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CFPB Study May Pave the Way for Class Actions Against Consumer Financial Products Companies

The Consumer Financial Protection Bureau (CFPB) recently released a study examining the prevalence, perception and effects of arbitration clauses in contracts for consumer financial products. Although the study purports to be only “empirical, not evaluative,” leading consumer advocacy groups have seized on the study’s findings to urge the CFPB to prohibit the inclusion of what the advocacy groups term “forced” arbitration clauses in contracts for consumer financial products. Under the Dodd-Frank Act, the CFPB has authority to promulgate regulations, through formal rulemaking, that “prohibit or impose conditions or limitations” on the use of arbitration provisions in contracts between consumers and companies who offer or provide consumer financial products, if the regulations are in the public interest and are consistent with the findings of the CFPB’s study of arbitration provisions. 12 U.S.C. § 5518(b). CFPB Director Richard Cordray has stated that now that the study is complete, the agency would “consider what next steps are appropriate.”

According to the CFPB’s study, around half of credit-card and checking-account balances currently outstanding are subject to arbitration provisions, and nearly all of these provisions contain class-action waivers. Thus, these clauses have dramatically restricted class action suits against companies in this sector. The study further finds that consumers are generally unaware of the arbitration provisions.

The CFPB also compared changes in consumer prices for issuers that eliminated their arbitration provisions to changes in prices for issuers that did not change their provisions in the same period. The CFPB concluded that there was no reliable evidence that the elimination of an arbitration provision raised consumer prices. This finding cuts against prior scholarship concluding that arbitration agreements reduce costs to businesses, which in turn pass on these savings to consumers.

The results of the study suggest that the CFPB is likely to take some action to restrict the use of arbitration agreements in contracts for consumer financial products. If the CFPB does so, this is likely to spur a substantial uptick in class actions against businesses in the consumer financial product sector. Companies operating in this space should consider undertaking a fresh review of their marketing, fee practices, and other consumer-facing aspects of their businesses now. Enhanced compliance today could mean avoiding a costly class action in the future.

The 728-page study, which the CFPB was required to undertake pursuant to the Dodd-Frank Act, purports to be the most comprehensive empirical study of consumer financial arbitration carried out to date. The study is available on the agency’s website.