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CFPB Litigation On Fire

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The Consumer Financial Protection Bureau ("CFPB") is engaged in a firestorm of tricky litigation these days. Some highlights, in addition to the Third Circuit's **NCSLT ruling we reported on previously**:

- With respect to the **CFPB's credit card late fee rule**, which is supposed to go into effect May 14, industry groups challenging the rule in court have been tousling back and forth with the CFPB. To start, the Northern District of Texas denied the plaintiff industry group's motion to request an expedited preliminary injunction hearing due to the very short timeframe for the rule to go into effect, opining that the case was best to be handled by the District Court of the District of Columbia and then transferred the case to the court in DC. The plaintiffs appealed this denial and transfer to the Fifth Circuit, which handed down a decision that found that the denial of the expedited timeframe for hearing the preliminary injunction was effectively a denial of the preliminary injunction itself, and the Fifth Circuit then found that the case should be returned to the Northern District of Texas for adjudication. The CFPB then challenged the Fifth Circuit regarding whether one of the justices that participated in the decision should be recused, because he owns shares of a large credit card issuer that could be negatively impacted by the rule. On April 17, the Committee on Codes of Conduct of the Judicial Conference of the United States determined that the Fifth Circuit justice did not need to be recused from the case. At this point, the briefing schedule for the case will not see the CFPB's responsive brief due until after May 14. As a result, it is likely that the plaintiffs will either choose to request an accelerated briefing schedule or ask the Fifth Circuit to rule on an emergency motion to stay the rule until the lower court can consider the preliminary injunction.
- The CFPB and the Department of Justice ("DOJ") have **filed an amicus brief** supporting consumers who are challenging the prohibition against actions taken by a class in their credit card issuer's arbitration agreement. In the underlying case, the consumers are challenging aspects of the issuer's compliance with the Serviceperson's Civil Relief Act ("SCRA") and have brought the case in federal district court as a class, instead of proceeding to arbitrate in accordance with the arbitration agreement included in their credit card agreement with the issuer. The CFPB and the DOJ argue that despite the consumers agreeing to the arbitration agreement, it is permissible under the SCRA for the consumers to file a class action in court due to the following language in the SCRA: "[a]ny person

aggrieved by a violation [of the SCRA] may in a civil action . . . be a representative party on behalf of members of a class or be a member of a class, in accordance with the Federal Rules of Civil Procedure, notwithstanding any previous agreement to the contrary." 50 U.S.C. 4042(a)(3). The CFPB has long considered arbitration to not be a consumer friendly alternative to litigation, even though the financial services industry and the CFPB itself has demonstrated that consumers who prevail in arbitration receive on average $5,389 versus consumers who are part of a class that prevails and who receive on average $32.35.