Does Your Arbitration Clause Have Claws?

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Applicable Law

- Federal Arbitration Act (FAA) – 1925;
  9 U.S.C. §§ 1, et seq.

- California Arbitration Act, CCP §§ 1280,
  et seq.

Benefits of Arbitration

- No jury trial
- Selection of tribunal
- Limited discovery
- Less expensive
- Flexibility in scheduling
- Cheaper
- Faster
- No appeal

Detriments of Arbitration

- No jury trial
- Administrative costs
- Subsidiary disputes
  - Selecting arbitrator(s)
  - Disqualification of arbitrator(s)
  - What did parties agree to arbitrate?
  - Is arbitration agreement enforceable?
  - Some arbitrators “split the baby”
  - Decision is final and unappealable

Issues to Consider in Drafting Arbitration Agreements

- Number and qualifications of the arbitrator(s)
- Location of the arbitration
- Discovery permitted
- Powers of the arbitrator
- Issues subject to arbitration
- Type of decision
- Injunctive Relief Carve-Out

(See handout)

Unconscionability

- Unconscionability requires two elements:
  a) That agreement is procedurally unconscionable and
  b) Is substantively unconscionable.
    - Procedural unconscionability almost always exists in consumer contracts because they are contracts of adhesion.
    - Substantive unconscionability in essence means the contract is one-sided and gives too many advantages to the stronger party.
    - Although to be unconscionable a contract must contain both elements, there is a sliding scale for measuring them.
- Procedural $\leftrightarrow$ Substantive

Leading California Decisions Limit Employee Arbitration Agreements

- *Gentry v. Superior Court* (2007) 42 Cal 4th 443
- *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal 4th 83
- Employee arbitration agreement must include the following:
  - Clear language in a separate document that employee is waiving right to a jury trial, (N.B. - Don’t bury in handbook)
  - Provision for a neutral arbitrator, and
  - Requirement for a written arbitration decision

In California Employee Arbitration Agreements May *Not*:

- Cause the employee to incur arbitration fees greater than the costs of litigating in court,
- Limit remedies available in court proceedings,
- Limit the employee's right to necessary discovery,
- Prohibit class actions where that would be a suitable procedure,
- Apply only to claims brought by the employee (*i.e.,* arbitration must be reciprocal), or
- Impose restrictive time-limits for asserting claims.

Suggested Ways To Make Employment Arbitration Agreements Both Enforceable And Effective:

- Allow employees to opt out (but see *Gentry v. Superior Court)*,
- Explain benefits of detriments of arbitration in neutral language, and
- Include mediation as a required first step.

(See sample agreement)

Consumer Agreements: Guidelines To Enforceable Arbitration

- **Don't** bury arbitration clause in the "fine print" or in subsidiary document, opt-out "bill stuffer" or clickwrap agreement.
- **Do** make the arbitration clause stand out from the rest of the agreement (e.g., in different type-face or as a stand-alone provisions) and, if possible, have the consumer sign, initial or otherwise acknowledge reading the specific arbitration clause.
- **Do** keep it simple, easy and fair.

The Don’ts Of Consumer Arbitration

- Only consumer, not vendor, has to arbitrate
- Venue inconvenient for consumer
- Consumer has to pay arbitration costs which are unreasonable in relation to the claim asserted
- Consumer cannot represent others similarly situated (class action waiver) (*Discover Bank v. Superior Court* (2005) 36 Cal 4th 148)
- Limits on damages/recoveries
- Selection of “captive,” non-neutral arbitrators
- Stronger party can reject arbitration decision and demand court trial
- No written decision required
- Allows stronger party to unilaterally modify the agreement
- Agreement imposes extremely short statute of limitations.

Healthcare Arbitration In California

- Highly regulated in California by Health & Safety Code:

  §§ 1363(a)(10), 1363.1, 1373(i), 1373.20, and 1373.21 and Civil Code § 1295

- Health Plan agreements exempt from FAA.
- Likelihood of procedural unconscionability very high due to absence of real consumer choice.
- Recommendation: Provide an opt-out period.

Specific Healthcare Arbitration Regulations

- §1363(a)(10) requires disclosure in health plan disclosure forms or materials a statement that the plan utilizes arbitration to settle disputes, if that is the case.

Specific Healthcare Arbitration Regulations (cont'd)

- §1363.1 describes what information must be disclosed to the employer group and individual subscribers, including specific language and placement of the disclosure.

  1. Must disclose whether arbitration applies to medical malpractice claims.
  2. Disclosure must be in a separate article and be "prominently displayed" on the enrollment form signed by each subscriber or enrollee.

Specific Healthcare Arbitration Regulations (cont'd)

3. Must clearly state that subscriber or enrollee is waiving his/her right to a jury trial, using language from C.C.P. §1295.
4. Must be displayed immediately above the signature line where both representative of group and individual subscriber signs.

- §1373(i) requires each plan contract to state 1) the type of disputes subject to arbitration, 2) the process to be utilized, and 3) how arbitration is to be initiated.

Specific Healthcare Arbitration Regulations (cont'd)

- §1373.20 lays out a number of the procedures that must be followed in arbitration.

1. If a professional dispute resolution organization is not used, the plan must have a provision for rapid selection of the arbitrator(s) or a method of default appointment.
2. After 30 days if no selection, then agreed method of selection deemed to have failed and C.C.P. §1281.6 shall be the default selection process.
3. If one party has engaged in dilatory tactics, a court may award the other party reasonable costs and fees.
4. Plan must include a provision for relief from fees and expenses in cases of extreme hardship.

Specific Healthcare Arbitration Regulations (cont'd)

- §1373.21 requires a written decision and filing of redacted decision with the Department of Managed Care.
- §C.C.P. §1295, which applies to "health care providers" (a defined term) sets forth the language that must be included in any service contract, allows rescission for 30 days.

1. Must make clear that parties are giving up right to a jury trial in medical malpractice cases.
2. Disclosure must be in 10-point, bold, red type immediately before the signature line.

Specific Healthcare Arbitration Regulations (cont'd)

3. Once signed applies to all subsequent medical services for which the contract was signed, unless rescinded in writing within 30 days.

4. Contract deemed <u>not</u> a contract of adhesion if above complied with.

Conclusion

- Whether negotiated or mandatory arbitration,
  look before you leap.
- Is arbitration worth the effort?
- If yes, then be sure to dot the “i’s” and cross the “t’s.”

Questions?