

Wells Fargo tightens tough arbitration agreement

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Wells Fargo recently notified checking and savings account customers that effective Feb. 15, its mandatory arbitration agreement - already one of the toughest in banking - will become even more ironclad.

Chase, on the other hand, is giving deposit-account customers a chance to opt out of mandatory arbitration, but only if they act quickly.

Effective Feb. 1., new Chase customers can opt out within 60 days of opening their account. Existing customers must opt out by April 2 for checking and savings accounts, or within 60 days of their next maturity date after Feb. 1 for certificates of deposit.

Many companies - including banks, brokerage firms, insurers and cable and cell phone providers - have adopted such agreements, which generally require customers to take disputes to arbitration and give up their rights to a trial by judge or jury.

Companies say arbitration is speedier and cheaper than going through the court system and that it should be mandatory because consumers don't know what's good for them.

Consumer groups say arbitration favors companies, and customers should have a choice of where to file claims.

The Dodd-Frank Act gave the Consumer Financial Protection Bureau the right to ban or restrict mandatory pre-dispute arbitration clauses between financial service companies and consumers, but only if it does a study and finds that doing so is in the public interest and protects consumers.

Alan Kaplinsky, an attorney who has helped financial companies draft mandatory arbitration agreements, does not think this will be a priority for the new bureau, which has many things on its plate.

"I think when they try to do their study, people will be surprised to find out that consumers who go through arbitration like it very much and they do quite well," Kaplinsky adds.

Dodd-Frank also gives the Securities and Exchange Commission authority to prohibit or limit mandatory arbitration in brokerage and investment advisory accounts.

Provisions upheld

In two recent decisions, the Supreme Court has upheld mandatory arbitration provisions, which has emboldened more companies to adopt or expand them.

In April 2011, the high court ruled in *AT&T Mobility LLC vs. Concepcion* that state law can not strike down an arbitration clause that bans class-action suits in court or in arbitration. Since then, more companies have added clauses to forced arbitration agreements prohibiting consumers from initiating or participating in class-action suits. (Brokerage firms cannot prohibit investors from participating in class actions.)

That struck a blow to consumers because in some cases, the losses sustained by individual customers are so small that

suing as a class is the only economical way to get recompense.

And in 2010, the high court ruled that an arbitrator - not a court - could decide whether a company's forced arbitration agreement is so unfair as to be unenforceable. The name of that case is Rent-a-Center West vs. Jackson, but "it should have been the fox guarding the henhouse case," because it allows arbitrators to decide whether arbitration is fair, says Paul Bland, an attorney with Public Justice who helped argue the losing side of the case.

Many companies have adopted language to take advantage of that decision as well. Wells Fargo's newest agreement, which takes effect Feb. 15, adds the sentence, "The arbitrator shall decide any dispute regarding the enforceability of this arbitration agreement."

'Egregious' clauses

Even before this addition, Bland says Wells had "one of the most anticonsumer, egregious" mandatory arbitration clauses he had seen. "The scope of it is exceptionally broad."

It says either the bank or the consumer can force an unresolved dispute into binding arbitration. It prohibits customers from participating in class-action suits and says the agreement will survive even if the consumer severs all relationships with the bank. Unlike most agreements, it generally prohibits consumers from disclosing the "existence, content or results" of the arbitration. It also says that "unless inconsistent with applicable law," each side will pay its own attorney fees, expert and witness fees, regardless of which side wins. In most cases, if the consumer wins the bank reimburses the customer's attorneys fees, Bland says.

Some customers - including Woodside attorney John Keating - were stunned to get Wells Fargo's notice, thinking this was the first time the bank had imposed mandatory arbitration. The notice simply stated the new policy without saying how it differed from an existing one.

"Here is a copy of a startlingly unconscionable new binding arbitration provision just received by e-mail from Wells Fargo. Possibly many banks may be trying to overreach in the same way, but this particular provision seems so awful as to need public attention," Keating said in an e-mail.

Rights on the line

Holly Rockwood, a spokeswoman for Wells Fargo, says the bank has had an arbitration agreement for consumer deposit accounts for more than 15 years. "Arbitration is generally faster and less expensive than litigation. Even so, if a claim is eligible to be resolved in small claims court, our arbitration provisions give consumers the option of pursuing their claims in small claims court. Recently we clarified and shortened the provisions in this arbitration agreement and notified our customers," she said in an e-mail.

If customers don't like mandatory arbitration, they can ask the company to strike it from the agreement or go to a company that doesn't have one. Some smaller banks and credit unions don't require arbitration, but most big ones do.

In October 2010, the Pew Safe Checking in the Electronic Age Project researched 265 checking accounts offered by the 10 biggest banks and found that 71 percent had mandatory arbitration clauses preventing customers from going to court to settle a dispute.

Bank of America "discontinued the use of mandatory arbitration in our consumer agreements for our credit card and deposit accounts" in August 2009, says BofA spokeswoman Betty Riess.

Chase customers will soon be able to opt out of forced arbitration by calling (800) 935-9935 or talking to a banker. "We want to give customers more choices with their account," Chase spokeswoman Eileen Leveckis says.

Chase's brief window

Bland says Chase knows that the vast majority of customers won't opt out within their brief window of opportunity and will be covered by mandatory arbitration. But by making its policy appear optional, it actually bolsters its arbitration agreement.

"In most cases, to challenge an arbitration clause as unfair, you have to show that it was a take-it-or-leave-it contract. If it looks like something you can opt out of, it's not take it or leave it," he says.

He finds it ironic that consumers raised such a ruckus when BofA tried to charge \$5 a month for debit card purchases and Verizon tried to impose a \$2 fee for paying bills online or by phone that both companies had to cancel those plans. Yet most customers say nothing about mandatory arbitration agreements, which are far more onerous. "They take away all these rights from people," he says. "It's not as obvious as a \$2 fee."

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