

# Arbitrating Managed Care Disputes

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# Advantages of Traditional Arbitration

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- **Less expensive than court litigation**
- **Quicker than court litigation**
- **Usually confidential**
- **Parties can select forum and specify procedures (e.g., discovery procedures, timeframes)**
- **Until recently, considered to provide protection from the filing of class actions in court**

## **Classic “Overreaching” Case – Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999)**

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- **3 arbitrators to be selected from list of arbitrators prepared by Hooters**
- **Arbitrators not required to be impartial or independent of Hooters**
- **Employee required to list all fact witness and facts known to each with claim; no analogous requirement for Hooters**
- **Hooters could move for summary disposition; employee could not**
- **Hooters could amend position; employee could not**
- **Hooters could amend arbitration rules at will and without notice**
- **Hooters, but not employee, had option to cancel agreement to arbitrate**

# “Overreaching” in Arbitration Provisions

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- **Statute of limitations provisions limiting period of time in which party can bring arbitration**
- **Provisions requiring the initiating party to advance fees**
- **Provisions that prohibit recovery of certain types of damages, such as punitive damages or treble damages**

# New Trend – Class Arbitrations

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- **Prior to 2003, unclear whether class arbitrations were permitted**
- **Depended on jurisdiction – e.g., permitted in California**
- **Not clear whether permitted under Federal Arbitration Act**

## June 2003 – *Green Tree Financial v. Bazzle*, 539 U.S. 444

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- Supreme Court ruled that if an arbitration clause is silent re class arbitration, question of whether clause allows class arbitration is for the arbitrator to decide
- Gave implicit approval to class arbitrations
- Led AAA to promulgate class arbitration rules
- Other alternative dispute resolution organizations have also done so – e.g., JAMS
- Has led to a proliferation in filing of class arbitration demands

# AAA Class Arbitrations

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- **Approximately 200 have been filed since 2003**
- **10 of those involve health care companies such as Aetna, Health Net, United, Oxford**
- **Usually brought by providers**
  - Several have grown out of the In Re Managed Care litigation
- **In at least one instance, a health care company has brought a class arbitration**
  - BCBSLA brought a claim for fraudulent billing against outpatient dialysis provider

# Disadvantages of Class Arbitration

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- **Moves more slowly than a typical arbitration**
- **Generally not confidential**
- **Class certification decision based on limited discovery**
- **Arbitrator less sophisticated than judge in analyzing whether claims suitable for class treatment; may lead to increased risk of certification**
- **Generally not appealable**
- **Preclusive effect of class arbitration settlements unclear**



## Highlights of AAA Class Arbitration Rules

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- **Party cannot bring class arbitration demand in AAA where arbitration clause on its face prohibits class actions – party must first seek court guidance**
  - **One arbitrator must be appointed from the AAA’s national roster of class action arbitrators**
  - **Arbitrator must issue a clause construction award determining whether the arbitration clause permits class arbitrations; proceedings then stayed for a period of at least 30 days to permit any party to seek court relief from determination**
  - **Arbitrator must apply Rule 4 of the Supplemental Rules “and any law or agreement of the parties the arbitrator determines applies to the arbitration.”**
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## Comparison Between Rule 4 And FRCP 23

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- **In addition to FRCP 23(a) prerequisites, arbitrator must also find**
  - class counsel is adequate (in addition to class representative)
  - each class member entered into an agreement containing arbitration clause that is substantially similar to clause signed by class representative
- **Only FRCP 23(b)(3)-type classes permitted**
- **Arbitrator must approve any settlement, voluntary dismissal or compromise of claims filed as a class arbitration – not just those that have been certified**

# Class Certification In AAA

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- **At least one class arbitration against a health benefits company has been certified – *Sutter v. Oxford Health Plans, Inc.* (March 24, 2006)**
- **Arbitrator found state law claims appropriate for certification that 11<sup>th</sup> Circuit had ruled were not appropriate for certification in the *In re Managed Care* litigation**

# Arbitration Clause Language Found To Not Bar Class Arbitrations

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- **Broader the arbitration clause is, more likely class arbitration will be found to be permissible under clause**
- **“No civil action concerning any dispute arising under this agreement shall be instituted in any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association.”**
- **Language providing that “any and all disputes” between the parties will be arbitrated**
- **Bottom line: arbitrators typically find class arbitration allowed**

# Arbitration Clause Language Found To Bar Class Arbitrations

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- **“No dispute may be joined with another lawsuit, or in arbitration with a dispute of any other person, or resolved on a class-wide basis.”**
- **“There shall be no right or authority for any claims to be arbitrated on a class action or consolidated basis or bases...”**

# Avoiding Class Actions through Arbitration

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**Binding Arbitration**  
**+**  
**Class Action Waiver**  
**=**  
**Individual Arbitration**  
**... if enforceable**

# Enforcing Class Action Waiver Provisions: Unconscionability Considerations

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- **Courts will not enforce contract provisions that are unconscionable under that state's law**
  
- **Two types of unconscionability: both required**
  - Procedural
    - Contract of adhesion
    - Primarily consumer contracts
  - Substantive
    - Imbalance in bargaining power
    - Unduly one-sided terms

# Enforcing Class Action Waiver Provisions: Unconscionability Considerations

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- **Enforcement depends on state law**
  - Waiver provision may be enforced by some courts while others may find same provision unenforceable
  - Federal courts apply state law of contracts to enforcement of arbitration agreements
- **California and Georgia are least likely to enforce**
  - Especially consumer and employment contracts
- **Choice of law provisions may not be upheld**



# Enforcing Class Action Waiver Provisions: Statutory Conflict Considerations

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- Where statute creates an unwaivable right to a class forum, class arbitration waiver provision may not be enforced

# Drafting Class Action Waiver Provisions

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- **Include a choice of law provision for a state enforcing waivers**
  - CA law will not enforce if provision is otherwise unconscionable
- **Increase likelihood of enforcement by including provisions reducing the burden on plaintiffs**
  - Advancement of arbitration fees
  - Allow recovery of attorneys' fees & costs
- **Consider including a “null and void” clause**
  - Courts will normally sever unenforceable provisions, likely resulting in binding class arbitration
  - Consider whether class litigation is preferable to class arbitration
  - “If the class action waiver provision is found to be unenforceable, then the entirety of this arbitration agreement shall be null and void.”