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Claims Management and Solutions

Don't Let a Funny Thing Happen on Your Way to the Forum*

*Apologies to Burt Shevelove, Larry Gelbart, and Stephen Sondheim.

5 Practical Tips for Drafting Effective Arbitration Clauses

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5 Practical Tips for Drafting Effective Arbitration Clauses

As a third-party claims administrator charged with helping our clients save expense dollars by managing their litigation spend, we often see defendant parties trying to enforce arbitration clauses in order to resolve disputes in a forum perceived to be quicker, less expensive, and less prone to runaway plaintiffs' awards. However, perception doesn't always mirror reality – arbitration clauses must be carefully crafted to fulfill their purposes. This article merely points out a few issues to consider. Companies that want to review their overall arbitration strategies – when and why it might be advantageous to arbitrate rather than litigate certain disputes – as well as how to craft arbitration clauses to achieve these goals, should consult with their legal advisors.

Litigating a motion to compel arbitration can sometimes swallow up any cost and time savings. The battle over whether a claim will be tried to a jury or presented at arbitration often determines the claim's potential perceived value, since plaintiffs think that jury awards will be more generous.

TIPS: Make sure the arbitration clause is CONSPICUOUS so that the signatures on the contract clearly indicate agreement to the arbitration clause. Use compulsory language – "shall" is better than "may" – so that the parties have agreed to arbitrate rather than just consider the options. Include a provision stating whether a judge or arbitrator will decide whether a particular issue is subject to the arbitration clause.

Discovery constitutes a large percentage of litigation costs.

TIPS: Put specific limits on discovery into the arbitration clause. This can include agreements to exchange certain information and the time frame for same, the format for exchanging electronic records, the number of depositions and/or the length thereof, and where any depositions will take place.

Although arbitration is typically less expensive than litigation, mediation is usually the least expensive way to resolve disputes.

TIPS: Consider requiring the parties to mediate the dispute prior to embarking down the arbitration road. The agreement might require document exchange and mediation in a certain time frame, and then allow for the remainder of the agreed discovery and arbitration if the dispute remains.

Choose the rules, including how many arbitrators will comprise the panel, how the parties will select them, where the arbitration will take place, which law will apply, which arbitration organization's rules will apply where not superseded by the arbitration agreement, how the arbitrators' fees will be paid, whether the arbitrators have the authority to award attorney fees and if so, under what circumstances, whether the arbitrators must issue reasoned opinions to facilitate any appeals, etc.

Consider a tiered approach where "small" disputes are resolved through an even more efficient process, such as with one arbitrator instead of a panel.

In conclusion, carefully crafted arbitration clauses can be an effective tool for streamlining the dispute resolution process so that contracting parties potentially reduce legal spend and resolve claims more quickly. Companies are well-served to contemplate when an arbitration clause can advance their interests, and the particular provisions that are most likely to yield the desired results.

Carl Warren is an employee-owned Third Party Claims Administrator with 25+ locations nationwide and specializes in liability, workers' compensation, and property claims management, litigation management and subrogation.

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