CARLTON FIELDS

CFPB Proposes Banning Use of Pre-Dispute Arbitration Agreements in Consumer Class Actions

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The Consumer Financial Protection Bureau (CFPB or Bureau) announced today that it is considering rules prohibiting application of pre-dispute arbitration agreements to class litigation involving certain consumer financial products. Citing concerns that such agreements "effectively prohibit" class litigation and prevent consumers from obtaining remedies for harm caused by providers of consumer financial products or services, the proposal would apply to most products subject to Bureau oversight. Various states, including California, are considering similar bans with respect to other types of claims. Dodd-Frank prohibited arbitration agreements in home mortgages, and authorized the Bureau to regulate the use of arbitration clauses in other consumer financial products, if it found based upon study that doing so would protect consumers and serve the public interest, and if any proposed rule included findings consistent with study results. In March, the Bureau released the results of a three-year study of pre-dispute arbitration agreements, in which it found that such agreements restricted consumer relief in disputes with financial service providers by limiting class

actions. Specifically, the Bureau reported that arbitration agreements could be used to move class action cases to arbitration, and typically prohibited class arbitration, thus blocking any form of class-wide relief for such claims. The study focused on credit cards, prepaid cards, and deposit accounts, and excluded cases involving investors, securities, brokerage accounts, or investor services. Insurance cases not involving an add-on to a consumer financial product such as title or credit card insurance were also excluded (see fact sheet). The proposal announced today would prohibit inclusion of arbitration clauses that block class action claims in contracts with consumers for credit cards, checking and deposit accounts, prepaid cards, money transfer services, certain auto loans, auto title loans, small dollar or payday loans, private student loans, and installment loans. More specifically, any arbitration agreement in such a contract would be required to explicitly state that the arbitration agreement is inapplicable to cases filed in court on behalf of a class unless and until class certification is denied or the class claims are dismissed. The proposal would also require companies that choose to arbitrate individual disputes to submit arbitration claims and awards issued to the CFPB. Specifically, covered entities that use arbitration agreements in their contracts with consumers would be required to submit initial claim filings and written awards in consumer finance arbitration proceedings to the Bureau through a process it expects to establish as part of the rulemaking. It is also considering whether to publish the claims or awards to its website and make them available to the public. The Bureau asserts that the proposals would benefit consumers by providing companies with incentive to comply with consumer laws in order to avoid lawsuits, bringing public attention to questionable business practices, and making the individual arbitration process more transparent. However, such benefits may be outweighed by consequences flowing from the increased costs of litigation that will result. Consumer class action lawyers have long targeted the financial services industry, often with questionable claims, expecting to be rewarded when companies settle to avoid the disruption and expense of protracted litigation. Since the Supreme Court decided *AT&T Mobility LLC v. Concepcion,* which upheld arbitration clauses requiring individual arbitration of claims, the financial services industry has increasingly relied on such clauses to successfully defend against expensive class actions and bring consumer claims to prompt resolution. The Bureau's suggestion that its proposal will benefit consumers is shortsighted, to say the least, as the proposed ban will encourage the filing of questionable class actions against the industry, potentially resulting in billions of dollars in increased costs which will ultimately be passed to consumers in the form of increased prices. In addition, such costs may drive some providers out of markets, reducing competition and leaving consumers with fewer, more expensive choices. The Bureau stated that it will convene a Small Business Review Panel with the Office of Management and Budget and the Small Business Administration Office of Advocacy to consider the potential impact of the proposals and begin the rulemaking process. Following completion of that process, review of the Panel's recommendations and that of other stakeholders, the Bureau expects to commence a rulemaking. The CFPB is not the only regulator attacking arbitration agreements with class action waivers, nor are such attacks confined to consumer financial products. The California Legislature just passed Assembly Bill 465, which would invalidate arbitration agreements with respect to employment claims such as discrimination and wage and hour and also preclude

class action waivers of such claims. Similar restrictions on arbitration and class action waivers are pending in a number of states. *View the CFPB announcement and links to the proposal »*

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