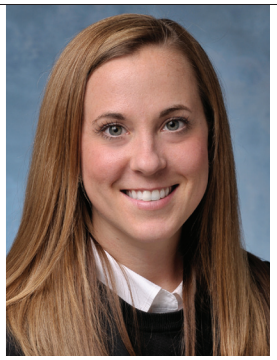
Class Action Litigation

Helping your business avoid or minimize the risk of exposure.


RUDY A. ENGLUND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A couple of novel tools are becoming increasingly available under Washington state and federal law, enabling businesses to reduce exposure to class and/or collective action litigation. Specifically, courts are more likely to enforce arbitration agreements, including provisions that waive one's ability to pursue class and/or collective actions. Therefore, a claimant would be limited to pursuing his or her claims in an arbitration format on an individual basis. Additionally, the U.S. Supreme Court recently held open the possibility that an offer of judgment to an individual claimant may moot a Fair Labor Standards Act (FLSA) collective action, requiring dismissal of such a case.

Enforceability of Arbitration Agreements

Where a claimant attempts to circumvent an arbitration agreement and litigate a claim in court, courts consider whether a valid arbitration agreement exists and, if it does, whether the agreement encompasses the dispute at issue. As long as the answers to these two questions are affirmative, the court should send the claim to arbitration. In considering whether an arbitration agreement is valid, courts generally evaluate whether the agreement is procedurally or substantively unconscionable. Procedural unconscionability relates to the manner in which the agreement was entered into. Courts typically consider whether the claimant had a reasonable opportunity to understand the terms of the contract and whether the important terms regarding arbitration were hidden in a maze of fine print. Even if there is unequal bargaining power between the claimant and the defendant, Washington state courts are reluctant to find procedural unconscionability sufficient to justify invalidation of an otherwise enforceable arbitration agreement. Generally, it is important for businesses to provide the recipients of their proposed arbitration agreement with ample opportunity to read and understand the agreement and to ask questions about the same. In addition, using a stand-alone document for the arbitration agreement may be preferable to including arbitration terms within a larger, more complicated agreement.

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Substantive unconscionability refers to the content of the arbitration agreement. Businesses should avoid including provisions that are onerous or one-sided. In particular, businesses may want to avoid provisions that impose unduly burdensome arbitration costs. In addition, courts look favorably upon arbitration agreements that allow for some discovery and the ability to pursue motion practice in arbitration. Including these provisions provides for the substantive fairness in arbitration that courts favor.

Avoidance of Class Actions

In the Supreme Court case of *AT&T Mobility LLC v. Concepcion*, the court reversed a rule classifying most class action waivers as unconscionable. Specifically, the Supreme Court essentially negated state laws declaring arbitration agreements unenforceable because they bar class actions and class arbitrations. Since *Concepcion*, courts have consistently upheld class action waivers in arbitration agreements.

Recently, the Supreme Court decided another significant case, *Genesis Healthcare Corp. v. Symczyk*. In the employment arena, the court ruled that a former employee's FLSA collective action against *Genesis* could not proceed because Genesis had previously given the plaintiff an offer of judgment, albeit on an individual, rather than collective, basis. The court held that the offer of full relief rendered the case—including the collective claims—moot. While the *Genesis* court found Rule 23 class actions to be distinguishable from FLSA collective actions, *Genesis* provides for a possible avenue for ending FLSA collective actions early and on an individual basis.

In light of the increasing ability of businesses to enforce arbitration agreements and avoid class action litigation, it would be prudent to consult with counsel to inventory available arbitration practices and consider the available options in terms of avoiding costly class and/or collective action litigation.

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