CFPB Issues Final Rule Banning Class Action Waivers in Arbitration

On Monday, July 10, 2017, the Consumer Financial Protection Bureau released its final Rule to Ban Class Action Waivers in Predispute Arbitration Provisions. The Rule is the result of a lengthy rulemaking process based on a provision of the Dodd-Frank financial reform legislation that empowered the CFPB to study and take appropriate action with respect to predispute arbitration provisions.

WHAT THE RULE DOES

The Rule prevents financial institutions under the jurisdiction of the CFPB from relying on predispute arbitration provisions in consumer financial obligations in which the consumer waives the right to sue, or be a member of a class, in a class action lawsuit.

WHEN DOES THE RULE TAKE EFFECT?

This ban on class action waivers in predispute arbitration agreements is effective 60 days following publication of the Rule in the Federal Register and applicable to contracts entered into more than 180 days after the effective date. Essentially, agreements entered into 241 days after publication of the final Rule in the Federal Register must contain the disclosure language preventing class action waivers. As of July 12, 2017, the Rule is not yet published in the Federal Register.

WHAT DOES THIS MEAN FOR FRANCHISED MOTOR VEHICLE DEALERS?

- In the Final Rule, the CFPB acknowledges that it does not have jurisdiction over franchised motor vehicle dealers.
- The CFPB acknowledges that it has no ability or grounds to prevent franchised motor vehicle dealers from asking consumers to agree as part of predispute arbitration agreement provisions to waive their rights to pursue, or participate in, class action lawsuits.
- While finance and lease sources under CFPB jurisdiction (and most are) must use a disclosure telling consumers who are subject to predispute arbitration provisions that they have a right to participate in class action lawsuits, the disclosure must also include language noting that this right is inapplicable to motor vehicle dealers exempt from CFPB jurisdiction.
- This change preserves the right of franchised motor vehicle dealers to rely on class action waivers in predispute arbitration provisions in RISCs and leases. The issue may be that some finance and lease sources may choose not to allow arbitration provisions. In their comments on the proposed rule, some indicated they would target resources to defense of class actions rather than expensive arbitration proceedings.
- The Rule has no effect in the ability of franchised motor vehicle dealers that are not in one document states to use arbitration agreements with class action waivers in other sale documents.
- If the Rule goes into effect and is implemented, dealers that choose to rely on them should not have to change predispute arbitration provisions in sale documents that will
not be assigned to finance sources. Any changes will be in RISC and lease forms, and financial institutions will prescribe the method and language by which they will comply with the Rule.

**WHAT MUST DEALERS FEAR FROM THIS RULE?**

The Rule protects the rights of dealers that choose to use an arbitration provision with a class action waiver. This preserves the rights of these dealers to require consumers to arbitrate disputes in individual arbitration proceedings.

Unfortunately, this final Rule did not solve the most severe problem for dealers since it does not account for the indirect liability that dealers face as a result of the master agreements they sign with finance and lease sources. Based on the master indirect finance and lease agreements that dealers sign with the finance and lease sources, dealers can still be held liable to indemnify finance and lease sources for alleged dealer wrongdoing leading to the class actions that consumers bring against financial institutions. Therefore, although dealers may be able to claim a plaintiff consumer waved the right to bring a class action directly against a dealer, this Rule still leaves dealers open to indirect liability and indemnification of the financial institutions for consumer class action lawsuits.

**WHAT HAPPENS NEXT?**

In the next 241 days or so (we anticipate that the Rule will be published in the Federal Register in the next few days), a few things can happen with this final Rule that could cause this Rule to not be implemented or go into effect.

1. *Financial Choice Act.* The final Rule could be invalidated if the Senate passes and President Trump signs the Financial Choice Act, which provides that the implementing authority for banning class action waivers is repealed.

2. *Congressional Review Act.* The CRA provides that Congress may override by majority vote any final rule within 60 legislative days after it receives notice of the rule. If Congress nullifies this Rule, then the CFPB is precluded from issuing a similar rule in the future. Some proponents of the Rule claim that CRA is not applicable because this Rule is issued as a result of a Congressional mandate in Dodd-Frank. The majority of analysts believe CRA applies to this Rule, and Congress can invalidate it.

3. *Lawsuits.* Persons adversely affected by this final Rule may bring a private action against the CFPB to invalidate the Rule on grounds such as the CFPB did not have authority to implement this Rule and it is not “in the public interest and for the protection of consumers,” as required by the implementing authority.

4. *New Director.* Issuance of the Rule may be a signal that Director Cordray is about to step down to return to Ohio to run for governor. The Bureau may have finalized the Rule to avoid a new director preventing issuance. If Director Cordray steps down, President Trump will name a successor who, once he or she weather the exceptionally slow
confirmation process, may have the authority to delay enforcement of the Rule while its basis is reviewed.

If not sidetracked, the Rule will apply to financial obligations of consumers with financial institutions under the jurisdiction of the CFPB entered 241 days after its publication in the Federal Register, so stay tuned.