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Have **Class Arbitrations** Found New Life?

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Can a claim on behalf of a class of plaintiffs be handled effectively and fairly in an arbitration proceeding? Anecdotal opinions about that subject are expressed freely, but they often have questionable evidentiary bases. More information that may contribute to this discussion now is being made available by arbitral organizations, arbitral awards and court decisions involving class arbitrations and by the Consumer Financial Protection Bureau (CFPB). The CFPB also has proposed rulemaking for future consumer financial transactions that could encourage class arbitrations, perhaps in contexts other than those under CFPB jurisdiction.

Class arbitration has found little favor in the U.S. Supreme Court in recent years. Justice Antonin Scalia, writing for a majority of five in *AT&T Mobility v. Concepcion*,[1] found class arbitration inconsistent with basic goals of the Federal Arbitration Act because in his view it is slower than traditional individual party arbitration, more costly, "more likely to generate procedural morass than final judgment" and more formal. He added that class arbitration increases the risk to defendants of large, potentially devastating losses because of the absence of comprehensive judicial review. According to Scalia, the deferential judicial review of arbitral awards is "unlikely to have much effect" and "makes it more likely that errors will go uncorrected."

Similarly, in an amicus brief in another case, the Chamber of Commerce of the United States recently argued that "[c]lass arbitration is a worst-of-all worlds Frankenstein's monster" because "[i]t combines the enormous stakes, formality and expense of litigation … with exceedingly limited judicial review of the arbitrators' decisions."[2]

In spite of that critique and the widespread use of clauses in which the parties waive any right to arbitration on a class basis, class arbitrations continue to be filed and result in decisions. The American Arbitration Association (AAA) has recorded 473 class arbitrations on its docket under its Supplementary Rules for Class Arbitration over the past 12 years, including 35 new cases filed in 2011, 28 cases filed in 2012, 27 cases filed in 2013, 39 cases filed in 2014 and 32 cases filed so far in 2015. JAMS reports a smaller but similarly steady recent total: 17 cases filed as class arbitrations in 2013, 15 cases filed in 2014 and 14 class cases during the first half of 2015.[3]

In 2009, the AAA submitted a brief as amicus curiae to the Supreme Court in *Stolt-Nielsen SA v. AnimalFeeds International*,[4] not in support of either party but to provide the court with neutral data on use of class arbitration at that time. The AAA brief concluded that its "substantial experience under the Class Rules indicates that they have achieved their stated goals of … providing guidance to the parties and arbitrators, and a fair, balanced, and efficient means of resolving class disputes." Nevertheless, the AAA brief explained that during the first six years of this experience, in which 283 separate class arbitrations had been filed, "no class arbitration conducted under the Rules has resulted in a final award on the merits, although one such award is imminent." The AAA brief disclosed that most class arbitrations that survived a clause construction phase appeared to have settled: "182 cases commenced as class arbitrations have been settled, withdrawn or dismissed."

Since that time, some AAA class arbitrations have proceeded to merits awards. In July 2015, for example, the U.S. Court of Appeals for the Fourth Circuit affirmed a lower court decision confirming a lengthy class arbitration award in favor of 487,066 consumers using "credit repair" services.[5] After a Class Determination Award was made, some of the defendants entered into class-wide settlements (in undisclosed amounts), approved by the arbitrator, that resulted in an arbitral award of $2.6 million in attorney fees to counsel for claimants. The case proceeded to a merits hearing against the remaining two defendants. In the final award, the arbitrator declined to award actual damages, which would have been

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tiny for individual claimants, and instead issued a $2 million punitive damage award, as allowed by statute, paid in equal portions under the cy pres doctrine to two consumer protection organizations.

In another recent case, after years of interruptions due to various judicial appeals, an arbitrator granted certification to a class estimated to include 44,000 current and former female employees at retail jewelry stores who challenged their employer's pay and promotion practices as inconsistent with federal statutes. In a 118-page award, the arbitrator certified a class only on disparate impact claims, based on identification of specific challenged policies and procedures. She declined to certify disparate treatment claims, finding that they did not satisfy the commonality requirement of the AAA Class Rules. The arbitrator left open the possibility that claimants might seek an "opt-in" class for their disparate treatment claim. Motions concerning the award reportedly remain pending.[6]

This sort of experience might lead one to ask whether outcomes in class arbitrations are really very different from class actions in U.S. courts. There has been no record of widespread complaints of procedural irregularities or unfairness in such cases, and class arbitrations can result in settlements administered much as class settlements in courts would be and in merits awards.

In an arbitration study published in March 2015,[7] the CFPB surveyed extensive data on both arbitration and court proceedings involving selected types of consumer financial transactions. The arbitration data was supplied by the AAA, covering 1,847 cases filed in the three years 2010 through 2012, only two of which were class claims. The court data included both individual small claims court filings and class action claims and settlements over a more extended time period. The CFPB therefore did not have the data needed to draw any meaningful conclusions about class arbitrations; but its data confirmed the general understanding that class actions in court normally are either settled or dismissed. Very few such cases end in final judgments on the merits.

The pervasiveness of settlements also was clear from the CFPB data on individual, non-class consumer financial cases. With respect to outcomes in individual arbitrations, the CFPB study found that less than one third of claims were resolved on the merits and that "the majority of cases ended in what may have been a settlement." In litigation, the CFPB study found that "over half of the individual cases filed in federal court ended in a known settlement and another 40% resulted in what may have been a settlement."

On Oct. 7, 2015 the CFPB announced potential rulemaking on arbitration agreements involving future consumer financial transactions within its jurisdiction.[8] The CFPB proposals, which are subject to review by a Small Business Review Panel before the CFPB can begin actual rulemaking, suggest three possible approaches to arbitration clauses in consumer finance agreements. The CFPB rejected the first, which would prohibit all such arbitration clauses, and instead favored a rule that would require the clauses to state explicitly that the arbitration agreement is inapplicable to cases filed in court on behalf of a class unless and until class certification is denied or the class claims are dismissed. Thereafter, individual claims could be required to proceed only in arbitration.

The CFPB also considered but did not endorse a third proposal, which would have given consumer financial services providers discretion to use arbitration agreements that required that class proceedings be conducted only in arbitration, instead of court, "provided those arbitration proceedings satisfied minimum standards of fairness." The CFPB noted that there had been relatively little use of class arbitration in the cases it studied and said that "industry groups have expressly stated that class litigation is preferable to class arbitration," citing the U.S. Chamber of Commerce position. The CFPB therefore declined to endorse a clause that would allow business to require all class claims to be brought in arbitration.[9]

But the CFPB added that the proposal it is considering "would permit an arbitration agreement that allows for class arbitration provided a consumer could not be forced to participate in class arbitration instead of class litigation. In other words, an arbitration agreement that allowed a consumer to choose whether the claim is filed in a class case in court or in arbitration would be permissible under the proposal (but one that permitted the claim to only be filed in arbitration would not be permissible)."

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The CFPB proposal does not yet include any specific clause language that would articulate how this consumer option to file a class claim either in court or in arbitration might be expressed, and the CFPB solicits comments on all aspects of its proposals (which also include a suggestion that regulated businesses might be required to submit copies of all consumer arbitral claims and awards to the CFPB for study and potential publication, involving possibly significant expense for small businesses).

The CFPB recognizes that the effect of its proposals probably would be to increase class action litigation, which has been criticized as an "imperfect tool,"[10] but nonetheless concludes that consumer finance business entities likely would *prefer* such litigation to class arbitration. The CFPB found that most clauses with class action prohibitions include anti-severability language "stating that if a court concludes that the no-class arbitration provision is not enforceable, the entire arbitration agreement also should be deemed to be unenforceable to prevent a court or arbitrator from mandating class arbitration, thereby demonstrating that companies have effectively chosen class litigation in court over class arbitration." In view of this presumed preference, the CFPB solicits comments on the extent to which businesses "would choose to remove arbitration agreements from their contracts entirely as opposed to including new language" of the type that the CFPB would propose.

On the basis of the continuing arbitral experience with class arbitration, which does not appear to have led to widespread complaint, regulated consumer financial enterprises might have reason to consider whether the CFPB's assumption that they prefer increased class actions rather than class arbitration is well based. For example, experience may show that, from their own court experience, arbitrators selected for class arbitrations can be as experienced in the substantive law involved and in class action procedures as some judges.

Do appellate courts really "control" the settlement/litigation process in class actions more strictly than they would in the case of class arbitrations? This conclusion seems worthy of further investigation on the basis of what now is happening. As Justice Stephen G. Breyer asked on behalf of the dissenting four members of the court in *Concepcion*, "Why would a typical defendant (say, a business) prefer a judicial class action to class arbitration?"[11]

Class arbitration is continuing, though certainly not flourishing. Whatever the outcome of the CFPB's proposals, they are likely to draw attention to the possible rediscovery of class arbitration in a variety of contexts.

1. 563 U.S. 333 (2011).
2. Brief for Chamber of Commerce of the United States of America as Amicus Curiae in Support of Plaintiff-Appellants, *Marriott Ownership Resorts v. Sterman*, No. 15-10627 at 9 (11th Cir. April 1, 2015).
3. Information on file with the authors.
4. Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party, *Stolt-Nielsen S.A. v. AnimalFeeds International*, No. 08-1198.
5. *Jones. v. Dancel*, 792 F.3d 395 (4th Cir. 2015).
6. *Jock v. Sterling Jewelers*, AAA Case No. 11-20-0800-6655. See Samuel Estreicher and Kristina A. Yost, "'Jock': Employment Class Arbitration Allows Disparate Impact Claims," N.Y.L.J. April 20, 2015.
7. Bureau of Cons. Fin Prot. Arbitration Study: Report to Congress, pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act sec. 1028(a) (March 2015), available at http://www.consumerfinance.gov/reports/arbitration-study-report-to-congress-2015/.
8. Bureau of Cons. Fin Prot. Small Business Advisory Review Panel for Potential Rulemaking on Arbitration Agreements: Outline of Proposals Under Consideration and Alternatives Considered (Oct. 7, 2015), available at http://www.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf.
9. Id. at 18.
10. Id. at 15 ("The Bureau understands that class lawsuits have been subject to significant criticism that regards them as an imperfect tool that can be expensive and cumbersome for all parties. However, …").
11. 131 S.Ct. at 1759.