

# Will Congress Kill Mandatory Arbitration In Consumer Finance Transactions?

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In 2007, Congress introduced legislation, entitled the Arbitration Fairness Act of 2007, to amend the Federal Arbitration Act (“FAA”) to render unenforceable predispute arbitration provisions in, among other things, agreements concerning consumer transactions. The legislation permitted parties to consumer transactions to agree to arbitrate disputes but only after the dispute arose and required courts to decide any dispute concerning the validity or enforceability of an arbitration agreement even when the arbitration agreement required submission of issues concerning arbitrability to the arbitrator. The Arbitration Fairness Act of 2007 died in committee, but in 2009 was re-introduced in both the House as H.R. 1020 and the Senate, S. 931, as the Arbitration Fairness Act of 2009. (See a previous post entitled [“The End of the Arbitration Clause?”](#) discussing recent court decisions and highlighting this pending legislation). To date, limited action has been taken on the respective bills.

While Congress has yet to act on broad amendments to the FAA, prohibition on mandatory arbitration clauses in connection with the provision of certain consumer financial products or services could be enacted as part of the sweeping Wall Street Reform and Consumer Protection Act of 2009, H.R. 4173 (the “Wall Street Reform Act”). (See previous post on the [Senate’s version of financial system regulatory reform legislation, the Restoring American Financial Stability Act](#)). Among other things, the Wall Street Reform Act would create a Consumer Financial Protection Agency. The director of the proposed Agency will have authority to:

Prohibit or impose conditions or limitations on the use of any agreement between a covered person [defined, with limitations, as any person who engages directly or indirectly in a financial activity in connection with the provision of a consumer financial product or service, (H.R. 4173, at § 4111)] and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties if the Director finds that such a prohibition or imposition of conditions or limitations are in the public interest and for the protection of consumers. H.R. 4173, at § 4208.

This legislation has passed both Houses of Congress and has been submitted to a Joint Conference Committee to resolve differences between the House and Senate versions. Assuming the final legislation includes a new consumer protection entity with authority to promulgate rules regulating arbitration in disputes related to consumer financial products or services, federal oversight of mandatory predispute arbitration provisions in agreements related to consumer financial products or services will likely come to fruition. That said, the creation of a new federal regulator would likely be time consuming and the promulgation of rules prohibiting arbitration would require, among other things, notice and comment. Thus, while it appears that the use of mandatory predispute arbitration provisions in agreements related to consumer financial products or services is at least headed for federal oversight, absent revival of the Arbitration Fairness Act of 2009, it will likely take several years before that federal oversight is in place.