Cooley

CFPB Warns Against Deceptive Terms in Consumer Contracts

June 11, 2024

On June 4, 2024, the Consumer Financial Protection Bureau (CFPB) issued Circular 2024-03 warning that the inclusion of "unlawful or unenforceable" terms in consumer contracts – particularly in the fine print of consumer agreements – could constitute a deceptive act or practice under the Consumer Financial Protection Act (CFPA) by misleading consumers. CFPB supervisory examiners indicate that they have identified several violations of the CFPA's prohibition on deception stemming from covered persons' use of unlawful or unenforceable contract terms and conditions.

Contractual terms that may be misleading and material

Under the CFPA, a representation, omission, act or practice is deceptive when:

1. It misleads or is likely to mislead the consumer.
2. The consumer's interpretation of the representation, omission, act or practice is reasonable.
3. The misleading representation, omission, act or practice is material.

The CFPB notes that a waiver of rights, or other similar term, that is banned under federal or state law is likely "material" because the representation "involves information that is important to consumers and, hence, likely to affect their choices."[1] Because inclusion of these material terms may mislead a reasonable consumer into believing that the terms are in fact enforceable and lawful, the CFPB asserts that such terms are likely deceptive in violation of the CFPA's prohibition on unfair, deceptive, or abusive acts or practices.

Which contractual provisions may violate the CFPA?

While Circular 2024-03 does not provide a comprehensive list of contractual terms that may be deemed deceptive under the CFPA, it notes that terms that attempt to waive or limit consumer rights may be unlawful or unenforceable under federal or state law, and therefore their inclusion in contracts may mislead consumers. For example, the CFPB highlighted that the Electronic Fund Transfer Act (EFTA) prohibits terms that waive any right conferred by the EFTA, or that waive any cause of action under the EFTA. In addition, the Military Lending Act generally prohibits contractual terms that require servicemembers and their dependents to waive their rights to legal recourse.

The CFPB also warns that covered persons risk violating the CFPA's prohibition on deceptive acts when including waiver provisions that they cannot legally enforce, even if the terms are paired with a disclaimer like "except where unenforceable." Similarly, Circular 2024-03 indicates that disclaimers in a contract, such as "subject to applicable law," do not cure the misrepresentation caused by the inclusion of an unenforceable contract term, nor do disclaimers issued after the fact.

Looking ahead

The CFPB has previously addressed the use of unlawful terms in contracts. In a 2022 bulletin, the CFPB warned covered persons that they could be liable under the CFPA if they deceive consumers using unenforceable contract restrictions on consumer reviews. The CFPB also has identified violations of the CFPA by companies using unlawful or unenforceable terms, such as waiving bankruptcy rights or restricting consumers' error resolution rights under the EFTA.

CFPB circulars are intended to "promote consistency in approach across the various enforcement agencies and parties," and therefore serve as a clear warning to industry participants that the CFPB and other regulators are

carefully reviewing consumer contracts to identify potentially deceptive provisions.

[1] *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000), quoting *In re Cliffdale Assocs., Inc.*, 103 FTC 110, 165 (1984).

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

Key Contacts

Elyse Moyer Washington, DC	emoyer@cooley.com +1 202 776 2113

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.