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Concepcion Undone: CFPB Proposes Rule Prohibiting Financial Service Providers From Including Class Action Waivers in Arbitration Agreements

On May 5, 2016, in a widely anticipated move, the Consumer Financial Protection Bureau (CFPB) proposed a rule that would prohibit certain consumer financial services and products providers (providers) from relying on mandatory arbitration clauses in order to block consumers from filing or participating in a class action against them. Essentially, CFPB's proposed rule would remove providers from the protections of the Federal Arbitration Act (FAA) and the US Supreme Court's ruling in *AT&T Mobility v. Concepcion,* 563 U.S. 333 (2011), which held that arbitration clauses containing class action waivers are enforceable in consumer contracts. If finalized in its proposed form, CFPB's rule will have an enormous impact on the state of consumer financial services litigation and lead to a dramatic increase in the number of class action filings against providers.

Comments on the proposed rule are due within 90 days of publication in the Federal Register. Notably, under the Dodd-Frank Act, the CFPB's new rule can only be applied to arbitration agreements entered 180 days after the rule's effective date, which is proposed to be 30 days after publication in the Federal Register. Thus, any rule will not be effective until, at the earliest, the middle of 2017. Financial services providers, therefore, can and should continue to include and enforce arbitration agreements with class action waivers for at least another year. However, new requirements from the Department of the Defense that go into effect this year for some loans made to military personnel and their families could impact the enforceability of arbitration agreements in some cases.

CFPB's Proposed Rule

The key section of CFPB's proposed rule is as follows:

> § 1040.4 Limitations on the use of pre-dispute arbitration agreements.
>
> (a) Use of pre-dispute arbitration agreements in class actions.
>
> (1) General rule. A provider shall not seek to rely in any way on a pre-dispute arbitration agreement entered into after [211 days following publication of the final rule] with respect to any aspect of a class action that is related to any of the consumer financial products or services covered by § 1040.3 including to seek a stay or dismissal of particular claims or the entire action, unless and until the presiding court has ruled that the case may not proceed as a class action and, if that ruling may be subject to appellate review on an interlocutory basis, the time to seek such review has elapsed or the review has been resolved.

The financial products and services covered by the proposed rule include: (1) most types of consumer lending (such as making secured loans or unsecured loans or issuing credit cards), activities related to that consumer lending (such as providing referrals, servicing, credit monitoring, debt relief, debt collection services, and the purchasing or acquiring of consumer loans) and extending and brokering automobile leases that are consumer financial products or services; (2) storing funds or other monetary value for consumers (such as providing deposit accounts); and (3) providing consumer services related to the movement or conversion of money (such as certain types of payment processing activities, transmitting and exchanging funds, and cashing checks). The CFPB made clear, however, that while it is initially limiting the scope of the rule to "these three core areas . . . the Bureau [will] continue to monitor markets for consumer financial products and services both those that would and would not be within the proposed scope and may at a later time revisit the scope of this proposed rule."

The proposed rule also specifies that all pre-dispute arbitration agreements executed after the effective date must include the following language: "We agree that neither we nor anyone else will use this agreement to stop you from being part of a class action case in court. You may file a class action in court or you may be a member of a class action even if you do not file it."

Finally, the proposed rule also contains a data submission requirement that financial companies provide certain arbitral records to the CFPB. The CFPB states that it "intends to use the information it collects to continue monitoring arbitral proceedings to determine whether there are developments that raise consumer protection concerns that may warrant further [CFPB] action." In addition, CFPB "intends to publish these materials on its website in some form, with appropriate redactions or aggregation as warranted, to provide greater transparency into the arbitration of consumer disputes."

Impact on Consumer Financial Services Litigation

Mandatory arbitration clauses containing class action waivers are an almost universal feature of pre-dispute agreements in the consumer financial services industry, and as a result, the number of class actions that survive a motion to compel individual arbitration has so far been limited. CFPB's proposed rule, which effectively removes the industry from the protection of *Concepcion*, would necessarily result in a dramatic increase in a provider's class action exposure. If the proposed rule goes into effect, providers are advised to continue to use and enforce arbitration agreements, where appropriate, over the next year but also to evaluate their class action risk as early as practicable and consider all other available procedural and substantive means to demonstrate that class treatment of plaintiffs' claims is not appropriate.

The Financial Services Litigation and Class Action lawyers of Squire Patton Boggs advise clients on the content and use of arbitration agreements in consumer financial products and services. For further information about CFPB's proposed rule, participation in the comment process, and inclusion and enforcement of arbitration agreements, contact:

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