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Could bellwether trials be answer to onslaught of mass arbitrations?

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There's no shortage of things to say about the ongoing fights over the litigation of mass arbitrations, and these days, everyone is talking. Recently, the topic of conversation is the use of bellwether proceedings to assess, value, and resolve mass arbitrations.

In particular, the United States Chamber of Commerce Institute for Legal Reform has issued an 80-page report raising the alarm about the practice of compiling and simultaneously filing hundreds or thousands of individual arbitrations against the same defendant, thereby requiring the defendant to pay arbitration fees that can approach millions of dollars (or more).[1]

Titled "Mass Arbitration Shakedown: Coercing Unjustified Settlements,"[2] the report argues that the practice of threatening and filing mass arbitrations is the "21st-century equivalent of the abusive class actions that characterized the last part of the 20th century" and threatens to inflict similar harm unless reasonable steps are taken to curb and control what, in the Institute's view, amounts to a "coercive gambit" to extract attorney-enriching settlements.[3]

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As the Institute report notes, numerous companies in recent years have faced extortionary mass arbitrations — or threatened mass arbitrations — including Uber (12,501 demands costing more than $18 million in initial arbitration fees), DoorDash (more than 6,000 demands costing nearly $12 million in initial arbitration fees), and CenturyLink (approximately 12,000 threatened demands that could have cost more than $30 million in initial arbitration fees).[4]

Perhaps not surprisingly, companies that have investigated claims in actual or threatened mass arbitrations have found that a significant percentage of claimants — up to 80% or more in some cases — had no claim at all.[5]

Many claimants were not customers or had not purchased the challenged product, had in fact received all services promised, had filed duplicative claims, or had already released their claims. Others provided fictitious personal information or were not residents and accordingly lacked standing to assert some of their state law claims. And some even were deceased.

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Companies that seek to resolve such obviously frivolous or illegitimate claims filed in arbitration must still pay substantial mandatory fees to the arbitration provider. As the Institute aptly observed, companies may choose to eliminate consumer arbitration entirely if faced with the specter of coercive mass arbitrations, leaving many consumers with no affordable, expeditious way to pursue their claims or obtain meaningful redress for any harms they may have suffered.[6]

To promote fair resolution of such disputes in arbitration, the Institute proposes borrowing from the "well-known case management tool" of bellwether trials.[7] Drawing on experiences of bellwether trials in multidistrict litigation — which often involves a large number of individual claims — the Institute argues for the selection and submission to the arbitration provider of representative cases, selected by the parties, to test the claims and generate results to inform a potential global resolution.[8]

The Institute also called on arbitration providers — specifically JAMS and the American Arbitration Association, two of the largest arbitration providers — to adopt or modify their rules and fee schedules to account for the proliferation of mass arbitrations and the unique threats they pose to the continued success of consumer arbitration.[9]

Just days after the Institute issued its report, JAMS posted an open letter from its president.[10] Although the letter does not mention the Institute report, it implicitly rejects the notion that new rules are required to accommodate mass arbitrations (what it defines as any group of 25 or more filings from the same law firm or lawyer against the same company at the same time).

Instead, it encourages the parties to engage in early collaborations to exchange information about party status and explore the use of test cases. But at the same time, JAMS emphasizes that its "core value is neutrality," and absent such "an agreement amongst the parties, the arbitration agreement controls" and must dictate how the arbitration is carried out.[11]

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Not all arbitration providers have been hesitant to craft robust rules specifically addressing mass arbitrations. Among others, New Era ADR has adopted specific rules[12] for the administration of mass arbitrations (which it defines as more than five cases arising out of common issues of law and fact), including the use of bellwether trials to establish precedent in subsequently tried cases with common issues of law and fact if a settlement is not reached.

New Era's rules currently are being tested in litigation in the Central District of California in a suit brought against Live Nation Entertainment, Inc., and Ticketmaster, LLC.[13]

On March 17, the plaintiffs filed an opposition to the defendants' motion to compel arbitration, arguing (among other things) that proceeding under New Era's mass arbitration rules, including the use of bellwether proceedings, is unconscionable as arising from an adhesion contract and because New Era's rules are unfairly biased toward the defendants.[14] As of writing, the Court has not yet resolved these issues.

At present, these developments raise more questions than they answer. What is clear is that mass arbitrations can pose a serious risk to the future viability of arbitration for resolving consumer disputes.

In light of this risk, specific consideration must be given to a variety of factors when executing a consumer arbitration program, including the specific language of the arbitration agreement, the selection of an arbitral forum, and how proceedings should be carried out to address a potential mass arbitration filing. These considerations can be highly business-specific and require careful evaluation before being implemented.

We regularly advise clients on these issues, and on ways to anticipate and address potential mass arbitration filings, and we will continue to follow developments in mass arbitration as they happen.

Notes

[1] U.S. Chamber of Commerce Institute for Legal Reform, *Mass Arbitration Shakedown: Coercing Unjustified Settlements* (Feb. 2023).

[2] https://bit.ly/3oN0GOG

[3] *Id*. at 6, 8.

[4] *Id*. at 22-23.

[5] *Id*. at 40.

[6] *Id*. at 51.

[7] *Id*. at 9.

[8] *Id*. at 52-59.

[9] *Id*. at 59-62.

[10] Kimberly Taylor, *Insight from the President: JAMS Policy Regarding Mass Arbitration Filings* (Mar. 3, 2023), https://bit.ly/43LRnxw

[11] *Id*.

[12] https://bit.ly/3P5R7F8

[13] *See Heckman v. Live Nation Entertainment, Inc.*, Case No. 2:22-cv-00047-GW-GJS (C.D. Cal.).

[14] Courts have split on the question of enforceability of bellwether-type provisions, albeit in highly case-specific contexts. Compare *MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024, 1042 (N.D. Cal. 2022) (finding substantive unconscionability where some consumers could not pursue arbitration "until all preceding traunches are adjudicated"), with *McGrath v. DoorDash, Inc.*, 2020 WL 6526129, at *11 (N.D. Cal. Nov. 5, 2020) (concluding that the arbitration protocol "is not so biased that it negates the agreement to arbitrate").

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