



What the New Arbitration Rule Means for Litigating Against For-Profit Schools



Abby Shafroth, National Consumer Law Center
Toby Merrill, Project on Predatory Student Lending

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Webinar Tips

- If you joined with a headset or through your computer speakers, please be sure your **device volume settings** are properly adjusted
- If your headset is not working, please try **unplugging and re-plugging** in your device
- Everyone will be muted during this presentation
- This training is being recorded



Webinar Tips

- **Questions?** Type it in the Q&A function and we will relay it to the speaker(s). Will hold most questions to end when we'll do a Q&A.
- If you are having technical problems, please use the Q&A function for help and I will assist you
- You can access the PPT for this webinar by opening the “materials” drop down. We will also post it on line and will send instructions on how to obtain a certificate of attendance.



Abby Shafroth

National Consumer Law Center

Abby Shafroth is a staff attorney at the National Consumer Law Center and focuses on student loan and for-profit school issues, as well as the intersection of criminal and consumer law. She is an author of the National Consumer Law Center's *Student Loan Law* treatise.

Abby attended the 2016 borrower defense rulemaking meetings that led to new arbitration rule, and participated in the 2018 borrower defense rulemaking meetings as representative for legal aid organizations.





Toby Merrill

Project on Predatory Student Lending

Toby founded and directs the Project on Predatory Student Lending at the Legal Services Center of Harvard Law School. The Project represents low-income student loan borrowers in cases against predatory for-profit college companies, and against the Department of Education for enabling this industry and failing to protect and enforce borrowers' rights.

The Project represented student borrowers in litigation that successfully challenged the Department's unlawful delays of the 2016 borrower defense rule. That lawsuit resulted in the 2016 borrower defense rule, including its new limits on arbitration, finally going into effect.



You've got questions. We've got answers. *(and more questions)*

- **WHY** limits on arbitration abuse were needed
- **WHAT** the 2016 Rule requires
- **WHO** the 2016 Rule applies to
- **WHEN** and how long the 2016 Rule will be in effect
- **HOW** does the 2016 rule impact litigation against schools that use arbitration agreements?

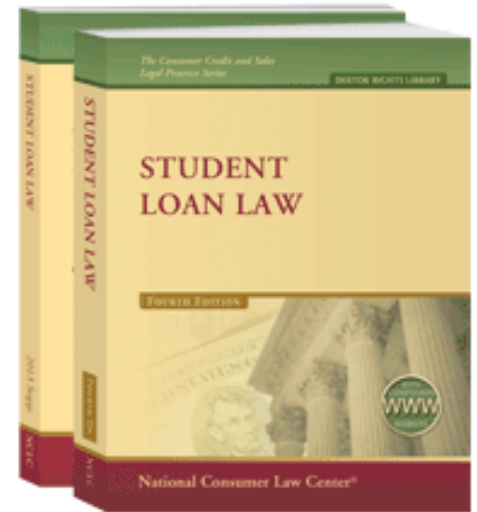
Student Loan Training Las Vegas, March 11-12, 2019



- Student loan litigation track at FDCPA Conference:
 - Double-session on Litigating against Predatory Schools
 - Other student loan sessions:
 - litigating against servicers,
 - litigating against Dep’t of Education,
 - using the FDCPA in representing student loan borrowers,
 - student loan primer
 - <https://www.nclc.org/conferences-training/fair-debt-collection-practices-conference.html>

More Resources

- Student Loan Manual
 - Online and print, companion website
- Student Loan Listserv
 - <http://lists.nclc.org/subscribe>
- Attorney case consultations
- Student Loan Borrower Assistance
 - www.studentloanborrowerassistance.org/
- Project on Predatory Student Lending
 - <https://predatorystudentlending.org/>



Why Limit Forced Arbitration?

- Unlawful predatory recruiting, including high-pressure sales tactics and false advertising and promises about . . .
 - likelihood of employment / job placement rates
 - expected salary
 - transferability of credits
 - cost of education/time to complete
 - internship programs
 - programmatic accreditation
 - language of instruction

Why Limit Forced Arbitration?

- Rampant use of clauses in enrollment agreements by for-profits relying on FSA
- Clauses:
 - insulate against potential liability for illegal conduct against students
 - prevent public (incl. government) detection of illegal conduct
- Most for-profit revenues come from federal student loan program, but high default rates + discharges (theoretically) available in cases of fraud, closure
 - Clauses shift risk of costs from illegal conduct from schools to students and taxpayers



Why Limit Forced Arbitration?

“[E]vidence showed that the widespread and aggressive use of class action waivers and pre-dispute arbitration agreements coincided with widespread abuse by schools over recent years, and the effects of that abuse on the Direct Loan Program.

It is undisputable that . . . abusive [schools] aggressively used waivers and arbitration agreements to thwart timely efforts by students to obtain relief from the abuse, and that the ability of the school[s] to continue that abuse unhindered by lawsuits from consumers has already cost the taxpayers many millions of dollars in losses and can be expected to continue to do so.”

- Dep’t of Ed, 81 Fed. Reg. 75,926, 76,025 (Nov. 1, 2016)

2016 Borrower Defense Rule

Limits Arbitration Abuse

Rule requires institutions that seek the privilege of participating in the federal student loan Direct Loan Program to agree, as a condition of participation:

- not to use pre-dispute arbitration clauses, class action bans, and mandatory internal dispute resolution processes against students participating in the DL program pursuing claims that could be asserted as borrower defenses, and
- to submit arbitral and judicial documents to ED regarding any claims filed against the school that could be asserted as borrower defenses

- 81 FR 75,926, 76,087-89 (Nov. 1, 2016)
(codified at 34 CFR § 685.300(b)(11), (d)-(i))

Who the Rule Applies to

- Institutions
 - Schools participating in Direct Loan Program
- Students
 - Direct Loan borrowers or students whose parents took out Direct Parent PLUS Loans (generally)

What the Rule Requires

- Does **NOT** make arbitration agreements and class waivers judicially unenforceable
- DOES require schools participating in DL program to agree:
 - not to “enter into” certain predispute arbitration agreements or class action bans
 - not to “rely in any way on” previously entered agreements, and
 - to amend previously entered agreements or provide a specific carve-out notice

What clauses are off-limits?

- Predispute arbitration agreements, internal dispute resolutions reqs, or class waiver *for borrower defense claims*
 - § 685.300(i)(1): „„Borrower defense claim“ means a claim that . . . could be asserted as a borrower defense as defined in § 685.222(a)(5)”
 - § 685.222(a)(5): “„borrower defense“ refers to an act or omission of the school . . . that relates to the making of a Direct Loan for enrollment at the school or the provision of educational services for which the loan was provided”

“Borrower defense claims”

- Clearly includes claims related to deceptive or otherwise unlawful recruitment conduct, or illegal conduct relating to making of Direct Loan, including claims relating to:
 - Recruiting misrepresentations,
 - breach of contract,
 - other violation of a student’s consumer protection rights under state law

- see 34 C.F.R. § 685.206(c) and 34 C.F.R. § 685.222

Examples of Protected Claims

✓ Likely protected

- “substantial misrepresentation”
- False advertising
- Unfair or deceptive recruiting
- Breach of enrollment contract
- Fraud

⊘ Likely not

- Slip and fall on campus
- Sexual and racial harassment claims
- Violation of HEA if not also a violation of state law or misrepresentation

New students/agreements

Schools that choose to continue putting predispute arbitration agreements or class waivers in agreements with student borrowers must agree to include specific language **carving out** BD-type claims:

“We agree that neither we nor anyone else will use this agreement to stop you from bringing a lawsuit concerning [BD-type claims]. . . This provision does not apply to lawsuits concerning other claims.”



- § 685.300(f)(3)
(similar language for class actions)

Existing agreements

For predispute arbitration agreements or class action waivers already entered into (including pre-2018 agreements), school agrees:

1. Not to “rely in any way on” it for BD type claims
 - e.g., seek to dismiss or stay action, seek protective order from discovery, exclude student from class, file in arbitration



Existing agreements

2. And to either:

- amend agreement to contain specific carve-out language OR
- provide specific written notice: “We agree [not] to use [agreement] to stop you from bringing a lawsuit concerning [BD-type claims] . . .”

NOTICE

Deadline: “no later than the exit counseling required under 685.304(b), or the date on which the school files its initial response to a demand for arbitration or service of a complaint from a student who has not already been sent a notice or amendment.”

Required record submissions

- Arbitral records (§ 685.300(g))
 - School must submit certain types of records to ED “in form and manner specified by the Secretary” for any any BD-type claims
 - Claims, counterclaims,
 - arbitration agreement
 - judgment, award
 - Determination agreement is unfair
 - Due w/in 60 days of filing/receipt
 - FOIA?



Required record submissions

- Judicial records (§ 685.300(h))
 - School must submit certain types of records to ED “in form and manner specified by the Secretary” for any BD-type claims
 - Claims, counterclaims
 - Dispositive motions and rulings/judgments
 - Due w/in 30 days of filing/receipt
 - FOIA?



Rule Delayed Unlawfully, Finally Forced Into Effect

- Rule was scheduled to go into effect July 1, 2017, but ED attempted to delay until it could revise/rescind through a new rulemaking
- **Rule went into effect October 16, 2018** due to federal court decision finding delays unlawful (*Bauer v. DeVos*, D.D.C.)

Future of the Rule

- New rulemaking:
 - July 2018 proposal: rescind arbitration limits
 - New proposal forthcoming: arbitration proposal unlikely to change
 - If finalized by 11/1/2019, rescission goes into effect 7/2020
 - **At least 18 months of access to courts!**
 - And if schools didn't already enter arbitration agreement or if they amended agreement to include carve out, student will likely retain right to sue
- Ongoing industry challenge to arbitration provision (*CAPPS v. DeVos*, DDC), but PI denied

What now?



POLITICO

Morning Education

A daily overview of education policy news

Will Trump administration enforce Obama-era arbitration ban?

By MICHAEL STRATFORD (mstratford@politico.com; [@mstratford](https://twitter.com/mstratford)) 12/20/2018 10:00 AM EST

Litigation: Developing Claims

Sources of Evidence: Federal Investigations

- HELP Report
- GAO
 - Eg, Undercover Testing Finds For-Profit Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices (2010)
- FTC
 - Eg, DeVry
- SEC
- Department of Education OIG reports

Litigation: Developing Claims

Sources of Evidence: State Enforcement Actions

“Ashford’s misrepresentations were not the actions of rogue employees but the consequence of the extreme pressure that Ashford exerted on its „Enrollment Advisors,” also known as „University Advisors” or „Admissions Counselors””

-California v. Bridgepoint (Ashford)

Litigation: Developing Claims

Sources of Evidence: False Claims Act Cases, SEC Filings



The screenshot shows the top portion of the Department of Justice website. At the top left is the Department of Justice seal. To its right, the text reads "THE UNITED STATES DEPARTMENT of JUSTICE". Further right, there is a link for "en ESPAÑOL" and several social media icons (Twitter, Instagram, Facebook, YouTube, RSS, Email). Below this is a navigation bar with links for "HOME", "ABOUT", "AGENCIES", and "RESOURCES". The main content area has a breadcrumb trail: "Home » Office of Public Affairs » News". A black banner with the text "JUSTICE NEWS" is positioned below the breadcrumb. Underneath, it says "Department of Justice" and "Office of Public Affairs". A horizontal line separates the header from the news content. On the left side of the line, it says "FOR IMMEDIATE RELEASE". On the right side, it says "Monday, November 16, 2015". The main headline reads: "For-Profit College Company to Pay \$95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations". Below the headline, the first sentence of the article is visible: "The United States has reached a landmark global settlement with Education Management Corp. (EDMC), the second-largest for-profit education company in the country, the Department of Justice announced today. The \$95.5 million settlement resolves allegations that EDMC violated federal and state False Claims Act (FCA) provisions by falsely certifying that it was in compliance with Title IV of the Higher Education Act (HEA) and parallel state statutes."

Home » Office of Public Affairs » News

JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE Monday, November 16, 2015

For-Profit College Company to Pay \$95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations

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Litigation: Developing Claims

Claims for class resolution

– Close central control

21. ITT headquarters provided centralized services to all campuses in the areas of accounting, marketing, public relations, curricular development, management information systems, purchasing, legal, regulatory, legislative affairs, real estate, human resources, and compliance and internal audits.

22. Major institutional functions, including recruiting, finance, academic affairs, career services, library, and registration all operated out of ITT's headquarters. ITT also maintained a centralized call center in Indiana, part of the function of which was to call students who had not reenrolled in ITT and threaten to take them to collections if they did not pay their alleged outstanding balances to ITT or re-enroll.

Litigation: Developing Claims

Claims for class resolution

- Close central control
- School policies
- Examples: recruiting, licensure

Litigation Considerations

- Attacks on the rule
- Non-compliance
- Other contract terms; prior litigation
- Prior motions to compel

Litigation Considerations



Questions?





Since 1969, the nonprofit **National Consumer Law Center® (NCLC®)** has worked for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. www.nclc.org