


ARBITRATION PROVISIONS TO AVOID CLASS ACTIONS

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Wheeler Trigg O'Donnell

EMERGING RESPONSIBILITIES OF IN-HOUSE COUNSEL
TO ADVISE, PROTECT AND DEFEND

**ENFORCEMENT
OF CLASS
ACTION WAIVERS**

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EMERGING RESPONSIBILITIES
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ARBITRATIONS FAVORED

Federal Arbitration Act (1925)

- An arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2

National Public Policy Favoring Arbitration

- *Southland Corp. v. Keating* (U.S. 1984)
Withdrew states’ power to require judicial forum if parties agreed to arbitrate

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NATIONAL POLICY

“Congress enacted the FAA to replace judicial indisposition to arbitration with a ‘national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.’”

Hall St. Assocs., L.L.C. v. Mattel, Inc.
(U.S. 2008)

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**CLASS ACTION WAIVERS
INITIALLY PREFERRED**

- Presumption of arbitration
- Not unconscionable
Carter v. Countrywide Credit Ind., Inc.
(5th Cir. 2004)
- Snowden v. Checkpoint Check Cashing*
(4th Cir. 2002)
- Statutory rights still vindicated in arbitral forum
Livingston v. Assoc. Fin., Inc.
(7th Cir. 2003)

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**EROSION OF THE RIGHT TO
BAN CLASS ACTIONS**
“Unconscionability”

- Principally developed in California and the 9th Circuit
- Most states require both procedural (formation of agreement) and substantive (terms of agreement) unconscionability
- Shroyer v. New Cingular Wireless, Inc.* (9th Cir. 2007)
(prohibitive costs)
- Szetela v. Discover Bank* (Cal. Ct. App. 2002)
“Discover has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies”

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**EROSION OF THE RIGHT TO
BAN CLASS ACTIONS**
“Vindication of a Statutory Right”

Trilogy of United States Supreme Court decisions

- *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (U.S. 1985) – First to use the phrase “effectively vindicate,” giving rise to method of invalidating arbitration agreements
- *Gilmer v. Interstate/Johnson Lane Corp.* (U.S. 1991) – Employment discrimination claims may be arbitrated without losing opportunity to vindicate rights
- *Greentree Financial Corp.-Alabama v. Randolph* (U.S. 2000) – Prohibitive costs could eliminate opportunity to vindicate rights

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Class Action Waivers In Arbitration Agreements Enforced



U.S. Circuit Courts of Appeals	U.S. District Courts	State Courts	State Statutes
3 rd , 4 th , 5 th , 7 th , 8 th , 9 th , 11 th	D. Colo., N.D. Ga., S.D. NY, S.D. W.V.	Colo. App., Del. Super., Fla. App., Hawaii, Ky., Md., N.C. App., N.D., NY App., Ohio App., Pa. Superior, Tex. App., Utah	Virginia – no class actions allowed Utah

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Class Action Waivers In Arbitration Agreements Held Unenforceable



U.S. Circuit Courts of Appeals	U.S. District Courts	State Courts	State Statutes (specific industries or requires heightened scrutiny)
1 st , 2 nd , 3 rd , 9 th & 11 th	D. Ariz., S.D. Fla., N.D. Ill., D. Mass., W.D. Mich., E.D. Okla., W.D. Wash.	Ala., Calif., Fla. App., Ill., Mass., Mo. App., N.J., N.M., Ohio App., Or. App., Pa. Superior, Wash., W. Va., Wis. App.	Conn., Ga., N.M., Ok.

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DRAFTING AN ENFORCEABLE ARBITRATION CLAUSE

First Generation Clauses:

- Excluded punitive, incidental and consequential damages
- Prohibited attorneys' fees
- Required proceeding to occur far from claimant's home
- Claimant required to pay 50% of arbitration fees
- Mandatory confidentiality provisions
- Company chooses arbitrator

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DRAFTING AN ENFORCEABLE ARBITRATION CLAUSE

Second Generation Clauses:

- Company pays all arbitration costs if nonfrivolous claims
- Reimbursement of attorneys' fees if claimant recovers demanded amount
- Location of proceeding in county of claimant's billing address
- Eliminated confidentiality requirement

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DRAFTING AN ENFORCEABLE ARBITRATION CLAUSE

Third Generation Clauses:

- Opt-out provision
- Company pays for proceeding if claims not frivolous
- Fee shifting to claimant if he wins greater than company's demand
- Severable from rest of agreement
- AT&T at forefront

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WHAT'S NEXT?

If Supreme Court grants certiorari -

- Will it overturn Southland?
- Further affirm the right to exclude class actions

Arbitration Fairness Act of 2009

- 2007 legislation reintroduced
- Pending in House & Senate committees
- Effectively bans all mandatory arbitration provisions in any commercial contract, parties' agreement notwithstanding, including pre-legislation agreements

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“No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of . . . an employment, consumer, or franchise dispute . . . or a dispute arising under any statute intended to protect civil rights”

-Arbitration Fairness Act of 2009

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Practice Areas

- Appellate
- Class Actions
- Commercial
- Insurance Bad Faith
- Intellectual Property
- Personal Injury
Defense
- Securities

Industries

- Consumer Products &
Services
- Financial Services
- Information
Technology
- Insurance

John Vaught's practice emphasizes complex commercial litigation, including securities fraud class actions, corporate governance issues, liability and director and officer insurance disputes, trade secrets, intellectual property, commercial, antitrust, and insurance class action matters. In addition, Mr. Vaught has substantial litigation, mediation, and trial experience in the federal courts and in Colorado involving complex commercial litigation, including the defense of class action litigation.

Education

- St. Mary's University School of Law - J.D., *summa cum laude*, 1978
St. Mary's Law Journal, Associate Editor
Outstanding Commercial Law Graduate
- Stephen F. Austin State University - B.S., Business and Economics, 1969
Student Body President

Defeated Numerous Attempts to Certify Class Actions Against Insurance Companies

We defeated numerous attempts by plaintiffs' lawyers to certify class actions against various insurance companies based on claims that the companies had to comply with the Colorado insurance laws. We obtained summary judgment in many similar cases and successfully defended the trial court summary judgments in the U.S. and Colorado courts of appeals.

Class Certification Denied in Federal Telephone Consumer Protection Act Case

On behalf of an automobile dealership client, we persuaded the Colorado Court of Appeals to affirm the trial court's denial of class certification in a case alleging violations of the Federal Telephone Consumer Protection Act, and we persuaded the Colorado Supreme Court to deny certiorari.