

New Consumer Arbitration Rules Boost Manufacturers

By **Sindhu Sundar**

Law360, New York (September 08, 2014, 5:46 PM ET) -- New consumer arbitration rules that went into effect this month could trip up litigators used to the more liberal filing of motions and evidence requests in courtrooms, but they will help product manufacturers get the quick resolutions they seek, attorneys say.

Under the new rules, which the American Arbitration Association implemented Sept. 1, the parties must first try to resolve issues through a teleconference with the arbitrator and will only be allowed to file written motions if they fail to reach an agreement on the issue in question and the arbitrator finds them necessary.

Motions that call for the dismissal of claims have to meet an even higher bar before they are filed: Manufacturers can only file such motions if they can show that they are likely to succeed on the merits, according to the new rules. The rule changes only apply to arbitrations overseen by the AAA.

Such provisions may not fluster manufacturers, which hope to use these new rules to end disputes through proceedings that are quicker and less expensive than those they usually see in civil litigation, attorneys say. But for litigators used to the incremental pace of courtroom proceedings, the rule changes could involve a learning curve.

“For those not dealing in the world of arbitration and more conversant with general civil litigation practice, these rules can be a real eye-opener because the customary knee-jerk reaction for many attorneys is to file a motion,” said Kristen Polovoy of Montgomery McCracken Walker & Rhoads LLP. “But that’s not the first step you take any longer for dispute resolution in the new world of AAA arbitration. But it does have a common-sense dimension to it, which is to pick up the phone and resolve this right here right now, rather than letting a month or more lapse while the parties resolve the issue.”

In addition to changes to motion practice, the new rules also significantly limit discovery and document exchange to issues approved by the arbitrator, according to the AAA. For manufacturers wary of lengthy and potentially damaging discovery fights in product liability litigation, this rule change offers a more palatable option, defense attorneys say.

Notably, German drugmaker Boehringer Ingelheim International GmbH agreed in May to pay roughly \$650 million to settle injury claims over its blood thinner Pradaxa after being hit with sanctions over discovery violations. U.S. District Judge David Herndon found that the company acted in bad faith by destroying or failing to preserve the phone and computers in order to hide information that could hurt it

in court.

Takeda Pharmaceuticals Ltd. was hit with \$6 billion in punitive damages in the first federal bellwether case over its diabetes drug Actos, after U.S. District Judge Rebecca Doherty allowed the plaintiffs to present evidence of Takeda's document destruction to a jury.

"Discovery often becomes a protracted process in the consumer and product liability class action world, especially because of the vast volume of electronic documents," Polovoy said. "But here, the arbitrator will cut to the chase and say, 'Here is what I need to know, and here's what's not relevant, and in that limited universe of information that we're doing to conduct our exchange.' It's that controlled environment that I think most manufacturers want."

The rule changes may have been spurred in part by growing number of disputes surrounding such clauses and class action waivers in consumer contracts in the arbitration-friendly climate fostered by recent U.S. Supreme Court rulings since *AT&T v. Concepcion*, attorneys say.

"It's no secret that lots of companies added class action waivers and arb provisions to their consumer agreements," said Warren Rissier of Bingham McCutchen LLP.

The new rules also aim to increase the transparency of arbitration rules by establishing a public database where the AAA will post manufacturers' arbitration provisions that it has approved. Under the new rules, manufacturers that want to arbitrate disputes through the AAA will need to first obtain its approval that the rules meet AAA's due process requirements.

The updated rules also allow consumers to find out more details about past arbitration awards so that they have a better sense of how such disputes can play out, said Neil Currie, vice president at the AAA. Despite such steps toward providing consumers with more insight into the process, the proceedings will still remain confidential for the most part — for instance, the identities of parties involved in a dispute will not be in the public registry, only a redacted version of the ultimate resolution.

Plaintiffs attorneys say the changes to the rules that require manufacturers to get the AAA's approval for their provisions present a mixed bag for consumers. On one hand, the rules would ensure that such provisions meet the association's due process rules. On the other, it may be harder for plaintiffs to fight such provisions in court by claiming that they deprive consumers of such rights, they said.

"Having these provisions preapproved and publicly listed on a registry legitimizes them in a way that makes it harder for consumers to try to overcome them in court," said Paul Slager of Silver Golub & Teitell.

--Editing by Jeremy Barker and Philip Shea.