

# Arbitration and Class Action Waivers: What's all the fuss about?

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# About the Presenters



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  - Defends and advises schools on all types of student and employee litigation and represents schools before all levels of regulators (DOE, state AGs, state agencies and boards, and accreditors)
- Ben DeGweck
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# About the Presenters



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  - Senior Vice President, Cobbs Allen
  - Provide risk transfer solutions related to education.
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# The Status of the Borrower Defense Rule(s)



# The Big Picture



## Borrower Defense Framework

Financial  
Responsibility Triggers

Arbitration  
Agreements

Closed School  
Discharge

False  
Certification  
Discharge

Misrep-  
resentation

Repayment  
Rates for  
Prop. Schools

# The BDR Timeline



Date	Rulemaking Event
Dec. 1, 1994	ED promulgates its first borrower defense rule at 34 CFR § 685.206(c).
July 21, 1995	ED publishes a <a href="#">Notice of Interpretation</a> in the Federal Register that provides additional guidance regarding the nature and scope of borrower defense claims.
Mar. 2016	ED carries out a negotiated rulemaking to create a new Borrower Defense Rule. Consensus is not achieved.
June 16, 2016	ED publishes its <a href="#">proposed 2016 Borrower Defense Rule</a> in the Federal Register.
Nov. 1, 2016	ED publishes its <a href="#">final 2016 Borrower Defense Rule</a> in the Federal Register, with an effective date of July 1, 2017.
Jan. 19, 2017	ED publishes <a href="#">procedural rules</a> governing recovery actions against institutions for loans discharged pursuant to the 2016 Borrower Defense Rule. These procedural rules become effective immediately.
May 24, 2017	The California Association of Private Postsecondary Schools (CAPPS) <a href="#">sues</a> ED asserting that elements of the 2016 Borrower Defense Rule violate the APA.
June 16, 2017	ED publishes a <a href="#">notice</a> indefinitely delaying almost all elements of the 2016 Borrower Defense Rule pending resolution of the CAPPS litigation, and announcing the agency's intent to initiate a new rulemaking to create a new Borrower Defense Rule.

# The BDR Timeline



Date	Rulemaking Event
July 1, 2017	The effective date of the delayed 2016 Borrower Defense Rule passes.
Oct. 24, 2017	ED publishes an <a href="#">interim final rule</a> that delays the effective date of the 2016 Borrower Defense Rule until July 1, 2018, and proposes a further delay of the 2016 Rule until July 1, 2019.
Nov. 2017 - Feb. 2018	ED carries out a negotiated rulemaking to create a new Borrower Defense Rule. Consensus is not achieved.
Feb. 14, 2018	ED publishes a <a href="#">final rule</a> that delays the effective date of the 2016 Borrower Defense Rule until July 1, 2019.
July 31, 2018	ED publishes its <a href="#">proposed 2018 Borrower Defense Rule</a> in the Federal Register.
Sept. 17, 2018	U.S. District Court for DC <a href="#">rules</a> that ED violated the APA when it delayed the 2016 Borrower Defense Rule.
Oct. 16, 2018	U.S. District Court for DC <a href="#">rules</a> that CAPPs cannot not justify a preliminary injunction of the 2016 Borrower Defense Rule.
March 15, 2019	ED <a href="#">publishes</a> guidance concerning the implementation of certain reporting obligations required under the 2016 Borrower Defense Rule.
June 3, 2019	ED <a href="#">publishes</a> brief Q&A with additional guidance regarding reporting obligations.
Sept. 2019	ED publishes its final 2019 Borrower Defense rule in the Federal Register, with an effective date of July 1, 2020.
July 1, 2020	Effective date of the 2019 Borrower Defense rule.

# Predispute Arbitration Clauses and Class Action Waivers



# The DL Participation Agreement



- Section 685.300 of the regulations requires institutions wishing to participate in the DL Program to “[e]nter into a written program participation agreement with [ED],” and details terms of participation.
- BDR-2 revised 685.300 to condition school’s continued participation in the DL Program on their acceptance of certain terms concerning dispute resolution, including the use of pre-dispute arbitration clauses and class action waivers.

# Existing Agreements



- Institutions that previously used predispute arbitration clauses or class action waivers that **cover BDR claims** have two options under the rule: (1) amend their prior agreements or (2) provide notice that they will not enforce the provisions with regard to BDR claims.
- ED recognizes in the guidance that providing **notice** is the more practical and likely approach.

# Existing Agreements



- Institutions must provide notice to **DL recipients** no later than (1) at the point of exit counseling **or** (2) the date on which the institution files its initial response to a demand for arbitration or service of a complaint from a student who has not already received a notice or amended agreement.
- Institutions must implement their new notice processes by **May 14, 2019**.
- ED has not created a notice “form,” but a school’s notice must include the **exact** language on the following slides.

# Content of Notice



- Notice for existing agreements with DL recipients including a **predispute arbitration clause**:

We agree not to use any predispute arbitration agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit regarding such a claim or you may be a member of a class action lawsuit regarding such a claim even if you do not file it. This provision does not apply to any other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Direct Loan or the provision of educational services for which the loan was obtained.

# Content of Notice



- Notice for existing agreements with DL recipients including a **class action waiver**:

We agree not to use any predispute agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.

# Future Agreements



- Institutions may continue to use both predispute arbitration clauses and class action waivers in future agreements, but must augment them to clarify that they do not cover **BDR claims by DL recipients**.
- Institutions that continue to use predispute arbitration clauses or class action waivers must augment their agreements to include the **exact** language included at 34 CFR 685.300(f)(3)(i) and 34 CFR 685.300(e)(3)(i), respectively.

# Mandatory Language



- Any future student agreement that includes a predispute arbitration clause should also include the following:

We agree that neither we nor anyone else will use this agreement to stop you from bringing a lawsuit concerning our acts or omissions regarding the making of the Federal Direct Loan or the provision by us of educational services for which the Federal Direct Loan was obtained. You may file a lawsuit for such a claim or you may be a member of a class action lawsuit for such a claim even if you do not file it. This provision does not apply to lawsuits concerning other claims. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.

# Mandatory Language



- Any future student agreement that includes a class action waiver should also include the following:

We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action lawsuit in court. You may file a class action lawsuit in court or you may be a member of a class action lawsuit even if you do not file it. This provision applies only to class action claims concerning our acts or omissions regarding the making of the Direct Loan or the provision by us of educational services for which the Direct Loan was obtained. We agree that only the court is to decide whether a claim asserted in the lawsuit is a claim regarding the making of the Federal Direct Loan or the provision of educational services for which the loan was obtained.

# Ongoing Arbitrations



- The unenforceability of predispute arbitration clauses and class action waivers applies to any arbitration proceeding that was (1) **ongoing and not final as of March 15, 2019**, (2) concerns a BDR claim, (3) involves a DL recipient, and (3) initiated pursuant to a predispute arbitration agreement.
- For any such arbitration, institutions were required to provide students with applicable notice(s) of unenforceability by **March 25, 2019**.

# Ongoing Arbitrations



- ED seems to indicate that arbitrations concluding prior to October 16, 2018 are unaffected, while those concluding after may be impacted. However, the guidance is unclear.
- **Consult counsel** if you were party to an arbitration proceeding that was (1) **ongoing as of October 16, 2018**, (2) concerned a BDR claim, (3) involved a DL recipient, was (3) initiated pursuant to a predispute arbitration agreement, and (4) **concluded prior to March 15, 2019**.

# Only BDR Claims Covered



- These new requirements **only** relate to student claims or complaints that are or could be asserted as a borrower defense claim.
- This means claims or complaints based on acts or omissions of the school that (1) relate to the making of a federal loan or (2) the provision of educational services for which the loan was provided.

# Only BDR Claims Covered



- ED has repeatedly indicated that this would exclude, for example, personal injury tort claims or a sexual or racial harassment claim.
- Based on proposed BDR-3 rule, ED also **might** consider the following excluded:
  - the general quality of the student's education or the reasonableness of an educator's conduct;
  - academic disputes and disciplinary matters; and
  - any claim that "is not directly and clearly related to the making of the loan or the provision of educational services by the school."

# Only BDR Claims Covered



- The regulations specify that whether a claim is “a claim regarding the making of a Direct Loan or the provision of educational services for which the loan was provided,” (*i.e.*, a borrower defense claim) is ultimately to be decided by the court.

# Panel Discussion



# Panel Discussion



Is there any current litigation seeking to prevent BDR's ban of arbitration agreements and class action waivers?

# BDR Litigation



- CAPPS v. Devos
  - October 2018 – Court denied preliminary injunction to block BDR regulations, setting the rule into effect
  - January 2019 – CAPPS filed Amended Complaint that continues to seek to invalidate the arbitration and class action provisions of BDR regulations
  - May 2019 – Briefing closed on cross-motions for summary judgment
- What's Next?
  - Summary judgment ruling that could:
  - Vacate the arbitration and class action provisions of BDR regulations;
  - Find against CAPPS and terminate the litigation; or
  - Could allow litigation to continue

*CAPPS v. Devos*, No. 1:17-CV-999, U.S. Dist. Ct. for Dist. of Columbia

# Panel Discussion



What if my school has not altered our agreements as required?

# Panel Discussion



ED specifies the language that must be used in notice to students, but are schools prohibited from adding additional language?

What about jury waiver provisions?

# Panel Discussion



What constitutes a BDR claim, and can I challenge what constitutes a BDR claim?

Schools should attempt to narrow the scope of what constitutes a BDR claim.

# Panel Discussion



If I've been using arbitration and class action waivers for the past few years and I get sued by a former student what should I do?

# Panel Discussion



Litigators and insurance professionals believe BDR will lead to an increase in student litigation. How can schools prepare to deal with the inevitable increase in litigation?

# Panel Discussion



Are employee arbitration and class action waivers allowed?

Are employee arbitration and class action waivers beneficial for schools?

# Panel Discussion



When must ED publish new regulations if BDR is to be replaced?

Is ED on pace to replace BDR?

# Questions & Answers



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