Battle of the blogs: Legal experts spar over consumers' arbitration clauses

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(June 7, 2022) - Legal heavyweights who've rhetorically sparred online over the actions of the Consumer Financial Protection Bureau are at it again, this time over the clauses that limit consumers' ability to sue their banks.

St. John's University School of Law Professor Jeff Sovern and Alan S. Kaplinsky, a partner at the national law firm Ballard Spahr LLP — two leading figures in consumer financial law — are engaged in debate over arbitration clauses and what the CFPB should do about them.

The often densely worded, difficult-to-understand clauses in contracts for credit cards and bank accounts typically require that disputes between a bank and consumer be resolved by privately appointed arbitrators. The clauses effectively bar individuals from joining class action lawsuits against the bank filed by similarly injured consumers.

The two men have been debating the issue off-and-on for years.

The pair often spar on legal and consumer financial issues. Kaplinsky's opinions and analyses appear in Ballard Spahr's Consumer Finance Monitor blog. Sovern's Consumer Law & Policy Blog is sponsored by the nonprofit consumer advocacy group Public Citizen.

The online exchanges between Sovern, who holds views generally favoring stronger consumer protections, and Kaplinsky, more frequently viewed as sympathetic to the financial services industry, have gained traction among private attorneys, government lawyers and financial industry observers.

Ballard Spahr's consumer finance blog, which was launched in 2011, has thousands of subscribers, and Kaplinsky has been quoted in articles and legal briefs, he told CQ Roll Call.

"Over the years, it has received many awards from the American Bar Association as a 'top blog: in the law firm space," he said.

Sovern said that according to Lexis, an online legal research tool, his blog has "been cited dozens of times in law review articles, congressional hearings, and the like."

The most recent scrum came last month when Sovern pondered why the CFPB and its director, Rohit Chopra, haven't taken up the issue of arbitration clauses.

In a May 11 posting, Sovern noted Chopra avoided mention of the issue during appearances before the Senate Banking and House Financial Services committees, and no committee members had asked any questions about it.

"I guess we will have to wait until the Bureau publishes its next regulatory agenda to see if arbitration is on its mind," Sovern wrote in the post, titled "Whither Arbitration Regulation?"

Kaplinsky, a few days later on May 13, offered a post titled: "Don't hold your breath, Professor Sovern!" While Sovern "laments" the lack of CFPB action, "there are many reasons why it would be foolish for the CFPB to revisit arbitration," he wrote.

Kaplinsky said Chopra already has a robust agenda for the agency, including rulemaking that would require to banks collect and report data on the race, gender and ethnicity of small business owners applying for credit. Another complicated rulemaking would give consumers a right to access their personal financial data collected and held by companies, including financial technology firms. Both proposals seek to implement provisions of the Dodd-Frank Act (PL 111-203).

"The CFPB does not have the bandwidth and resources to take up arbitration which would also undoubtedly be complex and controversial," Kaplinsky wrote.

The Ballard Spahr attorney noted the CFPB's previous attempts at arbitration rule "ended up very badly" for the bureau. In 2017, Congress passed a joint resolution under the Congressional Review Act (5 U.S.C. 801 et seq.) repealing a bureau rule that banned mandatory arbitration clauses in consumer financial contracts.

This debate comes after the two experts crossed swords on another issue: the CFPB's plans to update its examination manual to say alleged discriminatory acts can be considered to be an impermissible "unfair" practice under federal law. At the center of that debate are prohibitions known as UDAPP, an abbreviation for "unfair, deceptive and abusive acts and practices."

"You might think this is pretty straightforward: most of us would think odious discrimination is unfair," Sovern wrote in a May 1 blog post. "Discrimination easily qualifies as unfair under the statutory requirements of unfairness ... If the industry argues otherwise, it risks convincing consumers that the industry wants to discriminate. And that wouldn't serve anyone."

The next day, Kaplinsky responded that "Professor Jeff Sovern advocates very strongly in support of interpreting the 'unfairness' prong of UDAPP to encompass discrimination in connection with credit and non-credit consumer financial products and services offered by banks ... Professor Sovern's argument misses the point. The consumer financial services industry is not seeking a 'pass' when it comes to any form of discrimination. Instead, the industry simply wants to know what are the 'rules of the road.'"

Kaplinsky said that means that any expansion of UDAAP should be done through a formal rulemaking process, including a public comment period, rather than an amendment to an examination manual, given the complexity.

For all their disagreements, Sovern and Kaplinsky each say their online volleys are affable. "I consider them to be friendly and professional," wrote Kaplinsky in an email.

"Oh, definitely friendly," Sovern told CQ Roll Call. "I respect Alan's skills immensely and I enjoy our back-and-forth."

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