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Be Careful What You Wish For: Class Action Waivers and Arbitration Agreements Can Create Headaches if Not Carefully Drafted

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Companies often seek to avoid the expense and outsized potential liability of class actions by including class action waivers and arbitration clauses in contracts with consumers, employees, and corporate counterparties alike. But plaintiffs have increasingly been calling their bluff. Rather than being deterred by the prospect of prosecuting multiple arbitrations, plaintiffs' counsel are leaning into filing mass arbitrations—dozens, hundreds, or even thousands of arbitrations involving the same allegations against a company on behalf of numerous individual plaintiffs. In response, major arbitral bodies have revised their rules to address some of the problems that mass arbitrations present. Yet these revisions go only so far. Mass arbitrations can still be costly for respondents, including through duplicative proceedings and high filing fees. Companies should therefore take note and review their arbitration clauses to avoid the problems that can arise by relying solely on the arbitral forum's default rules.

Class Actions and Mass Arbitrations in Context

The 1966 amendments to the Federal Rules of Civil Procedure created a mechanism for obtaining damages awards on behalf of numerous absent class members on an opt-out basis. A key policy behind the rule was to enable plaintiffs to find representation when the costs of litigating exceed any potential individual award. As the Supreme Court explained forty years ago: "A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to

recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all."[1]Since then, class actions have exploded. For instance, the number of federal class actions increased by 268% between 2010 and 2020.[2]

In response to this class action boom, companies turned to class action waivers and arbitration clauses. Some observers feared that this would spell the end of litigation of low-value claims, which are lucrative for lawyers only if brought in bulk. As Justice Breyer put it in dissenting from a decision that effectively required the plaintiffs to pursue individual arbitration in lieu of a class action over their $30 claim: "What rational lawyer would have signed on to represent the [plaintiffs] in litigation for the possibility of fees stemming from a $30.22 claim?"[3]

Yet rational lawyers soon found a way to make individual arbitrations lucrative. Indeed, many plaintiffs' lawyers now view filing multiple small-value arbitrations as an opportunity, rather than an obstacle. A number of factors simultaneously incentivize mass filings and create massive headaches for respondents. Statutory or contractual fee-shifting provisions can make it worthwhile for plaintiffs' attorneys to litigate many small-value cases. The Fair Labor Standards Act, for example, awards fees and costs to prevailing employee-plaintiffs, and fee awards can exceed by far compensatory damage awards.

Companies, meanwhile, face significant risks from facing many arbitrations at once. When hundreds or thousands of individual arbitrations are filed, respondents' portions of filing fees alone can reach into the millions of dollars. Not only can companies be on the hook for disproportionate legal and other fees, but those fees can exceed what would have been incurred from class action litigation in court. For example, different plaintiffs making identical claims can demand a separate corporate-representative deposition in each arbitration, as opposed to the single corporate-representative deposition to which they would be entitled in federal court. Multiple arbitrations, with duplicative discovery and other proceedings, can thus ratchet up the cost of litigation while giving plaintiffs many bites at the apple.

Arbitral Bodies Respond

Both the American Arbitration Association and JAMS (formerly the Judicial Arbitration and Mediation Services) have created supplemental mass arbitration rules designed to mitigate some of those problems. In 2024, the AAA adopted its Mass Arbitration Supplementary Rules, which automatically apply when 25 or more similar consumer or employment demands are filed against or on behalf of the same party or related parties. The AAA amended the rules again in April 2025 so that they also apply when 100 or more similar demands in other types of cases are filed. In each case, the rules apply regardless of whether the demands are filed simultaneously.

The new rules include:

- a flat initiation fee regardless of the number of filings, and lower per-case fees that decrease as the number of arbitrations increases;

- a streamlined preliminary process involving a "process arbitrator" to address issues such as filing requirements, contractual conditions precedent, which arbitrations should be included in the mass arbitration, and the process for selecting merits arbitrators;

- an analogue to Federal Rule of Civil Procedure 11 requiring filers to affirm that the information filed is correct, which is designed to reduce issues like frivolous cutting and pasting across multiple demands and nonexistent plaintiffs; and

- procedural consolidation for some purposes, such as allowing substantially similar answers and other pleadings to be filed in a single document, consolidated notices and other documents, and assigning multiple cases to a single merits arbitrator "[t]o facilitate arbitrator selection, to satisfy the parties' desired arbitrator qualifications, if the number of individual cases exceeds the number of qualified arbitrators in the locale, or in any other circumstance determined by the AAA-ICDR to warrant such action."

JAMS instituted similar Mass Arbitration Procedures and Guidelines in May 2024. While the AAA mass arbitration rules apply automatically, the JAMS rules apply only where its mass arbitration rules are expressly adopted by the parties pre- or post-dispute.

The New Rules Fail to Protect Companies

Although these rules are a step in the right direction, they still leave a number of problems unresolved. Per-case filing fees, while lower under AAA's and JAMS's mass-arbitration rules, can still add up, forcing respondents to pay exorbitant fees at the outset, and administrative and arbitrator fees can total millions of dollars if arbitrations go through final merits hearings. And without all-purpose consolidation or a bellwether process, costs can continue to rise as respondents are burdened with duplicative proceedings. Indeed, the new AAA and JAMS rules do not necessarily relieve respondents of the burden of having to put a corporate representative up for multiple depositions or from having the same discovery fights time and again.

Different arbitral bodies have different procedures and requirements relating to consolidation and similar mechanisms, and it is vital that companies carefully consider and tailor their arbitration agreements to the disputes most likely to arise under those agreements. The AAA rules implicitly acknowledge this. The Introduction to the Mass Arbitration Supplementary Rules states, "Parties are encouraged to agree to additional processes that make the resolution of their Mass Arbitration more efficient." For example, companies could include provisions for complete or partial consolidation so that claimants' counsel do not get the opportunity to re-litigate discovery or merits issues. Such provisions might state that discovery in one arbitration will be used in related arbitrations, while prohibiting additional or duplicative discovery. An arbitration agreement could also provide for stays of related arbitrations pending bellwether merits hearings.

At the same time, companies must also ensure that arbitration agreements do not unduly delay consumers' ability to bring or prosecute a claim and are otherwise not "overly harsh" and "one-sided."[4] In the *MacClelland* case, for example, the court invalidated an arbitration agreement that required most of the defendant's customers to wait to file arbitration until bellwether arbitrations were completed. Whether an arbitration provision is overly harsh is a nebulous, fact-specific standard that can differ from state to state, requiring careful drafting with due attention to case law on permissible arbitration provisions. Companies should therefore consult counsel for help overhauling their standard clauses.

Takeaways

Companies often reflexively prohibit class actions and steer consumer, employment, and other claims to individual arbitration. At the same time, arbitration agreements are often not given the careful consideration they warrant. Treating arbitration agreements like boilerplate is a recipe for problems down the road. Getting arbitration procedures right up front, before arbitration is initiated, can save millions of dollars and prevent substantial burdens on executives and other business personnel.

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[1] *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 161 (1974).

[2] § 1:17. Introduction to empirical overview, 1 Newberg and Rubenstein on Class Actions § 1:17 (6th ed.).

[3] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting).

[4] *MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024, 1041 (N.D. Cal. 2022).

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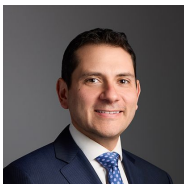

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