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Righting a Financial Wrong

Debt Settlement Services, Private Student Lenders, and Auto Lenders Use Forced Arbitration to Escape Accountability When They Harm Consumers

Acknowledgments

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Introduction

The Consumer Financial Protection Bureau (CFPB, or "the Bureau") in December 2013 released preliminary results of a study called for in the 2010 Dodd–Frank Wall Street Reform and Consumer Protection Act[1] on financial services businesses' use of arbitration clauses in consumer contracts. Such terms, or forced arbitration, call for disputes to be settled before a private arbitrator instead of in a court of law, and usually prohibit consumers from pursuing cases as a class.

The data from the first report covered several aspects of forced arbitration. For example, it confirmed a high prevalence of arbitration clauses in the terms of service of credit cards, checking accounts, and prepaid cards.[2] Additionally, according to the report, nearly all of the arbitration clauses contained terms denying their customers the ability to participate in class actions.[3] Based on an examination of the data from the American Arbitration Association (AAA), the chief provider of consumer arbitrations, the Bureau determined that few consumers go to arbitration to resolve disputes with financial institutions.[4]

In making these and other determinations, the Bureau examined information involving four major financial services and products: credit cards, checking accounts, prepaid cards and payday loans. Other consumer financial services sectors under the CFPB's jurisdiction similarly use forced arbitration clauses and prohibit class actions.

Notably, the debt settlement and auto loan sectors recently have fallen under considerable scrutiny by the Bureau and other state and federal officials for engaging in questionable practices. A review of materials involving these sectors shows that businesses within them have used forced arbitration to avoid having to respond to allegations and, in many instances, escaped accountability for actual wrongdoing. Meanwhile, users of their products and services who have suffered financial injuries from predatory and deceptive practices have been denied adequate legal remedies.

Another sector that makes widespread use of forced arbitration clauses is the private student loan industry. The agency recently released findings from its investigation into the

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Public Law 111-203 § 1028(a).
[2] Consumer Financial Protection Bureau, *Arbitration Study Preliminary Results, Section 1028(a) Study Results to Date* (Dec. 12, 2013), at 12-13, http://1.usa.gov/18WUWEy.
[3] Id.
[4] Consumer Financial Protection Bureau, *Arbitration Study Preliminary Results, Section 1028(a) Study Results to Date* (Dec. 12, 2013), at 12-13, http://1.usa.gov/18WUWEy.

private student loan market, which documented the impact of the high-cost loans.[5] In 2012, Public Citizen also issued a report on the industry. It concluded that unsavory conduct by the private student loan industry combined with restrictive terms in borrowers' promissory notes that require disputes to be resolved in private arbitration were not conducive to fair lending.[6]

The Bureau can make these industry sectors answerable for some of their shady practices by restoring consumers' ability to enforce their rights on their own. The Bureau has the authority to write a rule to require the regulated consumer financial services industry to eliminate predispute binding mandatory (or forced) arbitration from consumer transactions involving all products under its jurisdiction.[7]

The State of Forced Arbitration

Some consumers who fall victim to misconduct in the consumer financial services industry seek remedies in court on their own or collectively with other consumers through class actions. However, recent Supreme Court decisions including *AT&T Mobility LLC v. Concepcion* (2011),[8] *Compucredit v. Greenwood* (2012),[9] and *American Express v. Italian Colors Restaurant* (2013)[10] stifle private enforcement of state and federal consumer protection laws, which were designed to curb the worst of the industry practices. The decisions encourage businesses' expansive use of arbitration clauses and bans on class action in standard consumer contracts. These contract terms compel consumers to resolve legal disputes with companies in private arbitration instead of in open court.

Essentially, consumers are unwittingly deprived of their right to choose how to resolve disputes, whether in court or through other means, at the outset of their relationship with a business. They are rarely aware that they surrender their right to court when they sign up for products and services.[11]

In forced arbitration, the company selects the arbitration firm that will conduct the hearing, giving the arbitration firm a financial incentive to favor the business. Moreover, arbitration

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[5] See, e.g. Consumer Financial Protection Bureau, *Private Student Loans*, Aug. 29, 2012, http://1.usa.gov/1c99ay4.

[6] Christine Hines and Micah Hauptman, *Between a Rock and a Hard Place, Courthouse Doors Shut for Aggrieved Private Student Loan Borrowers*, Public Citizen, July 2012, http://bit.ly/Mh9Avh.

[7] Dodd-Frank Act, Public Law 111-203, § 1028(b).

[8] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011).

[9] *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012).

[10] *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013).

[11] The Employee Rights Advocacy Institute for Law and Policy and Public Citizen, *National Study of Public Attitudes on Forced Arbitration, Findings from a Survey of 800 Likely 2010 Voters Nationwide*, April 2009, http://bit.ly/1p2aOKC.

proceedings are often conducted in secret, may be adjudicated in a manner that does not follow the law, and frequently limit many common legal principles, including the use of discovery. Also, there is little opportunity to appeal an arbitrator's ruling.

In *Concepcion*, the Supreme Court held that the Federal Arbitration Act (FAA) preempts state contract laws that would render class-action bans in arbitration clauses unconscionable and, therefore, unenforceable.[12] Class-action bans are contract terms that deny consumers and workers the right to seek to join together in lawsuits. *Concepcion* compounded the effects of permitting companies to use arbitration clauses by enabling them to use such clauses as a means to prohibit consumers from pursuing cases as a class. Class-action bans often have the practical effect of preventing many consumers from seeking redress of any sort, whether in arbitration or in court, because the alleged harms to individuals often are not large enough to make it economically feasible to bring a case.

As the CFPB notes in its report, the financial services industry inserts class-action bans in almost all arbitration clauses in contracts for consumer financial services.[13] Yet class actions are a critical tool for consumers to obtain redress for wrongdoing by financial services providers. Illegal fees and fraudulent charges common to this sector often are too small to justify a consumer pursuing a case on her own, whether in court or arbitration.[14] Without consumers' ability to participate in class actions, companies are able to escape accountability, retain their ill-gotten profits and continue their predatory practices unabated.

In 2013, the Supreme Court went even further in expanding the reach of the FAA. In *American Express v. Italian Colors Restaurant* it held that a class-action ban in an arbitration clause was still enforceable even in a case where the claimants proved that a class action was the only economically viable way for them to pursue their claims.[15] The cost of arbitrating on an individual basis would have exceeded the amount an individual claimant could hope to win.[16]

These developments restricting access to the court system continue to have an effect on consumer financial services and products. The *Greenwood* decision, decided less than a

[12] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (April 27, 2011), http://bit.ly/Wfl7OX.

[13] Consumer Financial Protection Bureau, *Arbitration Study Preliminary Results, Section 1028(a) Study Results To Date*, Dec. 12, 2013, at 37, http://1.usa.gov/18WUWEy.

[14] See, generally, Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DePaul L. Rev. 305 (2010).

[15] *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013).

[16] *Id.*

year after *Concepcion*, eliminated the right to sue in court even though a federal law, the Credit Repair Organizations Act, appeared to expressly grant that right to consumers.[17]

Debt Settlement Services

Services offered by debt settlement companies are often sought by financially strapped consumers seeking relief from mounting unsecured debt. In the debt relief or settlement industry, companies offer to negotiate to settle the debt of a consumer's lenders at less than the actual amount owed. These services typically do not help consumers nearly as much as they anticipate; in fact, consumers are often left worse off after debt settlement companies get involved in their financial affairs.[18] Debt settlement schemes reportedly fail to assist two-thirds of the individuals who participate in them.[19]

A typical debt settlement business offers to negotiate a reduced balance with a consumer's lenders on the consumer's debts for a fee. The consumer agrees to deposit funds each month into a dedicated account managed by a second financial institution for future payment of the debts. Once the account builds, the company is expected to negotiate with each creditor (such as a credit card company) to settle the debt for less than the consumer actually owes. The settled accounts receive a negative score on credit reports.[20]

At the outset of the transaction, the firm typically instructs consumers to stop paying their creditors, which increases their risk of defaulting on the debt, being harassed by debt collectors, and facing collection lawsuits.[21] Meanwhile, the firm charges the consumer initial fees and monthly maintenance fees, which it takes from the separate account. The front-loading fees in particular, is one of the most abusive scams in the debt relief industry.[22] These fees also expend the limited funds that the debtors could have saved to pay their lenders as part of a negotiated settlement.

[17] *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012).

[18] National Association of Consumer Bankruptcy Attorneys, *Consumer Alert: The Debt Settlement Trap: The #1 Threat Facing Deeply Indebted Americans*, October 2012, http://bit.ly/XmTio1.

[19] NACBA, *Consumer Alert: The Debt Settlement Trap: The #1 Threat Facing Deeply Indebted Americans*, October 2012 http://bit.ly/XmTio1; Letter from Ellen Harnick, Center for Responsible Lending to Stuart Deley, U.S. Department of Justice, Re: Financial Fraud: Debt Settlement Company Abuses, Oct. 25, 2012, http://bit.ly/VA38y5.

[20] Experian, *Credit Advice, The Difference Between Credit Counseling And Debt Settlement*, Oct. 28, 2009, http://ex.pn/iMogSr.

[21] Letter from Johnson M. Tyler, et al, South Brooklyn Legal Services, to Donald S. Clark, Secretary, Federal Trade Commission, Oct. 26, 2009, http://1.usa.gov/1heJvsd.

[22] Jonathan L. Voigt, *A False Light in the Darkness: Protecting Consumers and Creditors from the Debt Settlement Industry*, 87 N.D. L. Rev. 273, 284-285 (2011).

Posing as consumers, researchers for the U.S. Government Accountability Office conducted a covert study on 20 companies.[23] Several companies said that the monthly payments that go into the set-up account would be entirely used to pay their own fees for about four months before any of the money would be reserved to settle consumers' debt.[24]

The Bureau and other federal and state officials have taken steps to rein in illegal conduct related to debt relief services. For example, in December 2012, the Bureau announced that it had obtained a court order requiring that a debt-relief firm, Payday Loan Debt Solution Inc., refund up to $100,000 to consumers who were charged upfront fees before they could receive services.[25] The Bureau has also taken action against debt settlement payment processors for collecting illegal fees.[26] The debt-relief fees often violate the Federal Trade Commission's 2010 Telemarketing Sales Rule that bars companies from charging upfront fees and requires for-profit debt settlement businesses to give accurate disclosures explaining their services.[27]

While government enforcement is indispensable to protecting the public, these agencies cannot police wily industry players alone. Consumer financial protection laws, such as the Credit Repair Organizations Act (CROA) and state debt-adjusting and consumer protection statutes, authorize government enforcement but also value private legal actions to beef up corporate accountability for predatory financial practices.

The CROA, for example, the purpose of which is "to protect the public from unfair or deceptive advertising and business practices by credit repair organizations,"[28] expressly grants consumers a "right to sue."[29] The CROA contemplates the use of class actions, and permits actual and punitive damages, and attorneys' fees as awards for consumers who successfully prove their claims against credit repair firms.[30]

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23 U.S. Government Accountability Office, *Testimony of Gregory Kutz Before the U.S. Senate Committee on Commerce, Science, and Transportation, Debt Settlement – Fraudulent, Abusive, and Deceptive Practices Pose Risk to Consumers*, April 22, 2010, http://1.usa.gov/a0PlYn.

24 Id.

25 Consumer Financial Protection Bureau, *CFPB and State Partners Obtain Refunds for Consumers Charged Illegal Debt-Relief Fees*, Dec. 21, 2012, http://1.usa.gov/1dMOGze.

26 Consumer Financial Protection Bureau, Deputy Director Steve Antonakes Remarks at Meracord Enforcement Press Call, Oct. 3, 2013, http://1.usa.gov/1maaxCP and Complaint, *Consumer Financial Protection Bureau v. Meracord LLC and Linda Remsberg*, filed Oct. 3, 2013, http://1.usa.gov/1e7ItJP.

27 Federal Trade Commission, *Telemarketing Sales Rule, Final Rule Amendments*, 75 Fed. Reg. 48458, Aug. 10, 2010, http://1.usa.gov/1dkkbg5.

28 15 U.S. Code § 1679(b)(2).

29 15 U.S. Code § 1679c(a)

30 15 U.S. Code § 1679g.

Since the *Concepcion* and *Greenwood* decisions, however, consumers who have filed court actions to recover losses from their dealings with debt settlement outfits have been thwarted by forced arbitration and class-action bans in the terms of service. Instead of being able to go to court, they are forced into private individual proceedings to resolve their disputes with the entities.

Representatives of debt settlement companies acknowledge that arbitration clauses are used as a "threshold defense" against consumers seeking recourse from alleged industry misconduct.[31] This practice enables companies to avoid answering or responding to the alleged misconduct at all. Industry lawyers have relied on arbitration terms to prevent class actions, giving consumers no option but to arbitrate on an individual basis if they are to seek redress.[32] A law firm that primarily represents corporations advised credit counseling professionals at a conference in 2011: "The risk of consumer class actions may be substantially reduced or possibly eliminated with the use of an appropriately drafted and implemented arbitration provision and class-action waiver."[33]

Similarly, another industry lawyer, from Georgia, published a blog post in January 2014 praising a Georgia appellate court decision that permitted a debt settlement firm to compel arbitration. "The lesson to learn," he wrote, "is that well-drafted arbitration and severability clauses can mean the difference between defending a one-on-one claim in arbitration or defending a class action in state court."[34]

In that case, a consumer brought a class action alleging that the debt settlement company charged her and others excessive fees and charges in violation of Georgia's debt adjusting statutes.[35] The debt settlement terms of service contained an arbitration clause, and the appeals court held that the consumer should be compelled to resolve the dispute in the private tribunal instead of in court.[36]

There are other examples of consumers who could not pursue remedies in court for alleged wrongs in the debt settlement sector. In a 2012 case, a consumer had enrolled in a debt

31 David Weinberg, Georgia Debt Settlement Class Action Defense News, Jan. 22, 2014, http://debtsettlementdefense.blogspot.com/.
32 Id.
33 Jeffrey S. Tenenbaum, Esq. and Jonathan L. Pompan, Esq. Venable LLP, *Credit Counseling: Telemarketing Sales Rule, Credit Repair Organizations Act, and Litigation Risk Developments*, Association of Credit Counseling Professionals, Spring 2011 Conference, May 23, 2011, San Diego, Calif., http://bit.ly/1ecwdwq.
34 David Weinberg, Georgia Debt Settlement Class Action Defense News, January 22, 2014, http://debtsettlementdefense.blogspot.com/.
35 *Penso Holdings, Inc. v. Cleveland*, 749 S.E.2d 821 (Ga. Ct. App. 2013).
36 Id.

resolution program seeking assistance to address $72,000 in unsecured debt.[37] The debt settlement provider was to provide "bundled legal services" to assist her in resolving her debt.[38] The consumer opened a bank account with a financial institution referred to as the payment processor, which would accept automatic monthly payments from her as part of the program.[39] The consumer's contract with the payment processor contained an arbitration clause.[40]

The consumer alleged that she thought she had contracted with a "reputable law firm" but learned otherwise and ended her participation in the program.[41] She asserted that she had no control over the bank account and claimed that she did not give the payment processor authority to process payment of funds in the account.[42] She sued the debt settlement provider and the payment processor, alleging violations of the Kansas consumer protection laws, including deceptive acts and practices.[43]

The payment processor sought to force the consumer into individual arbitration. The consumer argued that enforcing the arbitration clause would "effectively eliminate" her constitutional right to a jury trial, her right to seek punitive and other damages, and her right to seek attorney's fees granted under the consumer protection laws.[44] She also objected to the contractually designated arbitration firm choosing the arbitrator.[45] A Kansas district court held that the arbitration clause was valid. It held that the consumer must arbitrate her claims against the payment processor.[46]

In another matter, a disabled consumer in New York who received federal Social Security benefits signed up with Arizona-based debt settlement companies for help to reduce her credit card debts.[47] She contributed funds to an escrow account as part of the program. The escrow account funds were to be used to pay negotiated settlements with her creditors.

According to the court that reviewed her claims, by the time a settlement was negotiated with a creditor, her account held less than $650 even though she had paid the debt

[37] *Locke-O'Dell v. Global Client Solutions, LLC*, 2012 WL 1033624, at 1 (D.Kan. March 27, 2012).
[38] Id.
[39] Id.
[40] Id.
[41] Id.
[42] Id.
[43] Id.
[44] *Locke-O'Dell*, at 4.
[45] Id.
[46] Id., at 5.
[47] Duran v. J. Hass Grp. L.L.C., 2012 WL 3233818, at 1 (E.D.N.Y. June 8, 2012) aff'd, 531 F. App'x 146 (2d Cir. 2013).

settlement companies almost $4,000.[48] Represented by Brooklyn Legal Services, she sued the companies alleging violations of the Credit Repair Organizations Act and New York's consumer protection laws.[49] The court held that she would have to arbitrate her claims in Arizona, as instructed in the debt settlement contracts.[50]

Private Student Loans

The private student loan industry is another sector whose practices the Bureau and other federal and state agencies have closely examined.[51] In his 2013 annual report, the Bureau's student loan ombudsman (Rohit Chopra) reported that his office had received approximately 3,800 complaints from the public between October 2012 and September 2013.[52] The agency claims that its investigations have led to some improvements in the market,[53] but admits that numerous problems remain.[54]

The Bureau has heard from students over a variety of industry practices, including issues stemming from changes to loan repayment terms and payment processing procedures. But as with the other financial services sectors that service millions of consumers, the Bureau faces an uphill task as it tackles the most egregious or burdensome lender practices.[55] Meanwhile, current law permits broad contract terms that restrict consumers from seeking remedies on their own.

For example, the Bureau's report noted difficulties that students encountered when they sought to make payments exceeding the minimum amount due on their loans.[56] Students complained that payments submitted to cover several loans were "not applied in a way that helps them to pay off their loans with the highest rates."[57]

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48 Id.

49 Id.

50 Id.

51 Form 10-K, SLM Corporation, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the fiscal year ended December 31, 2013, http://1.usa.gov/1mBsoX2. See, also, Shahien Nasiripour, *Sallie Mae's Woes Grow With Illinois Probe*, The Huffington Post, Feb. 21, 2014, http://huff.to/1jlyWnL.

52 Consumer Financial Protection Bureau, *Annual Report of the CFPB Student Loan Ombudsman*, October 16, 2013, http://1.usa.gov/1cGZycG.

53 Id., at 7, http://1.usa.gov/1cGZycG.

54 CFPB, *Annual Report.*

55 As mentioned above, Public Citizen previously released a report in 2012 that examined obstacles, including forced arbitration, that borrowers face when seeking legal remedies for harm suffered from student loan lenders' alleged misconduct.

56 Consumer Financial Protection Bureau, *Annual Report of the CFPB Student Loan Ombudsman*, Oct.16, 2013, at 9, http://1.usa.gov/1cGZycG.

57 Id.

Justin Kuehn, a student loan borrower who had made payments that significantly exceeded the monthly minimum, filed a class action alleging that the banks initiated a scheme to extend the loan term in order to reap additional interest payments.[58]

Kuehn's case, which was recounted in Public Citizen's 2012 report and was pending at the time of publication, has since been directed into arbitration.[59] Kuehn had argued that the arbitration clause, which included a class-action ban in the student loan terms, was "unconscionable" and sought to strike it down. In most cases, a court decides whether an arbitration clause is fair or unreasonable.[60] However, the arbitration clause in Kuehn's loan terms granted the arbitrator the task of determining whether the arbitration clause in the contract was fair.[61] Terms granting arbitrators this authority over contracts were approved in a recent Supreme Court decision.[62] Consequently, the court in Kuehn's case held that the arbitrator should decide on the validity of the arbitration clause.

"I am disappointed at the result," Kuehn told Public Citizen at the time. "The fact that an arbitrator gets to decide whether the arbitration clause is enforceable gives him or her the power to decide on an issue that benefits the arbitrator financially. With companies' widespread use of forced arbitration in contracts, our only option as consumers is to challenge the validity of the arbitration clause itself in court. But that option is also gone."[63]

Noting that student debt has reached $1.2 trillion, the Bureau also has acknowledged the impact of abusive and illegal debt collection practices on borrowers.[64] However, recent consumer attempts to file lawsuits for harm caused by conduct that may violate consumer debt collections laws also have been hindered by the contract terms.

For example, in December 2013, a student loan borrower from Florida filed a complaint alleging violations of Florida's debt collection laws and the federal Telephone Consumer Protection Act, which restricts telephone solicitations and automatic dialing.[65] The lender's promissory note contained an arbitration clause and prohibited participation in class actions.[66] It also included a provision permitting the borrower to reject the arbitration

[58] *Kuehn v. Citibank, N.A.*, 2012 WL 6057941 (S.D.N.Y Dec. 6 2012).
[59] Christine Hines and Micah Hauptman, *Between a Rock and a Hard Place, Courthouse Doors Shut for Aggrieved Private Student Loan Borrowers*, Public Citizen, July 2012, http://bit.ly/Mh9Avh.
[60] *Kuehn*, at 3 (S.D.N.Y Dec. 6 2012).
[61] *Kuehn*, at 4 (S.D.N.Y Dec. 6 2012).
[62] *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2777 (2010).
[63] Christine Hines, *Student loans and forced arbitration*, Citizen Vox, Dec. 10, 2012, http://bit.ly/1dYSmOB.
[64] Consumer Financial Protection Bureau, *Annual Report of the CFPB Student Loan Ombudsman*, Oct. 16, 2013, at 4, 7, http://1.usa.gov/1cGZycG.
[65] *Jones v. Sallie Mae, Inc.*, 2013 WL 6283483 (M.D. Fla Dec. 4 2013).
[66] Id.

clause within 60 days of the "first disbursement."[67] The borrower said that he did not recall receiving or reviewing the student loan promissory note or the arbitration clause and that the arbitration clause was "unconscionable."[68] However, a Florida district court ultimately determined that the loan terms were valid and required the parties to resolve the dispute in private arbitration.[69]

The business of student loan lenders, including originating, servicing, payment processing and debt collection, falls under the purview of numerous federal and state consumer protection laws. Some of these federal laws include the Electronic Funds Transfer Act, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, the Right to Financial Privacy Act, the Servicemember Civil Relief Act, and the Truth-in-Lending Act.[70] All of these laws have provisions that specifically contemplate private rights of action.[71] As these provisions indicate, proper enforcement of consumer protection laws depends not only on state and federal enforcement but also on consumers' ability to act on their own, which forced arbitration substantially impairs.

Auto Financing

Similar to debt settlement companies and student loan providers, auto lenders are using forced arbitration to shield themselves from accountability in the event they harm consumers with shady practices. Before forced arbitration became increasingly prevalent in auto dealer and financing contracts, consumers who had knowledge of auto dealer misconduct were able to obtain some redress on their own.

Indeed, in the late 1990s, auto buyers uncovered auto financing practices that appeared to treat black and Latino car buyers different than similarly situated white customers.[72] Buyers brought a series of class actions against major auto lenders that resulted in settlements in which the lenders agreed to institute major changes in their lending practices.[73] Consumers, as direct participants in the marketplace, could act to eliminate practices that evidently violated discriminatory lending laws.

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67 *Jones*, at 2-3.

68 *Jones*, at 3.

69 *Jones*, at 5.

70 Form 10-K, SLM Corporation, *Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934, for the fiscal year ended December 31, 2013*, at 17 http://1.usa.gov/1mBsoX2.

71 15 U.S.C. § 1693m(a); 15 USC § 1681n; 15 U.S.C. § 1681n; 15 U.S.C. § 1692k(a); 12 U.S.C. § 3417; 50 U.S.C. § 597a; 15 U.S.C. § 1640(a).

72 Hines et al, *One Year Later: The Harms to Consumers from the Supreme Court's Concepcion Decision Are Plainly Evident*, April 2012, at 23 -26, http://bit.ly/L43EWQ.

73 Hines et al, at 24-26.

In 2013, the Bureau warned auto lenders to be cautious in avoiding actions that would constitute discriminatory pricing at auto dealerships with which they do business. It released a bulletin in March 2013 recommending that auto lenders, particularly lenders that conduct business with auto dealerships as third-party lenders, to be mindful of their compliance with fair lending laws.[74] In December 2013, the Bureau and the U.S. Department of Justice announced penalties against Ally Bank to resolve allegations of discriminatory lending.[75] The Bureau's monitoring and enforcement followed private lawsuits brought by auto buyers who had experienced discriminatory lending practices.

However, recent Supreme Court precedents and the prevalence of forced arbitration have changed the marketplace. Auto financers are now able to prevent auto buyers from pursuing private actions for alleged wrongdoing. In a recent case, a consumer in Maryland alleged that an auto financing company violated the state's consumer protection laws by imposing "undisclosed finance charges and employing other unfair business practices."[76] She argued that a letter from the auto lender revealing discrepancies between the total "amount purchased" ($19,261) and the check amount to the auto dealer ($15,143.07), indicated evidence of hidden charges.[77]

She sought a class action in state court. The consumer had executed a buyer's order contract (which contained an arbitration clause) and a retail installment sale contract (which did not) with the dealer. The dealer had assigned the retail installment contract to the lender, which gave the lender all the dealer's rights under the contract. The lender argued that it had an enforceable arbitration contract with the consumer.[78]

Ultimately, the lower court agreed that an enforceable arbitration clause existed when the documents were read together,[79] but held that the auto financing company waived its right to arbitrate by actively litigating in court. However, the appellate court disagreed. It reversed the trial court, ordering it to direct the consumer into arbitration to resolve the dispute.[80] Consequently, it appears her allegations against the company—allegations that may also affect other buyers—may never be heard in court. In other, similar cases, courts

[74] Consumer Financial Protection Bureau, *Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act*, CFPB Bulletin 2013-02, March 21, 2013, http://1.usa.gov/1jtiC4u.

[75] U.S. Department of Justice, *Justice Department and Consumer Financial Protection Bureau Reach $98 Million Settlement to Resolve Allegations of Auto Lending Discrimination by Ally*, December 20, 2013, http://1.usa.gov/NqY15u.

[76] *Rota-McLarty v. Santander Consumer USA*, 700 F.3d 690 (4th Cir. 2012).

[77] *Rota-McLarty*, at 695, FN2.

[78] *Rota-McLarty*, at 700.

[79] Id., at 696.

[80] Id.

appear to be interpreting documents executed at the time of sale as a single transaction, permitting the auto dealer or the financing company to enforce an arbitration clause contained in any of the documents.

For example, a consumer in Missouri signed a "pile of documents" including a sales contract, a retail installment contract to finance purchase of a car, and a separate document with an arbitration clause.[81] The retail installment contract did not contain any arbitration requirements.[82] The consumer sued the auto dealer for negligent misrepresentation over statements she alleged it made regarding the financing of the car.[83]

She argued that the retail installment contract, which was central to the dispute, did not contain an arbitration clause, and therefore the case should be heard in court. The trial court agreed with her assessment, rejecting the dealership's effort to require arbitration, and permitting the consumer to move her claims forward in court.[84] On appeal, however, the Missouri Supreme Court determined that all the documents were to be treated as part of a single transaction.[85] The court held that the arbitration clause applied to the entire relationship between the auto dealer and the buyer, and that the disputes over financing must proceed in arbitration.[86] The dealer's conduct may never be litigated in court.

Conclusion

Debt settlement, auto financing and student loans are just a few of the consumer financial sectors that the Bureau oversees. In its preliminary data released last year, it identified the use of forced arbitration and class-action bans in several other sectors, including checking accounts and credit cards. It is clear that the use of these provisions and the impact on consumers are common throughout the financial services industry. These terms deprive consumers of a meaningful choice of a forum to resolve disputes, eliminate their ability to band together to seek redress, and restrict their enforcement of critical state and federal consumer protection laws. Meanwhile, these terms allow companies to escape accountability while engaging in illegal and predatory practices that harm the financial marketplace. The Bureau can and should act to restore consumers' legal rights in all financial sectors by issuing a rule that eliminates forced arbitration in their contracts.

[81] *Johnson v. JF Enterprises, LLC*, 400 S.W.3d 763, 764-765 (Mo. 2013).
[82] *Johnson*, at 765.
[83] *Johnson v. JF Enterprises, LLC*, 400 S.W.3d 763, 765 (Mo. 2013).
[84] Id. at 765.
[85] Id. at 768.
[86] Id. at 768.