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CFPB Seeks to Restrict Arbitration Clauses in Consumer Finance Agreements

By Alex Williamson, J.D. Candidate 2018 | October 16, 2015

Last week the Consumer Financial Protection Bureau (CFPB) announced proposals for new regulation on consumer financial markets, most notably a restriction on arbitration clauses and class action limitations in consumer contracts for financial products and services such as checking and debit accounts, credit cards, and private student loans. The proposals arise from the findings of a study mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act passed in 2010. Title X of the act formed the CFPB and set the ball in motion for the agency's investigation into the use and effects of arbitration clauses in the sphere of consumer financial contracts.

The study included analysis of six product markets, 850 consumer financial agreements, a national survey of over 1,000 credit card holders, filings in small claims court and disputes reported between 2010 and 2012 to the American Arbitration Association (AAA), the largest provider of alternative dispute resolution services in the United States. The study showed that most major providers of financial services include pre-dispute arbitration clauses in their contracts with consumers. Within those contracts, the CFPB found that nearly all of the clauses studied also contained a provision that prohibited parties from participating in class action arbitrations or lawsuits. These clauses allow companies that provide financial services to bar consumers from sharing the financial and administrative burden of legal action. By placing such a cumbersome responsibility on individual consumers, these companies can effectively reduce the likelihood that any legal action will be taken against them at all.

Accordingly, while tens of millions of people are subject to these clauses, only 1,847 arbitration claims were filed with the AAA in the two years observed. Of those, only 900 were filed by consumers, the rest being brought by the companies or mutually by both the company and consumer. Out of the 341 cases filed in 2010 and 2011 that were resolved by an arbitrator rather than a settlement between the two parties, only 32 granted relief to consumers. Furthermore, results from the national survey showed that consumers are largely unaware that their credit card contracts contain an arbitration clause, or that the clause prevents them from bringing disputes in court or as a class action.

While the study strongly indicates that consumers are harmed by arbitration clauses and class action bans, there is still some political debate over the research findings. In June, eighty members of Congress sent a letter to the CFPB's Director Richard Cordray, expressing their concerns that the study was not "fair, transparent, or comprehensive" and, as a result, was "fatally-flawed".

According to Cordray, however, the study shines a light on these companies' blatant disregard for consumer rights. "Consumers should not be asked to sign away their legal rights when they open a bank account or credit card," said Cordray in an interview with National Public Radio last

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week. "Under this proposed approach, consumers would again get their day in court to hold companies accountable for potential wrongdoing…we think that's quite important."