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Sixteen Attorneys General from Coast to Coast Seek CFPB Regulation on Arbitration Clauses

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Attorneys General (AG) from 16 states – Delaware, Kentucky, Massachusetts, California, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington – have joined forces to write a letter to the Consumer Financial Protection Bureau (CFPB) encouraging the bureau to exercise its authority to regulate the use of pre-dispute mandatory arbitration clauses in consumer agreements for financial products and services. Pre-dispute arbitration clauses have been the source of boisterous opposition and extensive litigation in the employment and telecommunications spheres. Financial products and services is the next frontier in the battle.

In their letter, the AGs voice concern that pre-dispute mandatory arbitration clauses require consumers to waive "fundamental rights of Americans; the right to be heard and seek judicial redress" from the courts. The AGs cite "repeat player bias" as one of the reasons these provisions are unfair to the consumer, arguing that arbitrators favor the corporation in hopes of getting future cases. This arbitrator bias, combined with high arbitration costs, an imbalance in bargaining power between the consumer and the financial institution, inconvenient venues and the prevalence of class action waivers, has the effect of deterring individuals from pursuing their rights, according to the letter. The AGs encourage the CFPB to act in light of recent U.S. Supreme Court rulings that have rendered "arbitration clauses in all forms . . . virtually impenetrable – from even state legislation."

The American Financial Services Association (AFSA), a national trade organization for the consumer credit industry, responded to the AGs' letter to provide balance to the discussion. AFSA argues that the AGs' letter "mischaracterizes how arbitration is used in practice and fails to consider the benefits consumers receive from resolving disputes without the expense of protracted litigation." AFSA also challenges the study cited by the AGs to support their "repeat player bias" argument. According to AFSA, this study was an atypical data set of limited application – it focused exclusively on consumer debt collection actions and provides no meaningful input into the conversation about arbitration generally. AFSA reminds the CFPB that there is plenty of existing research showing that arbitration provides results that are comparable, or even superior, to judicial remedies. Finally, AFSA's response letter argues that the AGs have overstated the impact of class action waivers, as class action lawsuits "have taken a back seat" to the CFPB's broad restitution powers used to address consumer injuries.

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB is tasked with conducting a study of pre-dispute arbitration provisions in consumer financial markets. The CFPB is also vested with the power to regulate the use of mandatory arbitration clauses in consumer contracts. The CFPB issued preliminary results of its arbitration study back in December 2013 but has yet to release final results. The AGs' letter is significant because it could trigger increased CFPB scrutiny and regulation of mandatory arbitration provisions.