



## SAFE CHECKING IN THE ELECTRONIC AGE

### DISPUTE RESOLUTION CLAUSES IN CHECKING ACCOUNT AGREEMENTS SHOULD BE FAIR TO CONSUMERS

In April 2011, the Pew Health Group's Safe Checking in the Electronic Age Project released [\*Hidden Risks: The Case for Safe and Transparent Checking Accounts\*](#). This report examined the terms and conditions of over 250 distinct checking accounts offered online by the 10 largest banks in the United States as of October 2010. At that time, these banks held nearly 60 percent of all deposit volume nationwide.

**Pew's Finding:** More than 80 percent of accounts examined contain either binding mandatory arbitration agreements or fee-shifting provisions that require the accountholder to pay the bank's losses, costs and expenses in a legal dispute regardless of the outcome of the case.

**Pew's Policy Recommendation:** The newly created Consumer Financial Protection Bureau (CFPB) has been tasked with studying and reporting to Congress on the use of arbitration agreements in financial products and services.<sup>1</sup> Based on this research, the CFPB is authorized to prohibit or impose limitations on these agreements should it find that to do so protects consumers and is in the public interest.<sup>2</sup>

Pew recommends that in this study of arbitration agreements, the CFPB should examine the prevalence of binding arbitration clauses and of fee-shifting provisions, including loss, costs and expenses clauses, in checking accounts and assess whether such provisions prevent consumers from obtaining relief.

The Federal Arbitration Act generally makes arbitration agreements valid as a matter of federal law.<sup>3</sup> However, some arbitration agreements have been challenged under the laws of several states that prohibit "harsh, one-sided, and oppressive" terms in so-called "contracts of adhesion" (i.e., contracts that are not freely negotiated).<sup>4</sup>

Some banks in the study allowed customers to take them to court but required the customer to pay the bank's loss, costs and expenses regardless of the outcome. While fee-shifting agreements like these are usually held unenforceable against prevailing parties, they likely have a chilling effect on consumers who are weighing legal action against their bank, dissuading them from seeking redress through the courts.<sup>5</sup>

## Dispute Resolution Provisions

How do banks restrict customers' access to courts in the case of dispute?

Checking Account Dispute Resolution Terms	Percentage of Accounts
Customer waives right to jury trial	96%
Customer waives right to class action	94%
Customer required to enter binding mandatory arbitration agreements	71%
Customer must pay the bank's losses, costs, and expenses	12%

**Note:** Data represent 265 checking accounts offered by the 10 largest American banks by deposit, which collectively hold nearly 60 percent of all deposits in the United States. Most accounts disclose more than one dispute resolution restriction.

## ENDNOTES

1. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 111 Pub. L. No. 203, §1028(a), 12 U.S.C.S. § 5518(a).
2. *Id.* § 1028(b), 12 USCS § 5518(b).
3. Federal Arbitration Act, 9 USC § 2.
4. *Tillman v. Commer. Credit Loans, Inc.*, 655 S.E.2d 362, 370 (N.C. 2008). See *Johnson v. Keybank Nat'l Ass'n (In re Checking Account Overdraft Litig.)*, 718 F. Supp. 2d 1352, 1358 (S.D. Fla. 2010).
5. *Big Lots Stores v. Luv N' Care*, 302 Fed. Appx. 423, 426 (6th Cir. 2008); *Miles v. The N.Y. State Teamsters Conf. Pension & Ret. Fund Employee Pension Benefit Plan*, 698 F.2d 593, 601-02 (2d Cir. 1983); *Southwest Marine, Inc. v. Campbell Indus.*, 796 F.2d 291, 292-93 (9th Cir. 1986) (Noonan, J., concurring).