

Why the CFPB's Anti-Arbitration Rule Hurts Consumers

The Consumer Financial Protection Bureau (CFPB)'s final rule regulating arbitration agreements for consumer financial products and services will harm consumers. Many of the CFPB's key findings cited to support its rules are not consistent with its study on arbitration and do not justify the imposition of limitations on the use of pre-dispute arbitration agreements.

Additionally, the CFPB provides little credible evidence to suggest consumer protection would be enhanced by the issuance of this rule. In fact, the Study demonstrated that the majority of consumers who filed arbitration disputes did far better financially than those filed in class-actions. In contrast, class-action cases took longer, had higher legal fees, and less money was awarded to consumers.

Background on the Anti-Arbitration Rule:

- The Dodd-Frank Act, enacted by Congress in 2010, created the CFPB and directed it, under section 1028 of the statute, to study the use of arbitration agreements in connection with offering or providing consumer financial products and services.
- Congress authorized the CFPB to prohibit or impose conditions or limitations on the use of pre-dispute arbitration agreements **if** the Bureau finds that such prohibitions or conditions are in the public interest and for the protection of consumers.
- In 2015, the CFPB published its Arbitration Study ("Study") – an incomplete, fatally-flawed analysis – and based upon the study began a rule-making process to effectively eliminate arbitration agreements.
- Industry groups have met personally with the CFPB and submitted comments during the Bureau's comment period, yet the CFPB moved forward with the rule-making without taking into consideration the concerns of the experts in the field.
- On July 10, 2017, the CFPB published its final rule on arbitration, which bans class-action waivers from consumer financial agreements.

The CFPB's Arbitration Study is Incomplete:

- Lacks a thorough examination of the arbitration process and an assessment of consumer satisfaction with the experience.
- Lacks a calculation of the average and median cash recoveries for individual class members in class action settlements. The Study only provides figures for class-wide recoveries, which masks actual recoveries for individual plaintiffs in the class.
- Lacks the economic consequences to consumers, companies, and taxpayers if arbitration is no longer available to settle disputes.
- Lacks the benefits of providing consumers with more education and information about arbitration and class action lawsuits.
- Lacks the effect of the CFPB's complaint database on reducing unresolved consumer dispute volumes.
- Lacks the effect CFPB enforcement and supervisory actions have had on compliance with federal consumer financial laws.
- Lacks an examination of the potential elimination of beneficial products and services from the marketplace due to the inability to mitigate class action risk under certain statutes.

The CFPB's Arbitration Rule is Inconsistent with its Arbitration Study:

- Arbitration is up to 12 times faster than litigation in providing consumers with a resolution to their dispute. Disputes in arbitration were generally resolved in 2-8 months, while a class action lawsuit averaged about 1 year for completion (and frequently over 2 years).
- Arbitration provides 166 times more in recovery, as consumers obtained an average of \$5,389 in arbitration versus \$32.35 in class actions.
- Over 60 percent of class actions resulted in no relief for putative class members, as these cases were either settled individually or withdrawn by the plaintiff. In addition, only 12 percent of class actions even obtained a final *class* settlement.
- About one-third of arbitrations resulted in a decision on the merits, while class actions rarely receive a final verdict.

The CFPB's Arbitration Rule is Contrary to the Public Interest:

- The final arbitration rule is expected to expose an additional 53,000 consumer financial products and services providers ("providers") to class action litigation.
- The CFPB estimates an additional 1,208 class action lawsuits filed against providers each year, at an estimated total cost of over \$1 billion. This estimate includes 604 additional federal class action lawsuits per year and \$523 million in settlement costs, defense costs, and trial attorneys' fees. It also includes an equal number of new state class action suits.
- According to the CFPB, the rise in litigation costs will be passed through to consumers, either through higher prices or reduced quality of products or services, although the Bureau is uncertain as to the magnitude of the effect.

The CFPB's Arbitration Rule Fails to Enhance Consumer Protection:

- The CFPB's Study generally ignores the Bureau's own effect on the industry's compliance with federal consumer financial laws. The Study examined the enforcement activity of state and federal agencies between January 1, 2008 and December 31, 2012, but selecting this period glosses over the growing volume and impact of the Bureau's own enforcement activities since 2012. Over the course of its six year existence, CFPB claims its enforcement actions have resulted in \$11.8 billion in relief for over 29 million consumers – or about \$407 per consumer. Yet, remarkably, it failed to consider the impact of its own actions on industry's compliance with consumer protection laws from 2012.
- The Bureau did not consider other alternatives to promoting class action lawsuits that may have provided a more significant consumer protection benefit. One of the Study's most significant findings was that consumers are generally unaware or ill-informed about arbitration. The logical conclusion would be to educate and inform consumers. In fact, the small businesses that participated in the small entity review process recommended that the Bureau educate consumers about arbitration *and* consider a number of specific improvements to arbitration to make it more consumer-friendly.
- The CFPB's promotion of class action lawsuits discounts the important consumer protection benefits of individualized remedies. Many of the federal consumer protection laws offer statutory damages that greatly exceed the average class action recovery. The Truth in Lending Act, for example, provides a prevailing plaintiff with \$200 to \$5,000 (depending on the type of account) per violation. Members of class actions do not benefit from those statutory damage awards. Furthermore, certain consumer claims for relief cannot be joined in a class action as they do not meet the requirements outlined in the Federal Rules of Civil Procedure. Their only alternative now is to go to court, which is time-consuming and can be stressful and intimidating. It is these consumers who will be harmed the most by the CFPB's arbitration rule.