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A Fight Against the Fine Print

In a ruling that could have a ripple effect, an Alameda County judge rules Bank of America can't force a customer into arbitration

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Judge Richard Hodge

When college student Andre Watkins filed suit against Bank of America for alleged misconduct in handling a problem with his checking account, bank attorneys filed a motion to compel arbitration.

The bank argued that Watkins had agreed to all their terms and conditions on the day he opened his account and signed the required one-page "master agreement." Though the form Watkins signed never specifically mentioned alternative dispute resolution, the bank maintained that the form clearly stated that other "written information we give you is part of this agreement" -- including a pamphlet Watkins should have received that spelled out the ADR provision.

But in an order that could be used to challenge similar provisions used by the banking industry, Alameda County Superior Court Judge Richard Hodge last week

denied the motion to compel arbitration. He said the one-page agreement appeared only to ask for a signature authorizing the bank to pay out funds from the account and certifying that the customer had given accurate information.

"To 'certify' that your taxpayer identification number is correct (or that you are a citizen of the United States, or that you have not been convicted of a felony) is not the same as agreeing to be bound by the explicit terms of a contract," Hodge wrote.

Hodge says the agreement failed to adequately spell out the terms of the bank's ADR provision, and, more significantly, that the provision neglected to spell out its implications -- namely, the waiver of a customer's right to a jury trial.

The order has the obvious effect of allowing Watkins to move forward with his suit. But it also extends beyond the Watkins case to cast doubt on the enforceability of similar ADR provisions.

While Hodge's order has no precedential value, it could be referenced by attorneys arguing cases challenging similar ADR provisions.

"This could be far-reaching and affect every Bank of America arbitration agreement," said William Duncan, the Hornbrook solo attorney who represented Watkins with Yreka solo John Lawrence. "The judge is saying this is clearly insufficient to waive a customer's right to a jury trial in California."

And Hodge's order could become precedential if an appellate court called to review the case confirmed his reasoning.

"We haven't reached a decision yet about whether the bank will appeal *Watkins v. Bank of America*," bank spokesperson Sharon Tucker said. "The trial court has just issued its decision in the matter, and the bank is still analyzing it."

According to court documents filed by Duncan, Watkins reported having his wallet stolen -- with his ATM card, PIN number and checkbook inside. The alleged thief drained the account and caused overdrafts. Watkins claims the bank recovered the overdrawn amount from a government disability check deposited in the account and then closed it.

Morrison & Foerster attorneys Arne Wagner and Ilene Diamond, who represented Bank of America, declined to comment.

But according to court documents, the bank argued that the master agreement, also called the signature card, must clearly be accompanied by supporting materials. And the bank maintained that the ADR provision should have been as clear to Watkins as any other of the terms and conditions regarding his account stated in the pamphlet, called the FACTS booklet.

"Without the FACTS booklet, a customer would lack information about key account provisions, such as interest rates on account funds, overdraft protection, customers' obligation to inform the bank of unauthorized transactions, direct deposit discount, 24-hour customer service, check storage services, Versateller and other electronic banking services and service charges," a document states.

"As it is clear from even a superficial examination of the signature card, that card contains none of these key terms and conditions."

Attorneys say Hodge's order seems to pick up from where a 1998 California appellate court decision left off.

Hodge relied heavily on the logic behind *Badie v. Bank of America*, A068753. In that case, the First District Court of Appeal rejected the validity of an ADR clause that the bank sought to add to prior agreements by mailing inserts -- or bill stuffers -- to customers.

The court noted that such an addendum should have included an "unambiguous and unequivocal" waiver of a customer's right to a jury trial "either in the language of the change of terms provision or in any other part of the original account agreements."

Attorney James Sturdevant, who represented the four individuals and two consumer organizations challenging Bank of America's bill stuffer ADR provision in *Badie*, called Hodge's order "consistent with *Badie* and with the standard principles of contract construction in California."

Imagine, he said, if a bank could slip into an agreement an addendum that it could take your home or impose death if you missed a payment.

"When you talk about waiving any constitutional right, you have to get the clear and unmistakable consent from the individual entering into the agreement."

But Sturdevant maintains that the banks continue to try to slip such provisions into customer agreements.

"They know a customer doesn't want to have to give up his rights or agree on the best forum to resolving a dispute he hopes never happens to begin with," he said.

But Tucker, the bank's spokesperson, issued a statement praising ADR as "an efficient and reliable process for resolving customer disputes because it saves time and money."