Published on *The National Law Review* https://natlawreview.com

CFPB and the Future of Arbitration Clauses: Consumer Financial Protection Bureau

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The CFPB has issued a report regarding mandatory consumer arbitration clauses, a sign that arbitration clauses may become passé.

On March 10, the Consumer Financial Protection Bureau (CFPB), as required by section 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, issued a lengthy study on mandatory predispute arbitration agreements. According to an accompanying statement released by the CFPB, the report supports five conclusions: (1) over half of checking account deposits and credit card debt is covered by such agreements; (2) 75% of consumers do not know whether they are subject to such an agreement; (3) consumers are reluctant to pursue claims in even simplified court systems, such as small claims; (4) approximately 32 million U.S. consumers are eligible to participate in class action settlements annually; and (5) arbitration agreements do not lead to lower prices for consumers.

What Does This Mean?

In other situations where the CFPB has issued a report or study, it has used those documents as the legal, policy, and political justification for subsequent regulatory actions, such as for fair lending and payday lending. Based on the new study, we anticipate that the CFPB will promulgate rules that either prohibit or restrict the use of mandatory consumer arbitration clauses or create a system in which such arbitration may not be commercially or legally viable.

Moreover, although the CFPB's actions certainly do not bind any other agency of federal or state government, we believe that the CFPB action might lead to what amounts to "government peer pressure" on other agencies, such as the Federal Trade Commission, Securities and Exchange Commission, and Commodity Futures Trading Commission, as well as state law enforcement and financial regulatory authorities, to either promulgate their own rules if they have the authority or to

look to their own unfair and deceptive trade practices authority to expand the CFPB mandate beyond the CFPB's authority.

Analysis

The study provides what will likely be represented to be empirical support for rules that would prohibit or curtail the use of these agreements with respect to consumer financial products, such as checking accounts, credit cards, prepaid cards, private student loans, auto purchase loans, and mobile wireless agreements.

One of the study's underlying premises is that 32 million consumers benefit from class action settlements annually. This amounts to more than 41% of the adult U.S. population. As the percentage of deposits and debt covered by such agreements increases, the study indicates that the number of consumers who "benefit" from class action settlements will decrease.

Whether the study supports the relative benefits to financial consumers of class action to the extent that the CFPB has concluded that it does may be open to question. First, the assumption that there is a correlation between deposits/debt subject to arbitration clauses, and numbers of consumers benefiting from class action settlements, may be overstated. Given broad-based criticism of the U.S. consumer class action settlement system, in which many consumers receive miniscule sums or even value as in coupons and the like, while class plaintiffs' lawyers receive the lion's share of such settlements, the 32 million number is relatively meaningless.

Second, even if there is no direct price correlation, the more fundamental question is whether arbitration is fair. As long as the adjudications, whether by arbitration or through class action, are fairly initiated and conducted, there should be no particular reason for the CFPB, rather than the marketplace, to dictate the nature and form of financial consumer remedies.

Third, the analysis suggests that this is an issue with a binary answer when it is not. There is a legitimate role both for arbitration and consumer class action settlements in our system of financial consumer dispute resolution. If indeed there are specific concerns about the fairness of consumer arbitration, those should be solvable without the need to dispense with, or limit, the availability of arbitration as a remedy.

Given the study's expressed preference for consumer class action settlements, however, the CFPB's results and conclusions bear careful consideration and monitoring. As we noted above, further regulatory action based on the study would appear to be quite likely.

National Law Review, Volume V, Number 71