



**MANDATORY ARBITRATION
AGREEMENTS
WHERE ARE WE/WHAT'S NEXT?
IS THIS EVEN A GOOD IDEA?**

November 21, 2013

Today's Discussion

- Mandatory Arbitration – A Summary
- Open Legal Issues
- Program Design and Drafting Issues
- Be Careful What You Wish For

Legal Lay of the Land – the Supreme Court

- *Gilmer v. Interstate/Johnson Lane Corp.*
- *Rent-A-Center West v. Jackson*
- *AT&T Mobility v. Concepcion*
- *CompuCredit v. Greenwood*
- *Oxford Health Plans v. Sutter*
- *American Express v. Italian Colors Restaurant*

Open Legal Issues - Unconscionability

- Filing fees
- Fee splitting
- Shorter statute of limitations
- Trade secrets and non-compete disputes
- Reservation of rights
- Venue
- Confidentiality
- Arbitrator selection provisions

Other Open Legal Issues

- “Who decides” preliminary questions
- Defining “gateway questions”
- Effective vindication theory

Program Design/Drafting Issues

- Making MAA part of a comprehensive dispute resolution policy
- Scope of agreement – covered employees
- Covered claims
- Exclusions and carve-outs
- Class action waivers

Program Design/Drafting Issues (Cont'd)

- Discovery and Other Procedural Issues
 - JAMS v. AAA
 - Limitations on discovery
 - Rules of evidence
 - Motions practice
 - Confidentiality Delegation
- Jury trial waivers
- Severability

Implementation Issues

- Consent
- Consideration
- Communications strategy

Be Careful What You Wish For

- 1. You may get more claims.*
- 2. You may end up having more trials.*
- 3. You may end up losing more cases.*
- 4. Collateral litigation is almost inevitable.*
- 5. You may spend a lot more time, money and resources in getting a resolution.*
- 6. You may end up litigating the same dispute in multiple forums.*

Be Careful What You Wish For (Con't)

7. *You have virtually no chance of appealing an adverse ruling by an arbitrator.*
8. *You may not be able to keep the proceedings confidential.*
9. *You will not be able to minimize investigations and complaints by government agencies.*
10. *You may be substantially limited in your ability to pursue legal action against dishonest employees.*

Q & A

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