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Consumer News

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California Banks Impose Binding Arbitration On Their Customers

In June, Bank of America, the biggest bank in California, instituted a new policy calling for binding arbitration in all cases of disputes with its credit card and checking account customers. In July, Wells Fargo Bank, the second largest bank in California, instituted a similar policy, and more banks are expected to follow suit.

In addition, Bank of America is instituting a "judicial reference procedure" for class action suits in which a judge would appoint an arbitrator to act as referee. The referee would hear the case in the form of a trial, and the referee's decision would be subject to appeal through the courts.

Under Bank of America's new policy, when a customer files suit against the bank, either party can demand that the dispute be resolved through binding arbitration, and the other party must comply. Furthermore, under binding arbitration, both parties forfeit their right to appeal, even in cases of alleged judicial error or abuse of discretion. Observers expect the bank to choose arbitration in every case.

Bank of America will work with the American Arbitration Association ("AAA"), a nonprofit organization that promotes alternative dispute resolution. The AAA provides a list of arbitrators, their backgrounds, and the rates they charge. Each side picks an arbitrator, and if they can't agree, the AAA ultimately will pick one. The fees ranges from $300 to as much as $4,000. The party filing the complaint pays the fee, which she will recover if she wins the case.

Some speculate that arbitrators may favor the party with which they regularly do business. Charles Mazursky, vice president of the Los Angeles Trial Lawyers Association, suggests that an "arbitrator makes money on these things, and he wants to render a decision that won't disqualify him for other hearings." Mazurksy continues, "If he finds too often in favor of the consumer, do you think the bank is going to continue to choose him?"

According to Winslow Christian, Senior Vice President and Director of Litigation for Bank of America, claimants tend to be awarded compensation from binding arbitration, but are unlikely to be awarded much more than actual damages.

However, the biggest advantage of arbitration is that it is less costly than traditional civil litigation. The arbitrator completely controls discovery, normally the longest and most costly part of litigation. Arbitrators rarely order broad discovery even though they have the power to order as much discovery as a judge normally would. Plaintiffs' lawyers argue that curtailed discovery gives the bank an advantage because the proof backing a customer's claim is usually in the bank's files.

Bank of America points out that it has been including binding arbitration in its commercial loan contracts for four years, but critics charge that Bank of America's unilateral decision to change the rules for consumers amounts to an adhesion contract. Unlike commercial borrowers, consumers do not have any power to bargain over the terms in their contracts.

Bank of America's Christian admits "[i]t is an adhesion contract, it clearly is, but an adhesion contract is not voidable unless it is [unfair]." He adds that if consumers "don't like it they can go across the street." However, consumers may not be able to simply go across the street now that the two biggest banks in California have instituted binding arbitration for all of their customers.

Dean Jay Folberg, of the University of San Francisco Law School, says it is hard to predict whether Bank of America's new policy can be successfully challenged. The United States Supreme Court has upheld a similar arbitration clause imposed on securities investors. On the other hand, as Dean Folberg points out, courts in California have held that consumer banking, in contrast to securities investing, is a fundamental necessity of daily life.

Dean Folberg, who chaired a Judicial Advisory committee on alternative dispute resolution ("ADR"), notes that courts are eager to encourage alternatives to civil litigation. Dean Folberg also adds, however, that "to push ADR in that comprehensive a manner creates a backlash that, in the long run, could be detrimental to the use of alternatives to litigation."

800 Call Scam Costs Consumers Plenty

Consumers have been calling '800' numbers to find out about their sweepstakes winnings, only to learn later that the toll-free call they placed actually cost them as much as $15.60. Allied Marketing Group of Dallas ("Allied"), a direct-mail company, developed the '800' promotion which it operates under the name of Sweepstakes Clearinghouse.

The promotion works in the following way. Sweepstakes Clearinghouse sends postcards to consumers. The postcards indicate that the consumers have won undisclosed prizes. The cards then direct consumers to call an '800' number to find out what they have won.

Callers are greeted by a computerized voice which directs them to remain on the line for more instructions. At this point, the callers are warned that they will be billed if they stay on the line.

Callers who remain on the line

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are asked to punch in the 12-digit control code printed on their postcard. They are also asked to punch in their telephone numbers and ZIP codes. After they have given this billing information, they can learn about their prizes.

Despite the warnings, many consumers stay on the line because they just do not expect to have to pay for a toll-free call. Consumer complaints have prompted many sympathetic state officials to sue Sweepstakes Clearinghouse to stop the promotion.

As Richard M. Kessel, executive director of the New York State Consumers Protection Board explains, "we think '800' numbers should be a sanctuary for all toll-free calls. At the very least, the consumer should be required to hang up the telephone and dial another number that's not an '800' number."

William M. Parrish, an attorney representing Sweepstakes Clearinghouse, denies any wrongdoing on the part of his client. He argues that "callers are not being billed for an '800' call on their telephone number; they're being billed on the use of an automated information service."

This '800' number sweepstakes promotion follows a '900' number promotion commonly used a few years ago. Callers receiving a sweepstakes postcard would call a '900' number to find out that they had won an inexpensive gift. Meanwhile they would accumulate phone charges which often exceeded the value of their prize.

Other services traditionally provided through '900' numbers are beginning to use '800' number formats. For example, a phone- sex provider attracted callers with an '800' number, then ultimately charged the callers $4.95 per minute for the service. In another example, a psychic charged $120 per call to customers who called on an '800' number.

A San Francisco group, Consumer Action, joined forces with AT&T and Sprint to warn consumers about some companies that are charging for "information services" offered through '800' numbers. In addition, the two long-distance phone companies are proposing rule changes to the Federal Communications Commissions ("FCC") which would require all '800' numbers to be strictly toll-free.

'800' numbers, originally established in 1967 to allow businesses to provide toll-free services, are big business for long-distance carriers. AT&T, the biggest provider, says that one-third of its daily volume comes from calls made to '800' numbers. These companies do not want to jeopardize this business by allowing legitimate toll-free numbers to be associated with sleazy pay-per-call services.

Currently, '900' numbers are subject to many restrictions. Callers must be advised that they will be charged and may hang up at no cost. Furthermore, most telephone customers can block '900' number services from their phones.

'800' numbers are not subject to the same restrictions because they have been traditionally used for toll-free business purposes. The FCC is currently studying the '800' promotion used by Sweepstakes Clearinghouse. The agency is considering action which would close the loophole in its current regulations by adding new restrictions on '800' numbers.

FDA Issues Warning About Seldane

In July, the Food and Drug Administration ("FDA") directed Marion Merrell Dow, Inc. ("Merrell Dow"), the maker of seldane, a popular antihistamine, to warn physicians and patients that the drug may cause serious health problems if taken with certain antibiotics and antifungal drugs. Seldane may also pose risks to patients who suffer from liver disease.

Seldane, technically known as terfenadine, is extremely popular because it effectively controls allergy symptoms without causing drowsiness, usually associated with antihistamines. The FDA said that patients should not take seldane in conjunction with the antibiotic erythromycin or the anti-fungal drug Nizoral, also known as ketoconazole.

Seldane is sold over-the-counter in Canada, although it is available only by prescription in the United States. Merrell Dow had planned to seek approval to market seldane over-the-counter in the United States, but the company postponed its submission for approval pending further scientific review.

The company hoped to market the drug directly to consumers, building up brand name recognition and loyalty and heading off competition from generic drug makers when the patent for the drug expires. In addition, over-the-counter drugs generate much higher sales volume because many patients prefer to avoid seeing a physician.

The FDA has received 64 reports from patients who had cardiac problems while using seldane. Since 1985, there have been 15 cases of cardiac arrest and four deaths.

The agency first discovered the problems with seldane in 1989 after a woman taking seldane with an antifungal drug sought treatment at the Uniformed Services University. The woman, who complained of frequent fainting spells, was found to have a rare irregular heart rhythm.

Merrell Dow first warned doctors in 1990 about possible adverse side effects associated with seldane. Due to the increasing number of reported problems, the FDA decided that a stronger warning for both physicians and patients was in order. The agency is also looking for possible side effects when seldane is used with other drugs.

Doctors, however, have written more than 200 million prescriptions for the drug worldwide, and Dr. Richard Lockey, president of the American Academy of Allergy and Immunology, suggests that allergy specialists "reassure patients that as long as they are not taking these other medications, seldane is a safe drug to take."

Analysts predict that prescription sales of seldane are unlikely to be affected by the FDA's warnings. However, the company has not gone unscathed. Immediately following the announcement, its stock dropped $5.75 a share, and the company can expect a few lawsuits from both angry investors and injured patients.