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Consumer Financial Protection Bureau

ALERT

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Back to the Future: The CFPB's Arbitration Report Could Signal a Return to the Days Before *Concepcion*

The "preliminary" report on consumer arbitration issued late last year by the Consumer Financial Protection Bureau appears to be another marker along the road leading to the end of alternative dispute resolution as a primary method of resolving consumer disputes. The CFPB's failure to gather data relating to the multitude of sound reasons for continuing to use pre-dispute arbitration provisions in consumer agreements indicates the death knell may soon be heard for an approach that has been supported by Congress, industry and the U.S. Supreme Court for most of the past century.

In April 2012, the CFPB began studying pre-dispute arbitration provisions in consumer contracts based on a directive by Congress as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Since then, the Bureau has gathered and evaluated comments from industry and the public, and has obtained data from large banks and other consumer financial entities overseen by the federal agency.

Based on its study to date, the CFPB reported the following as highlights:

- Arbitration clauses are commonly used by large banks in credit card and checking account agreements;
- Larger institutions are the most likely entities to use arbitration clauses;
- Arbitration clauses are more complex than others clauses in consumer agreements;
- Approximately nine out of 10 arbitration clauses bar consumers from filing class arbitration;
- Few consumers choose arbitration, while many have participated in class action settlements;
- Consumers do not file arbitrations for small-dollar disputes (under $1,000); and
- Few consumers file small claims court actions to vindicate their rights.

The study's findings conspicuously glossed over the benefits that are generally cited in support of consumer arbitrations, such as increased efficiency, simplified procedures, reduced costs and amount of time required to resolve disputes, fairness of outcomes, and parties' overall satisfaction with the process and results.

The logical conclusion to be drawn from these findings is that the CFPB is laying the foundations for rulemaking that will prohibit or severely limit the availability of pre-dispute arbitration clauses in consumer agreements.

The ramifications of a prohibition or limitation on consumer arbitrations, which could be implemented as soon as the end of 2014, would be to unwind the Supreme Court's rulings upholding consumer arbitration in cases such as *Concepcion v. AT&T Mobility* and drive consumer disputes back into overcrowded and underfunded courtrooms. Moreover, a rule that prohibits the enforcement of pre-dispute consumer arbitration agreements would also likely eliminate class action waiver provisions, reigniting a wave of costly, cumbersome and often protracted consumer class action filings in state and federal courts.

What can companies do to prepare for the elimination of arbitration provisions and class action waivers, in the event the CFPB continues along the path it seems to be on?

First, continue to improve complaint collection, tracking and resolution procedures. Heed the CFPB's clear and consistent mandate since the agency first came into existence – that the best way to avoid regulatory and legal problems is to monitor and respond to complaints in an efficient manner. This includes creating fair and effective methods of collecting and addressing consumer complaints, then responding to and resolving them in a manner that leaves consumers feeling they were heard and treated fairly. Create internal dispute resolution procedures for consumers to raise and resolve complaints without the involvement of regulators or class action attorneys. Examine and extrapolate from complaint patterns to identify ways to solve problems, whether they are caused by marketing, operational, training, personnel or other issues, and thank consumers for their part in finding solutions.

Second, even if the CFPB prohibits the use of pre-dispute arbitration provisions in consumer contracts, this does not necessarily mean customers will not be able to agree voluntarily to forgo participating in collective dispute resolution actions. Historically, the primary reason that courts have held class action waivers to be unenforceable is because consumer waivers were not ***knowingly and intelligently obtained***. This means that for a waiver to be legally enforceable, the person waiving rights must fully understand the terms of the waiver and must voluntarily agree to those terms.

Pay careful attention to the CFPB's admonition that most consumer arbitration provisions are written in language that is more complex than other parts of the consumer agreement. For a waiver of rights to be voluntary, the person agreeing to it must fully understand the waiver. The language used to describe a class action waiver must be simple, clear and written at a level most consumers can easily understand. The waiver must be voluntary, meaning that people waiving their rights must want to do so. Consumers must have reasonable incentives ("bargained-for consideration") for agreeing to forgo rights. Such incentives could take the form of a discount or some other benefit in return for the consumer's agreement to give up the right to participate in a class action should a dispute arise. Companies should also consider including a pre-litigation mediation requirement in the event actual arbitration is prohibited.

How the CFPB ultimately will address the arbitration and class action waiver issues remains unclear, and industry and perhaps even Congress and/or the courts may weigh in on these issues before they are settled. But given the CFPB's negative and lopsided presentation of the arbitration issues in its preliminary report, it is critical that consumer financial services companies begin strategizing and implementing alternatives for addressing consumer disputes in the event the agency continues on the course it has started.

Loeb & Loeb LLP's Consumer Financial Protection Bureau Task Force

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