

The New Arbitration Rule: The End for Now.

November 29, 2017 | Nora Udell

Have you heard the news? The Arbitration Rule is no more!

The Vote.

In a close vote (50 Republican Senators and Vice President Pence's tie-breaking vote), the Senate approved the House Resolution of Disapproval under the Congressional Review Act to repeal the Consumer Financial Protection Bureau's Arbitration Rule. Senator Lindsey Graham, Senator John Kennedy, the Senate Democrats and Senator Sanders voted to reject the Resolution.

President Trump signed the Joint Resolution with little fanfare (and no tweets) on November 1st. As a result, financial service companies can continue to use mandatory arbitration agreements to avoid class action litigation.

The Treasury's Report.

The day before the Senate's vote, the Treasury Department released a Report examining the Bureau's Rule and its supporting study. The Report examined the data the Bureau relied on to support the Rule. According to the Treasury, the ban would have:

- resulted in more than 3,000 additional class action lawsuits over the next five years;
- imposed more than \$500 million in additional legal defense fees;
- transferred \$330 million to plaintiffs' lawyers; and
- resulted in little, if any, monetary benefit for consumers.

The Treasury found that the Bureau failed to conduct a meaningful cost-benefit analysis. According to the Treasury, the Bureau failed to consider the fact that:

- in more than 85% of class actions, most plaintiffs recover nothing;
- in the average successful class action, the plaintiffs' attorney earns \$1 million payment, while each consumer is entitled to receive only \$32; and
- only 4% of the consumers claim the \$32.

The Treasury concluded that the Bureau failed to adequately consider whether the Rule would advance consumer protection or serve the public interest, as required by the Dodd Frank Act.

Now what?

Under the Congressional Review Act, the Bureau cannot reissue the rule "in substantially the same form" or make a new rule that is "substantially the same as" the disapproved rule, unless Congress passes a new law authorizing the Bureau to do so. See 5 U.S.C. § 801(b)(2). We don't expect Congress to enact a law that limits the use of mandatory arbitration agreements any time soon. So, it's the end of the Arbitration Rule, for now.

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