



PUBLIC INTEREST
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SECTION



THE
FLORIDA
BAR



August 22, 2016

Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington DC 205552

RE: Docket No. CFPB-2-16-0020 or RIN 3170-AA51

The undersigned organizations strongly support the Consumer Financial Protection Bureau (CFPB)'s proposed rule to limit pre-dispute binding mandatory arbitration clauses in consumer finance contracts. We are:

Jacksonville Area Legal Aid, Inc. is a non-profit law firm dedicated to providing free civil legal assistance to qualified low-income and special-needs individuals and groups who could not otherwise afford them in seventeen counties across north and central Florida.

The Florida Alliance for Consumer Protection is a statewide nonprofit, nonpartisan organization whose mission is to advance consumer protection through advocacy, research and education.

The Public Interest Law Section of the Florida Bar's mission is to advocate for and enhance the constitutional, statutory or other rights that protect the dignity, security, justice, liberty, or freedom of the individual or public at large. In addition, we strive to increase the knowledge and understanding of consumers in the substantive areas of public interest law. Attorneys who are section members have expertise in a variety of legal specialties including consumer protection.

We have an interest in the proposed rules based on our knowledge of the law in this area. Our interest also arises from the harm we see to consumers, especially the elderly, members of the armed services and their families, and low to medium income consumers here in Florida. These populations are disproportionately harmed by deceptive and illegal practices in the financial marketplace, including debt collection, auto lending, credit reporting, and small dollar lending.

We strongly endorse the CFPB's proposed rules to return to consumers the ability for access to the courts whether in individual cases or together in class actions to seek remedies and hold companies accountable for their misconduct. Further, it is in the

public interest that consumers are protected by the CFPB's restrictions on the use of pre-dispute mandatory, often unilateral, forced arbitration clauses that prohibit class actions.

In our individual practices and advocacy, we have all had to advise clients that, though they may have suffered from violations of Florida's Deceptive and Unfair Trade Practices Act, for example, they are barred from access to court because of a mandatory arbitration clause in the contract they have signed. One of our members reviewed a contract for a consumer for what amounted to a car title loan, masquerading as an installment loan. Buried in the fine print of the single space eight-page contract was an "opt-out" clause for arbitration. However, by the time the attorney reviewed the contract, the ability to opt-out from mandatory arbitration period had expired. The consumer appeared to have a possible claim under Florida's Deceptive and Unfair Trade Practices Act for certain "voluntary insurance charges" among other possible issues. But with the mandatory arbitration requirement, the consumer would have been prohibited from bringing the claim because of the possible costs to the consumer and the lack of the ability to engage in adequate discovery to fully prosecute the claim.

Unilateral, mandatory arbitration clauses are also routinely used in relatively small dollar payday loan contracts. For example, an elderly person took out a \$500.00 loan, paid back over \$2,500 over a six month period and still owed the original \$500.00. The lender had access to his bank account and debited his account eight (8) times in one day. This caused eight "over the limit" fees assessed on the account and increased the loan by eight "bounced check" charges. He wanted to sue the lender as a result of these collection abuses as well as the 500% interest rate. This long-time Florida resident was told his only option was to participate in expensive arbitration in Maryland. He was left with no remedy.

We also see abuses against consumers from virtually every car dealer in Florida who is unlawfully charging an excessive fee for "electronic filing fees" – the modern method of filing registrations and titles on each sales transaction. Car dealers pay a third party vendor approximately \$15 per transaction. Dealers are allowed to charge the car buyer this fee, but car dealers inflate the cost that they pay and, of course, pass that on to the consumer without disclosing to the consumer that part of the fee goes to the dealer. Now, virtually every car dealer in Florida also includes an arbitration clause in their paperwork, foreclosing class action relief for this unfair and deceptive practice. Car dealers charge these excessive fees with impunity because of forced arbitration clauses.

On a weekly basis we see low income and elderly consumers who are caught up in "bait and switch" car sales and financing agreements. They are being told their initial financing fell through day, weeks or months after the transaction takes place. They now are faced with having to pay either a higher interest rate or larger down payment or lose their new car, their trade in and/or their down payment. They have no remedy because of unilateral mandatory arbitration clauses. They also have no transportation and no discretionary money to try to purchase another car.

Though there may be situations where arbitration is something the consumer might desire in a specific set of circumstances, allowing mandatory, unilateral or forced arbitration as a boilerplate term in form contracts more often than not unfairly harms consumers.

The issues we see include:

- Financial institutions that are routinely using the same arbitration firm repeatedly for their arbitrations. This leads to arbitrators favoring the financial institution because of this repeat business.
- Appeals from arbitration decisions are difficult, costly and rarely permitted. The standard of review is radically limited. There are few ways to overturn an arbitration award beyond showing collusion between the arbitrator and the other side or a manifest disregard of law by the arbitrator. They are, therefore, essentially unreviewable.
- Arbitration is generally expensive for consumers, unlike the claims of industry that it is inexpensive. The concept that arbitration is “quick and inexpensive” has become less so.
- Arbitration has far fewer procedural protections. Typically discovery does not exist. The consumer is severely limited in what he or she can obtain from the other side in order to prove his or her case. Consumers do not have the broad, court-supervised discovery the courts provide.
- Companies often have forum selection clauses that require the consumer travel great distances to arbitrate (one of the many reasons arbitration can prove expensive for the consumer). Companies choose laws that will be most beneficial to industry and disfavor consumers.
- Forced arbitration creates a private court that provides no precedent. Each arbitration decision is, therefore, a “one-off.”

In addition to the general failure of forced arbitration to allow adequate access to court and due process for consumers, the class action bans found in so many consumer adhesion contracts result in many consumers having no way to address their claim. In reviewing an Advance America cash advance contract signed in Florida for a potential client, we found that the class action waiver clause in their contracts would prohibit the consumer from addressing a violation that would not be feasible to address on an individual basis. The contract provides that “you may not pursue the resolution of any dispute in any forum as a representative...or as part of a class action, and you may not be a named or unnamed class member or representative in any such action.” The CFPB data finds that few consumers go to individual arbitration, while millions more recover in class actions. An example where recovery by class action was beneficial to consumers occurred in the case where hundreds of debtors were being subjected to illegal debt collection efforts, including being tricked into signing consents to judgments. These consumers could not afford to hire an attorney to represent them in these small dollar

debts to prevent what were in effect illegal “confessions of judgment.” Because these low income and elderly consumers were able to file a class action they were able to stop this illegal practice and avoid these illegal judgments.

We support the CFPB’s proposed rules addressing the contract language found in many consumer finance contracts. Though we would like to see a ban on all unilateral, mandatory forced arbitration agreements, we strongly support the prohibition on pre-dispute arbitration agreements to block consumer class actions in court. Further, we support the language to be inserted in the applicable contracts that states: “We agree that neither we **nor anyone else** will use this agreement to stop you from being part of a class action case in court.” This language would prevent payday lenders like Advance America from banning such protections for consumers in their contracts. Therefore, even though a consumer finance contract may require arbitration, at least the contract cannot use pre-dispute arbitration as a tool to block consumer participation in class actions. Finally, the highlighted language above, “nor anyone else,” is crucial since it provides consumers protection from third-party institutions that might be assigned the contract. These protections will give consumers in many cases access to court that they have not had under forced arbitration.

We also support the CFPB’s proposal to require providers that choose to use pre-dispute arbitration agreements to submit certain records relating to the arbitration proceedings to the CFPB. The submission by financial institutions using pre-dispute arbitration agreements of their arbitration claims, counterclaims, arbitration contract terms filed with the arbitrator, arbitration award, and any communication from the arbitrator regarding noncompliance with its rules poses minimal burden on these institutions but will enhance the transparency into the arbitration of consumer disputes. This transparency is what exists in the public domain in cases filed in court but does not currently exist in cases that are arbitrated. This data collection will benefit all parties.

In sum, the CFPB proposes reasonable rules to allow consumers access to court while maintaining the use of pre-dispute arbitration agreements as the CFPB collects data currently unavailable on the process and results of ongoing arbitrations. We urge the Bureau to move quickly to finalize the rule so consumers may have these important rights they have thus far been without.

Sincerely,

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