CLIENT ALERTS & INSIGHTS

Hoisted by Your Own (Pet)Arb Clause? New Developments in Mass Arbitration

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For more than a decade, companies have benefited immensely from the United States Supreme Court decision of *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), which upheld a company's right to compel consumers into participating in individual arbitration proceedings, and largely abrogated stricter standards for determining the unconscionability of class action waivers. The *Concepcion* opinion has, among other things, made arbitration provisions in consumer contracts relatively common and regularly enforced across the country.

Although arbitration clauses are intended to provide a simple way for consumers to address their grievances, savvy plaintiffs' lawyers have exploited such provisions by filing hundreds or thousands of substantially similar arbitration demands against target companies-thereby threatening the companies with exorbitant filing fees-in an effort to force big-ticket settlements. This new wave of "mass arbitrations" has caused many retailers to question whether the benefits of arbitration clauses outweigh their (potentially very expensive) risks.

Below, we summarize the current landscape.

The Mass Arbitration Threat

Mass arbitration is a tactical maneuver whereby plaintiffs' counsel threatens a company with massive fees by filing dozens, if not hundreds or thousands, of nearly identical claims at once. At thousands of dollars per claim (which includes administrative fees, hearing fees, professional fees related to the arbitrator and more), these charges can quickly add up to millions of dollars, separate from any defense costs or judgments. Furthermore, these fees must be paid regardless of the value of the case or, generally speaking, the validity of the claims. As a result, plaintiffs have been able to weaponize companies' arbitration clauses-which are normally intended to *avoid* excessive litigation fees and costs-and coerce businesses into settlement.

By way of an extreme example, in 2020, Amazon was hit with roughly 75,000 individual demands for arbitration, which famously led the retail giant to remove the mandatory arbitration provisions from its consumer online terms of service. In 2019, Intuit was hit with approximately 125,000 individual demands for arbitration and the case later settled for $141 million. More recently, plaintiffs have threatened mass arbitrations against smaller companies hit with common consumer protection claims, such as price advertising and wiretapping litigation.

In response to complaints that mass arbitration tactics are unfair, the bench has not always expressed its sympathies to companies and has even labeled them as being "hoisted by their own petard." However, retailers hit with mass arbitrations have protested that substantial portions of

mass arbitration claims are baseless and often arise from individuals who were not actually customers, whose claims were already released or even those who are no longer alive. One of these strategies is currently being explored in *Valve Corporation v. Zaiger LLC et al.*, No. 2:23-cv-01818 (W.D. Wash. 2023), where the law firm defendant is accused of improperly signing up thousands of platform users to increase the amount of arbitration demands it could file and ultimately force a settlement-despite having no real intention of arbitrating the claims. The nature of mass arbitration makes it easy for such baseless claims to survive through discovery-well after the respondent has already incurred hefty administrative fees.

Ninth Circuit to Decide for Whom the Bellwether Tolls

In an attempt to stymie the risk of mass arbitrations, many retailers have turned to bellwether provisions, which allow the parties to arbitrate a set of mutually chosen test cases, as opposed to arbitrating the entire spectrum of claims at once. This approach reduces the number of fees due up-front and provides a more efficient process to explore the merits of the relevant allegations. Specifically, a bellwether arbitration process involves the adjudication of a small group of "sample" individual claims, then a larger mediation would be attempted, followed by additional "batches" of individual arbitrations. The outcome of these representative cases, generally selected by the parties, consequently informs and allows for a potential resolution for the remaining claims.

The Ninth Circuit was slated to consider the enforceability of bellwether provisions in *MacClelland v. Cellco Partnership, 609 F. Supp. 3d 1024 (N.D. Cal. 2022), appeal filed, No. 22-16020 (9th Cir. July 13, 2022), which was originally* scheduled for oral argument on Nov. 14, 2023. That case involved nearly three thousand claims against Verizon, with customers alleging that the company tricked customers into paying extra administrative charges each month by portraying them as taxes. The U.S. District Court for the Northern District of California held that many elements of Verizon's arbitration clause were unconscionable-including limitations on the number of arbitrations that could be litigated at once, and the availability of punitive damages and injunctive relief. However, before the Ninth Circuit could adjudicate whether these provisions were "permeated by unconscionability," the case settled the day prior to the oral arguments.

Although the Ninth Circuit will not be providing guidance as soon as some hoped, it is set to consider similar arbitration enforceability issues in *Skot Heckman v. Live Nation Ent., Inc.*, No. CV 22-0047-GW-GJSX, 2023 WL 5505999 (C.D. Cal. Aug. 10, 2023). This class action involves a group of consumers alleging that Live Nation, and its subsidiary Ticketmaster, engaged in anticompetitive conduct following the merger between the companies, by excessively raising the prices for concert tickets and violating a consent decree with the Department of Justice. The companies filed a joint motion to compel arbitration, but in August 2023, the trial court struck down their arbitration clause as procedurally and substantively unconscionable. More specifically, the court raised concerns about having confidential bellwether rulings bind other claimants without notice, the lack of mutuality in the right to appeal, and various limitations on discovery and legal arguments.

Live Nation and Ticketmaster appealed, arguing that the procedures were specifically developed to handle these types of mass arbitration filings which might otherwise overwhelm companies. The Ninth Circuit has not yet set a date for oral argument, but oral arguments appear likely to occur this summer in June or July of 2024, and the Court's eventual ruling will affect businesses and consumers alike.

New Considerations for Arbitral Forums

In response to the new wave of mass arbitrations, many companies are turning to novel arbitral forums that advertise more cost-efficient procedures for mass arbitration proceedings. However, these new procedures are being challenged by the plaintiffs' bar as unconscionable, in that they allegedly create unfair procedural obstacles, such as inordinate arbitrator discretion, discovery limitations and extensive delays.

For example, one of the issues in the Ticketmaster case is that in 2023, Ticketmaster had updated its arbitration to New Era ADR ("New Era"), a newer legal-tech startup based out of Chicago, as the arbitral forum (Ticketmaster previously used JAMS). As part of the *Heckman* appeal, the Ninth Circuit will consider whether, e.g., group arbitration provisions were hidden in New Era's Rules and whether New Era was biased in favor of Live Nation since the company initially relied on Live Nation as its primary revenue source and actively sought business from Ticketmaster's counsel.

More institutional arbitration forums have also taken notice of the mass arbitration wave (along with the rise in competition when it comes to arbitral forums) and have responded in kind. On Jan. 15, 2024, the AAA released a revised fee schedule for mass arbitration cases. Unlike the AAA's previous Mass Arbitration Supplementary Rules, which subjected companies to up-front fees that could reach tens of millions of dollars depending on the number of claims, the AAA's revised rules only require flat initiation fees for *all* cases, which must be paid upon filing an arbitration demand-a $3,125 fee for individuals and $8,125 for businesses. In an effort to encourage early resolution, this initiation fee covers an administrative review of the demand, an administrative conference with the AAA and an appointment of a Global Mediator and/or Process Arbitrator who has greater authority to decide preliminary administrative disputes. If the case survives the initiation stage, the AAA will then subject the business and individual to its "per case" fee schedule-which ranges between $75 to $125 for consumers and $100 to $325 for companies depending on how many cases are filed.

Is Refusing to Pay an Option? Not in California-but Maybe in Illinois.

When faced with many millions of dollars in administrative fees, many businesses have asked an obvious question: is it too late to back out? Some have simply refused to pay the fees, with the goal of getting the case kicked out of arbitration. This strategy carries serious risks.

As an initial matter, the rules for consumer arbitration under JAMS and the AAA, as well as various state precedent, provide that a company risks waiving its contractual right to arbitrate by refusing to pay administrative fees for, or otherwise participate in, a consumer arbitration. This type of waiver may negatively impact the enforceability of the arbitration provision in the future.

In California, companies may face sanctions by failing to pay. California law (Cal. Code Civ. Pro. § 1281.97 *et seq.*) provides consumers with a variety of options if the company elects against paying mandatory arbitration fees, including the ability to: (i) withdraw the claim from arbitration and proceed in court; (ii) continue the arbitration, with the consent of the arbitrator, and reserve the right to initiate a collection action against the business for nonpayment; (iii) obtain an order from the court compelling the business to pay the outstanding fees; or (iv) pay the fees and pursue reimbursement later. Regardless of the claimant's course of action, he or she is entitled to pursue a variety of sanctions against the business which range from default judgment to contempt.

Although Illinois does not have a similar law, a pending Seventh Circuit case is similarly considering whether a court can force a company to pay massive arbitration fees when consumers mobilize and file mass arbitrations. In 2022, nearly 50,000 arbitration demands were filed against Samsung following alleged violations of Illinois's Biometric Information Privacy Act (BIPA). Samsung's terms included an arbitration clause that required Samsung to pay a portion of the fees and costs needed for the arbitration. Samsung refused to pay the steep bill for arbitration proceedings and the consumers ultimately filed a motion to compel arbitration in federal court. In that case, *Wallrich et al. v. Samsung Electronics America, Inc. et al*, the Northern District Court of Illinois held that the petitioners had a right to arbitrate their claims and ordered the electronic manufacturer to pay roughly $4.13 million in filing fees. However, on Nov. 8, 2023, the Seventh Circuit Court of Appeals temporarily blocked the lower court's decision requiring that Samsung pay the arbitration fees. The Seventh Circuit recently heard oral arguments on the issue on Feb. 15, 2024.

Class Waiver Without Arbitration Clause

Another important consideration is whether to offer an arbitration clause at all, given the risk of mass arbitration. Although historically uncommon, some retailers use class waivers without an arbitration clause, with the goal of avoiding arbitration clauses and ensuring that plaintiffs bring their claims in court on an individual basis, rather than as a putative class action. Several courts across the country have enforced these kinds of provisions, such as by granting companies' proactive motions to strike class claims based on the class waiver.

In *Pace v. Hamilton Cove et al.*, 475 N.J.Super. 568 (N.J. Super. A.D., 2023), the New Jersey Supreme Court will consider the enforceability of this kind of stand-alone class action waiver under New Jersey law. This class action involves a group of tenants of a residential apartment complex suing the building owner over alleged false advertising claims of security in the building, with the defendants claiming that plaintiffs were bound by the class action waivers included in the lease agreements. The Appellate Division previously held that the class action waivers are not enforceable because the agreements did not also contain arbitration provisions. The case was argued before the state's highest court on Jan. 16, 2024, yet a decision on this matter has yet to be issued. Thus, although insight into this issue appears forthcoming, it remains up in the air whether class action waivers are unenforceable in New Jersey in contracts that do not contain a mandatory arbitration clause.

Conclusion

These recent developments suggest that improved arbitration clause drafting is a necessary response to the mass arbitration phenomenon. Companies should consult knowledgeable counsel to protect themselves and avoid major potential liability. The Benesch team has extensive experience in this area and is here to help.

For more information, please contact a member of Benesch's **Litigation Practice Group** or **Retail & E-Commerce** industry team.