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Consumer Data Breach: Equifax and Arbitration

Matthew H. Adler (Pepper Hamilton LLP) · Monday, October 23rd, 2017

The latest large consumer data breach, this time involving Equifax, has also shed a sharp light on an ongoing controversy about consumers' access to justice. In taking steps to ameliorate its PR crisis, Equifax found itself right in the middle of the dispute about class actions and arbitration clauses.

On September 7, Equifax revealed that the personal data of 143 million individuals was potentially compromised. In response, Equifax created a website for consumers to identify whether they were one of the 143 million victims. Equifax then offered victims free credit monitoring. So far, so good, right, in terms of proactively getting out in front of a controversy? But then Equifax stepped on its own tail. In order to sign up for the free service, Equifax required that consumers agree to its terms of service, including this language:

> ***Agreement to resolve all disputes by binding individual arbitration.*** Please read this entire section carefully because it affects your legal rights by **requiring arbitration of disputes** (except as set forth below) and a **waiver of the ability to bring or participate in a class action**, class arbitration or other representative action. Arbitration provides a quick and cost effective mechanism for resolve disputes, but you should be aware that it also limits your rights to discovery and appeal.

This created a backlash for Equifax. Consumers objected that by signing up for the free monitoring service, they would effectively waive any right to legal recourse against Equifax for the data breach. In response to the further bad press this created, Equifax reversed course and deleted the arbitration clause: "In response to consumer inquiries, we have made it clear that the arbitration clause and class action waiver included in the Equifax and TrustedID Premier terms of use does not apply to this cybersecurity incident." (A Progress Update for Consumers, September 8, 2017)

Two days later, Equifax issued another statement, further clarifying its position, stating that it had removed the arbitration and class waiver language from the website and that victims would not waive any rights by signing up for the free protection. (A Progress Update for Consumers, September 13, 2017)

Why all the fuss about what might look to many like legal boilerplate? Because over the last decade, fueled by a number of US Supreme Court cases, arbitration clauses have been used to change consumer litigation. Businesses have administered an effective one-two punch, first requiring consumers to agree to arbitration in their contracts (such as credit card, cable TV and cell phone agreements), and then second, including language in that arbitration which bars the consumer from joining in a class action over any grievance that may arise under the agreement. No courts, no massive suits – just individual versus business on a single issue and contract.

Arbitration has long been judicially blessed[1)] but its combination with class action waivers is of more recent vintage. Like a hurricane picking up force, arbitration's swallowing up of class action rights came in a series of US Supreme Court opinions beginning in 2011. The first case, AT&T Mobility LLC v. Concepcion, faced head on a California rule designed to prevent precisely what has since occurred. That state law made class action waivers in arbitration agreements unenforceable.[2)] The majority found the state rule to be an attack on arbitration that was contrary to the Congressional purpose of the Federal Arbitration Act (FAA) to promote arbitration.[3)] Justice Breyer's dissent focused on the disincentives of lawyer to take on small consumer cases: "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[4)] As the Seventh Circuit similarly found, "[t]he *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."[5)]

The Supreme Court took this further in *Am. Express Co. v. Italian Colors Rest*, 133 S. Ct. 2304 (2013). In that case, the Court held that courts must enforce class action waivers even when doing so may effectively prevent an individual from being able to meaningfully vindicate his rights.[6)] In *Italian Colors*, an antitrust plaintiff argued that it had to hire an expert to have a chance of winning, but could not afford that expert unless plaintiff could join with others in the case and pool that cost. The Court upheld the class action waiver anyway, prompting these sharp remarks from Justice Kagan in dissent: "The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad."[7)]

All this led to a legislative and administrative backlash under the Obama Administration. In 2010, as part of the Dodd Frank reforms, Congress created the Consumer Financial Protection Bureau (CFPB) and directed the new agency to study and promulgate regulations on the use of mandatory arbitration provisions in consumer financial contracts. The CFPB released its study in 2015. It criticized mandatory arbitration provisions and specifically called out the use of class action waivers. In July 2017, the CFPB issued a rule that goes far, prohibiting "providers of certain consumer financial products and services" from including class action waivers in arbitration agreements.

The irony and anomaly of the CFPB rule is that the underlying study took so long that by the time the rule finally issued, there was a new Administration and new Congress. Whether the rule survives that change is a pending and close question. The Rule's fate oddly resembles that of Obama care: it was rolled back in the House this past July, but the Senate has so far not even scheduled a vote.

Even if Congress never acts, the new CFPB rule may face its demise in the courts. On September 29, the US Chamber of Commerce and other organizations filed suit in federal court in Texas claiming the rule violates both the Administrative Procedures Act and the agency's organic act, Dodd Frank, because it fails to advance the public interest or consumer welfare. To add to the mix, this week the Supreme Court will hear argument on whether class action waivers conflict with the National Labor Relations Act.[8)]

Into this controversy between the courts, the agencies, Congress, and business and consumer groups stepped Equifax. In trying to appear to be doing something valuable for consumers, it stubbed its toe by creating precisely the kind of clause that has so infuriated consumer activists. That Equifax's attempt received such immediate publicity met by such an immediate retraction shows that passions run high. The debate on this thorny social issue of access to justice promises to be an ongoing battle irrespective of the outcome of Congressional action.

References

?1 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

?2 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011).

?3 *Concepcion*, 563 U.S. at 346–47.

?4 *Concepcion*, 563 U.S. at 365.

?5 *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in original).

?6 *Italian Colors*, 133 S. Ct. at 2306; see also *DIRECTV v. Imburgia*, 136 S. Ct. 463 (2015).

?7 Id. at 2313.

?8 *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris* and *National Labor Relations Board v. Murphy Oil US*.

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