consumer and securities broker-dealers, investment advisers, and certain whistleblower proceedings.²⁸

21. See Patrick McHenry et al., Comment Letter on CFPB Proposed Rule on Arbitration Agreements (Sept. 8, 2016), <https://www.regulations.gov/contentStreamer?documentId=CFPB-2016-0020-5917&attachmentNumber=1&contentType=pdf> (“[W]hatever the Bureau’s intention, rather than giving consumers greater access to justice, the proposal will make it more difficult and more expensive for consumers to resolve disputes with service providers.”).

22. See Frankel, *supra* note 18, at 285 (“Defenders of class action bans . . . respond that the class action system is broken and imposes huge costs on companies while providing little or no benefit to consumers.”).

23. See Gess et al., *supra* note 1 (questioning the reliability of the Arbitration Study for failing to exclude contingent attorney fees for class actions from its calculations when evaluating how consumers fare in class actions versus arbitration).

24. See McHenry et al., *supra* note 21 (arguing that, even if well-intentioned, the Final Rule would make settling claims with financial service providers more expensive for consumers).

25. *Discover Bank v. Superior Court of L.A.*, 36 Cal.4th 148, 162–63 (2005).

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

27. *Id.*

28. Arbitration Agreements, 82 Fed. Reg. 33210 at 33211 (July 19, 2017) (codified at 12 C.F.R. pt. 1040).

B. *The Arbitration Study and the Final Rule*

Section 1028(b) of Dodd-Frank gave the CFPB authority to limit or prohibit the use of pre-dispute arbitration clauses.²⁹ Section 1028 originates from a whitepaper released by the Department of Treasury in June 2009, saying that consumers often do not know that they waive their rights to trial when they sign contracts to take out a loan and suggesting that the CFPB³⁰ study the use of arbitration clauses.³¹ In order for the CFPB to exercise its authority to limit or prohibit the use of pre-dispute arbitration clauses, Dodd-Frank dictated the rule has to be “in the public interest and for the protection of consumers” and consistent with the arbitration study authorized by section 1028(a).³²

The CFPB conducted the Study to determine whether to regulate arbitration.³³ The Study focused on measuring the prevalence of arbitration agreements in consumer financial products and services contracts and the effects of individual arbitration versus consumer class actions.³⁴ The Study focused on six specific consumer financial product markets: credit cards, checking accounts, prepaid reloadable cards, private student loans, payday loans, and mobile wireless third-party billing.³⁵ Among its findings, the Study found that tens of millions of consumers are subject to arbitration agreements through their contracts in these product markets, and nearly all of these arbitration agreements included class action waivers.³⁶ The Study also surveyed over 1,000 consumers and found that more than half of those subject to arbitration

29. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) § 1028(a), 12 U.S.C. § 5518(b) (2016) (“The Bureau, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.”).

30. The whitepaper was written when the CFPB was still known as the Consumer Financial Protection Agency. David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 1038 (Aug., 2017).

31. *See id.* (arguing that the CFPB’s rule on arbitration falls short of ensuring enforcement and compliance with consumer financial protection laws).

32. Dodd-Frank §§ 1028(a)–(b), 12 U.S.C. §§ 5518(a)–(b).

33. CFPB, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015) [*hereinafter* ARBITRATION STUDY].

34. Arbitration Agreements, 82 Fed. Reg. 3321, 33220 (July 19, 2017) (codified at 12 C.F.R. pt. 1040).

35. ARBITRATION STUDY, *supra* note 33, § 1, at 7.

36. Arbitration Agreements, 82 Fed. Reg. at 33222.

agreements in their credit card contracts thought they could participate in a class action lawsuit against the card issuer.³⁷

To illustrate the benefit of consumer financial class actions, the CFPB analyzed 419 of 422 consumer financial class settlements between the years 2008 and 2012.³⁸ These settlements involved 350 million class members total and resulted in a gross recovery amount of \$2.7 billion.³⁹ In addition to the staggering award values, fifty-three of the 419 settlements involving 106 million class members included behavioral relief to change companies' harmful practices as part of the settlement.⁴⁰

Overall, the CFPB determined that the findings of the Study necessitated a limit on pre-dispute arbitration clauses, including the potential to regulate the practice further in the future.⁴¹ In May of 2016, the CFPB proposed a rule to address concerns about class action waivers written into pre-dispute arbitration clauses in consumer financial services contracts.⁴² After reviewing the comments received during the public comment period, the CFPB published the Final Rule on arbitration agreements to the Federal Register.⁴³

The Final Rule had two parts: (1) it prohibited covered financial service providers⁴⁴ from using class action waivers in covered consumer financial product or service contracts,⁴⁵ and (2) it required covered

37. *Id.* at 33224.

38. *Id.* at 33233. Three of the class settlements were excluded because the CFPB could not find data on the attorney's fees. *Id.* at 33233 n. 328.

39. *Id.* at 33234.

40. *Id.*

41. *Id.* at 33210.

42. *Id.* at 33246.

43. *Id.* at 33247.

44. Service providers include any person that (1) participates in designing, operating, or maintaining the consumer financial product or service, or (2) processes transactions relating to the consumer financial product or service. 12 U.S.C. § 5481(26) (2016). Excluded from this definition are (1) persons regulated by the Securities and Exchange Commission, (2) broker dealers, (3) investment advisers, (4) persons regulated by the Commodity Futures Trading Commission, (5) federal agencies, (6) providers of less than twenty-five consumers in a calendar year, (7) merchants, retailers, or sellers of nonfinancial goods or services, (8) employers providing a product or service to an employee. Arbitration Agreements, 12 C.F.R. § 1020.3(b) (repealed 2017).

45. Covered products include products and services (1) offering an extension of consumer credit, (2) extending automobile leases, (3) providing debt management services, (4) providing consumer credit reports, (5) providing accounts subject to the Truth in Savings Act, 12 U.S.C. § 4301 (2016), (6) providing accounts subject to the Electronic Fund Transfer Act, 15 U.S.C. § 1693 (2016), (7) transmitting or exchanging funds as defined by 12 U.S.C. § 5481 (2016), (8) accepting financial or banking data directly from a consumer for the purpose of initiating payment by a consumer, (9) providing check cashing, check collection,

providers to submit certain arbitral records and court records to the CFPB.⁴⁶ The first part would require covered providers to put language in the agreements to reflect the limitation on class action waivers.⁴⁷ The CFPB planned on using the records required by the second part of the rule to monitor arbitral and court proceedings to determine if there are new developments that raise consumer protection concerns.⁴⁸ The CFPB reserved the ability in the Final Rule to later require these records to be posted on the CFPB's website with appropriate redactions to "provide greater transparency into the arbitration of consumer disputes."⁴⁹ The Final Rule would have applied to consumer financial product and service providers in the market of extending consumer credit, brokering automobile leases, providing debt management services, providing consumer credit reports, transmitting funds, processing payments, and collecting debt.⁵⁰

III. ANALYSIS OF THE FINAL RULE

A. *Utility of Arbitration*

Critics of the rule believe that class actions benefit plaintiffs' attorneys more than individual consumers, and that a ban on class actions would deprive consumers of the efficiency of arbitration.⁵¹ The Study

or check guaranty services, and (10) collecting debt arising from any of the aforementioned consumer financial services. Arbitration Agreements, 12 C.F.R. § 1040.3(a)(1)–(10).

46. Records to be submitted are (1) the initial claim and any counterclaim, (2) the answer to any initial claim and/or counterclaim, (3) the pre-dispute arbitration agreement filed with the arbitrator or arbitration administrator, (4) the judgment or award, if any, (5) any communication from the arbitration or arbitration administrator if an arbitrator refuses to administer arbitration or dismisses a claim, and (6) any submission to a court seeking dismissal, deferral, or stay of any aspect of a case. Arbitration Agreements, 12 C.F.R. § 1040.4(b).

47. Arbitration Agreements, 12 C.F.R. § 1040.4(a)(2)(i) ("[A] provider shall ensure that any such pre-dispute arbitration agreement contains the following provision: '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.'").

48. Arbitration Agreements, 82 Fed. Reg. at 33210.

49. *Id.*

50. *Id.*

51. See Brenna A. Sheffield, Note and Comment, *Pre-Dispute Mandatory Arbitration Clauses in Consumer Financial Products: The CFPB's Proposed Regulation and Its Consistency with the Arbitration Study*, 20 N.C. BANKING INST. 221 (2016) (examining the proposed rule on arbitration prior to the final rule on whether it was consistent with the standards in Dodd-Frank).

did not exclude contingent attorneys' fees from its reports on class action awards, which critics say inflates the award total when not all of that amount is going to consumers.⁵² The "father of arbitration clauses," Alan S. Kaplinsky⁵³ warned that if the rule went into effect, an avalanche of litigation would follow, further burdening the legal system and depriving consumers of the benefits of quicker arbitration proceedings.⁵⁴ Representative Patrick McHenry and Senator Ben Sasse wrote a letter endorsed by dozens of other Republican members of Congress, concerned with the costs of defending class actions being passed on to consumers and expressed doubt about the way the Study analyzed consumer outcomes.⁵⁵ The letter claimed that the Final Rule would make it more difficult and expensive for consumers to resolve disputes with their providers than if they went through individual arbitration, and urged the CFPB to "adopt a less divisive, more reasonable approach" that "respects the decisions of consumers."⁵⁶ Of the over 6,000 public comments received on the Proposed Rule, hundreds of nearly identical comments came from private citizens that poured in during the comment period calling the Proposed Rule "Obama's trial lawyer payday."⁵⁷

While arbitration may be more efficient and provide greater individual award amounts than litigation, few consumers actually use arbitration to get relief.⁵⁸ Consumers enter into arbitration agreements every day when they acquire checking accounts, private student loans,

52. Gess et al., *supra* note 1.

53. Alan Kaplinsky is a partner at Ballard Spahr that is said to have "pioneered" the use of pre-dispute arbitration agreements and helped launch the blog CFPBMonitor.com. *Alan S. Kaplinsky*, BALLARD SPAHR LLP, http://www.ballardspahr.com/people/attorneys/kaplinsky_alan.aspx (last visited Sept. 16, 2017).

54. Jessica Silver-Greenberg & Michael Corkery, *U.S. Agency Moves to Allow Class-Action Lawsuits Against Financial Firms*, N.Y. TIMES: DEALBOOK (July 10, 2017), <https://www.nytimes.com/2017/07/10/business/dealbook/class-action-lawsuits-finance-banks.html>.

55. McHenry et al., *supra* note 21.

56. McHenry et al., *supra* note 21.

57. *See, e.g.*, Jon Bradfield, Comment Letter on CFPB Proposed Rule on Arbitration Agreements (Aug. 22, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-3318> ("Trial lawyers don't need any more money than their billable hours."); Lucia Walrath, Comment Letter on CFPB Proposed Rule on Arbitration Agreements (Aug. 18, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-2537> ("Obama's trial lawyer payday must be stopped.").

58. *See* Arbitration Agreements, 82 Fed. Reg. at 33210 ("This final rule is based on the Bureau's findings . . . that pre-dispute arbitration agreements are being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that consumers rarely file individual lawsuits or arbitration cases to obtain such relief.").

prepaid cards, and many other financial products and services.⁵⁹ Most consumers have little understanding of the arbitration agreements in the contracts they sign or how often they waive their rights to a trial when entering into these agreements.⁶⁰ The American Arbitration Association (“AAA”) is the largest non-profit arbitration administrator in the United States and averages under 1,500 consumer arbitration proceedings annually.⁶¹ For those who do end up seeking legal redress for a claim against their financial service providers, many claims are too small to make individual action worth the time, money, and effort.⁶² For example, the \$30.22 claim in *Concepcion* would not be worth the legal fees associated with either arbitration or litigation, if they could even get an attorney to take their claim to begin with.⁶³ Because of this, many consumers are left without any redress at all when their arbitration agreements involve class action waivers.⁶⁴

Not only is arbitration rarely used by consumers,⁶⁵ but class arbitration is virtually nonexistent.⁶⁶ The Study identified 1,847 arbitration filings in total for the product markets studied—averaging about 616 per year for 2010, 2011, and 2012.⁶⁷ The CFPB also found that only two class arbitrations were filed between 2010 and 2012.⁶⁸ These numbers are shockingly low, considering millions of consumers are covered by these arbitration agreements and thirty-two million consumers benefit from class actions altogether each year.⁶⁹

59. *See id.* at 33211 (“In the last few decades, companies have begun inserting arbitration agreements in a wide variety of standard-form contracts....”).

60. *See id.* at 33224 (“[T]he survey found that consumers generally lacked awareness regarding the effects of arbitration agreements.”).

61. Resnik, *supra* note 17, at 3 (“[T]housands of courts operate in the state and federal systems, where civil filings are estimates to run between 25 and 47 million cases annually, excluding about 50–60 million juvenile and traffic cases.”).

62. *See* Resnik, *supra* note 17, at 4 (“My goal is to turn attention to the underlying fact that almost no consumers or employees ‘do’ arbitration at all.”).

63. *See* *AT&T Mobility v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (“What rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim?”).

64. *See* Resnik, *supra* note 17, at 4 (“My goal is to turn attention to the underlying fact that almost no consumers or employees ‘do’ arbitration at all.”).

65. Arbitration Agreements, 82 Fed. Reg. at 33227.

66. *Id.* at 33227.

67. ARBITRATION STUDY, *supra* note 33, § 5, at 20.

68. Arbitration Agreements, 82 Fed. Reg. at 33227.

69. Resnik, *supra* note 17.

B. *Class Actions as an Enforcement Tool*

To supporters of the rule, class action waivers are seen as hindering enforcement through private litigation, essentially giving companies a “get out of jail free” card.⁷⁰ Richard Cordray, director of the CFPB at the time of the Study, said that by blocking group lawsuits, mandatory arbitration clauses block consumers’ ability to seek legal redress “when a little harm happens to a lot of people.”⁷¹ A comment letter submitted by Senator Harry Reid and signed by thirty-seven fellow Senators commended Cordray on the proposed rule and stressed the importance of class actions for consumer protection.⁷² Senator Reid’s letter asserted that class action waivers protect corporations from accountability for “abusive, anti-consumer practices,” which allows for these practices to continue unchecked.⁷³

Beyond monetary relief for individual consumers, the Final Rule would have provided a huge benefit to consumers by encouraging private enforcement through litigation.⁷⁴ Because of the scarceness of arbitration proceedings, it is difficult to ensure that consumer financial service providers are maintaining ethical business practices.⁷⁵ Arbitration proceedings lack the independence of elected or appointed judges and published opinions available for public inspection.⁷⁶

The CFPB studied the utility of class actions as an enforcement tool by analyzing the extent to which private class actions overlapped with government enforcement actions, and which types of actions occurred first when the two overlapped.⁷⁷ The CFPB found that for 88%

70. See Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (beginning a three-part series on arbitration in consumer and employment contracts); Noll, *supra* note 30, at 986 (arguing that the CFPB’s rule on arbitration falls short of ensuring enforcement and compliance with consumer financial protection laws).

71. Richard Cordray, *Let Consumers Sue Companies*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/let-consumers-sue-companies.html?mcubz=3>.

72. Harry Reid et al., Comment Letter on CFPB Proposed Rule on Arbitration Agreements (Aug. 3, 2016), <https://www.regulations.gov/document?D=CFPB-2016-0020-1482>.

73. *Id.*

74. Arbitration Agreements, 82 Fed. Reg. 33210 at 33210 (July 19, 2017) (codified at 12 C.F.R. pt. 1040).

75. Resnik, *supra* note 17, at 3.

76. Resnik, *supra* note 17, at 3.

77. Arbitration Agreements, 82 Fed. Reg. at 33237.

of public enforcement actions, there was not an overlapping private action.⁷⁸ For 68% of the private class actions, there was not an overlapping public enforcement action.⁷⁹ When the two did overlap, private class actions tended to come before government enforcement actions.⁸⁰ The CFPB interpreted this data to mean that private class actions complement government enforcement, especially given increasing limitations on resources available to regulators.⁸¹

The enforcement value of class actions was also demonstrated by the fifty-three settlements that mandated a change in harmful practices the Study analyzed.⁸² These settlements affected at least 106 million individual class members.⁸³ While some of those class members may no longer have contractual relationships with the defendant companies, that number also does not account for future consumers who will unknowingly benefit from the changes.⁸⁴

C. Monitoring Requirement and Arbitration Transparency

The monitoring rule would have provided transparency for the arbitration process and helped the CFPB assess whether there is a need to regulate arbitration agreements further by requiring covered providers to submit arbitral and court records to the CFPB.⁸⁵ The CFPB was particularly concerned with monitoring for arbitrations administered by biased administrators.⁸⁶ Some consumer advocates submitted comments claiming that arbitration can never be neutral because of biases towards “repeat players.”⁸⁷ While the CFPB did attempt to analyze this long-alleged bias, it maintained that the results of the Study did not identify an obvious bias favoring repeat players.⁸⁸ The small pool of data was a clear limitation on the ability of the Study to fully analyze this issue.⁸⁹ By

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 33234.

83. *Id.*; ARBITRATION STUDY, *supra* note 33, § 8, at 22.

84. ARBITRATION STUDY, *supra* note 33, § 8, at 23, n. 42.

85. Arbitration Agreements, 82 Fed. Reg. at 33310.

86. *Id.* at 33253.

87. *Id.* at 33228.

88. *Id.*

89. *Id.*; ARBITRATION STUDY, *supra* note 33, § 5, at 58.

continuing to monitor the results of arbitration relating to consumer financial products and services, the CFPB could have acted further if it determined there were new “developments that raise consumer protection concerns.”⁹⁰

While the CFPB maintains that the results of the Study were not conclusive in determining a “repeat player” bias, the data it collected did seem to lean in that direction.⁹¹ The Study looked at 158 disputes with affirmative consumer claims across all product markets brought in the years 2010 and 2011 and their outcomes broken into which disputes involved “repeat players” on either side.⁹² For the disputes involving a repeat company and no consumer lawyer, only four out of thirty-eight disputes ended with any form of award for the consumer.⁹³ When there was a repeat company and a non-repeat consumer lawyer, nine out of twenty-one consumers saw an award.⁹⁴ When both parties involved a repeat player, only thirteen out of eighty-five consumers had any type of award.⁹⁵ The sample size for non-repeat companies was small, with six out of fourteen disputes ending with a consumer award.⁹⁶ Overall, only thirty-two disputes out of the 158 disputes studied ended with a grant of relief for consumers.⁹⁷ The Study was clearly limited by such a small sample size overall, but the results do tend to show that repeat companies seem to fare better in these disputes than consumers, especially consumers with a non-repeat attorney or no attorney at all.⁹⁸ If a larger sample size reveals the opposite or a statistically insignificant effect, the CFPB could have chosen not to regulate arbitration further by banning arbitration agreements altogether.⁹⁹

The AAA provided these disputes, filed by consumers or companies from the beginning of 2010 through the end of 2012, to the

90. Arbitration Agreements, 82 Fed. Reg. at 33210.

91. ARBITRATION STUDY, *supra* note 33, § 5, at 56–68.

92. ARBITRATION STUDY, *supra* note 33, § 5, at 67.

93. ARBITRATION STUDY, *supra* note 33, § 5, at 67.

94. ARBITRATION STUDY, *supra* note 33, § 5, at 67.

95. ARBITRATION STUDY, *supra* note 33, § 5, at 67.

96. ARBITRATION STUDY, *supra* note 33, § 5, at 67.

97. ARBITRATION STUDY, *supra* note 33, § 5, at 67.

98. ARBITRATION STUDY, *supra* note 33, § 5, at 67.

99. *See* Arbitration Agreements, 82 Fed. Reg. 33210, 33252 (July 19, 2017) (codified at 12 C.F.R. pt. 1040) (“[The CFPB] preliminarily found that a comparison of the relative fairness and efficiency of arbitration and individual litigation was inconclusive and thus that a total ban on the use of pre-dispute arbitration agreements in consumer finance contracts was not warranted at that time.”).

CFPB pursuant to a non-disclosure agreement.¹⁰⁰ The authority to continue monitoring specified arbitral and court records would have helped the CFPB keep track of particular risks to consumers by noting trends in the types of violations being enforced through private enforcement actions without having to rely on private arbitration administrators to turn over information limited by short time frames and non-disclosure agreements.¹⁰¹ The monitoring rule would have also helped the CFPB take enforcement action against providers that are repeatedly harming consumers.¹⁰² Class actions and the court system as a whole are not perfect, but with litigation comes extensive documentation and recordkeeping subject to public scrutiny.¹⁰³ Holding arbitration administrators accountable in the same way that we expect from courts is the first step in improving the system in a way that can actually benefit both consumers and companies.¹⁰⁴

One of the most prevalent criticisms of the Final Rule was that the Study was “deeply flawed.”¹⁰⁵ Despite its flaws, the Study took on an extremely challenging proposition by attempting to study trends in arbitration.¹⁰⁶ Since arbitration often keeps plaintiffs from filing claims, claims that actually do get brought to arbitration may tend to be only significantly stronger cases and claims for higher dollar amounts, and therefore not representative of all of the harms to consumers that go unchecked.¹⁰⁷ It is also difficult to quantify success, as many arbitral awards may include equitable relief or nominal damages.¹⁰⁸ Despite these difficulties, which critics of the Final Rule may label as “flaws,” the CFPB concluded in the Study that plaintiffs in consumer financial arbitrations prevailed only 20% of the time.¹⁰⁹ The monitoring provision would allow the CFPB to continue studying the fairness of arbitration for

100. ARBITRATION STUDY, *supra* note 33, § 1 at 7.

101. Arbitration Agreements, 82 Fed. Reg. 33210 at 33237.

102. *Id.*

103. Resnik, *supra* note 17.

104. Resnik, *supra* note 17.

105. Complaint for Declaratory and Injunctive Relief, Chamber of Commerce of U.S. v. CFPB, No. 3:17-cv-02670-D (N.D. Tex. Sept. 29, 2017).

106. See David Horton & Andrea C. Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 76 (2015) (“Studies of consumer arbitration awards are important but challenging to execute.”).

107. *Id.* at 77.

108. *Id.*

109. ARBITRATION STUDY, *supra* note 33, § 5.6.6, at 41.

consumers, and could have helped make up for what the Study lacked in resources and practicality.¹¹⁰

IV. FAILURE OF THE FINAL RULE

A. *The Political Climate and Events Surrounding Reversal of the Final Rule*

Challenges to the Final Rule appeared almost immediately after it was published in the Federal Register.¹¹¹ The House of Representatives passed a resolution of disapproval under the CRA on July 25, 2017, just six days after the Final Rule was published.¹¹² The House vote was mostly along party lines, gathering the necessary votes in a relatively short period of time.¹¹³ The Senate, however, experienced more difficulty in gathering support for the resolution, leaving uncertain the fate of the Final Rule for several months while the issue was publicly debated.¹¹⁴

1. Wells Fargo Unauthorized Accounts Scandal

The issue of the Wells Fargo unauthorized accounts scandal resurfaced following the House vote, reminding the public of a prime example of “when a little harm happens to a lot of people.”¹¹⁵ In September 2016, news broke that Wells Fargo employees created

110. See Arbitration Agreements, 82 Fed. Reg. 33210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040) (“The Bureau will use the information it collects to continue monitoring arbitral and court proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further Bureau action.”).

111. See David Sherfinski, *House Votes to Undo Federal Consumer Bureau’s Arbitration Rule*, WASH. TIMES (July 25, 2017), <https://www.washingtontimes.com/news/2017/jul/25/house-votes-to-undo-consumer-financial-protection/> (“House Republicans moved [July 25, 2017] to rein in the Consumer Financial Protection Bureau, approving a legislative veto of a new rule that would have made it easier for people to join class-action lawsuits.”).

112. *Id.*

113. See *id.* (reporting that the House voted to repeal the Final Rule less than a week after it was published to the Federal Register).

114. See Kate Berry & Ian McKendry, *Four Questions as Senate Vote Nears on CFPB Arbitration Rule*, AM. BANKER, Oct. 24, 2017 [*hereinafter* Berry, *Four Questions*] (“The GOP appears to have barely enough votes to roll back the contentious CFPB rule But victory was not assured, as key GOP senators were still a question mark.”).

115. Richard Cordray, Opinion, *Let Consumers Sue Companies*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/let-consumers-sue-companies.html?mcubz=3>; Stacy Cowley, *Wells Fargo May Have Found More Fake Accounts Created by Employees*, N.Y. TIMES: DEALBOOK (Aug. 4, 2017), <https://www.nytimes.com/2017/08/04/business/dealbook/wells-fargo-fraud-accounts.html?mcubz=0>.

millions of fake accounts under the names of real costumers in order to meet demanding sales quotas.¹¹⁶ Some customers only discovered the misconduct when they were charged fees on the fraudulent accounts.¹¹⁷ In August 2017, shortly after the House vote, reports surfaced that over a million more unauthorized accounts were discovered on top of the 2.1 million originally reported.¹¹⁸ This news came after the financial institution paid \$185 million in fines and penalties, and \$142 million to settle class-action claims.¹¹⁹ The harms done to consumers by the unauthorized accounts included fees charged on the accounts, harm to credit scores, and calls from debt collectors.¹²⁰ Many of the refunds issued to consumers were fairly small and averaged about \$25.¹²¹

In addition to the newly discovered fake accounts causing the scandal to resurface, Wells Fargo has also been in hot water over charging illegal fees to veterans to refinance their mortgages and inadvertently jeopardizing customers' personal information when responding to a subpoena in an ongoing civil suit in New Jersey.¹²² The Wells Fargo scandal drew national criticism and dominated headlines, but for consumers wrongfully charged \$25 in other situations, bringing an individual arbitration is simply not realistic when the costs of time and money outweigh the damage done by the financial service.¹²³

2. Equifax Breach

In addition to the ongoing investigations into the Wells Fargo scandal, a massive breach of consumer data occurred at Equifax and put 143 million consumers at risk leading up to the deadline for the Senate to

116. Cowley, *supra* note 115.

117. Cowley, *supra* note 115.

118. See Cowley, *supra* note 115 (“[I]ts review of potentially unauthorized accounts could reveal a ‘significant increase’ in the number of accounts involved, up from the 2.1 million that it previously estimated.”).

119. Cowley, *supra* note 115.

120. See Michael Corkery, *Wells Fargo Fined \$185 Million for Fraudulently Opening Accounts*, N.Y. TIMES: DEALBOOK (Sept. 8, 2016), <https://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html> (reporting on the harms done to Wells Fargo customers).

121. *Id.*

122. Cowley, *supra* note 115.

123. See *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The 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.”).

vote on reversing the Final Rule pursuant to the CRA and brought consumer financial concerns into the limelight.¹²⁴ Following the breach, Equifax offered free credit monitoring services to the affected consumers.¹²⁵ The free services, however, were accompanied by pre-dispute arbitration clauses written into the terms and conditions.¹²⁶ Equifax quickly tried to remedy the situation by announcing that the arbitration clause would not apply to consumers affected by the breach, and multiple class-action lawsuits were filed shortly after.¹²⁷

Despite Equifax backpedaling on its arbitration clause a few days later,¹²⁸ the story became a prime example of why the Final Rule would have benefited consumers.¹²⁹ Congressman Brad Sherman, sitting on the House Financial Services Committee, spoke harshly of Equifax for the way the company handled the situation, accusing Equifax of attempting to “sneak in” an arbitration provision to the free credit monitoring services meant to mitigate the damage of the massive breach.¹³⁰ Senator Elizabeth Warren, a vocal supporter of the Final Rule,¹³¹ took to Twitter

124. See Ian McKendry, *Equifax Breach May Kill Repeal of CFPB Mandatory Arbitration Rule*, AM. BANKER, Sept. 8, 2017 [*hereinafter* McKendry, *Equifax Breach*] (“The massive breach at Equifax is likely to hurt — and may ultimately doom — efforts by Republicans to overturn the Consumer Financial Protection Bureau’s rule banning mandatory arbitration clauses.”).

125. *Id.*

126. *Id.*

127. David Lazarus, *The Real Outrage Isn’t Equifax’s Arbitration Clause – It’s All the Others*, L.A. TIMES (Sept. 12, 2017, 3:00 AM), <http://www.latimes.com/business/lazarus/la-fi-lazarus-equifax-arbitration-clauses-20170912-story.html>.

128. See *id.* (quoting Equifax spokesperson Wyatt Jeffries saying “. . . we will not apply any arbitration clause or class-action waiver against consumers for claims related to the free products offered in response to the cybersecurity incident or for claims related to the cybersecurity incident itself.”).

129. See McKendry, *Equifax Breach*, *supra* note 124 (“Yes, it was slimy for the company to try to deny people their right to sue or to join class-action lawsuits. But no, Equifax was by no means alone in pulling such a stunt.”).

130. McKendry, *Equifax Breach*, *supra* note 124.

131. This is unsurprising considering § 1028 of Dodd-Frank originated from a Treasury Department whitepaper that was supposedly influenced by Warren while she was still a law professor. In 2007, while Elizabeth Warren was a law professor at Harvard, she published an article named *Unsafe at Any Rate*, which influenced a bill introduced during the Bush administration to establish a “Consumer Credit Safety Commission.” The bill was not passed, but during the Obama administration the idea was revived and was included in the Dodd-Frank Act. Donald C. Lampe & Ryan J. Richardson, *The Consumer Financial Protection Bureau at Five: A Survey of the Bureau’s Activities*, 21 N.C. BANKING INST. 85, 91–92 (2017); Noll, *supra* note 30, at 1039.

to advocate for it, saying that it would prohibit companies like Equifax from avoiding legal accountability.¹³²

3. Clashing Agencies and Organizations

The Equifax breach and continued Wells Fargo scandal almost killed support for repeal of the Final Rule, but the Office of the Comptroller of the Currency (“OCC”) released findings that caused a tilt in the other direction.¹³³ In September 2017, the OCC released a paper estimating the probable costs to consumers resulting from the Final Rule.¹³⁴ Then-acting Comptroller of the Currency Keith Noreika said at a fintech conference following the release of the paper that there could be as high as a 3.5% annual percentage rate increase in the cost of consumer credit.¹³⁵ However, the paper issued by the OCC admitted to some of the same weaknesses the CFPB faced with the Study, showing “substantial uncertainty” about the potential effects to the cost of consumer credit.¹³⁶ The OCC’s paper estimated an expected increase of 3.43% for customers of the institutions involved in the *Ross* settlements, the same data set analyzed by the CFPB to estimate the effects of the Final Rule on consumer costs.¹³⁷ Regardless, the uncertainty from both the CFPB and the OCC was concerning.¹³⁸

The United States Chamber of Commerce, together with other corporate lobbying groups, also joined the fight against the Final Rule by

132. See Elizabeth Warren (@SenWarren), TWITTER (Sept. 8, 2017, 12:52 PM), <https://twitter.com/SenWarren/status/906198646659715072> (“The @CFPB’s new rule would stop companies like @Equifax from avoiding legal accountability like this – as long as @GOP doesn’t reverse it.”).

133. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, OCC REVIEW: PROBABLE COST TO CONSUMERS RESULTING FROM THE CFPB’S FINAL RULE ON ARBITRATION AGREEMENTS (Sept. 20, 2017) (criticizing the Final Rule by presenting findings about the likelihood and magnitude of costs that would be passed onto consumers).

134. *Id.*

135. *Arbitration Rule to Raise Cost of Credit 25 Percent, OCC Study Finds*, ABA BANKING J. (Sept. 28, 2017) https://bankingjournal.aba.com/2017/09/noreika-arbitration-rule-to-raise-cost-of-credit-25-percent-occ-study-finds/?utm_campaign=ABA-Newsbytes-092917-HTML&utm_medium=email&utm_source=Eloqua.

136. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 133, at 3.

137. OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 133, at 4–5.

138. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 133, at 4–5 (“The magnitude of the likely effect on pricing is uncertain.”); see also ARBITRATION STUDY, *supra* note 33, § 10 at 6 (“We are unable to identify any such evidence from the data.”).

filing a lawsuit against the CFPB on September 29, 2017.¹³⁹ The complaint was filed in federal court in Dallas, and named the American Bankers Association, the American Financial Services Association, the Consumer Bankers Association, the Financial Services roundtable, and multiple Texas corporate lobbying groups as plaintiffs in addition to the Chamber of Commerce.¹⁴⁰ The complaint alleged that Dodd-Frank created an unconstitutional structure for the CFPB, that the Final Rule violates the Administrative Procedure Act because the Study was “deeply flawed,” and the Final Rule violates Dodd-Frank by failing to advance the public interest or consumer welfare.¹⁴¹

The attacks did not end with the OCC and Chamber of Commerce.¹⁴² On October 23, 2017, the Department of Treasury followed the OCC in issuing a statement against the Final Rule.¹⁴³ The report from the Treasury served to echo the OCC’s condemnation of the rule, but did not offer any new findings about the Final Rule’s impact on consumer costs.¹⁴⁴ Sam Gilford, a spokesperson for the CFPB, responded that the Treasury report did nothing more than bring up arguments that have already been analyzed in depth.¹⁴⁵

On the other end of the spectrum, the American Legion, the country’s largest veterans’ organization, joined prominent Democrats and consumer groups to oppose the resolution of disapproval.¹⁴⁶ The veterans’ organization remains concerned with unfair and burdensome lending practices targeting servicemembers and their families.¹⁴⁷ At the American Legion’s ninety-ninth national convention, it passed a

139. See Complaint for Declaratory and Injunctive Relief, Chamber of Commerce of U.S. v. CFPB, No. 3:17-cv-02670-D (N.D. Tex. Sept. 29, 2017) (complaint from lawsuit).

140. *Id.*

141. *Id.*

142. U.S. DEP’T OF TREASURY, LIMITING CONSUMER CHOICE, EXPANDING COSTLY LITIGATION: AN ANALYSIS OF THE CFPB ARBITRATION RULE (Oct. 23, 2017).

143. See *id.* (the statement).

144. See Kate Berry & Ian McKendry, *Fight to Kill CFPB Arbitration Rule Could Rest on Whose Data is Right*, AM. BANKER, Oct 23, 2017 [*hereinafter* Berry, *Fight to Kill CFPB Arbitration Rule*] (“The Treasury report did not present its own finding on projected consumer costs but instead praised the OCC’s review.”).

145. *Id.*

146. See THE AMERICAN LEGION, RESOL. NO. 83: PROTECT VETERAN AND SERVICEMEMBER RTS. TO FAIR CONSUMER ARBITRATION (Aug. 22–24, 2017) (“The American Legion oppose legislation to repeal the Consumer Financial Protection Bureau’s rule on arbitration agreement.”).

147. *Id.*

resolution in support of the Final Rule and, more specifically, against Congress repealing it.¹⁴⁸

A late-night vote by the Senate ended the Final Rule, with only two Republicans defecting from the vote: Lindsey Graham and John Kennedy.¹⁴⁹ Not only did the exercise of the CRA stop the Final Rule in its tracks, but it prevents the CFPB from writing a “substantially similar” rule without receiving congressional approval requiring sixty votes in the Senate.¹⁵⁰

Richard Cordray called the repeal “a giant setback” for consumers.¹⁵¹ Following the vote by the Senate, Cordray urged President Trump to veto the CRA repeal.¹⁵² In his letter to President Trump, Cordray admitted that he may be “wasting [his] time” by writing the letter, but wanted to make a personal appeal to the President to protect consumers anyway.¹⁵³ Cordray urged President Trump to follow the support of the American Legion and the Military Coalition by vetoing the repeal.¹⁵⁴ Despite Cordray’s personal appeal, President Trump signed the resolution of disapproval and put an end to the Final Rule.¹⁵⁵

This repeal and the events leading up to it highlight an ongoing battle with Cordray and the CFPB on one side, and the Trump Administration and Republican-controlled Congress on the other.¹⁵⁶ The repeal had full support from the Trump Administration working in its favor, with Vice President Pence acting as the tie-breaker.¹⁵⁷ With Noreika, a Trump appointee, as the temporary head of the OCC, the OCC

148. *Id.*

149. McKendry, *supra* note 6, at 2.

150. McKendry, *supra* note 6, at 2.

151. *See* McKendry, *supra* note 6, at 2 (statement of CFPB Director Richard Cordray) (“Wall Street won and ordinary people lost. Companies like Wells Fargo and Equifax remain free to break the law without fear of legal blowback from their customers.”).

152. Letter from Richard Cordray, Dir. of CFPB, to President Donald J. Trump (Oct. 30, 2017) (on file with the CFPB).

153. *Id.*

154. *Id.*

155. Evan Weinberger, *Trump Officially Kills CFPB Arbitration Rule*, LAW360 (Nov. 15, 2017), <https://www.law360.com/articles/980811/trump-officially-kills-cfpb-arbitration-rule>.

156. *See* Kate Berry, *Inside Cordray’s Ill-Fated Gamble on CFPB Arbitration Rule*, AM. BANKER, Oct. 26, 2017 [*hereinafter* Berry, *Inside Cordray’s Ill-Fated Gamble*] (arguing that the failure of the Final Rule was a result of a political miscalculation by Cordray, and that repeal could have been prevented by tempering the rule or waiting until a Democratic administration to finalize it).

157. Kate Berry, *Is Arbitration Win a Turning Point for Banks?*, AM. BANKER, Oct. 25, 2017 [*hereinafter* Berry, *Turning Point*].

newly inserted itself into the battle when it released its statement condemning the Final Rule.¹⁵⁸ The CFPB also had to cope with the Treasury reiterating the OCC's concerns, with Steven Mnuchin at the head of the Department, another Trump appointee.¹⁵⁹

4. The Trump Administration and the CRA

The use of the CRA also highlights a common theme of the Trump presidency so far.¹⁶⁰ The CRA allows Congress to review “major rules”¹⁶¹ and pass a resolution of disapproval to repeal them within sixty legislative days of the rule being published to the Federal Register.¹⁶² The CRA was enacted in 1996,¹⁶³ but had only been used to overturn a regulation once prior to the Trump Administration.¹⁶⁴ Since President Trump took office, the CRA has been used fifteen times to overturn Obama-era regulations.¹⁶⁵

The CFPB waiting too long to publish the Final Rule may have contributed to its failure.¹⁶⁶ The Study was published in 2015, and it took until the second half of 2017 for the Final Rule to be published.¹⁶⁷ The Final Rule may have fared better under the Obama Administration, giving

158. See Kate Berry, *OCC-CFPB Spat Takes Interagency Discord to a New Level*, AM. BANKER, Oct. 18, 2017 (“Before [Noreika] became acting comptroller in May, the OCC had not objected to the CFPB’s arbitration policy.”).

159. See U.S. DEP’T OF TREASURY, *supra* note 142 (prepared after Mnuchin was confirmed).

160. See Berry, *Four Questions*, *supra* note 114 (“Before this year, the Congressional Review Act was a relatively obscure vehicle for members of Congress to try to undo regulations on various sectors.”).

161. “Major rule” is defined as any rule which the Office of Information and Regulatory Affairs of the Office of Management and Budget finds is likely to result in (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation. 5 U.S.C. § 804(2) (2016).

162. 5 U.S.C. § 802 (2016).

163. *Id.*

164. In 2001, the CRA was used to overturn a Department of Labor rule. U.S. GOV’T ACCOUNTABILITY OFFICE, *Congressional Review Act FAQs*, <http://www.gao.gov/legal/congressional-review-act/faq> (last visited Jan. 24, 2018).

165. At the time this Note was published in February of 2018, the CRA was used fifteen times to pass resolutions of disapproval since President Trump took office. *Id.*

166. See Arbitration Agreements, 82 Fed. Reg. 33210, 33403 (July 19, 2017) (codified at 12 C.F.R. pt. 1040) (publishing the Final Rule to the Federal Register on July 19, 2017); ARBITRATION STUDY, *supra* note 33 (reporting to Congress in 2015 the results of the Study).

167. Arbitration Agreements, 82 Fed. Reg. at 33210; ARBITRATION STUDY, *supra* note 33.

the very President who appointed Cordray the opportunity to veto the repeal if the CRA was still utilized.¹⁶⁸ Instead, the CFPB published the Final Rule after President Trump took office and Congress began using the CRA to roll back regulations enacted under President Obama.¹⁶⁹ Additionally, the battle over the Final Rule waged while many were already speculating that Richard Cordray was going to step down or President Trump was going to find a reason to fire him.¹⁷⁰

B. Costs to the Banking Industry and Pass-Through to Consumers

While the criticisms from the OCC and the Treasury may have had political motivations at the forefront, the uncertainty of the pass-through costs to consumers was a fatal flaw for the Final Rule.¹⁷¹ The CFPB estimated that this rule would expose about 53,000 providers of consumer financial products and services to class actions.¹⁷² It estimated that this would result in 103 additional class action settlements in federal courts with an additional \$342 million paid out to consumers.¹⁷³

To analyze whether these additional awards and the expenses of defending these cases would pass on costs to consumers, the Study looked at the settlements in *Ross v. Bank of America*¹⁷⁴ in which certain credit card companies agreed to remove pre-dispute arbitration clauses from their consumer contracts for at least three and a half years.¹⁷⁵ Based on the *Ross* settlements, the CFPB found that there was not any “statistically significant evidence that the price of consumer credit card services increased after the *Ross* settlers eliminated pre-dispute arbitration clauses

168. See Berry, *Inside Cordray’s Ill-Fated Gamble*, *supra* note 156 (suggesting that the CFPB should have delayed the Final Rule until a Democratic administration).

169. See Berry, *Four Questions*, *supra* note 114 (“[The Congressional Review Act] has picked up steam under the Trump administration as leaders [in] both GOP-controlled houses of Congress look to reverse Obama-era rules.”).

170. See Elizabeth Dexheimer & Mark Niquette, *CFPB’s Cordray to Step Down, Allowing Trump to Remake Agency*, Banking Rep. (BNA) No. 19, at 2 (Nov. 16, 2017) (“Republicans have long urged Trump to remove Cordray, arguing that he lacks accountability and that the agency has stifled lending.”).

171. See Berry, *Fight to Kill CFPB Arbitration Rule*, *supra* note 144 (“[O]pposing sides in the arbitration debate – both in and out of government – are still battling over whose data is more credible.”).

172. Arbitration Agreements, 82 Fed. Reg. at 33403.

173. *Id.*

174. *Ross v. Bank of Am.*, No. 05 Civ. 7116(WHP), 2006 WL 36909 (S.D.N.Y. Feb. 23, 2010).

175. ARBITRATION STUDY, *supra* note 33, § 10.1, at 6.

from their credit card agreements.”¹⁷⁶ However, industry commenters and a trade association noted that the temporary nature of the moratorium and the fact that larger institutions like Bank of America are slow to change prices made the *Ross* case study inappropriate.¹⁷⁷

The CFPB asserted that the providers would have a larger incentive for compliance, and any costs passed onto consumers would be balanced by fewer harmful business practices by providers.¹⁷⁸ In addition to changes in conduct as the result of injunctive relief, the CFPB hoped that consumers would also benefit from the reporting requirements providing more transparency into arbitration, a process that has long benefited from the results being kept confidential.¹⁷⁹ The uncertainty of the extent of the costs being passed on to consumers was ultimately detrimental to the Final Rule.¹⁸⁰

C. *De Facto Ban on Arbitration*

While some consumer advocates wanted to see a complete ban of mandatory pre-dispute arbitration agreements in consumer financial service and product contracts,¹⁸¹ the CFPB chose instead to prohibit only class action waivers in the Final Rule.¹⁸² The CFPB did not claim that all arbitration proceedings are inherently unfair to consumers.¹⁸³ Not many consumers actually arbitrate disputes, but consumers who did participate in arbitration and ultimately prevailed on their claims were awarded more substantial individual awards, averaging about \$5,400 for the cases studied by the CFPB from 2010 to 2012.¹⁸⁴ Additionally, the CFPB did not identify an obvious bias favoring repeat players.¹⁸⁵

176. ARBITRATION STUDY, *supra* note 33, § 10.1, at 7.

177. Arbitration Agreements, 82 Fed. Reg. at 33238.

178. *Id.* at 33410.

179. *See id.* (“[P]rovisions . . . [will] provide greater transparency into the arbitration of consumer disputes.”).

180. *Id.*

181. *Id.* at 33252.

182. *Id.* at 33210.

183. *Id.* at 33252.

184. *Id.*

185. *Id.* at 33253.

Industry commenters argued that the Final Rule would amount to a total ban on arbitration.¹⁸⁶ If consumer financial service providers cannot use arbitration clauses to prevent the costs of defending class litigation, they argue, the Final Rule will end the practice of using arbitration in the financial services industry altogether.¹⁸⁷ This argument makes it seem like financial institutions favor arbitration clauses precisely because they preclude certain claims.¹⁸⁸

Considering the uncertainties that still remain about the effects of the Final Rule, particularly concerning the costs that will be passed on to consumers, the CFPB should have proposed a less ambitious rule.¹⁸⁹ In the Final Rule, the CFPB reserved the right to further regulate arbitration if the monitoring provision uncovered inherent unfairness in arbitration proceedings resulting from repeat player biases that the Study was unable to adequately quantify.¹⁹⁰ If the CFPB chose to simply continue data collection and implement the monitoring rule, but still reserved this right to further regulate the practice in the future, the Agency may have been able to craft a rule that could withstand interference from Congress.¹⁹¹ In the meantime, consumers and financial service providers could still use arbitration for its efficiency in individual actions, while the CFPB adopted a watchdog status over the practice.¹⁹² Consumer advocates may not have been as pleased with a rule with less teeth, but such a rule would have given the CFPB the ability to regulate more easily in the future.¹⁹³

186. See Frankel, *supra* note 18, at 287 (“[M]any in the financial services industry predict that if companies cannot use arbitration as a means of banning class actions, they will not use arbitration at all.”).

187. Frankel, *supra* note 18, at 286.

188. See Resnik, *supra* note 17, at 2 (“[D]espite the heralding of arbitration as a speedy and effective alternative to courts, the mass production of arbitration clauses has not resulted in ‘mass arbitration.’”).

189. See OFFICE OF THE COMPTROLLER OF THE CURRENCY, *supra* note 133, at 3 (uncertain costs); CFPB *supra* note 30, § 10.1, at 7 (no significant evidence of costs).

190. Arbitration Agreements, 82 Fed. Reg. at 33252.

191. See Berry, *Inside Cordray’s Ill-Fated Gamble*, *supra* note 156 (“Had the agency tempered the rule instead of banning all mandatory arbitration clauses in financial contracts, it could have avoided having it repealed by Congress.”).

192. See McHenry, *supra* note 21 (calling arbitration highly-effective, low cost and fair).

193. See Berry, *Inside Cordray’s Ill-Fated Gamble*, *supra* note 156 (“The CFPB’s loss has big consequences for the agency – under the Congressional Review Act, they are prevented from adopting a future rule that is ‘substantially similar.’”).

V. CONCLUSION

While the Study had its flaws,¹⁹⁴ the Final Rule was a step in the right direction for the CFPB to continue monitoring the practice of arbitration.¹⁹⁵ Most importantly, the Final Rule would have allowed consumers to seek relief against harmful conduct by providers, and consequently providers would have been pressured into changing questionable practices that spread small damages across large amounts of consumers.¹⁹⁶

Where the Study lacked the resources to appropriately study a large sample of arbitration proceedings, the monitoring provision would have allowed the CFPB to continue observing these practices.¹⁹⁷ Should a complete ban on arbitration agreements in consumer financial contracts have become necessary, the CFPB would have been able to make that determination at a later date.¹⁹⁸ However, financial institutions and their allies in Congress did not view the Final Rule as being the middle ground that the CFPB and its supporters did.¹⁹⁹

The flaws in the Final Rule may have resulted in a huge loss of opportunity for the CFPB.²⁰⁰ While repeal of the Final Rule does not mean the chance is gone forever, sixty votes in the Senate to give the CFPB permission to publish a substantially similar rule is unrealistic for the time being.²⁰¹ The repeal was a huge victory for big banks, and with Richard Cordray being replaced with a bank-friendly President Trump appointee, the possibility of a similar rule coming up again within the next few years is virtually nonexistent.²⁰²

194. McHenry, *supra* note 21.

195. Arbitration Agreements, 82 Fed. Reg. 33210.

196. *See* Arbitration Agreements, 82 Fed. Reg. 33210 (explaining the rule would allow consumers to sue where they previously could not); Reid, *supra* note 71 (claiming rule will pressure industry into better behavior); Resnik, *supra* note 17 (stating that class action suits will spread wealth from industry mistakes).

197. Arbitration Agreements, 82 Fed. Reg. at 33210.

198. *Id.*

199. *See* McHenry, *supra* note 21 (“[W]e urge you to... develop a less divisive, more reasonable approach that preserved arbitration as a viable, available, affordable means of dispute resolution and respects the decisions of consumers.”).

200. *See* Berry, *Inside Cordray’s Ill-Fated*, *supra* note 156 (explaining the significance of the repeal of the Final Rule on the CFPB’s ability to pass a similar rule in the future).

201. 5 U.S.C. § 801(b)(2) (2016).

202. Berry, *Turning Point*, *supra* note 157; *see* McKendry, *supra* note 6 (discussing whether this repeal will lead to more rollback of more bank regulations); *see* Dexheimer, *supra* note 170, at 5 (discussing the impact of Cordray’s resignation).

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*I am grateful to Roy Dixon, Patrick Conlon, Nancy Coppola, and Professor Lissa Broome for their comments and guidance during the writing and editing process. To my mom, stepdad, and brother, thank you for your endless support and encouragement throughout my law school career.