Insights: Alerts

Arbitration: Not Necessarily a Better Option for Companies Hit with BIPA Litigation

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Lawsuits under the Biometric Information Privacy Act (BIPA) are filed nearly every day in Illinois and other jurisdictions. In these cases, a company defending an alleged BIPA violation usually seeks to enforce a relevant arbitration clause as their first line of defense. Arbitration provisions are material portions of a contract that were bargained for by the parties and allow for a potentially cheaper and quicker resolution of disputes as compared to prolonged litigation in state or federal courts. In light of a recent BIPA case, however, businesses may want to reconsider including such clauses in their Terms of Use as well as the cost of "mass arbitration" compared to litigation.

The case is *Paula Wallrich et al. v. Samsung Electronics America Inc. et al.* (N.D. Ill. filed Oct. 7, 2023). Respondents, Samsung Electronics America, Inc. and Samsung Electronics Co. Ltd. (collectively "Samsung"), manufacture and sell smartphones, tablets, and other devices. The terms of use for those devices contain an arbitration agreement which selects the American Arbitration Association ("AAA") for administration, provides for arbitration under the AAA Consumer Arbitration Rules, and prohibits "class action" and "combined or consolidated" disputes, instead mandating solely individual claims. The arbitration clause also provides that Samsung will pay all of the initial arbitration fees and costs in consumer cases, which many jurisdictions (and AAA) require to enforce the arbitration clause against a consumer.

On September 7, 2022, Petitioners simultaneously filed 50,000 individual arbitration demands before the AAA alleging BIPA violations,[1] the arbitrations were terminated after Samsung refused to pay the arbitration administrative fees. In the court case filed by the arbitration claimants, Samsung argued that the court does not have the authority to order a party to an arbitration to pay arbitration fees.

On September 12, 2023, U.S. District Judge Harry D. Leinenweber rejected this argument and ordered Samsung to pay $4 million in individual arbitration fees on behalf of 35,610 customers who alleged BIPA violations. The administrative fees are generally nonrefundable and unrecoverable. The only way Samsung could get a full refund would be if (a) the arbitrator in each of the 35,610 arbitrations found that the claim was "filed for purposes of harassment" or was "patently frivolous," (b) the arbitrator in each arbitration exercised their discretion to reallocate the fees, and (c) each of the 35,610 claimants had collectable funds.[2] Judge Leinenweber noted that while Samsung may not have expected that so claimants many would seek arbitration against it, it should not be allowed to "blanch at the cost of the filing fees it agreed to pay in the arbitration clause."[3] Samsung sought refuge from the order in the 7th U.S. Circuit Court of Appeals.

On November 8, 2023, the Seventh Circuit paused the arbitration fee order and agreed to fast-track Samsung's appeal seeking to overturn it.[4] The schedule for oral arguments has yet to be set.

The decision to arbitrate rather than leave a case in the hands of the court is crucial. Mandatory arbitration

provisions and class action waivers usually protect companies from costly class action litigation. The *Wallrich* case, however, demonstrates the potential financial burden on companies of "mass arbitrations," which occur when customers mobilize and simultaneously file individual claims in arbitration. As the number of pro-plaintiff decisions under BIPA grows, companies should keep a watchful eye on the Seventh Circuit's decision before drafting compulsory arbitration clauses and other class action defenses.

Footnotes

[1] September 7, 2022 Petitions for Arbitration.
[2] Samsung's Motion to Stay the District Court's Order; Request for Administrative Stay until the Court rules; and Motion to Expedite the Appeal.
[3] September 12, 2023 Order.
[4] November 8, 2023 Order.

Related People



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