Republicans Introduce Bills to Scrap New Bank Arbitration Rule

Republican lawmakers in the House and Senate have introduced bills calling for the repeal of a just-announced regulation that would make it easier for consumers to bring class-action lawsuits against banks, reports ***The Los Angeles Times***.

The new Consumer Financial Protection Bureau rule would ban banks and other financial institutions from forcing arbitration clauses on customers to prevent them from bringing or joining class-action suits.

Some Republicans have introduced resolutions calling for use of the Congressional Review Act, which allows Congress to new regulations created by federal agencies, writes **James Rufus Koren**.

Read the *LA Times* article.

Should I Have an Arbitration Clause in My Construction

Contract?

Although it is typical for AIA form contracts to contain arbitration clauses, as a contractor you should consider whether you should have an arbitration clause in your construction agreement, advises **Paul W. Norris** of Stark & Stark.

In an article posted on the **New Jersey Law Blog**, Norris explains "there are numerous factors to consider in determining whether mandatory arbitration is the preferred dispute resolution mechanism, or whether the state court system is preferred. Although arbitration may have some advantages, there are also disadvantages which must be considered rather than simply adopting the AIA form."

He discusses the cost of the arbitration proceeding, judge or jury vs. an arbitrator, discovery during an arbitration process vs. the state court process, timeliness of the proceeding, judgments, and appeals from arbitration of a state court.

Read the article.

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CFPB Hits Back at Efforts to

Kill Rule Easing Bank Lawsuits

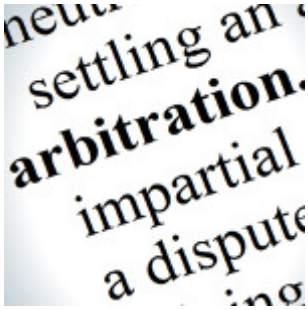
Just days after approving a controversial rule that will make it much easier for Americans to sue their banks, the U.S.'s top consumer watchdog is already fighting back against attempts to prevent the regulation from taking effect, **reports Bloomberg**.

Bloomberg's **Elizabeth Dexheimer** reports that Consumer Financial Protection Bureau Director Richard Cordray said there is "no basis" to claims that his agency's action will put the nation's financial system at risk. Cordray was responding to concerns raised by acting Comptroller of the Currency Keith Noreika, a regulator appointed by the Trump administration who had a long legal career representing banks.

Under the new rule, financial firms are restricted from forcing consumers to resolve their disputes through arbitration, a practice that has been used by the industry for years to keep grievances tied to payday loans, credit cards and other products out of courts.

Read the Bloomberg article.

Consumer Watchdog Makes It Easier to Sue Banks and Other Companies



The government's consumer watchdog has finalized a rule that will make it easier for people to challenge financial companies in court, reports ***The Washington Post***.

The new Consumer Financial Protection Bureau rule targets arbitration clauses, which can show up on user agreements for credit cards, bank accounts and other consumer products.

"As a condition for receiving services or products, consumers often give up their right to join a class-action lawsuit with these clauses, and instead agree to settle any disputes in a private process known as arbitration," writes the *Post*'s **Jonnelle Marte**.

Now the rule will ban companies from using these agreements to block consumers from joining group lawsuits. But supporters of arbitration say the clauses can help companies and consumers save money by minimizing legal costs.

Read the *Post*'s article.

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Post M&A Disputes: Breach of Indemnification Clauses in M&A Contract

Baker McKenzie's **Global Arbitration News** has posted an article discussing the difficult questions raised in both substantive and procedural law by indemnification clauses in share purchase agreements.

The author, **Dr. Philipp Schuett**, explains that the reason is that an indemnification dispute involves at least four parties: "The target company, the third party who raises claims against the target company, the seller (= the indemnitor) and the buyer (= the indemnitee)."

He then discusses the reasons to include indemnification clauses in SPAs, the scope and wording of indemnification clauses, the potential for disputes, and avoidance of post-M&A disputes.

Read the article.

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Drafting and Negotiating IP & IT Provisions in M&A Transactions

Practical Law will present a free 75-minute webinar with Rita Berardino, Senior Legal Editor, Practical Law Intellectual Property & Technology, and presenters from Wilson Sonsini Goodrich & Rosati, who will discuss IP and information technology (IT) considerations in drafting and negotiating M&A agreements.

The event will be Wednesday, June 28, 1-2:15 p.m. EDT.

Intellectual property and technology assets have become increasingly significant components of a company's business strategy and the focus of many M&A transactions, the company says on its website.

Topics will include:

- Common structures for M&A transactions.
- Key IP and IT provisions of M&A transaction documents, including:
    - Drafting and negotiation of IP and IT provisions.
    - How courts have interpreted these provisions.
- Key ancillary IP and IT agreements, including licenses and assignments.

A short Q&A session will follow.

Presenters:

- Manja Sachet, Partner, Wilson Sonsini Goodrich & Rosati
- Jason Greenberg, Associate, Wilson Sonsini Goodrich & Rosati
- Jennifer McGrew, Associate, Wilson Sonsini Goodrich &

Rosati
- Rita Berardino, Senior Legal Editor, Practical Law Practical Law IP&T (Moderator)

Register for the webinar.

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Tips for Drafting Arbitration Clauses in Smart Contracts

While arbitration may be a preferable alternative to court for smart contract disputes, it doesn't happen on its own – it typically requires a properly drafted arbitration clause, points out **Jared Butcher** in Steptoe & Johnson's **Blockchain Blog**.

Butcher discusses some aspects of the arbitration clause that should be re-considered when dealing with smart contracts.

The article covers the topics of arbitrator appointment, governing law and the arbitral body, forum selection, and summary dispositions.

Read the article.

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Using Arbitration Agreements to Reduce the Costs of Litigation and the Risk of Class Action Claims

A properly drafted arbitration clause with a class action waiver should be enforceable and can be a good and useful line of defense against expensive and costly litigation, especially class action lawsuits, write **Jay N. Varon** and **Jennifer M. Keas** in Foley & Lardner's **Consumer Class Defense Counsel** blog.

Their article explains how arbitration works, what type of arbitration agreements are generally enforceable, what features that have or can cause problems, and how such provisions can reduce the risk of class actions.

They also discuss the possible effect or non-effect that could come from the Consumer Financial Protection Bureau's proposed arbitration rule.

Read the article.

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Insight on Waiving Contractual Right to Arbitration

Bass, Berry & Sims attorney Chris Lazarini provided insight on factors a court should consider when determining whether a party has waived a contractual right to arbitration, the firm reports on its website.

"The factors, which are tied to potential prejudice to the non-moving party, include: (1) the time elapsed between commencement of litigation and the request for arbitration, and (2) the extent to which the moving party has participated in the litigation process," according to **Lazarini's article**.

His article examines the issue as presented in the case *Chehebar vs. Oak Financial Group, Inc.*, No. 14-2982 (E.D. N.Y., 3/7/17)

Read the article.

Arbitration Clauses Extending to Non-Signatory Affiliates:

Are They Enforceable?

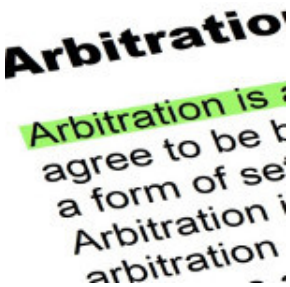


Image by NY Photographic

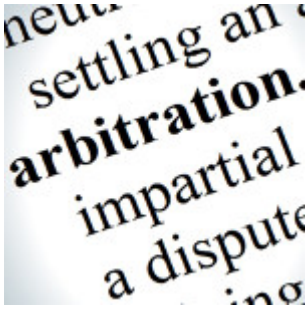
A recent decision of the New Jersey Appellate Division considered the enforceability of arbitration agreements by non-signatories, writes **Marissa Tillem** in Proskauer Rose's **Minding Your Business** blog.

She discusses a case in which the plaintiff filed a putative class action complaint against defendant alleging violations of New Jersey's Truth-In-Consumer Contract, Warranty and Notice Act, as well as the state's Lemon Law.

The panel determined, among other things, that by signing a lease agreement, plaintiff agreed to arbitrate her dispute not only with the underlying signatories of the lease, but with any of its affiliates. Now the plaintiff will need to decide whether to pursue her claims in arbitration, Tillem explains.

Read the article.

Is ‘Class Arbitration’ an Oxymoron?



“Class arbitration” – the utilization of a class action mechanism in an arbitration proceeding – is considered by some to be the unicorn of ADR; desirable but elusive, writes **Gilbert Samberg** on Mintz Levin’s blog, **ADR: Advice from the Trenches**.

“Another view is that it is the Frankenstein’s monster of ADR – an anomalous hybrid of disparate parts that comprise a disconcerting and ultimately nonviable creation,” he writes. “And so let us ask, is ‘class arbitration’ an oxymoron? Should it be viable given the essential nature of arbitration? And whither the emperor’s jurisprudential clothes?”

The Mintz Levin post is one in a series of posts concerning the concept, its theoretical roots, the current state of the law, implementation of the mechanism, the significance and effects of a class arbitration award, etc.

Read the article.

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Clear Arbitration Provision Deemed Enforceable

In his **Petes' Take** blog for Porzio, Bromberg & Newman, **Peter J. Gallagher** describes a New Jersey case in which a court ruled that a clear arbitration provision, negotiated by a sophisticated party while represented by counsel, is enforceable.

In Columbus Circle NJ LLC v. Island Construction Co., LLC, the appellate court held that the arbitration provision in the AIA contract used in this case satisfied the requirements to explain to the signer the possible consequences of giving up the right to adjudication in a court of law, Gallagher explains.

"By its terms, the provision required plaintiff to choose between arbitration and 'litigation in a court of competent jurisdiction,' therefore, when plaintiff chose 'arbitration,' it did so 'with full knowledge that arbitration [was] a substitute for the right to have [its] claim adjudicated in court.' Moreover, the Appellate Division noted that neither the LLC nor its sole member was 'an average member of the public,'" according to Gallagher.

Read the article.

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Drafting Arbitration Clauses in Construction Contracts

Many construction lawyers who specialize in transactional work acknowledge that they do not spend much time considering or negotiating the arbitration clauses in construction contracts, points out
Patricia H. Thompson in a post on the **website of JAMS**.

She addresses the question: Should an arbitration clause be just a boilerplate provision, taken "off the shelf," or should it be specifically negotiated and crafted for the particular construction project and to accommodate the parties' requirements?

The post lists some of the major questions to consider, such as: Should arbitration be mandatory or permissive? Should there be one or three arbitrators, should they all be neutral, and should they have particular qualifications or professional expertise? Should the arbitrator's power be broader or more limited than otherwise provided by relevant statutes or rules?

Read the article.

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Health Law: Is Your Arbitration Agreement Enforceable?

A recent decision of the Arizona Court of Appeals provides guidance for evaluation of the enforceability of arbitration agreements in the health care field, reports Snell & Wilmer in its **Health Law Checkup** blog.

Andrew Sniegowski explains that Gullett *v. Kindred Nursing Centers West, LLC* arose out of the plaintiff's claims that a rehabilitation center had abused and neglected his father, who lived there for the last month of his life. The plaintiff argued that the arbitration agreement was substantively and procedurally unconscionable.

The court determined that the agreement was substantively valid, but it remanded the case for further proceedings in the trial court limited to the issue of procedural unconscionability.

Read the article.

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Court: Arbitration Agreement Included In Product Manual Is Unenforceable

A recent ruling in a New Jersey federal count stated that a contractual term, like an arbitration clause, is binding only when the terms are reasonably conspicuous, rather than in a manner that de-emphasizes its provisions.

Writing in Carlton Fields' **Reinsurance Focus**, shareholder **Jeanne Kohler** described the case involving a Samsung smart watch. The suit accused the company of deceptive marketing and pricing. Samsung moved to compel arbitration, based on an arbitration provision on page 97 of a 143-page "Health and Safety and Warranty Guide" in the watch box.

The appellate court wrote that the clause "did not appear to be a bilateral contract, and the terms were buried in a manner that gave no hint to a consumer that an arbitration provision was within."

Read the article.

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Court Finds Contract and Arbitration Clause Unenforceable Due to Fraud in the Inception

The Ninth Circuit, in an unpublished opinion, has found that a contract, and therefore an arbitration clause within it, was unenforceable due to fraud in the inception, despite the fact that both parties had ample opportunity to review the contract in its entirety, reports **Reinsurance Focus**, a publication of **Carlton Fields Jorden Burt, P.A.**

"This result was required, the court found, because, assuming the allegations of the complaint to be true, the plaintiff did not know that by signing the contract it was agreeing to be a victim of defendants' scheme," writes **Jason Brost**.

The court cited a California Court of Appeals decision for the proposition that it was enough that defendants, as the party drafting the contract, drafted the contract "'in such a way as to not apprise' the other party of its intentions."

Read the article.

11th Circuit: Arbitration Clauses Are Like Makeup – They Only Cover So Much

In a pun-laden opinion, the Eleventh Circuit Court of Appeals affirmed a district court's ruling that the Kardashian sisters Kim, Kourtney and Khloe could not rely on the doctrine of equitable estoppel to compel plaintiff Kroma Makeup EU, LLC to arbitrate its claims, **reports TheTMCA.com**.

Those claims involved allegations of trademark infringement and tortious interference with contract.

As the court put it, "there is a wrinkle in this case: the arbitration clause which the non-party to the agreement is seeking to enforce is explicitly limited to disputes between the parties."

TheTMCA.com reports:

> The Eleventh Circuit first clarified that although federal law generally governs arbitration agreements, the "issue of whether a non-signatory to an agreement can use an arbitration clause in that agreement to force a signatory to arbitrate a dispute between them is controlled by state law," and that the parties "agree that Florida law controls on that issue."

Read the article.

When an Arbitration Clause Sounds Permissive But Is Not: Does 'May' Really Mean 'Must'?

Narges Kakalia of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo asks and then answers some pointed questions about arbitration in an article on the firm's ADR Advice website.

"Is an arbitration clause mandatory or permissive when it provides that either party to the contract *may* elect to submit a dispute to binding arbitration? What if the contract also provides that the right to arbitrate is not exclusive of any other rights that a party has to pursue legal action in an appropriate forum? Such an arbitration clause certainly sounds permissive. But courts have invested a lot of ink addressing the question, and (spoiler alert!) they have more or less consistently come to the conclusion that such a clause makes arbitration mandatory if any party chooses it," she writes.

She explains that many litigants and their lawyers misinterpret the real meaning fo the word "may" in this context.

Read the article.

Justices Will Hear Challenges to Mandatory Employee Arbitration

Image by NY Photographic

The U.S. Supreme Court has agreed to decide whether companies can use employment contracts to prohibit workers from banding together to take legal action over workplace issues, **reports *The New York Times***.

Adam Liptak writes that the court will consider three cases that follow a series of Supreme Court decisions endorsing similar provisions, generally in contracts with consumers. The question for the justices in the new cases is whether the same principles apply to employment contracts.

“In both settings, the challenged contracts typically require two things: that disputes be raised through the informal mechanism of arbitration rather than in court and that claims be brought one by one,” Liptak writes. “That makes it hard to pursue minor claims that affect many people, whether in class actions or in mass arbitrations.”

Read the *NYT* article.

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Contract Drafting for Dispute Resolution

John M. Newman of the Cecil C. Humphreys School of Law at the University of Memphis has compiled a guide to drafting for dispute resolution, covering mandatory-arbitration provisions, class waivers, choice of law, choice of venue, exculpatory and liquidated-damages clauses, fee and cost allocations, and more.

He writes that some defendant-friendly U.S. Supreme Court decisions, critical coverage in the popular press, and efforts by federal agencies to stymie the private sector's increasingly widespread use of contractual dispute-resolution provisions have made the topic particularly timely.

"In light of the growing importance of dispute-resolution provisions, this guide seeks to concisely identify and explore, from a transactional perspective, the relevant questions, considerations, and law relating to these powerful tools," Newman writes. "It also provides illustrative examples of well-drafted provisions, often drawn from real-world legal instruments. The target audience includes practitioners, scholars, businesspersons, and other analysts seeking to learn and apply best practices when planning and drafting for dispute resolution."

Read the article.

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