

Arbitration Provisions & Insurance Policies

Consumer Liaison Presentation

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Arbitration Clauses

- *Ubiquitous in Consumer Contracts* – credit cards, software agreements (downloading from the internet), employment contracts and many other form contracts people sign as a matter of course.
- *Benefits* – cheaper and quicker than going to Court?
 - Not necessarily, especially if consumer must pay $\frac{1}{2}$ the costs
 - Benefits “Repeat Players” – the business or industry that requires arbitration agreements and utilizes the procedure frequently, v. individual consumers
 - Tremendous imbalance in knowledge and experience

Arbitration Clauses

Problems

- Can deprive consumers of legal rights and benefits provided by State statutes and common law, such as bad faith penalties and reimbursement of attorney's fees
- Consumers rarely realize arbitration provisions are in their contracts and unlikely could have them removed even if they did know
- Confidential – where allowed, how are insurance policyholders fairing? Do regulators know and can they even find out?
- Consumers barred from aggregating claims, which is often an essential procedural device for combatting unfair practices that take a small chunk out of every policyholder, but affects a large group

Arbitration Clauses & Insurance

- Often used in professional liability and commercial insurance contracts *& some personal lines policies*
- Will become more common unless State Insurance Regulators and their State Legislators move to prohibit or at least regulate their use
- Arbitration clauses can threaten a state's traditional authority to regulate insurer conduct in personal lines policies

What States Can Do

- The McCarran-Ferguson Act provides the legal argument that States can regulate arbitration clauses in insurance contracts even though the Federal Arbitration Act (FAA) often bars States from doing so in other consumer contracts. However:
 - States need to *clearly indicate* they do so pursuant to their authority to regulate the business of insurance. Silence may mean FAA applies
 - Court decisions on this issue mixed, though majority favor a State's ability to regulate arbitration clauses in insurance contracts.
 - Congress can modify the FAA authorizing or restricting State Authority

What States Can Do

Example: Washington Statute 48.18.200

- No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement
- (a) requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country; or
- (b) depriving the courts of this state of the jurisdiction of action against the insurer; or ...

Upheld: *State of Washington DOT v. James River Insurance Company*, 292 P.3d 118 (2013) (Supreme Court of Washington)