EST. 1822
A FAIRFAX COMPANY

Simple Cyber

GUIDANCE FOR C&F INSUREDS

Mass Arbitration of Cybersecurity & Data Privacy Matters: The Devil Is in the Details

What is "Mass Arbitration"?

A new tactic by class action plaintiffs' attorneys to leverage the high cost of arbitration for quick/large settlements from insureds.

Why is this creating a CATCH 22?

Since a favorable Supreme Court decision in 2011, mandatory arbitration clauses have become a popular contractual tool by organizations to avoid litigating matters before juries. Adding a mandatory arbitration clause historically has been seen as a means to remove the uncertainty of a runaway jury or excessive verdict.

Class action plaintiffs' attorneys have adapted by filing mass arbitration demands, thereby weaponizing an organization's own contractual wording against itself. These attorneys are now filing multiple individual arbitration demands at the same time if class action waivers would otherwise bar a class action. These mass filings, sometimes involving hundreds or thousands of claimants, might require the defendant organization to pay a filing fee for each claimant at the inception of the arbitration. The fees can quickly amount to millions of dollars before the arbitration even begins.

Compounding this problem is the fact that all arbitration demands, even those that might be frivolous or otherwise lack merit, may not proceed until all required fees have been paid in full. Accordingly, class action plaintiffs' attorneys have been using the threat of a mass arbitration demand, along with the associated exorbitant filing fees, to leverage early, and often grossly inflated, settlements, even potentially for unfounded claims.

This tactic is increasingly being used by data breach and privacy class action plaintiffs' attorneys to exert maximum pressure on defendants for early, inflated settlements.

However, new changes to mass arbitration procedures, including capping fees and stricter filing requirements, by both the American Arbitration Association ("AAA") and JAMS significantly alters this dynamic and should bring more parity to the process. That said, organizations should be aware that the risk of mass arbitration still exists and they should work with their legal counsel to try to reduce their exposure.

What are we asking our insureds to do?

Review mandatory arbitration requirements with your legal counsel.

This is an immediate issue based on a new tactic by class action plaintiffs' attorneys. We suggest reviewing the arbitration wording in your terms of services or other agreements with consumers.

BEST PRACTICES

to Discuss with Outside Counsel During the Review

- *Review arbitration agreements. The key is to keep the wording 'fair and reasonable'.*
- *Consider provisions to your privacy policy or terms of services that could help mitigate this risk and the overall cost of mass arbitration. Examples include:*
  - *Working with your legal counsel to prohibit "mass arbitration" in the dispute resolution section (in addition to a class action waiver), instead requiring an early dispute resolution process like an expedited settlement process or mandatory mediation.*
  - *Working with your legal counsel to shift fees and costs to the prevailing party a dispute.*
- *Evaluate your selected arbitration provider to ensure that it is the best fit. AAA (American Arbitration Association) and JAMS (Judicial Arbitration and Mediation Services) are adjusting mass arbitration rules and special fee schedules, and could be subject to further change.*

These best practices can help ensure that the arbitration process cannot be used to extort settlements for frivolous or meritless claims.

If you have questions about this advisory, your policy, or risk mitigation opportunities, please contact **CyberSolutions@cfins.com.**

WSHB
WOOD·SMITH·HENNING·BERMAN

This update was co-drafted by Crum & Forster and the Cybersecurity & Data Privacy team at Wood Smith Henning & Berman. The Cyber Solutions Team at Crum & Forster is available to assist you stay ahead of these evolving risks. The national Cybersecurity & Data Privacy team at Wood Smith Henning & Berman represents clients across the country in not only defending class actions and other litigation, but also arbitrations and mass arbitrations arising from cyberattacks or alleged violations of privacy laws.