PUBLICATION

CFPB Announces Final Rule to Ban Class Action Waivers in Arbitration Clauses

Authors: Kristine L. Roberts
July 11, 2017

Yesterday, the Consumer Financial Protection Bureau (CFPB) issued its long-anticipated final rule on arbitration clauses in contracts governing consumer financial products and services. While the CFPB is not banning arbitration clauses outright, the new rule would prevent the use of arbitration provisions to block class action lawsuits. The rule is set to go into effect in eight months, but a major fight is already brewing as industry groups and congressional Republicans mobilize in opposition to it.

What does the new rule require?

The final rule has two main components: First, the rule would prohibit companies from using pre-dispute arbitration agreements to block consumer class actions in court, and it would require them to include language in their agreements reflecting this limitation. Second, the rule would require companies that use pre-dispute agreements to submit certain records relating to arbitral and court proceedings to the Bureau. The Bureau is still working on finalizing provisions that will require it to publish the materials it collects on its website.

The rule broadly applies to companies that lend money, store money, and move or exchange money to or for consumers. These include, for example, banks, credit card companies, auto lenders, student lenders, payday lenders, check cashing companies, debt collectors and credit reporting agencies.

How did we get here?

The CFPB has been studying pre-dispute arbitration provisions in consumer contracts since 2012. The Dodd-Frank Act tasked the CFPB with reviewing the use of pre-dispute arbitration provisions in consumer contracts. In March 2015, the Bureau reported on its study of arbitration agreements, including a comparison of consumer finance disputes that were resolved through arbitration, individual lawsuits and class actions. Among other findings, the study noted that roughly 32 million consumers each year were eligible for relief as part of class action settlements in federal court, and the Bureau expressed concern about arbitration clauses blocking class actions.

In October 2015, the CFPB announced its proposed rulemaking, with an outline of the proposals under consideration. In May 2016, the Bureau announced its proposed rule and invited public comment. Not surprisingly, the proposal drew more than 100,000 comments from groups and individuals on both sides of this issue.

What does this mean for the industry?

The new rule means that banks, consumer lenders and other companies that provide financial services and products to consumers would no longer be able to require customers to waive the right to bring class action lawsuits. As noted, there is no outright ban on arbitration, so companies could still require customers to bring individual claims through arbitration rather than a lawsuit.

New contracts containing a pre-dispute arbitration agreement would be required to include the following provision: "We agree that neither we nor anyone else will rely on 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 filed by someone else."

The rule would also require companies to submit certain records to the CFPB, including claims and counterclaims, answers to these claims and counterclaims, and awards issued in arbitration. The Bureau will also collect correspondence from arbitration administrators regarding companies' non-payment of arbitration fees and their failure to follow the arbitrator's fairness standards. The Bureau intends to publish these redacted materials on its website beginning in July 2019.

The rule would almost certainly lead to more class action lawsuits. Moreover, the prospect of publishing data on arbitration claims and awards brings additional litigation and even regulatory risks. In his prepared remarks on the new rule, CFPB Director Richard Cordray stated that, "This will help us better monitor arbitrations to make sure the process is fair for individual consumers. . . This will promote transparency and give consumers, providers, and other regulators more insight into how arbitration works." Companies should thus expect that the CFPB will be reviewing arbitration claims and awards for potential regulatory or enforcement actions. With the new rule, banks, lenders and other consumer finance companies would have to adjust for these risks and price their products and services accordingly.

What is likely to happen next?

Industry and consumer groups are already gearing up for a fight, as are members of Congress. Director Cordray noted in his remarks that he is "aware of those parties who have indicated they will seek to have the Congress nullify this new rule." Cordray is referring to the Congressional Review Act, which allows lawmakers to review and overrule regulations within sixty legislative days by a simple majority. House Financial Services Committee Chairman, Jeb Hensarling, who previously described the proposed rule as a "big, wet kiss to trial attorneys," has stated that Congress should reject the new rule. Meanwhile, Senator Elizabeth Warren released a statement praising the new rule as allowing "working families to hold big banks accountable when they're cheated and help discourage the kinds of surprise fees that consumers hate."

The American Bankers Association has urged Congress to overturn the rulemaking, arguing that rule "would essentially eliminate arbitration – and force consumers into court – by requiring companies to face a flood of attorney-driven class action lawsuits from which consumers receive virtually nothing." The Consumer Bankers Association released a similar statement, touting "the longstanding benefits of arbitration" and asking Congress "to move swiftly and overturn this anti-consumer rule." In contrast, consumer groups have spoken in favor of the rule. The Consumer Federation of America called the new rule an "important step of restoring law and order to the financial marketplace." Public Citizen issued a statement stating that elected officials should embrace the rule and warning that "those who denounce it should prepare to face the wrath of consumers fed up with widespread financial scams and shams."

Absent congressional action, there are likely to be legal challenges. Given the breadth and scope of the final rule and its potential impact on the consumer financial industry, lawsuits challenging the rule seem inevitable.

What can banks be doing now?

As noted above, the new rule brings additional risk in the form of more class action litigation and likely increased regulatory scrutiny of arbitration proceedings and awards. Banks, consumer lenders and other consumer financial companies will have to factor that additional risk in their pricing and service offerings. In addition, companies should start inventorying and reviewing customer contracts containing arbitration provisions and consider how those agreements will need to be redrafted to comply with the new rule.