HUDSON COOK

Strange Adversaries

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If you have even a small appreciation for irony, you'll enjoy this. The Consumer Financial Protection Bureau is in the process of banning arbitration clauses in credit transactions when the clauses prohibit class relief. As part of its justification for the proposed ban, the CFPB has proffered two "studies" it conducted that purport to show that the arbitration process is unfair to consumers.

Then along comes New York Attorney General Eric T. Schneiderman, who proceeds to drop something very unpleasant in the CGPB's punchbowl. Schneiderman just announced that New York consumers recovered more than $2.5 million in arbitrated lemon law claims in 2015, bringing the total to $12.4 million since 2011. New car lemon cases - 53 of them - accounted for $2 million of the amount, while 15 used car cases totaled about a half million.

Attorney General Schneiderman said "The Lemon Law Arbitration Program has proven to be efficient and effective means for both consumers and the auto industry to resolve disputes. Under this program, hundreds of auto consumers have obtained compensation without the costs and delays of going to court." Note that this is an activist, consumer-protective state attorney general characterizing the arbitration process as "efficient" and "effective," and says the process is cheaper and quicker than going to court. This is the same process the CFPB calls unfair.

Is arbitration unfair? Perhaps in the CFPB's ivory tower, where staff studies are little more than carefully selected "facts" that agree with the policy decision that has long since been made, that may appear to be the case. But in the real world, things are apparently a bit different.

We have argued that the underlying rationale the CFPB has voiced for banning class relief - that the prohibition of class proceedings keeps consumers with small claims from aggregating those claims and effectively strips them of any legal remedy - shouldn't apply in auto sales, finance and lease transactions. In this part of the consumer credit world, auto buyers' claims tend to be significant and worth pursuing, whether in court or arbitration. In addition to the awards that buyers can seek for actual damages, many of the laws and regulations applicable to car transactions provide for awards of attorneys fees, and sometimes for a doubling or tripling of actual damages.

The CFPB's underlying rationale falls apart in the car world, as Schneiderman's

comments describing the real word operation of arbitration, but you can search the Bureau's studies until you are blind, and you won't find any mention of the differences between a $25,000 automotive lemon law claim, or a $10,000 fraud claim on the one hand and a $1.10 cell phone roaming charge on the other hand.

But I'm howling at the moon. Sometime this year, the CFPB will propose a rule that will prohibit class waivers in arbitration agreements. A few months later, that rule, or something very much like it, will become final. At that point, the ongoing battle between car dealers and creditors on the one hand, and class action lawyers on the other hand, will have swung back in the class action lawyers' favor.

All thanks to the CFPB's "don't bother me with the facts" regulatory philosophy. Your tax dollars at work!

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