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CFPB ARBITRATION STUDY: HIGHLIGHTS

In March 2015, the federal Consumer Financial Protection Bureau (CFPB) released a comprehensive study about the use of forced arbitration clauses in consumer financial contracts.¹ These clauses prevent cheated or defrauded consumers from filing lawsuits against banks, credit card companies, payday lenders or other financial institutions. Instead, consumers are forced to resolve disputes in private, rigged arbitration systems. The following are some specific highlights from the 2015 study:

Forced arbitration clauses are everywhere.

- “Tens of millions of consumers use consumer financial products or services that are subject to pre-dispute arbitration clauses.”²

Arbitration clauses include class action bans, preventing consumers from joining with others to resolve disputes.

- “Nearly all the arbitration clauses studied include provisions stating that arbitration may not proceed on a class basis. Across each product market, 85-100% of the contracts with arbitration clauses – covering close to 100% of market share subject to arbitration in the six product markets studied – include such no-class arbitration provisions. Although these terms effectively preclude all class proceedings, in court or in arbitration, some arbitration clauses also expressly waive the consumer’s ability to participate in class actions in court.”³

Most consumers are unaware of forced arbitration clauses.

- “Consumers are generally unaware of whether their credit card contracts include arbitration clauses.”⁴
- “Less than 7% of consumers whose credit card agreements included pre-dispute arbitration clauses stated that they could not sue their credit card issuers in court.”⁵
- “Most consumers whose [credit card] agreements contain arbitration clauses wrongly believe that they can participate in class actions.”⁶

Few consumers go to individual arbitration to settle disputes.

- From 2010 through 2012, consumers alone filed an average of 411 [arbitration] cases each year for six product markets combined – credit card, checking account/debit cards, payday loans, prepaid cards, private student loans and auto loans.⁷

Consumers are disadvantaged in arbitration proceedings.

- “Overall, consumers were represented by counsel in roughly 60% of the cases, though there were some variations by product. Companies almost always had counsel.”⁸
- “Almost all of the arbitration proceedings involved companies with repeat experience in the forum.”⁹ According to the CFPB, “[i]n over 80% of the disputes, the company had participated in at least three other disputes relating to the same product markets in a three-year period.”¹⁰
- Consumers prevailed in 21.4 percent of cases filed in 2010 and 2011 that were resolved by an arbitrator and where the CFPB was able to ascertain the outcome.¹¹
- In contrast, companies prevailed in 93 percent of cases in which companies made claims or counterclaims that were resolved by arbitrators and where the CFPB was able to ascertain the outcome.¹²

Class actions benefit millions of consumers.

- “We were able to find precise figures or estimates for the class size for 329 of the 419 settlements. There were 350 million total class members in these consumer financial class action settlements for cases reporting such data.”¹³ It is important to note that this figure only reflects 78 percent of settlements where class size or a class size estimate could be identified.¹⁴

Class actions provide significant relief to consumers.

- Review of 419 federal consumer financial class action settlements revealed that “the total amount of gross relief – defined as the total amount defendants offer to provide in cash relief (including debt forbearance) or in-kind relief and to pay in fees and other expenses was \$2.7 billion. This estimate includes cash relief of \$2.0 billion and in-kind relief of \$644 million. These figures represent a floor. Many settlements had relief, such as provisions in which companies agreed to change company behavior towards consumers, that was not quantified as of final approval.”¹⁵
- “Of the 251 settlements (60% of all settlements) reporting data, \$1.1 billion had been or was scheduled to be paid to class members in cash or debt forbearance as of the time of the last document we were able to review.”¹⁶ It should be noted that this amount “excludes payment of in-kind relief and, again, it excludes any valuation of behavioral relief.”¹⁷

- “Of 236 settlements reporting data (56% of all settlements), 34 million consumers were guaranteed recovery as of the time of the last document available for review, having made claims (11 million consumers) or participated in an automatic distribution (24 million consumers).”¹⁸

There is minimal overlap between public consumer financial enforcement actions and private class actions.

- In studying consumer financial enforcement actions filed by state and federal regulators, the CFPB was “unable to find an overlapping private class action complaint in 88% of the enforcement actions.”¹⁹
- “Likewise, for the private class actions for which we sought to find related public enforcement action, we were unable to do so in 68% of the cases. This was particularly the case with class action settlements of less than ten million dollars, where we were unable to identify a corresponding public enforcement action for 82% of the time.”²⁰
- “When we did find overlapping activity by government entities and private class action lawyers, class action lawyers filed before the government between 62% and 71% of the time. In contrast, private class action complaints were preceded by public enforcement activity 36% of the time.”²¹

Arbitration clauses do not guarantee lower prices or greater credit access for consumers.

- The CFPB “did not find statistically significant empirical support for the theory that companies pass savings from their use of arbitration clauses onto consumers.”²² More specifically, the “analysis did not identify any statistically significant evidence of an increase in prices among those companies that dropped their arbitration clauses and thus increased their exposure to class action litigation risk.”²³
- In addition, the CFPB was “unable to identify evidence that companies that eliminated arbitration clauses reduced their provision of credit to consumers relative to companies that did not change their arbitration clauses.”²⁴

NOTES

¹ Consumer Financial Protection Bureau, *Arbitration Study Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (March 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf.

² *Id.* at 9 (Section 1: Introduction And Executive Summary).

³ *Id.* at 10 (Section 1: Introduction And Executive Summary).

⁴ *Id.* at 11 (Section 1: Introduction And Executive Summary).

⁵ *Id.* at 4 (Section 3: What Do Consumers Understand About Dispute Resolution Systems?).

⁶ *Id.* at 11 (Section 1: Introduction And Executive Summary).

⁷ *Ibid.*

⁸ *Id.* at 12 (Section 1: Introduction And Executive Summary).

⁹ *Ibid.*

¹⁰ *Id.* at 10 (Section 5: What Types Of Claims Are Brought In Arbitration And How Are They Resolved?)

¹¹ *Id.* at 12 (Section 1: Introduction And Executive Summary)

¹² *Ibid.*

¹³ *Id.* at 3 (Section 8: What Is The Value Of Class Action Settlements?)

¹⁴ *Id.* at 16 (Section 1: Introduction And Executive Summary).

¹⁵ *Id.* at 4 (Section 8: What Is The Value of Class Action Settlements?)(citation omitted).

¹⁶ *Ibid.*

¹⁷ *Id.* at 16 (Section 1: Introduction And Executive Summary).

¹⁸ *Id.* at 5 (Section 8: What Is The Value Of Class Action Settlements?)

¹⁹ *Id.* at 4 (Section 9: What Is The Relationship Between Public Enforcement And Consumer Financial Class Actions?)

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Id.* at 15 (Section 10: Do Arbitration Clauses Lead To Lower Prices For Consumers?)(citation omitted).

²³ *Id.* at 18 (Section 1: Introduction And Executive Summary).

²⁴ *Ibid.*