MEMORANDUM

DOCKETS:	Federal Register Citation: 81 FR 47863 CFR Sections Affected: 12 CFR 1041 Docket No.: CFPB-2016-0025 RIN: 3170–AA40 Federal Register Citation: 81 FR 32829 Document No.: 2016-10961 Docket No.: CFPB-2016-0020 RIN: 3170-AA51
DATE OF EX PARTE COMMUNICATION:	May 18, 2017
SUBJECT:	Meeting with Americans for Financial Reform member organizations to discuss various consumer finance issues, including the Notice of Proposed Rulemaking on Payday, Vehicle, Title, and Certain High-Cost Installment Loans and the Notice of Proposed Rulemaking on Arbitration Agreements
PARTICIPANTS:	Andrew Rogers, American Association for Justice Lisa Donner, Americans for Financial Reform Jose Alcoff, Americans for Financial Reform Alexis Goldstein, Americans for Financial Reform, by phone Brian Marshall, Americans for Financial Reform Amanda Werner, Americans for Financial Reform/Public Citizen Joe Valenti, Center for American Progress Rebecca Borne, Center for Responsible Lending, by phone Mike Calhoun, Center for Responsible Lending Diane Standaert, Center for Responsible Lending Ruth Susswein, Consumer Action Michael Best, Consumer Federation of America Pam Banks, Consumers Union Rashmi Rangan, Delaware Community Reinvestment Action Council, by phone Christine Hines, National Association of Consumer Advocates Alys Cohen, National Consumer Law Center Renato Rocha, National Council of La Raza Debby Goldberg, National Fair Housing Alliance Josh Silver, National Community Reinvestment Coalition Andy Morrison, New Jersey Citizen Action, by phone Liz Ryan-Murray, People's Action, by phone

	Kalitha Williams, Policy Matters Ohio, by phone Remington Gregg, Public Citizen Jennifer Wang, The Institute for College Access and Success Rob Randhava, The Leadership Conference Ed Mierzwinski, U.S. PIRG
CFPB STAFF:	Director Cordray Benjamin Cady Keo Chea Alicia Criado Erik Durbin Ren Essene Eric Goldberg Gail Hillebrand Jonathan Lanning Mark Morelli Brenda Muniz Shaba Nassar David Pope Terry Randall Paul Rothstein David Silberman Laura Udis Julie Vore Katherine Welbeck Richard Williams
MEMO PREPARED BY:	Brenda Muñiz, Community Affairs, CFPB

On May 18, 2017, the CFPB staff identified above met with representatives of American Association for Justice, Americans for Financial Reform, Center for American Progress, Center for Responsible Lending, Consumer Action, Consumer Federation of America, Consumers Union, Delaware Community Reinvestment Action Council, National Association of Consumer Advocates, National Consumer Law Center, National Council of La Raza, National Fair Housing Alliance, National Community Reinvestment Coalition, New Jersey Citizen Action, People's Action, Policy Matters Ohio, Public Citizen, The Institute for College Access and Success, The Leadership Conference, and U.S. PIRG to discuss consumer finance issues, including the Bureau's Notice of Proposed Rulemaking on Payday, Vehicle, Title, and Certain High-Cost Installment Loans and the Notice of Proposed Rulemaking on Arbitration Agreements. A summary of the discussion related to the Bureau's open rulemakings is attached along with documents provided by meeting participants.

cfpb Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

ATTACHMENTS:

Readout of Discussion on Small Dollar Lending and Arbitration at Meeting with Director Cordray and Americans for Financial Reform, May 18, 2017.

House Liberty Caucus statement on H.R. 985, March 9, 2017.

Gretchen Carlson says ending mandatory arbitration "has become my mission" by Jim Spencer, Star Tribune, March 8, 2017.

Ending Forced Arbitration is a No-Brainer by Dean Clancey, April 17, 2015.

Conservatives Should Oppose Forced Arbitration by Dean Clancey, September 11, 2015.

Two Cheers for CFPB's Forced Arbitration Ban by Dean Clancey, October 7, 2015.

Good News: CFPB Bans Forced Arbitration by Dean Clancey, May 5, 2016.

Wells Fargo Scandal Puts GOP in a Bind by Dean Clancey, September 22, 2016.

Will Trump Revive Unconstitutional Forced Arbitration Clauses by Dean Clancey, February 13, 2017.

Readout of Discussion on Small Dollar Lending and Arbitration at Meeting with Director Cordray and Americans for Financial Reform One Constitution Square, Room 1201 Thursday, May 18, 2017, 1:00 PM – 2:00 PM

External participants: Andrew Rogers, American Association for Justice, Lisa Donner, Jose Alcoff, Alexis Goldstein, Brian Marshall, Amanda Werner, Americans for Financial Reform; Joe Valenti, Center for American Progress; Mike Calhoun, Diane Standaert, Center for Responsible Lending; Ruth Susswein, Consumer Action; Michael Best, Consumer Federation of America; Pam Banks, Consumers Union; Christine Hines, National Association of Consumer Advocates; Alys Cohen, National Consumer Law Center; Renato Rocha, National Council of La Raza; Debby Goldberg, National Fair Housing Alliance; Josh Silver, National Community Reinvestment Coalition; Liz Ryan-Murray, People's Action; Remington Gregg, Public Citizen; Jennifer Wang, The Institute for College Access and Success; Rob Randhava, The Leadership Conference; Ed Mierzwinski, US PIRG.

External participants (via phone): Rebecca Borne, Center for Responsible Lending; Rashmi Rangan, Delaware Community Reinvestment Action Council; Andy Morrison, New Jersey Citizen Action; Liz Ryan-Murray, People's Action; Kalitha Williams, Policy Matters Ohio.

CFPB staff participants: Front Office: Director Richard Cordray; Consumer Education and Engagement: Gail Hillebrand and Richard Williams; External Affairs: Keo Chea, Alicia Criado, Brenda Muniz, David Pope, Shaba Nassar, and Katherine Welbeck; Research, Markets, and Regulations: Benjamin Cady, Erik Durbin, Eric Goldberg, Jonathan Lanning, Mark Morelli, Terry Randall, Paul Rothstein, David Silberman, Laura Udis, and Julie Vore; Technology and Innovation: Ren Essene.

Top Takeaways:

Director Richard Cordray and cross-Bureau staff met with the Americans for Financial Reform (AFR) coalition. Although other issues were discussed, this summary reflects only comments made about small dollar lending and arbitration, which are both currently subject to open rulemakings.

Small Dollar Lending

- Mike Calhoun, Center for Responsible Lending (CRL), urged quick action on finalizing the payday rule. He recommended that if the Bureau cannot issue a rule soon covering both short-term and longer-term loans, it bifurcate the rulemaking by first tackling the abuses of the short-term loan market and then later issuing a rule addressing long-term installment lending.
- He highlighted the findings of a CRL poll showing that 80% of consumers across demographics and political affiliation want a strong payday rule.
- Renato Rocha, National Council of La Raza (NCLR), thanked the Bureau for its proposed payday rule. He stated that Latino communities are targeted and experience a higher concentration of payday lenders in their neighborhoods; NCLR has collected 7,000 signatures in support of a strong rule.

- Kalitha Williams, Policy Matters Ohio, described a steady erosion of consumer protections in her state of Ohio. She underscored that payday lenders have never registered with the state and have never became subject to the usury cap, enabling them to charge up to 800% interest. She also said that unauthorized title lenders are operating in her state and that lenders have moved from short-term lending toward long-term lending to evade the Bureau's forthcoming rule. She noted legal attempts to curb these loans have been unsuccessful.
- Rashmi Rangan, Delaware Community Reinvestment Action Council, explained that legislation passed in Delaware in 2012 capped short-term small dollar loans to a maximum of five per year. In response, payday lenders shifted to longer-term loans.
- Andy Morrison, New Jersey Citizen Action, said that payday lenders are shifting toward "flex loans" which are long-term, revolving lines of credit in New Jersey. He also said that state lawmakers have delayed regulation of these loans until the Bureau issues a final rule.
- Diane Standaert, Center for Responsible Lending, highlighted state legislative efforts to curb payday lending. She said that some payday lenders still offer short-term loan products and have resisted state efforts to lengthen the short-term loan window from 14 to 30 days.
- Liz Ryan-Murray, People's Action, urged the Bureau to issue a final rule. She stated that if the Bureau issues a short-term rule, then it should signal that a strong long-term rule is forthcoming.

Arbitration

- Amanda Werner, Americans for Financial Reform (AFR), urged the Bureau to finalize its arbitration rule as soon as possible. She explained that more state, local, military, veteran, and faith groups support the Bureau's proposed rule. She also referenced an uptick in news coverage on the issue.
- Christine Hines, National Association of Consumer Advocates, referred to a proposed Californian bill that would allow class action claims to be brought against Well Fargo, which uses arbitration clauses in its contracts. She also highlighted arbitration litigation at the state level where debt collectors have successfully invoked the arbitration clauses in original contracts used by institutions, such as Navient.
- Andrew Rogers, American Association for Justice, referenced a House Liberty Caucus letter in opposition to House bill, H.R. 985, "Fairness in Class Action Litigation Act," which would significantly limit the ability of a federal court to certify any class.

house
liberty
caucus

House Liberty Caucus statement on H.R. 985, Fairness in Class Action Litigation Act of 2017

March 9, 2017

The House Liberty Caucus urges opposition to H.R. 985, the Fairness in Class Action Litigation Act of 2017. This bill benefits bad actors by making it significantly more difficult for persons to assert their rights through the court system.

Class action lawsuits are a market-based solution for addressing widespread breaches of contract, violations of property rights, and infringements of other legal rights. They are a preferable alternative to government regulation because they impose damages only on bad actors rather than imposing compliance costs on entire industries. They also help the judiciary by consolidating a multitude of similar cases, which decreases burdens on the already clogged court system.

H.R. 985 adds immense procedural hurdles for class action plaintiffs. For example, it requires plaintiffs to affirmatively demonstrate that every member of the class suffered the same injury. Under a literal reading of this rule, even if thousands of people in a group were injured, the case could not proceed if a single member suffered a different type or different severity of injury. This allows bad actors to avoid massive liability just because their victims cannot be sorted into a perfect group in which every person has the same injury.

The bill violates the freedom of contract and makes redress unnecessarily difficult for injured victims. It limits the amount of money that plaintiffs' lawyers can earn from their work on class action lawsuits and restricts when they can receive compensation, while putting no such requirements on defendants. This inherently limits access to legal counsel and creates an uneven playing field.

Matt Weibel
Executive Director
House Liberty Caucus

Gretchen Carlson says ending mandatory arbitration 'has become my mission'

At the U.S. Senate, the former Fox News anchor talks of sexual harassment case and the inability to go to trial.

By Jim Spencer Star Tribune
MARCH 8, 2017 — 9:36AM

Gretchen Carlson, the former Fox News anchor who sued network boss Roger Ailes for sexual harassment, at the home of her lawyer in Montclair, N.J., July 12, 2016.

WASHINGTON – Former Fox News anchor Gretchen Carlson stood in a Senate meeting room Tuesday and talked about sexual harassment. The Minnesota native and former Miss America did not discuss the particulars of her claims of inappropriate conduct that cost Fox News chief Roger Ailes his job. Carlson focused instead on mandatory arbitration clauses in employment contracts that can turn cases like hers into dirty little secrets. Arbitration that forces employees into secret hearings conducted by company-picked decisionmakers "silences survivors of sexual harassment," Carlson said.

She spoke surrounded by Minnesota Sen. Al Franken and other Democratic members of the Senate and House who are introducing various measures to allow aggrieved employees and customers a day in court if they so choose.

So far, business interests, led by the U.S. Chamber of Commerce, have fought off efforts to circumvent arbitration clauses that fill the fine print of millions of employment and service agreements.

Opponents call legislative and regulatory measures that allow class-action lawsuits as an alternative to mandatory arbitration a "gift to plaintiffs' lawyers" rather than to those who might sue.

Carlson said she hoped Congress "would take an extra look this time around, because specifically around the issue of sexual harassment, the floodgates have been opened."

Said Carlson: "I really do think life works in mysterious ways, and this has become my mission."

Franken, who failed in an attempt to pass a forced arbitration bill last year, praised Carlson as an inspiration for other women who have been sexually harassed at work, making sure they know they are not alone.

Carlson was not alone in her criticism of mandatory arbitration at Tuesday's news conference.

Kevin Ziober, a Navy reservist, said his company fired him when he told his bosses that he was being deployed to Afghanistan for a year in 2012. Ziober tried to sue under a federal law that supposedly keeps companies from retaliating against deployed members of the military. But a federal appeals court ruled that his company had the right to force him into mandatory arbitration because it was included in the employment contract he signed. Ziober said he will ask the U.S. Supreme Court to hear his case. However, the high court has backed forced arbitration on earlier occasions. So the solution needs to be legislative, Franken and others said.

Franken knows that, in a Republican-run Congress, he and other Democrats face long odds to pass laws that provide legal alternatives to mandatory arbitration clauses. Still, he believes situations like Carlson's and Ziober's represent a call to action. Mandatory arbitration, he said, "is a permission slip to opt out of the justice system."

APRIL 17, 2015 BY DEAN CLANCY

Ending Forced Arbitration Is a No-Brainer

Republicans should wait before denouncing Obama's upcoming rules.

The Obama administration is preparing to issue consumer protection regulations that will force Republicans to choose between their Wall Street allies and the Seventh Amendment right to a jury trial in civil cases. Republicans will be tempted to denounce the new rules as yet another example of this president's customary imperial overreach, but on this issue, they should stop and take a second look.

The problem is called forced arbitration, and if you've ever taken the time to read a consumer service contract or end-user license agreement before signing it (which makes you an admirable human being, and very rare), you'll almost certainly have seen a clause that revokes your right to go to court in case of a breach of the agreement by the corporation.

Such clauses are found everywhere, from credit cards and checking accounts to cable TV and car rentals. When you sign, you agree to accept the decision of a private, for-hire arbitrator. Unfortunately, the arbitrator is usually hired by the same company that breached the agreement and is not legally required to follow statutory or common law precedents. Its decisions are almost impossible to appeal. Most consumers have no idea that's what they're agreeing to.

Enter the Consumer Financial Protection Bureau, which has been authorized by Congress to step in to study this problem and, based on its findings, restore Americans' ability to hold financial institutions accountable. Under the Dodd-Frank Act of 2010, the bureau is authorized to issue regulations that limit or ban the use of forced arbitration in consumer financial services and products. Regulations to do just that are expected to be promulgated sometime this year.

The regulations may turn out to be poorly framed or excessive – we're talking about the same administration that gave us Lois Lerner and executive amnesty, after all – but the problem Congress wanted the agency to address is real.

Recently, while traveling to Topeka on business, I needed to rent a car. I stopped at the Thrifty counter at the Kansas City airport. While filling out the usual paperwork, I asked the gentleman behind the counter, "What happens if I don't check this box that says I waive my right to sue?" He blinked at me uncomprehendingly for a moment and then replied, "Um, it means you don't get the car." I checked the box, disgusted. My destination was 80 miles away, I was in a hurry, and I didn't have time to haggle or shop around with Thrifty's competitors, all of whom undoubtedly have the same policy.

Today, a big company like Thrifty can effectively insist that we waive our Seventh Amendment rights on a "take it or leave it" basis; and market forces are not sufficient to police the problem. We're stuck. And it isn't just car rentals. When you buy a hair dryer or click "I agree" to a software download, you're probably forfeiting your right to go to court.

Statistics show that, more often than not, the arbitrator hired by the company you're disputing with will rule in the company's favor, likely because he's eager to be hired again by that company in the future.

Even consumers who think they understand what they're signing usually have no clear idea of how arbitration really works. They mistakenly equate it with mediation or some other court-like procedure. In reality, forced arbitration is conducted in secret and lacks the procedural safeguards that allow consumers to prove their case. Arbitrators typically keep their reasoning private, making it hard for the losing party to know why he lost, and results are rarely published, making it difficult for similarly situated parties to know they're entitled to relief.

To be sure, arbitration can be a great option when it's voluntarily agreed to by both parties after a dispute has arisen, but to be truly voluntary, all parties need to be free to say no. In the case of consumer financial services and products (the kinds of agreements the Consumer Financial Protection Bureau is authorized to regulate), most individual consumers have no bargaining power, as anyone who's tried to negotiate with his credit card company can attest.

Voluntary arbitration agreements have always been lawful, but up until the 1920s pre-dispute arbitration clauses like the one I had to sign at Thrifty were rarely enforced by American courts. Americans have long cherished the common-law right to a jury trial in civil cases. Indeed, preserving that right was one of the top demands of the Antifederalist skeptics of the proposed Constitution, and the Seventh Amendment was ratified precisely to preserve that ancient right in the courts of the newly constituted federal government.

In 1925, Congress enacted the Federal Arbitration Act to make arbitration a viable alternative for resolving contractual disputes between corporations. That strikes me as constitutionally tolerable, so long as agreements are voluntary and the parties are of roughly equal bargaining power, and if recourse to the courts is still possible if the arbitration process itself is disputed. But recent interpretations of that act by the U.S. Supreme Court have expanded its reach to cover all kinds of contracts, including consumer and employment contracts, and have even overridden state-level laws permitting class actions. (One of the reasons most corporations favor arbitration is that it forces each claimant to pursue his claim individually.)

So in disputes between individual Americans and big companies, the Seventh Amendment has become Swiss cheese, and with more holes than cheese. Many genuinely aggrieved consumers are being denied access to the civil justice system.

How can we fix this? The Supreme Court should reverse its errors, and Congress should amend the Federal Arbitration Act to ensure agreements are truly voluntary. (A bill to do that, dubbed the Arbitration Fairness Act, has been introduced in recent Congresses, but has gone nowhere, thanks to fierce opposition by the U.S. Chamber of Commerce.) Realistically, in the near term, the Consumer Financial Protection Bureau's forthcoming Dodd-Frank regulations are the best hope consumers have for relief. But that only applies to consumer financial services and products. So there's no avoiding a legislative remedy.

This issue should be a no-brainer for conservatives. Ending the un-American practice of forced arbitration should be on the agenda, not just of traditional consumer advocates, but of everyone who loves liberty and the Bill of Rights. As a freedom issue, it's right up there with things like repealing health care mandates, allowing cell-phone unlocking, ending corporate subsidies and eliminating cronyist tax breaks.

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SEPTEMBER 11, 2015 BY DEAN CLANCY

Conservatives Should Oppose Forced Arbitration

Unconscionable, unnecessary, unconstitutional.

It's long past time that conservatives wrested the banner of "consumerism" away from the so-called "consumer advocates," those left-leaning types who typically promote mandates, price controls, and regulation as the solution to problems, for which the real remedies are individual liberty, market competition, and freedom of contract.

Consumerism, in short, should be pro-consumer, not pro-government.

One of the few areas in which the "consumer advocates" are actually on solid ground — and thus where conservatives can safely join forces with them, and steal some of their thunder — is the issue of pre-dispute mandatory arbitration clauses (emphasis: pre-dispute). I'm referring to those fine-print items you find in most consumer agreements nowadays that waive your right to sue the company in case of a dispute. Instead, you agree to accept the results of binding arbitration. The clauses touch a host of services: rental cars, credit cards, prepaid cards, car loans, student loans, checking accounts, debit accounts, nursing-home admissions, software apps — the list goes on.

Currently two federal agencies (the Consumer Financial Protection Bureau and the Centers for Medicare and Medicaid Services), acting under congressional authorization, are moving to ban the controversial clauses in certain kinds of contracts. And a third agency (the Securities and Exchange Commission) has been authorized to do so.

Business interests are predictably lobbying to block the rules. Conservatives should take the other side. On this issue, the left is right and the right is wrong — or rather, the pro-business right is wrong. The pro-market right should join the consumer advocates in opposing pre-dispute mandatory arbitration as a violation of liberty and an infringement of the Seventh Amendment right to a civil jury trial.

Business interests love pre-dispute binding arbitration (emphasis: binding) because it reduces their exposure to potentially costly lawsuits. Litigation is certainly abused in this country. And, to be sure, binding arbitration can be a useful alternative to litigation, assuming the agreement is truly voluntary. But that means both parties have to know what they're agreeing to and have the freedom to say no.

Nowadays arbitration is often imposed on a "take it or leave it" basis, before a dispute has arisen, without the consumer really understanding what "binding arbitration" entails, and before the full nature or extent of a possible injury can really be known. And it's getting increasingly difficult for us to "take our business elsewhere," because the clauses are being imposed universally. That's because the Supreme Court, in cases like *AT&T Mobility v. Concepcion* (2010) and *American Express v. Italian Colors Restaurant* (2013) — cases that take it for granted that agreements are voluntary — has effectively overruled state consumer-protection laws in this area. Competition and federalism aren't doing their usual magic, because Uncle Sam is sitting on them.

The arbitration process itself, meanwhile, isn't always perfect. It can be marred by bias, excessive secrecy, and disregard for the traditional rules of due process. The arbitrator's reasoning, for example, is sometimes not revealed, and the decision itself is usually kept secret. Which is why

forcing people into it is controversial. Meanwhile, the evidence for arbitration's cost-saving benefits remains debatable.

Individuals should, of course, be free to make contracts for any lawful purpose. They should even be free to waive their constitutional rights — within reason, of course (no selling ourselves into slavery). Courts have traditionally thought it unreasonable to hold people to promises that effectively shut off their access to impartial justice. And arbitrators aren't necessarily impartial; they're usually, and understandably, biased in favor of the party who pays them, which is usually the company.

In the Federal Arbitration Act of 1925, Congress moved to tie the courts' hands in this area, declaring pre-dispute mandatory arbitration clauses to be "valid, irrevocable, and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract." Unfortunately, that law, reinforced by the aforementioned judicial decisions, has led to a world in which arbitration clauses are ubiquitous and unavoidable, with no effective recourse for consumers under either federal or state law.

And those are just the policy problems. Even more important is the constitutional one.

The right to a jury trial is the only right mentioned twice in the Bill of Rights. The Fifth Amendment safeguards it in criminal cases, the Seventh in civil ones: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Those last three words are sweeping. Congress has very little room to carve out exceptions. Which makes the Federal Arbitration Act at best suspect, constitutionally speaking.

So what's the proper remedy? Congress should repeal the Federal Arbitration Act or amend it to make pre-dispute mandatory arbitration agreements optional.

Congress has begun to do just that. In 2010 it banned forced-arbitration clauses outright in mortgages and real estate agreements and authorized their prohibition in consumer credit contracts (CFPB) and broker-customer contracts (SEC). Meanwhile, CMS is using its power to attach strings to federal dollars to ban them in Medicare-funded nursing home admissions.

Congress is on the right track. Involuntary agreements are unconscionable. Involuntary arbitration agreements run afoul of the Seventh Amendment. The pending rules are wins for liberty, the Constitution, and the freedom of contract.

On this one, conservatives should follow their pro-market and not their pro-business instincts — and start taking the banner of consumerism away from the so-called "consumer advocates."

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[Originally published at DailyCaller.com, September 11, 2015. @dailycaller. Reposted at DeanClancy.com.]

OCTOBER 7, 2015 BY DEAN CLANCY

Two Cheers for CFPB's Forced Arbitration Ban

The proposed regs should go further.

This morning the Wall Street Journal reports:

The CFPB is set Wednesday to propose rules that curb mandatory arbitration. The plan throws the new federal agency into the center of a national debate over whether consumers are helped or harmed by arbitration agreements that block class-action lawsuits. Such clauses are common for a range of products and services such as mobile phones, home mortgages and nursing homes.

The proposals under consideration would ban companies from including arbitration clauses that block class-action lawsuits in their consumer contracts for a broad range of financial products including credit cards, checking and deposit accounts, prepaid cards, money transfer services, certain auto loans, payday loans and private student loans.

Here's a copy of the Consumer Financial Protection Bureau's newly unveiled proposal.

I give the agency two cheers for this proposal, not three. It's a step in the right direction but doesn't go far enough.

While the agency is right, and has explicit congressional authorization, to prohibit pre-dispute mandatory arbitration clauses that would stand in the way of class-action lawsuits, it doesn't also ban the clauses with respect to individual lawsuits. It could, and should.

As I've argued in places like U.S. News & World Report and Daily Caller, all forced-arb clauses are unconscionable, when imposed on a pre-dispute, take-it-or-leave it basis and the consumer has nowhere else to take his business. Such clauses aren't voluntary and therefore shouldn't be enforced. Sadly, such clauses are increasingly common, thanks to the Federal Arbitration Act of 1925, as aggressively expanded by a number of recent Supreme Court decisions. Today it's nearly impossible for consumers to avoid these clauses or say no to them.

The remedy is simple: Congress should repeal the Arbitration Act or at least to amend it to restore the Seventh Amendment right to a civil jury trial. At a minimum, Congress shouldn't try to block the new reg.*

Arbitration clauses should be voluntary.

Dean Clancy, a former senior White House and congressional aide, writes on U.S. health care, budget, and constitutional issues. Follow him at deanclancy.com or on twitter @deanclancy.

NOTE

* I assume the U.S. Chamber of Commerce will denounce the new rule in passionate terms as a costly sop to the trial lawyers. This is ironic, since the same organization loudly objects to forced arbitration when the shoe is on the other foot.

MAY 5, 2016 BY DEAN CLANCY

Good News: CFPB Bans Forced Arbitration

A federal regulation conservatives should welcome.

Good news. Today the CFPB issued a long-awaited ban on pre-dispute forced arbitration clauses. Story here. Press release here.

The ban, drawn up under congressional authorization by the Consumer Financial Protection Bureau (CFPB), and set to take effect in 90 days, makes the annoying, ubiquitous clauses optional in credit card and other consumer credit contracts. This is a big win for consumers—and the Constitution.

The Chamber of Commerce and pro-business Republicans are panning the rule as an infringement of the sacred right of contract. Pro-market conservatives should welcome it for the same reason: It vindicates the sacred right of contract—and the U.S. Constitution.

Forced arbitration clauses are nominally voluntary but in reality involuntary. They're "take it or leave it" propositions that force a consumer to waive his constitutional right to a civil jury trial in the event of a dispute with the seller, before any injury has occurred. Private arbitration may be a great alternative to going to court, but no one should have to waive his constitutional rights as a condition of buying a toaster or renting a car.

The Federal Arbitration Act, upon which these offensive clauses rest, is unconstitutional, because it violates the Seventh Amendment's guarantee that

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury ***shall be preserved.*** *[Emphasis added.]*

That's a law, not a suggestion.

I have no love for the CFPB, but the Constitution needs friends wherever it can get them.

In recent years, Congress has begun turning against the clauses. It banned them in mortgage contracts in 2010 and authorized CFPB and the Securities and Exchange Commission (SEC) to ban them in other areas. CFPB issued a draft rule last October. Today, it finalized that rule.

Unfortunately, the rule only prohibits banks and other financial companies from using the clauses to block consumers from joining together in class action lawsuits. Individuals get no such relief. That doesn't go far enough. The noxious clauses should be optional for everyone.

Congress should not only welcome the forced-arbitration ban, it should go further and pass the SCRA Rights Protection Act (H.R.4161and S.2331), a bill to protect U.S. servicemembers and their families from being victimized by the clauses during a military deployment. Unscrupulous companies hide behind the clauses to avoid their obligations under the Civil War-era Servicemembers Civil Relief Act (SCRA), exposing military families to illegal repossessions of their homes, cars, and other property.

For more on why conservatives should cheer the CFPB's forced-arbitration ban, see my articles here, here, here, and here.

Today's announcement is a welcome win for the Seventh Amendment—and consumers.

Dean Clancy, a former senior White House and congressional aide, writes on U.S. health care, budget, and constitutional issues. Follow him at deanclancy.com or on twitter @deanclancy.

SEPTEMBER 22, 2016 BY DEAN CLANCY

Wells Fargo Scandal Puts GOP in a Bind

The politics of the megabank's dirty forced-arbitration tactic.

As the shocking Wells Fargo scandal unfolds, congressional Republicans find themselves in a bind. They can passively leave the matter to prosecutors, doing nothing to deter future repetitions of the massive, systematic fraud engaged in by the national bank chain—and thus appear to condone that fraud. Or they can support reforms that would deter such fraud—but in so doing upset their party's Big Business base.

Here's a nice summary of the scandal, by *The Washington Post's* Dana Milbank:

> *Wells Fargo pressured low-wage workers with unrealistic sales targets, so these workers created 2 million bogus accounts over five years, causing customers to be hit with fees and damage to their credit ratings.*

Those bogus accounts were created under the names of real customers, without their knowledge or consent. Eventually, of course, the scam was exposed. And what has been done about it? Milbank again:

> *Some 5,300 workers have been fired and $185 million in penalties assessed to the bank, but not a single high-level executive has been sacked or even forced to give back the tens of millions of dollars in pay earned based on the fraud.*

This week the Senate Banking Committee hauled Wells Fargo's CEO up for a high-profile and well-deserved tongue-lashing. Progressive Sen. Elizabeth Warren, D-Mass., basically demanded the man resign, return the money, and report to jail.

But when it came to the most disturbing revelation of the entire hearing, Republicans were quiet.

It transpires that, to avoid lawsuits, the San Francisco-based megabank has been invoking boilerplate clauses in its customers' bank account contracts that say the customer cannot sue the company but rather must take his complaint to private, binding arbitration. Arbitrators are notoriously less favorable to customer-plaintiffs than are juries.

And here's the kicker: The clauses are not part of the fake accounts but rather of the underlying, authorized ones. As Sen. Sherrod Brown, D-Ohio, dryly summarized, "The bank invoked the fine print on a real account to block redress on a fake one, which [the bank itself] had created."

Now that's chutzpah.

But despite pressure from Brown, the embattled CEO refused to disavow the tactic. And Republicans did not condemn it.

To be sure, the company's position is understandable. A jury would be more likely to side with the victims, at great expense to the company. An arbitrator, however, is hand picked—and paid—by the company. Sentence first, verdict afterward.

And unlike juries, arbitrators typically do everything in secret, don't disclose their decision to the public, and don't disclose their reasoning, even to the disputants. In other words, it's a star chamber.

And to top it all off, we're asked to believe signers of arbitration clauses "agreed" to this kangaroo court, pre-dispute—that they signed away their Seventh Amendment right to a jury trial, sight unseen. In truth, they probably didn't know they were signing it, or had little freedom not to do so. Typically, forced-arb clauses are hidden in the fine print of contracts that are offered on a "take it or leave it" basis.

If the clauses were really optional, as the Seventh Amendment requires, Wells Fargo's victims could be obtaining redress right now, on their own, in a court, rather than having to wait for a prosecutor to enforce the law.

But back to the Republicans. They support forced arbitration. They also want to dismantle the federal agency charged with regulating the financial industry, the Consumer Financial Protection Bureau. They can't have it both ways.

To be credible, Republicans must soften their opposition to either regulation or litigation or both. But in so doing, they must naturally disappoint their Big Business allies, who hate both. And if they dither, they appear to condone Wells Fargo's behavior, which is indefensible.

In other words, the scandal is pure gift to the Democrats.

If the GOP is wise, it will cut its losses and throw forced arbitration under the bus. That would be not only morally right but politically smart.

Among other things, it would put the party on the right side of an issue related to national security. That's right: Last month the Military Coalition, which represents more than 5.5 million U.S. service members, reservists, and their families, formally petitioned Congressto ban the clauses, which unscrupulous employers and creditors exploit to block Americans in uniform from enforcing their federal right not to be fired, dispossessed, or otherwise cheated during a deployment.

Dear GOP: Friendly advice. When you're on the wrong side of both Wells Fargo's victims *and* the nation's military families? Stop. You're doing it wrong.

The unfolding scandal offers Republicans a golden opportunity to stand up for the little guy for a change, against corporate fraud. And the first, obvious step is to reject fraud's best friend: forced arbitration.

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Will Trump Revive Unconstitutional Forced Arbitration Clauses?

How the Blue Collar Billionaire can stick up for the little guy.

One of the few things I agreed with the Obama Administration about is the need to get rid of forced arbitration clauses, those annoying contract provisions that deprive us of our Seventh Amendment right to sue companies that injure us.

The ubiquitous clauses are not only unconstitutional, they're also anti-consumer and increasingly used by powerful people like Roger Ailes and the executives of Wells Fargo to shield themselves from accountability for outrageous behavior. (I've written quite a bit about this.)

With the change of presidents, it's unclear where this issue is headed.

Before it left town, the Obama Administration proposed strong anti-forced-arbitration regulations via the Consumer Financial Protection Bureau, the Centers for Medicare and Medicaid Services, and the Department of Education, with each agency essentially banning the clauses within the industries under its jurisdiction.

Unfortunately, the CFPB version of the rule, which would ban the clauses in credit card and other financial services agreements, is stuck in limbo.*

When President Trump came in, the rule was still pending. It had not yet become "final." One of Trump's first acts was to issue a general moratorium on all pending rules. Everything was halted for a fresh review.

So what's next? Is the CFPB rule dead?

Maybe, maybe not. As an independent agency, CFPB enjoys a special status that arguably exempts it from Trump's order. As a recent summary by the lawyers at Mayer Brown explains:

> *"Independent regulatory agencies," such as the Consumer Financial Protection Bureau ("CFPB") . . . may be excluded from [Trump's] moratorium. ... Although the memorandum appears sweeping in scope, banks and other financial service providers are not necessarily relieved from new regulations, as the regulatory freeze does not appear to apply to independent agencies. ... Executive Order 12866 [first issued in the 1980s] expressly exempts "those [agencies] considered to be independent regulatory agencies" from its definition of "agency." The term "independent regulatory agency" is defined pursuant to 44 U.S.C. § 3502(5) to include the* ***CFPB****, the Federal Reserve Board, the OCC, the FDIC, and the SEC. [Emphasis added.]*

That would seem to take CFPB off the hook. Still, Trump White House staff have it in their power to slow down the agency with other bureaucratic hurdles, like the Paperwork Reduction Act of 1980, which authorizes the Office of Management and Budget (OMB) to hold up the works, perhaps indefinitely. And if CFPB pulled the trigger, Congress could try to retaliate legislatively somehow.

Meanwhile CFPB's director, Richard Cordray, will only say that his agency is "digesting" the moratorium and has not decided yet whether or how to follow it.

I hope the agency invokes its exempt status and moves ahead.

If it does, doubtless the U.S. Chamber of Hypocrisy and its big business allies will throw a fit. But if Trump is smart, he'll disregard the crony lobby and take a principled stand for a pro-market—rather than a merely pro-business—policy.

By continuing Obama's efforts to make private arbitration truly optional, the Blue Collar Billionaire could not only strike a blow for the little guy, he could also shore up every citizens' sacred, Seventh Amendment right to trial by jury—and thus the cause of liberty.

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NOTES

* Rather than fix this problem via regulations, I would prefer Congress undid its own mistakes—in this case, by repealing or amending the constitutionally problematic Federal Arbitration Act, which is the source of the noxious clauses. But with special interests blocking reform legislation, I think regulatory action is the only way to do the right thing until Congress comes to its senses. Trial by jury is a constitutional right. And justice delayed is justice denied.