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The Modern Arbitration Frankenstein: The Rise and Fall of the Consumer Financial Protection Bureau's Arbitration Rule

NICK LEYH*

I had worked hard for nearly two years, for the sole purpose of infusing life into an inanimate body. For this I had deprived myself of rest and health. I had desired it with an ardour that far exceeded moderation; but now that I had finished, the beauty of the dream vanished, and breathless horror and disgust filled my heart.¹

I. INTRODUCTION

The above quote is Dr. Victor Frankenstein's reaction after he resurrects a corpse in Mary Shelley's classic novel *Frankenstein*. Dr. Frankenstein seeks to reanimate a corpse to achieve a better understanding of life and ultimately conquer death itself.² Yet, the reanimation goes awry, and Dr. Frankenstein abandons his creation, who in turn exacts revenge against its creator.³ Shelley's tale of the attempted creation of an indispensable cure that is in turn perverted into a monstrous harm is analogous to the modern state of forced arbitration. To an extent, arbitration was once utilized as an effective alternative to litigation, aiding consenting parties in finding a quicker and less expensive way to resolve legal issues. However, arbitration has mutated from an alternative to a *de facto* replacement for litigation, at least in the realm of federal consumer class actions where mandatory arbitration provisions containing class actions waivers are ubiquitous. Moreover, the recent failure⁴ of the Consumer Financial Protection Bureau ("CFPB") to successfully regulate these arbitration provisions resembles Dr. Frankenstein's ill-fate at the hands of his own creation.

This Comment will analyze the CFPB's proposed rule prohibiting companies from including a ban on class actions within their arbitration provisions. The

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1. MARY SHELLEY, *FRANKENSTEIN* 58 (Johanna M. Smith ed., Bedford Books of St. Martin's Press 1992) (1818).

2. *See id.*

3. *See id.*

4. Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html>.

CFPB's proposed rule⁵ has created a political firestorm, resulting in strong opposition to the ban on class action waivers amongst both House and Senate legislators.⁶ Further, the current proposed rule has already been rejected by the House, utilizing the Congressional Review Act, an act passed in 1996 that allows the legislature to "fast-track" votes on legislation with only a simple majority from both houses of Congress,⁷ to enable a vote. The debate that surrounded the rule reflects the modern debate surrounding the efficacy of using arbitration provisions in consumer contracts.⁸ Proponents of the rule view the ubiquitous use of arbitration provisions in consumer contracts as a way for companies to evade a courthouse and justice,⁹ while detractors of the rule insist that arbitration is a simple, cheap, and effective way for consumers to bring claims against companies and the CFPB's rule effectively removes this option for consumers.¹⁰

This Comment will begin by reviewing the history of the CFPB's rule, from the initial arbitration inquiry conducted by the CFPB to the current debate in the legislature. Next, this Comment will detail the consequences of the rule's recent failure. Lastly, this Comment will critically examine the necessity of the proposed rule in the current age of ever-present arbitration provisions within consumer contracts and the lasting ramifications to consumers of both passage and failure.

II. BACKGROUND

A. Origins of the Arbitration Rule

The CFPB was born out of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") in response to the financial crisis¹¹ in 2008.¹² Dodd-Frank outlined the powers and responsibilities of the CFPB including specifically granting the CFPB the capability to review and restrict pre-dispute arbitration.¹³ Moreover, Dodd-Frank specifically instructed the CFPB to "conduct a study of, and . . . provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute."¹⁴ The CFPB announced a public

5. Pub. L. 111-203, 111th Congress, tit. X (2010).

6. See James Koren, *House Votes to Kill New Bank Arbitration Rule in Blow to Federal Consumer Agency*, L.A. TIMES (July 25, 2017), <http://www.latimes.com/business/la-fi-arbitration-house-vote-20170725-story.html>.

7. See Richard S. Beth, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act* (Oct. 10, 2001), <https://www.senate.gov/CRSpubs/316e2dc1-fc69-43cc-979a-dfc24d784c08.pdf>.

8. Jean R. Starlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1661 (2005).

9. See *id.*

10. See Eric J. Mogilnicki, *The CFPB's Flawed Case for Banning Class Action Waivers*, LAW360 (July 13, 2016), <https://www.law360.com/articles/815971/the-cfpb-s-flawed-case-for-banning-class-action-waivers>.

11. Beginning in 2007, the subprime mortgage market bubble burst leading to an international financial crisis and the collapse of huge investment banks like Lehman Brothers, a massive government bailout, and stricter regulation of the financial industry through legislation and the development of regulatory agencies. See generally THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, Financial Crisis Inquiry Commission (Jan. 2011).

12. Pub. L. 111-203, 111th Congress, tit. X (2010).

13. See *id.* at tit. X, subtitle B.

14. *Id.* at § 1028(a).

inquiry examining mandatory arbitration and its efficacy for consumers on April 24, 2012¹⁵ and released its findings in March of 2015.¹⁶ The CFPB's study found that of the 341 arbitration awards resolved between 2010 to 2011, arbitrators awarded relief to consumers on their affirmative claims in thirty-two cases for a total of \$172,433 and granted consumers debt forbearance in forty-six cases for a total of \$189,107.¹⁷ In contrast, out of the 244 arbitration cases brought by companies, 227 resulted in awards for the companies with the awards totaling over \$2,800,000.¹⁸

Following up on its arbitration field study, the CFPB issued a proposed rule on arbitration that would prohibit companies from banning class actions suits in their mandatory arbitration clauses,¹⁹ and asked for public comments to be submitted electronically.²⁰ On July 10, 2016, the CFPB issued its final rule implementing the ban on class action waivers in arbitration provisions.²¹ The CFPB justified its issuance of the final rule on three principles: (1) the new rule would aid consumers who unfairly have their right to participate in class actions and seek redress in court eliminated by class action waivers in arbitration clauses; (2) class action law suits provide consumers with a greater opportunity to obtain a remedy as opposed to arbitration proceedings, as found by the CFPB's arbitration study; and (3) the class action law suits also serve a regulatory function in that successful class action suits will force companies to change harmful and fraudulent practices.²²

B. *The Political Debate Over the Rule*

The CFPB's arbitration rule ignited a political firestorm amongst legislators, lobbyists, and politicians. The rule also faced opposition by the Comptroller of Currency, Keith Noreika, who issued multiple public letters asking Director Cordray of the CFPB to delay its issuance of the rule and provide additional data to support the rule.²³ Noreika's first letter stressed the Office of the Comptroller of the Currency's ("OCC") duty to assess the soundness and safety of the CFPB's

15. See CFPB Launches Public Inquiry into Arbitration Clauses (Apr. 24, 2012), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/>.

16. See Arbitration Study: Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a) (Mar. 10, 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

17. See *id.* at 12.

18. See *id.*

19. See Bureau of Consumer Financial Protection, Notice of Proposed Rule Making: 12 CFR Part 1040, http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf.

20. See New Protections Mandatory Arbitration, <https://www.consumerfinance.gov/arbitration-rule/>.

21. See 12 CFR § 1040 (2016).

22. See CFPB Issues Rule to Ban Companies From Using Arbitration Clauses to Deny Groups of People Their Day in Court, CONSUMERFINANCE.GOV (July 10, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-rule-ban-companies-using-arbitration-clauses-deny-groups-people-their-day-court/>.

23. See Keith Noreika, *Letter to the Honorable Richard Cordray*, CONSUMERFINANCEMONITOR.COM (July 10, 2017), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/07/OCC-Letter-to-CFPB-re-Arbitration-Rule-07-10-2017.pdf>; see also Keith Noreika, *Letter to the Honorable Richard Cordray*, CONSUMERFINANCEMONITOR.COM (July 17, 2016), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/07/Noreika-letter-July-17.pdf>.

arbitration rule on the federal banking system.²⁴ Noreika added that arbitration is an effective alternative dispute resolution technique for consumers and that the CFPB's rule has been criticized on the basis that it could end the practice of arbitration for companies and consumers alike.²⁵

Director Cordray responded in his own public letter on July 12, 2017, spurning the OCC's request.²⁶ Initially, Cordray expressed surprise at the OCC's request for additional data and its fear that the rule could have far-reaching consequences on financial institutions, since the CFPB had been researching mandatory arbitration for several years and had publicly been engaged in the rulemaking process for the current rule for two years.²⁷ In addition, Cordray stressed the OCC's lack of involvement at any stage in the process, even after the CFPB had reached out to OCC staff on several occasions for input.²⁸ Cordray concluded that the OCC had not "in good faith attempted to work with the Bureau to resolve concerns regarding the effect of the rule on the safety and soundness of the U.S. banking system of the stability of the financial system of the United States."²⁹ Cordray also criticized the OCC's assertion that the rule would adversely affect the U.S. banking system by pointing out that financial institutions have managed to survive lawsuits in the past and still face suits today.³⁰ Therefore, Cordray explained, the assertion that allowing class action lawsuits will somehow now jeopardize U.S. financial institutions is mistaken.³¹

Noreika again responded in a public letter on July 17, 2017, reiterating the OCC's concerns that the CFPB's rule was overreaching.³² Noreika sought further data from the CFPB on its conclusions regarding arbitration on the basis that such transparency was necessary to issuing the rule.³³ Further, Noreika restated the data would allow the OCC to conduct a proper safety and soundness review of the rule, as Noreika has specifically talked to OCC economists who said such data was essential to finalizing its review of the CFPB rule.³⁴ Noreika concluded his letter by advising the CFPB that delaying the rule "a few additional weeks . . . seem[s] a sound investment."³⁵

Legislators were also quick to act in response to the CFPB's arbitration rule. Congress looked to the Congressional Review Act of 1996, which granted Congress the right to repeal regulations and rules by a simple majority in each house and prohibiting the issuance of a similar rule or regulation unless explicitly authorized,³⁶

24. See Keith Noreika, *Letter to the Honorable Richard Cordray*, CONSUMERFINANCEMONITOR.COM (July 10, 2017), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/07/OCC-Letter-to-CFPB-re-Arbitration-Rule-07-10-2017.pdf>.

25. *See id.*

26. See Richard Cordray, *Letter to the Honorable Keith Noreika*, CONSUMERFINANCEMONITOR.COM (July 12, 2017), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/07/July-12-Director-Cordray-Letter-to-Acting-Comptroller-Noreika.pdf>.

27. *See id.*

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.*

32. See Keith Noreika, *Letter to the Honorable Richard Cordray*, CONSUMERFINANCEMONITOR.COM (July 17, 2017), <https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/07/Noreika-letter-July-17.pdf>.

33. *See id.*

34. *See id.*

35. *See id.*

36. See 5 U.S. Code § 801(b)(2) (1996).

to quash the CFPB rule.³⁷ On July 25, 2017, the House successfully authorized a veto of the CFPB rule in a 231-190 vote essentially down party lines.³⁸ For now, the fate of the CFPB rule is in the hands of the Senate, who have already introduced a bill to veto the rule as well.³⁹ However, Senate Majority Leader Mitch McConnell omitted any mention of the CFPB arbitration rule or the bill to veto in his speech regarding the agenda for the Senate after the August recess.⁴⁰ Thus, the CFPB rule remains in legislative limbo while each party attempts to marshal sufficient votes in favor of its position.

III. ANALYSIS OF THE DEBATE

The current debate concerning the CFPB's arbitration rule has been cast in the shadow of two significant financial scandals: The Wells Fargo fake account scandal, where the bank was caught creating fake accounts under customers' names in order to accumulate fees and issue more credit cards,⁴¹ and the Equifax data breach that resulted in thousands of consumers' credit cards and credit report information to be accessible by hackers.⁴² These events placed the arbitration rule in the spotlight as both companies implemented forced arbitration amongst the consumers directly affected by the scandal.⁴³ With the stakes of passage or failure of the CFPB's rule so high and a speculated deadline for a vote on November 16,⁴⁴ the political debate grew more fervent as the time to a final vote drew near.

A. The "Big, Wet Kiss to Trial Attorneys"

Almost immediately after the promulgation of the CFPB's arbitration rule, conservative opponents voiced their strong dissatisfaction against the rule. Jeb Hensarling, Republican Congressman of the 5th District of Texas and chairman of the

37. David Sherifnski, *House Votes to Undo Federal Consumer Bureau's Arbitration Rule*, THE WASHINGTON TIMES (July 25, 2017), <http://www.washingtontimes.com/news/2017/jul/25/house-votes-to-undo-consumer-financial-protection-/>.

38. *See id.*

39. Ryan Rainey, *Prospects Dim for Senate Vote on CFPB Arbitration Rule this Month*, MORNING CONSULT (Aug. 1, 2017), <https://morningconsult.com/2017/08/01/prospects-dim-senate-vote-cfpb-arbitration-rule-month/>.

40. *See id.*

41. Michael Corkery, *Wells Fargo Fined \$185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), <https://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html>.

42. Sara A. O'Brien, *Giant Equifax Data Breach: 143 Million People Could be Affected*, CNN (Sept. 8, 2017), <http://money.cnn.com/2017/09/07/technology/business/equifax-data-breach/index.html>.

43. Kevin Freking, *Dems wield Equifax, Wells Fargo in fight over arbitration*, WASHINGTON POST (Sept. 27, 2017), https://www.washingtonpost.com/business/dems-wield-equifax-wells-fargo-in-fight-over-arbitration/2017/09/27/6d24b102-a3b0-11e7b5738ec86cdfef1ed_story.html?utm_term=.78adf5.B0dfdb

44. Richard S. Beth, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act* (Oct. 10, 2001), <https://www.senate.gov/CRSpubs/316e2dc1-fc69-43cc-979a-dfc24d784c08.pdf>; *see also* Alan Kaplinsky, *What is the Deadline for the Senate to Pass a CRA Resolution to Override the CFPB's Arbitration Rule?*, CONSUMER FINANCE MONITOR (Oct. 16, 2017), <https://www.consumerfinancemonitor.com/tag/congressional-review-act/>.

House Financial Services Committee,⁴⁵ issued a pre-release following the rule calling it a “big, wet kiss to trial attorneys.”⁴⁶ Hensarling echoed some of the oft-repeated criticisms of the rule, arguing that the CFPB’s regulation benefits trial attorneys lobbying at the expense of consumers, whom Hensarling asserts are the true beneficiaries of the arbitration system.⁴⁷ Albeit briefly, Hensarling’s short and pointed release laid bare the opposition’s two chief complaints to the rule. First, the rule deprives consumers of the right to arbitrate, a more efficient dispute resolution system than class action litigation. Second, the proposed rule will force companies to abandon arbitration and increase costs directly hurting consumers.⁴⁸

Financial industry representatives and conservative opponents of the CFPB’s rule have staunchly defended the notion that arbitration is more efficient and rewarding system for consumers than class actions. Attacking the CFPB’s arbitration study that led to the rule, Eric Mogilnicki sees the CFPB study itself as proof of class action litigations’ cost to consumers.⁴⁹ First, Mogilnicki observes the most frequent results in class actions are either settlement or the plaintiff’s withdrawal.⁵⁰ He further points out that only seventeen percent of class action settlements actually settle on a class basis.⁵¹ Mogilnicki further highlights that even when class actions are resolved in favor of the entire class, the class members often get only coupons or vouchers instead of actual money.⁵² Thus, class actions are an inferior resolution mechanism, as opposed to arbitration. Additionally, in a public letter to Director Cordray of the CFPB, the American Bankers Association (“ABA”), the Consumer Bankers Association (“CBA”), and the Financial Services Roundtable (“FSR”) critiqued the rule in estimating that it would cause a “permanent surge of 6,042 additional class actions” every five years.⁵³ With this estimated increase in class actions, the letter continues, consumers will be forced to foot the bill for these costly class action suits.⁵⁴

Opponents of the rule also prophesize that the rule could lead companies to abandon arbitration altogether, resulting in disastrous consequences for consumers. The ABA, CBA, and FSR letter argued that the increase in costs by bringing a class action would affect both parties.⁵⁵ However, companies could seek to offset the rising costs of litigation by increasing costs of services and products, further harming the consumers.⁵⁶ The ABA, CBA and FSR go on to argue that the practice of

45. See Jeb Hensarling, *Committees and Caucuses*, REPRESENTATIVE JEB HENSARLING (Oct. 6, 2017), <https://hensarling.house.gov/about/committees-and-caucuses>.

46. See Press Release, Fin. Serv. Comm., Hensarling: CFPB Rule Big, Wet Kiss to Trial Attorneys (May 5, 2016).

47. See *id.*

48. See *id.*

49. Eric J. Mogilnicki, *The CFPB’s Flawed Case for Banning Class Action Waivers*, LAW360 (July 13, 2016), <https://www.law360.com/articles/815971/the-cfpb-s-flawed-case-for-banning-class-action-waivers>.

50. See *id.*

51. See *id.*

52. See *id.*

53. American Bankers Association, Consumer Bankers Association, Financial Services Roundtable, *Comments on the Bureau’s Proposed Arbitration Rule* (Aug. 22, 2016), <https://www.aba.com/Advocacy/commentletters/Documents/joint-trades-arbitration-comment-letter.pdf>.

54. See *id.*

55. See *id.*

56. See *id.*

arbitration itself will be abandoned if the rule passes.⁵⁷ The letter foresees companies forgoing arbitration for individual claims when companies would have to face class actions in court and the costs of resolving claims through both court and arbitration systems would be “prohibitive.”⁵⁸

Ultimately, the opponents of the CFPB’s arbitration rule rely upon the future consequences to consumers in order to persuade the legislature and the public to oppose the proposed regulation.

B. Revoking the “Get-Out-of-Jail Free” Card

In a news conference held in late September of this year, Senate Minority Leader Chuck Schumer equated passing the bill to effectively repealing the CFPB’s arbitration rule to allowing companies, like Wells Fargo or Equifax, “get-out-of-jail free” cards.⁵⁹ Thus, the continued practice of forced arbitration clauses that eliminate class action litigation for consumers essentially insulates companies from accountability to consumers.

Richard Frankel posits that the oft-repeated argument that a successful passage of the CFPB rule will result in consumers paying more for services due to increased litigation costs and that companies will abandon arbitration *en toto* are merely rhetorical.⁶⁰ Corporations utilizing arbitration clauses participate in litigation as well, and further, many of those entities have carved-out exceptions for certain claims so that they must be tried in court.⁶¹ Therefore, the conclusion that engaging in arbitration for some claims and litigation for other claims is untenable, Frankel argues, is demonstrably false.⁶² More frightening to Frankel is the proposition that the passage of the rule would actually result in companies abandoning arbitration completely. If so, this abandonment “would show that the industry’s preference for arbitration is built on claim suppression” and that current usage of “arbitration stops consumers from bringing claims.”⁶³

Proponents of the rule also advanced that without a rule akin to the CFPB’s, there is no accountability for financial institutions in the wake of scandals such as Wells Fargo’s fake accounts and Equifax’s data breach. For example, David Dayen highlights the recently filed case *Chamber of Commerce of the United States, et al v. Consumer Financial Protection Bureau*, to illustrate not only the hypocrisy of the companies but also that forced arbitration insulates companies from meaningful

57. See *id.*; see also Eric J. Mogilnicki, *The CFPB’s Flawed Case for Banning Class Action Waivers*, LAW360 (July 13, 2016), <https://www.law360.com/articles/815971/the-cfpb-s-flawed-case-for-banning-class-action-waivers>.

58. American Bankers Association, Consumer Bankers Association, Financial Services Roundtable, *Comments on the Bureau’s Proposed Arbitration Rule* (Aug. 22, 2016), <https://www.aba.com/Advocacy/commentletters/Documents/joint-trades-arbitration-comment-letter.pdf>.

59. *Senate Democrats on Forced Arbitration* (CSPAN television broadcast Sept. 27, 2017), <https://www.c-span.org/video/?434769-1/senate-democrats-hold-news-conference-forced-arbitration>.

60. See Richard Frankel, “*What We Lose in Sales, We Make Up in Volume*”: *The Faulty Logic of the Financial Services Industry’s Response to the Consumer Financial Protection Bureau’s Proposed Rule Prohibiting Class Action Bans in Arbitration Clauses*, 48 ST. MARY’S L. J. 283, 287 (2016).

61. See *id.* at 299-300; see also Arbitration Study: Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a) (finding that 66.7% of credit card arbitration provisions, 59.0% of checking account arbitration provisions, and 62.7% of prepaid card arbitration provisions had express “Carve-outs” for small claims court actions).

62. See Frankel, *supra* note 60, at 300.

63. *Id.* at 287.

accountability.⁶⁴ The case was filed by eighteen associations and corporations challenging the constitutionality of the CFPB rule and seeking to stay the implementation of the rule.⁶⁵ Ironically, Dayen finds the fact that the representatives of the financial institutions have “banded together” in order to seek redress in the courts, defeats their argument that arbitration is more effective for participants because the lawsuit appears so similar to a class action.⁶⁶ In essence, the plaintiffs in *Chamber of Commerce of the United States, et al v. CFPB*, utilize a system of adjudication resembling class action litigation in order to prevent consumers from engaging in a similar system against themselves.⁶⁷

C. The Treasury Weighs In

With the sixty-day deadline of the Congressional Review Act steadily approaching, the Treasury Department weighed in with its own analysis of the CFPB arbitration rule. In an attempt to sway the debate towards repealing the CFPB’s arbitration rule.⁶⁸ The Treasury Department’s critique reiterated several talking points from the opponents of the rule: The rule will actually harm consumers because companies will stop using arbitration, the rule is merely a gift to class-action trial attorneys, and the rule will increase costs significantly to both businesses and consumers.⁶⁹ However, the Treasury’s report also proposed a new reason to overturn the CFPB’s rule, arguing that class actions lead to “blackmail settlements” where companies settle meritless claims to avoid the risk of potentially huge judgments against them.⁷⁰ The Treasury Department also proposed that companies settle meritless class-action claims for “nuisance value,” or to a price below the costs of hiring attorneys to defend the case until it is dismissed.⁷¹ The CFPB’s failure to account for these “blackmail settlements” reveals the CFPB’s flawed methodology since these settlements “represent transfers that would reduce fairness—by imposing costs on firms unrelated to violations affecting consumers—rather than enhance it.”⁷²

Judge Richard Posner espoused the blackmail settlement theory when he denied class certification in *Matter of Rhone-Poulenc Rorer, Inc.*⁷³ In that case, the plaintiff class consisted of hemophiliacs infected by HIV, and the class alleged the infection was a result of using the defendant drug companies’ blood solid products.⁷⁴ The district court certified the class and the defendants responded by seeking

64. See David Dayen, *In New Lawsuit, Corporations Band Together to Stop Consumers from Banding Together*, THE INTERCEPT (Oct. 6, 2017), <https://theintercept.com/2017/10/06/consumer-protection-arbitration-rule-lawsuit-equifax-wells-fargo/>.

65. See Petitioners’ Complaint for Declaratory and Injunctive Relief at 2-3, *Chamber of Commerce of the United States, et al v. Consumer Financial Protection Bureau*, No. 3:17-cv-02670 (Sept. 29, 2017).

66. See David Dayen, *In New Lawsuit, Corporations Band Together to Stop Consumers from Banding Together*, THE INTERCEPT (Oct. 6, 2017), <https://theintercept.com/2017/10/06/consumer-protection-arbitration-rule-lawsuit-equifax-wells-fargo/>.

67. See *id.*

68. See generally LIMITING CONSUMER CHOICE, EXPANDING COSTLY LITIGATION: AN ANALYSIS OF THE CFPB ARBITRATION RULE, U.S. Department of the Treasury (Oct. 23, 2017).

69. See *id.* at 1-2.

70. *Id.* at 5-6.

71. *Id.* at 6.

72. See *id.* at 7.

73. See *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

74. *Id.* at 1294.

mandamus with the Seventh Circuit.⁷⁵ At oral arguments, the defendants raised the “intense pressure” to settle in order to avoid a devastating potential judgment as a reason to decertify the class.⁷⁶ Judge Posner found defendants’ argument persuasive, hypothesizing that some companies can face bankruptcy based solely on one class action judgment against them.⁷⁷ However, Posner also stated that such pressures must be balanced against the potential benefits that the class action will bring to plaintiffs.⁷⁸ In *Rhone-Poulenc Rorer, Inc.*, Judge Posner found that the pressures against those companies outweighed the benefits of the class actions since the plaintiffs’ individual damages were worthy of separate trials (as opposed to suits where the plaintiffs’ damages are individually too small to rationally bring to court unless in a class action).⁷⁹ Ultimately, and in consideration of a separate issue regarding judicial abuse of discretion, Judge Posner decertified the class.⁸⁰

Posner’s blackmail hypothesis in *Rhone-Poulenc Rorer, Inc.* received criticism as baseless and disadvantaging plaintiffs.⁸¹ Judge Rovner’s dissent highlighted that Posner’s theory rested on no precedent and was merely “statistical conjecturing.”⁸² Additionally, the defendants presented the argument of pressure to settle to avoid significant financial risk for the first time at oral arguments.⁸³ In an Eleventh Circuit case, Judge Tjoflat bluntly rejected an argument similar to Posner’s.⁸⁴ Judge Tjoflat matter-of-factly stated, “[m]ere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit.”⁸⁵ Judge Tjoflat recognized that overturning certification of class actions on the basis of financial risk to defendant companies may create pressures on plaintiff classes to settle or even abandon their claims altogether.⁸⁶ In retrospect, the blackmail settlement theory appears to fall short when given any critical examination of the aspects of class action litigation and the perspective of both parties.

IV. THE KILLING BLOW

At nearly 10:00 p.m. on October 24, 2017, the Senate finally brought the bill to repeal the CFPB’s arbitration rule to the floor for a vote.⁸⁷ The vote was mostly down party lines, with Republican senators voting for the legislation and democrats voting against.⁸⁸ Senator Lindsay Graham of South Carolina and Senator John Kennedy of Louisiana were the only two senators who voted contrary to their party.⁸⁹

75. *Id.*

76. *Id.* at 1299.

77. *See id.*

78. *Id.*

79. *See Matter of Rhone-Poulenc Rorer, Inc.*, at 1299.

80. *Id.* at 1304.

81. *See id.* at 1306; *see also* Allan Kanner & Tibor Nagy, *Exploding the Blackmail Myth: A New Perspective on Class Action Settlements*, 57 BAYLOR L. REV. 681, 689 (2005).

82. *See Matter of Rhone-Poulenc Rorer, Inc.*, at 1307.

83. *Id.* at 1306.

84. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004).

85. *Id.*

86. *See id.*

87. *See* On the Joint Resolution (H. J. Res. 111), Vote Summary, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00249#position.

88. *See id.*

89. *See id.*

Both senators voted against the resolution.⁹⁰ In dramatic fashion, the Senate vote ended in a 50-50 tie, forcing Vice President Mike Pence to cast the deciding vote in favor of passing the legislation to repeal the CFPB arbitration rule.⁹¹

V. THE RAMIFICATIONS OF THE FAILURE OF THE CFPB RULE

Though the arbitration rule faced significant opposition from the start, including multiple executive agencies creating reports against the arbitration rule and a lawsuit preemptively challenging the rule, the rule's failure to pass carries a costly penalty for consumers. Ultimately, the carcass of the now defunct rule further highlights how modern financial institutions have perverted the practice of arbitration into an escape from facing consumers in court. The consequences of the failure of the CFPB arbitration rule are twofold: The strengthening of the protection of corporations from facing litigation and the weakening of consumers' rights to bring actions at all.

A. *The Insulation of the Consumer Industry*

The failure of the CFPB's arbitration rule removes a key regulatory option in overseeing corporations' class action litigation. Private class action litigation has been shown to bring to light legal issues requiring government enforcement.⁹² In the CFPB's report to Congress regarding the state of arbitration, the agency found that between 2008 and 2012, there were one-hundred and thirty-three cases where class action litigation and government enforcement aligned on the same issue.⁹³ The key statistic in the CFPB's report was that seventy-one percent of the aligning cases were initiated as private class actions instead of government enforcement suits.⁹⁴ The fact that almost three-fourths of these parallel cases were begun as class actions demonstrates the potency of the class action suit in illuminating consumer wrongdoing.

However, the study also demonstrated the efficacy of class actions in achieving results on behalf of consumer plaintiffs.⁹⁵ Regarding both the class action cases and government cases that ended in settlements of over ten million dollars, twenty-one cases were private class actions only, six cases were initiated by private class actions and followed by government actions, and only three were government actions followed by private litigation.⁹⁶ Further, there were no government-initiated actions whatsoever that resulted in settlements of over ten million dollars.⁹⁷ The settlement amounts also increased when private class actions commenced the lawsuits instead of government agencies.⁹⁸ For the private class actions with no government actions

90. *See id.*

91. *See id.*

92. *See* Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), CONSUMER FINANCIAL PROTECTION BUREAU, 13-20 (Mar. 2015).

93. *See id.* at 14.

94. *See id.*

95. *See id.* at 18.

96. *See id.*

97. *See id.*

98. *See* Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a), CONSUMER FINANCIAL PROTECTION BUREAU, at 18-19.

following, the net relief (which excludes attorneys' fees and court costs)⁹⁹ totaled 931 million dollars.¹⁰⁰ In the government actions that trailed private class actions, those settlements resulted in 814 million dollars.¹⁰¹ However, in suits where private class actions followed government actions the settlements resulted in only 299 million dollars in total net relief.¹⁰² The CFPB's data presents a powerful case for the notion that class actions provide a successful regulatory function for consumers against consumer corporations.

More specifically, class action litigation can verifiably lead to significant policy change within corporations. In the case of *In Re Checking Account Overdraft Litigation*, bank account holders filed a class action, alleging their banks collected excessive overdraft fees related to debit card charges.¹⁰³ The account holders asserted the banks intentionally rearranged the charges from highest to lowest to maximize the amount of overdraft fees.¹⁰⁴ The case ultimately settled for 410 million dollars.¹⁰⁵ Far more reaching than the massive settlement was the shift in overdraft fee policy across the nation.¹⁰⁶ According to the Pew Charitable Trusts, banks dramatically reduced categorizing account holder transactions from highest to lowest in the years after the *In Re Checking Account Overdraft Litigation*.¹⁰⁷ Remarkably, ninety one percent of the large banks have limited or abandoned "high-to-low" categorization of account holder transactions.¹⁰⁸ In regards to tobacco class action litigation in the 1990s, class actions helped pave the way for the historic Master Settlement Agreement¹⁰⁹ and continued to keep the tobacco industry honest in fear of plaintiffs "landing a killer blow."¹¹⁰ While there are countless other examples of class action litigation directly impacting consumer industries, the CFPB's arbitration rule ultimately removes this effective tool from the hands of the consumers.

99. *See id.* at 23.

100. *See id.* at 19.

101. *See id.*

102. *See id.*

103. *See In re Checking Account Overdraft Litig.*, 694 F. Supp. 2d 1302, 1307 (S.D. Fla. 2010).

104. *See id.*

105. *See* Timothy Raub, *Judge Approves \$410 Million Settlement In Checking Account Overdraft MDL*, LEXIS NEXIS LEGAL NEWSROOM (Nov. 9, 2011), <https://www.lexisnexis.com/legalnewsroom/litigation/b/litigation-blog/archive/2011/11/09/judge-approves-410-million-settlement-in-checking-account-overdraft-mdl.aspx?Redirected=true>.

106. *See generally* David L. Noll, *The Dangerous Consequences of Repealing the CFPB's Arbitration*, THE REGULATORY REV. (Nov. 6, 2017), <https://www.theregreview.org/2017/11/06/noll-repealing-arbitration-rule/>.

107. *See Consumers Need Protection From Excessive Overdraft Costs: An Evidence-Based Case for Regulation to Limit the Number and Amount of Fees*, THE PEW CHARITABLE TRUSTS (Dec. 20, 2016), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/12/consumers-need-protection-from-excessive-overdraft-costs>.

108. *See id.*

109. The Tobacco Master Settlement Agreement was a settlement between forty-six U.S. states and four tobacco manufacturing companies in 1998. The settlement resulted in the tobacco companies paying over 206 billion dollars. *See Master Settlement Agreement*, (Nov. 1998) https://web.archive.org/web/20080625084126/http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf.

110. GERAINT HOWELLS, *THE TOBACCO CHALLENGE: LEGAL POLICY AND CONSUMER PROTECTION* 150 (Ashgate Publishing, Ltd., 2013).

B. “Too Darn Bad” For Consumers

After the repeal of the CFPB’s arbitration rule, consumers’ ability to hold companies accountable for wrongdoing has been crippled. Professor David Noll observes the options for consumers has not only been limited but those options have become more indirect as well.¹¹¹ Noll explains that private lawyers will hesitate to take future consumer-related litigation because individually, they won’t be cost-effective to pursue, and as a class-action they are now likely barred unless explicitly authorized by other legislation.¹¹² Thus, a consumer desiring to hold a multimillion dollar corporation accountable will have to rely upon state law enforcement and administrative agencies to bring potential claims.¹¹³ However, not only are prosecutors and administrative officials resource-limited, their “decisions about which cases to pursue are influenced by political considerations that do not affect private attorneys.”¹¹⁴ Noll muses that only “[t]ime will tell whether [the repeal of the arbitration rule] merely opened the door to a new era of corporate fraud.”¹¹⁵

While consumers’ options may have drastically decreased, businesses are using arbitration provisions exponentially more to evade changing problematic practices and policies. In *Amador, et. al. v. California Culinary Academy, Inc., et. al.*,¹¹⁶ a class of students brought an action against Career Education Corporation (“CEC”) and California Culinary Academy, a subsidiary of CEC.¹¹⁷ The students alleged CEC fraudulently misrepresented the program, the incomes students working culinary jobs who attended CEC programs earned, as well as the qualifications CEC required for incoming students.¹¹⁸ The class action ultimately settled, netting the students forty million dollars.¹¹⁹ Sometime after this settlement, CEC began implementing binding arbitration provisions preventing students from bringing further class actions.¹²⁰ Instead of forcing CEC to alter its policies regarding its advertising towards prospective students, mandatory arbitration provisions provided CEC with a sufficient alternative to real change.

The Education Department proposed new regulations last year that prohibited “mandatory pre-dispute arbitration clauses and class action waivers that deny students their day in court if they are wronged.”¹²¹ However, the proposed regulations face a similar fate to the CFPB’s arbitration rule since, as the new administration

111. See David L. Noll, *The Dangerous Consequences of Repealing the CFPB’s Arbitration*, THE REGULATORY REVIEW (Nov. 6, 2017), <https://www.theregreview.org/2017/11/06/noll-repealing-arbitration-rule/>.

112. See *id.*

113. See *id.*

114. See *id.*

115. See *id.*

116. See Complaint at 1, *Amador v. Cal. Culinary Acad., Inc.*, Superior Court of California, No. CGC 07 467710 (Cal. 2007).

117. See *id.*

118. See *id.* at 3-7.

119. See generally Order Granting Final Approval of Class Action Settlement and Granting Plaintiff’s Motion for Attorneys’ Fees and Costs, *Amador v. Cal. Culinary Acad., Inc.*, Superior Court of California, No. CGC 07 467710 (Cal. 2012).

120. See For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success, Senate Committee on Health, Education, Labor and Pensions, 339.

121. See *Education Department Proposes New Regulations to Protect Students and Taxpayers from Predatory Institutions*, U.S. DEPARTMENT OF EDUCATION (June 13, 2016), <https://www.ed.gov/news/press-releases/education-department-proposes-new-regulations-protect-students-and-taxpayers-predatory-institutions>.

and Secretary of Education took office, Secretary Betsy DeVos has announced a “regulatory reset” that includes establishing a new rule making committee to potentially revise the proposed regulation.¹²² Further, the proposed regulations have been delayed to take effect in July of 2019—two years after the proposed regulation was slated to be enforced.¹²³

Forced arbitration provisions prohibiting class action litigation severely restricts consumers’ ability to hold corporations accountable for their transgressions. In *American Express Co. v. Italian Colors Restaurant*, where the Supreme Court upheld arbitration provisions prohibiting class actions, Justice Kagan writing for the dissent believed the majority merely told consumers “[t]oo darn bad” when facing forced arbitration.¹²⁴ In repealing the CFPB’s arbitration rule, Congress has echoed this sentiment emphatically.

VI. CONCLUSION

*Had I right, for my own benefit, to inflict this curse upon everlasting generations? I had before been moved by the sophisms of the being I had created; I had been struck senseless by his fiendish threats; but now, for the first time, the wickedness of my promise burst upon me; I shuddered to think that future ages might curse me as their pest, whose selfishness had not hesitated to buy its own peace at the price, perhaps, of the existence of the whole human race.*¹²⁵

When Dr. Frankenstein ponders on the permanency of his failed experiment on society, he despairs at the thought of the continued existence and propagation of his creation.¹²⁶ One wonders whether the current state of forced arbitration excluding class action litigation will be viewed with similar disgust in the future. Regardless of its perception in the years to come, mandatory arbitration is here to stay for the time being. The CFPB’s attempt and subsequent failure to reign in mandatory arbitration signals the vitality of the current practice of forcing consumers to choose between a service or the right to a lawsuit. After Dr. Frankenstein dies, his creation expresses his regret over Dr. Frankenstein’s inability to foresee the consequences of his actions: “and if yet, in some mode unknown to me, thou hadst not ceased to think and feel, thou wouldst not desire against me a vengeance greater than that which I feel.”¹²⁷ As consumers continue to endure the ramifications of mandatory arbitration provisions and class actions waivers, Congress may have wished to have “thought and felt” before repealing necessary regulation to protect consumers such as the CFPB’s proposed regulation.

122. See *Secretary DeVos Announces Regulatory Reset to Protect Students, Taxpayers, Higher Ed Institutions*, U.S. DEPARTMENT OF EDUCATION (June 14, 2017), <https://www.ed.gov/news/press-releases/secretary-devos-announces-regulatory-reset-protect-students-taxpayers-higher-ed-institutions>.

123. See Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 82 Fed. Reg. 49155 (proposed Oct. 24, 2017) (to be codified at 34 C.F.R. pts. 668, 674, 682, & 685).

124. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 240 (2013).

125. MARY SHELLY, *FRANKENSTEIN* 198 (CRW Publishing Ltd., 1818).

126. See *id.*

127. *Id.* at 267.