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Consumer

Three Tips for Writing Effective Arbitration Clauses

BNA Snapshot

- Companies that want to avoid class action liability should carefully craft arbitration provisions
- The AT&T contract that famously survived Supreme Court review can serve as a model, the company's lawyers say

By **Perry Cooper**

Oct. 18 — A well-drafted arbitration provision can save companies from expensive and time-consuming class litigation, two defense attorneys say.

The U.S. Supreme Court has created a robust body of arbitration law over the past five years. Companies and their attorneys should draft service and employment contracts with these decisions in mind, Mayer Brown LLP partners Kevin S. Ranlett and Archis A. Parasharami, both based in Washington, said.

Ranlett and Parasharami ought to know. Their firm helped client AT&T Mobility draft an arbitration provision that was ultimately upheld by the U.S. Supreme Court in one of those landmark cases, **AT&T Mobility LLC v. Concepcion**, **563 U.S. 333** (2011).

AT&T's arbitration provision is a good model of what works, they said. But Ranlett stressed that arbitration clauses aren't one-size-fits-all. Companies need to customize their contracts to suit their individual circumstances.

Here are three tips for implementing an arbitration program.

1. Don't Create Uncertainty

The contract should expressly say class actions aren't permitted, Ranlett said. It also should ban arbitration on a classwide basis, which he called “bad for everyone.”

Make it clear in the agreement whether the court or an arbitrator will make decisions about arbitrability, he said.

Several courts are currently grappling with the question of who decides whether class arbitration is available because the contracts didn't say so explicitly (**17 CLASS 1063, 10/14/16**).

Lay out what kinds of claims should be decided by the arbitrator, Ranlett said.

The more you can spell out clearly at the time of drafting, the more it will save you from headaches down the road.

2. Include Consumer/Employee-Friendly Terms

The arbitration clause should be prominent and obvious so that the consumer or employee signing it will be sure to notice it, Ranlett said.

It should also give consumers the option of forgoing arbitration to handle their claims in small claims court, as AT&T's contract provides, he said.

Filing fees are lower in small claims court than in regular court proceedings, and filers don't need attorney representation. But they can't proceed as a class.

It's important not to put all of the costs of arbitration on the consumer, Parasharami said.

At the very least, companies should follow the American Arbitration Association's rules for costs. Those rules cap the consumer's filing fee at $200 and require the business to compensate the arbitrator.

Parasharami suggests companies consider being even more generous than the AAA requires.

AT&T's arbitration clause provides that the company pays all arbitration costs as long as the claim isn't frivolous.

In 2011, when the Supreme Court upheld AT&T's arbitration provision in Concepcion, the provision required AT&T to pay a consumer a minimum of $5,000 and double attorneys’ fees if an arbitrator awarded the consumer more than AT&T's final settlement offer. That floor is now $10,000.

3. Avoid Potentially Unconscionable Terms

Finally, attorneys should avoid including provisions that would be held invalid under unconscionability principles of contract law.

That includes ensuring the arbitration forum is convenient for the consumer or employee and that both sides’ arguments are treated equally, Ranlett said.

The company should also follow AT&T's lead and not limit the consumer or employee's remedies.

That means giving the arbitrator the option of awarding any form of individual relief that would be available to the consumer in court, including punitive damages, attorneys’ fees and injunctive relief.

The attorneys spoke at an Oct. 11 webinar put on by Strafford Publications Inc.

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