PUBLICATION

CFPB Eyes Consumer Arbitration Clauses

October 8, 2015

It has only been 24 hours since the Consumer Financial Protection Bureau (CFPB) announced its plans to propose rules limiting the use of arbitration clauses, but the financial services industry is already gearing up to challenge the effort.

Yesterday, the CFPB announced in a press release its plans to propose rules limiting the use of arbitration clauses by consumer financial companies. The CFPB would require financial companies to use arbitration clauses that explicitly do not apply to disputes filed as class action lawsuits, unless and until class certification is denied or class claims are dismissed.

Since yesterday's announcement, politicians and leaders of the consumer financial services industry have roundly condemned the effort. According to industry leaders, CFPB rules restricting arbitration clauses will harm both financial companies and consumers alike. Regarding financial companies, many feel that the proposed rules will encourage meritless class actions initiated by plaintiffs' attorneys seeking to collect fees, resulting in significantly higher litigation costs. As lenders are forced to increase their legal spend due to increased large-scale litigation, the cost of credit for consumers will also increase.

Many feel that the rules will result in increased legal costs for consumers as well. Chairman of the House Financial Services Committee, Rep. Jeb Hensarling (R-Texas), criticized the CFPB's proposal by pointing out that "forcing consumers to hire expensive lawyers and go to trial rather than use a low-cost dispute resolution system harms the very low- and middle-income consumers the CFPB should be helping."

The proposed CFPB rules are coming at an interesting time; in the past five years, the Supreme Court of the United States has issued several decisions upholding the use of mandatory arbitration clauses that include class action bans. This situation is distinctive, however, because Congress has explicitly directed the CFPB to examine the use of arbitration clauses in the consumer financial context and issue regulations in the public's interest. Appellate challenges to the CFPB's rules, if they are ultimately enacted, will be a hard-fought battle.

Although the CFPB is not banning the use of arbitration clauses in individual disputes, it has also expressed interest in enacting a new reporting system for companies that elect to use arbitration clauses for individual disputes. In the future, consumer financial companies could be required to submit data about each arbitration claim − and any award issued − to the CFPB.

According to the press release issued on October 7, the proposed rules would apply to most consumer financial products, including 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.

The CFPB's announcement comes roughly six months after it released a study regarding the use of arbitration clauses in the consumer financial context. (The findings released in March 2015 can be found here.) According to the CFPB, the study revealed that "arbitration clauses restrict consumers' relief for disputes with financial service providers by allowing companies to block group lawsuits."

The CFPB has published an outline of the proposals under consideration, and the 34-page outline can be found here.

If you have questions about this or any other CFPB-related question, please contact the author of this alert, your regular Baker Donelson attorney, or any member of our CFPB team.