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Using Arbitration And Class Waivers As Privacy Suit Tools

By **Mark Olthoff and Courtney Klaus** (February 23, 2024, 5:13 PM EST)

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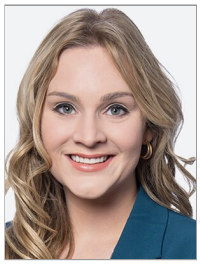

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The number of data breach class actions has surged in recent years, and this trend shows no signs of slowing down. In 2023, an average of 45 data breach class actions were filed in federal court every month.

Other types of privacy cases such as web tracking or recording litigation have also exploded in the past couple of years. Are there alternatives to fighting battles in open, public courts? Are there options to potentially reduce the costs of litigation in lawsuits?

Arbitration clauses and class action waiver provisions can be a possible solution. As a recent example, the U.S. District Court Northern District of California in Clements v. T-Mobile USA Inc. enforced an arbitration provision last month, where the plaintiff alleged he was the victim of identity theft following cyberattacks on his cell phone carrier.[1]

The court found the agreement to arbitrate was enforceable and the claims alleged within the scope of the arbitration provision.[2] This article discusses how these clauses have been used in privacy class actions.

Benefits of Arbitration Clauses

Arbitration can be an effective way to avoid the expense and delays of litigation in court. Larger organizations often prefer arbitration because it bypasses lengthy hearing processes, keeps litigation confidential and gives the parties a say in who becomes the ultimate decision maker.

Arbitration clauses may also include class waivers, which can prevent large groups of people from consolidating their claims. These benefits of arbitration, accompanied by class waivers, are especially attractive to companies seeking to mitigate the costs of data breach litigation, where organizations may face huge class sizes and significant reputational damage.

Arbitration and Class Waiver Success in Recent Data Privacy Cases

In 2022, the U.S. District Court for the District of Maryland certified classes of tens of millions of people in In re: Marriott International Inc., following one of the largest data breaches in the country involving Marriott's customer loyalty program.[3] Marriott soon after appealed the certification rulings.

In October 2023, the U.S. Court of Appeals for the Fourth Circuit vacated the certification decisions, ruling that the district court must evaluate the existence of a class waiver before a class action can proceed.[4]

The presence of a class waiver is to be considered at the initial stages of a case. In other words, "a class-waiver defense is not a defense to liability" but a defense "to being required to litigate a class action at all," according to the Fourth Circuit opinion.[5]

Upon remand, the district court reinstated the class certification orders.[6] The court found that the class waiver provisions had been waived because Marriott failed to advance the waiver arguments and, instead, agreed to multidistrict litigation in a single court, which it observed was inconsistent with the class waiver.[7]

In Flores-Mendez v. Zoosk Inc., the Northern District of California found in 2022 that the representative plaintiff in a data breach lawsuit had agreed to an online dating service's terms of use, which contained a class waiver.[8] The court then denied the plaintiffs' motion for class certification.[9]

Similarly, StockX, an e-commerce website, convinced the U.S. Court of Appeals for the Sixth Circuit in 2021 to dismiss a class action and compel arbitration where its amended terms of service included an arbitration provision.[10]

And in another case, Heidbreder v. Epic Games Inc., a video gamer was **prevented** from bringing a class action against Epic Games in the U.S. District Court for the Eastern District of North Carolina in 2020 because the end user license agreement he signed included an arbitration clause.[11]

Two recent cases in consumer contracts illustrate how these provisions can provide advantages.

In Trimble v. AT&T Mobility LLC, the U.S. District Court for the Western District of North Carolina granted the defendant's motion to compel arbitration in a data breach case last year.[12] The plaintiff had argued the agreement was invalid, and his claims were outside the scope of the provision, but the court disagreed on each point.[13]

Similarly, as mentioned in the introduction, the Northern District of California recently enforced the agreement to arbitrate data breach claims in Clements v. T-Mobile and found the broad provision encompassed all disputes related to services with the cellular carrier.[14]

These cases illustrate that arbitration clauses and class waivers can provide significant relief to avoid costly lawsuits.

While not every interaction with a company may create an opportunity to include arbitration and class waiver agreements, such instances do exist where companies enter transactions.

For example, arbitration clauses are common in employment agreements and consumer-facing agreements. Terms of service and licensing agreements may include them as well.

Keeping Arbitration Clauses Enforceable

Not all arbitration clauses and class waivers are enforceable. Mistakes and blind spots increase the risk that a company will be forced to litigate against a class action lawsuit it attempted to avoid with a waiver. Below is a list of steps an organization can take to prepare itself for an enforceability challenge to arbitration provisions in court.

1. Provide proper notice.

When a standard form agreement includes an arbitration clause, courts often look to consent between parties to decide whether the agreement should be enforceable.

Courts have found that a plaintiff consents to new or updated arbitration agreements when companies provide conspicuous notice of updates to terms of service.

However, imprecise language that fails to clearly explain a consumer's rights does not provide the consumer with proper notice that they have entered an arbitration agreement.

Furthermore, while some courts have found that silence from a consumer is enough to prove consent, other courts, like the Supreme Court of Indiana, require a more substantial showing of consent from the consumer, particularly where agreements are amended and the amendment is to be effective unless rejected by the party.[15]

Companies may avoid these consent-related problems by issuing notices that clearly describe a consumer's rights and by requiring an affirmative act on the part of the consumer, like clicking an "accept" button to new terms.[16]

2. Do not waive the arbitration right or class waiver.

Whether or not a party has a valid arbitration clause, the party can inadvertently waive the right to arbitrate in litigation. The same is true of class waivers.

A party waives its arbitration right or class waiver if it has knowledge of the right and acts inconsistently with that right. Acting inconsistently with an arbitration right includes litigating on the merits without raising the arbitration right first.

In Hill v. Xerox Business Services LLC, the U.S. Court of Appeals for the Ninth Circuit held last year that the defendant **could not** compel arbitration of absent class members' claims after it had already substantively challenged a representative plaintiff's claims over the course of six years.[17]

But in Armstrong v. Michaels Stores Inc., the same court held, also in 2023, that the defendant had not waived its arbitration right when it **pled arbitration** as an affirmative defense in its answers to the plaintiff's original and amended complaints.[18]

As referenced above, in Marriott, the District of Maryland found Marriott had waived its argument to force individual actions by, among other things, agreeing to consolidate the action in a jurisdiction different from the waiver's accompanying choice of law provision.[19]

And, more recently, the Northern District of California in In re: Google Assistant Privacy Litigation, a data privacy case where plaintiffs allege that Google Assistant-enabled devices surreptitiously recorded conversations, **found** last month that the company waived its right to arbitrate by waiting four years to raise the issue in heated litigation.[20]

The court thus denied Google's request to arbitrate.[21] These cases are a reminder that it is important to consider the full language of an arbitration clause or class waiver provision to ensure that a party does not inadvertently take steps that could invalidate it.

3. Consider a jurisdiction's public policy.

While arbitration agreements are generally enforceable under the Federal Arbitration Act, courts sometimes will strike down arbitration clauses or class waivers if the court finds the agreements are unconscionable or contrary to public policy objectives.

Public policy objectives are evidenced by laws that explicitly provide for class action rights.

For example, the U.S. District Court for the District of Rhode Island held last year in Metcalfe v. Greicco Hyudail LLC that a class waiver was not enforceable when a plaintiff brought an action under the Rhode Island Deceptive Trade Practices Act.[22] In that case, the waiver ran contrary to Rhode Island's public policy objectives.[23]

Last month, the Court of Appeal of the State of California, Fourth Appellate District, held — in J.R. v. Electronic Arts Inc., a case quite similar to Heidbreder, referenced above — that a minor video gamer who disaffirmed a user agreement with Electronic Arts **was not** bound by the arbitration provision in the agreement under California's Family Code.[24]

Thus, a state's public policy not only determines what kind of language and content is acceptable in these agreements, but it can also decide which consumers can be bound by them.

4. Review and revise.

If an agreement already exists without an arbitration clause or a class waiver, a company might consider amending the agreement to add one.

Courts have typically held that companies can add new arbitration clauses to already existing agreements, provided they meet certain notice requirements.

It is important to stay abreast of what the jurisdictional requirements are for arbitration agreements and what the court says about public policy in the state.

Risks and Mass Arbitration Developments

The rise of arbitration clauses and their prevalence in the class action space is not without controversy or risk.

Activist groups have criticized the prevalence of arbitration clauses and class waivers as a sort of "get-out-of-jail-free" card that impedes the defense of an individual's right to privacy. And, in a world of "be careful what you ask for," sometimes enforcing class waivers in arbitration can be costly as well.

When a data breach occurred at popular education technology website Chegg, a law firm seeking to exploit an arbitration provision filed 15,107 individual arbitration demands in the District of Maryland in 2020.

This mass arbitration can be costly for companies that promise in their agreements to bear certain arbitration costs, such as filing fees.

In Chegg's case, $300 individual filing fees would add up to approximately $4.5 million when all the demands were totaled together.[25]

In Wallrich v. Samsung Electronics America Inc., currently in the U.S. Court of Appeals for the Seventh Circuit, Samsung is **appealing** a district court's order that would require it to pay about $4 million in arbitration fees in connection with roughly 35,000 individual arbitration demands.[26]

Looking Ahead

The American Arbitration Association has recently taken steps to mitigate mass arbitration abuse. The new 2024 Consumer Mass Arbitration and Mediation Fee Schedule, for example, now allows a business to pay a flat filing fee of $8,125 at the outset of a mass arbitration, instead of an additional filing fee for every new case. [27]

Mass arbitration can still become costly, as businesses are still required to pay an arbitrator appointment fee and final fee on a per-case basis, but the new rules are likely to reduce administrative costs for businesses at the initial stages of mass arbitration.[28]

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[1] Clements v. T-Mobile USA Inc., Case No. 5:22-cv-07512-EJD, 2024 WL251326 (N.D. Cal. Jan.19, 2024).

[2] Id. *6.

[3] In re Marriott Int'l Inc., Customer Data Sec. Breach Litig., 341 F.R.D. 128, 172 (D. Md. 2022).

[4] In re Marriott Int'l Inc., 78 F.4th 677 (4th Cir. 2023).

[5] Id. at 687.

[6] In re Marriott Int'l Customer Data Sec. Breach Litig., No. 19-MD-2879, 2023 WL8247865, at *4-*5 (D. Md. Nov. 29, 2023).

[7] Id.

[8] No. C 20-04929 WHA, 2022 WL2967237 at *1 (N.D. Cal. July27, 2022).

[9] Id.

[10] In re StockX Customer Data Sec. Breach Litig., 19 F.4th 873, 886 (6th Cir. 2021).

[11] Heidbreder v. Epic Games Inc., 438 F.Supp.3d 591, 598 (E.D.N.C. 2020).

[12] Civil Action No. 5:23-CV-0038-KDB-DSC, 2023 WL 5493584 (W.D. N.C. Aug. 24, 2023).

[13] Id. at *5-6.

[14] Clements, 2024 WL 251326 *6.

[15] Land v. IU Credit Union, 218 N.E.3d 1282, 1290 (Ind. 2023).

[16] Id. at 1291.

[17] 59 F.4th 457, 481 (9th Cir. 2023).

[18] 59 F.4th 1011, 1015 (9th Cir. 2023).

[19] 2023 WL8247865, at *4.

[20] Case No. 19-cv-04286-BLF, 2024 WL251407 (N.D. Cal. Jan.23, 2024).

[21] Id. *6.

[22] Metcalfe v. Greicco Hyudail LLC, No. CV 22-378-JJM-LDA, 2023 WL6441945 (D.R.I. Oct.3, 2023).

[23] Id. at *2.

[24] J.R. v. Elec. Arts Inc., No. E080414, 2024 WL178081, at *4-*6 (Cal. Ct. App. Jan.17, 2024).

[25] Alison Frankel, Mass Consumer Arbitration is On! Ed Tech Company Hit with 15,000 Data Breach Claims, Reuters, (May 12, 2020) https://www.reuters.com/article/idUSKBN22O33D/.

[26] Wallrich v. Samsung Elecs. Am. Inc., Case No. 22 C 5506, 2023 WL5935024 (N.D. Ill. Sept.12, 2023), stay granted and appeal expedited, No. 23-2842 (7th Cir. Nov.8, 2023).

[27] Consumer Mass Arbitration And Mediation Fee Schedule, Am. Arbitration Ass'n, (Amended Jan. 15, 2024) https://www.adr.org/sites/default/files/document_repository/Consumer_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf.

[28] Id.