

IS THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEEING THE RIGHT TO TRIAL BY JURY IN CIVIL CASES PASSE?

A monumental study was completed by the Consumer Financial Protection Bureau (“CFPB”) in March 2015 simply entitled “Arbitration Study”, Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act §1028(a). Any consumer who owns a cell phone, has a stock brokerage account or purchases nearly anything from a major manufacturer will receive a “contract” in which they waive their right to trial by jury and consents to arbitration. Some of those arbitration tribunals are industry created preachers. So called “pre-dispute” arbitration now finds its way into nursing home, hospital and even doctor “contracts.”

The vanishing jury trial, is no joke. There are many federal courts throughout the United States that have little work to do in the civil field. The disappearance of the right to trial by jury has also had devastating effects in the state courts.

Is the trend to eliminate lawsuits in court a good thing or is it unfair? Most manufacturers and retailers are happy to see consumers and other plaintiffs in general lose their right to trial by jury. Consumers, on the other hand, are livid when they find out that they have given up a basic and fundamental constitutional right without even appreciating what they have signed onto.

Section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 required the Consumer Financial Protection Bureau to study the use of pre-dispute arbitration agreements in connection with the offering or providing of consumer financial products and services.

Unsurprisingly the study determined that tens of millions of consumers use consumer financial products and services that are subject to pre-dispute arbitration clauses. Just over 50% of credit card loans outstanding are subject to these waivers. Eight percent of banks, covering 44% of insured deposits include arbitration clauses in their checking account contracts. In the private student loan and mobile wireless markets, substantially all of the large companies used arbitration clauses. Virtually all arbitration clauses include provisions stating that arbitration may not proceed on a class basis, which means that it can simply be too expensive for a consumer to bring any claim at all.

The study by CFPB confirms that consumers are generally unaware of their waiver of the right to trial by jury and agreement to arbitration agreements.

The scope of the study is empirical, meaning that it looks at the facts and does not make any particular conclusions about the utility of pre-dispute arbitration clauses.

Generally speaking the court system is paid for by taxes, although there certainly are transactional costs and user fees. The arbitration system, on the other hand, is private and is sometimes extremely expensive for consumers. Parties can challenge arbitration awards in court only on the limited grounds specified in arbitration statutes.

Consumers are very unlikely to consider bringing formal claims against their card issuers or others that require the pre-dispute arbitration clauses in their contracts.

Section 4 of the report is of particular interest because it describes the differences between arbitration and the court system. The report makes clear that arbitration rules are complex. The AAA Consumer Arbitration Rules are 10,560 words in length.

Consumers prevail in claims against big corporations, when they are forced to resort to arbitration, in only a few hundred arbitration decisions per year. The voluminous report is very careful not to draw conclusions but the facts lead to the inevitable finding that pre-dispute arbitration is not beneficial to consumers, is time consuming, expensive and yields few ascertainable results. The power of the courts under a 7th Amendment mandate simply do not exist in the pre-dispute arbitration setting. The “hammer” of having a judge, and possibly a jury, to determine a claim is absent. The “peers” of the consumer plaintiff do not exist in arbitration.

*Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)*

Cliff Rieders, who practices law in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.

CAR/mdb