MASS ARBITRATION AND CLASS ACTIONS

Surf's Up! The Rising Tide of Mass Arbitrations

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INTRODUCTION[1]

This session will cover the rise of mass arbitrations, the current legal landscape, recent cases and disputes involving mass arbitration, ethical issues that can arise when mass representation is involved, and new rules and procedures from some of the largest arbitral bodies.

WHAT IS "MASS ARBITRATION"?

Individual disputes submitted to arbitration on a large-scale basis, often including hundreds or even thousands of individual claims against one or more defendants, and most often sharing common evidence, operative facts, and representation.

The American Arbitration Association (AAA) currently defines mass arbitrations as those involving: "(1) Twenty-five (25) or more similar demands for arbitration or a global request for mediation filed against or on behalf of the same party or related parties; (2) representation of the parties is consistent or coordinated across the cases; and (3) a particular fee schedule (e.g. employment/workplace or consumer fee schedule) applies to the matter."[2]

JAMS defines "Mass Arbitration" as "75 or more similar Demands for Arbitration, or such other amount as specified in the Parties' agreement(s), filed against the same Party or related Parties by individual Claimants represented by either the same law firm or law firms acting in coordination."[3]

HOW WE GOT HERE

1. The Federal Arbitration Act ("FAA")

Enacted in 1925, the FAA provides for private dispute resolution outside of the court system. The FAA has been interpreted broadly by Courts and provides that that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction,

[1] The speakers would like to acknowledge the work of attorney Kelly McCauley (Baker Hostetler) for her significant research and contribution to this presentation and course materials.
[2] *See* https://www.adr.org/consumer/mass-arbitration (last visited May 16, 2024).
[3] *See* https://www.jamsadr.com/mass-arbitration-procedures (last visited May 16, 2024).

> or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided in chapter 4.

9 U.S.C.A. § 2 (West) (Validity, irrevocability, and enforcement of agreements to arbitrate).

2. Traditional Advantages and Criticisms of Arbitration

Since its enactment, the FAA has been praised and scrutinized for facilitating the resolution of disputes in arbitration. Prior to the rise of mass arbitrations, conventional wisdom in favor of arbitration was that arbitration would be a quicker and cheaper solution to litigation through the court system and had the added benefits of curtailing class actions, keeping disputes out of the public view, limiting appeal options, and lack of precedential value.

Others viewed the arbitration process with great skepticism, often complaining that arbitration curtailed class actions, significantly reduced the negotiating leverage of individual claimants, did not make it economically feasible to take certain cases, lacked precedential value, and had a perceived bias in favor of companies who repeatedly used the same arbitration body.

3. Supreme Court Precedent

In the last fifteen years, the Supreme Court has repeatedly validated the use of arbitration agreements in the consumer and employment contexts. For example:

- In *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), customers brought a putative class action against AT&T alleging that the company's offer of a "free phone" to anyone who signed up for its service was a fraudulent offer because AT&T charged sales tax on the retail value of the free phone. AT&T moved to compel arbitration based on the contract between plaintiffs and AT&T, which required arbitration. The district court in California found the arbitration provision unconscionable because it disallowed class proceedings, which the Ninth Circuit affirmed based on the rule developed in *Discover Bank*.[4] The Ninth Circuit also held that the FAA did not pre-empt its ruling. Following an appeal, the Supreme Court reversed the Ninth Circuit's decision and held that California's rule violated the "liberal federal policy favoring arbitration" and "interfered with the fundamental attributes of arbitration." The Supreme Court ultimately held that California's rule was preempted by the FAA and remanded the case for further proceedings.

- Seven years later, the Supreme Court decided *Epiq Systems Corp. v. Lewis*, 584 U.S. 497 (2018), which involved three consolidated cases on appeal from the Fifth, Seventh, and

[4] In *Discover Bank*, the California Supreme Court held that class waivers in consumer arbitration agreements are unconscionable when the agreement is an adhesion contract, disputes between the parties likely involve small amounts of damages, and the party with inferior bargaining power alleges a deliberate scheme to defraud. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Ninth Circuits, employees who entered into arbitration agreements, and employers who moved to compel arbitration under those agreements. In each of the three cases, the parties entered into employment contracts providing for individualized proceedings to resolve employment disputes, and each employee sought to litigate their Fair Labor Standards Act ("FLSA") and related state law claims through class or collective actions in state court. In those cases, the employees argued that by requiring individual proceedings, the arbitration agreements violated the National Labor Relations Act ("NLRA") because they interfered with "concerted activities" protected by Section 7 of the NLRA.

The Supreme Court held that NLRA did not displace the FAA and the Court refused to accord *Chevron* deference to the NLRB's interpretation of federal statutes as outlawing class and collective action waivers by employees. Accordingly, the Court held that employment arbitration agreements with class action waivers are valid and the NLRA does not nullify class action waivers as illegal.

4. Increasing Use of Arbitration Clauses and Cost-Shifting Terms

Following these Supreme Court decisions, companies began to increasingly include class action waivers and arbitration requirements in employment and consumer contracts. To avoid unconscionability issues and ensure their arbitration agreements would not be struck down, companies implemented "consumer and employee friendly" terms to ensure that the cost of arbitration would not be viewed as prohibitively expensive compared to filing fees and potential recoveries in court. Those terms often included the company's agreement to bear the majority of arbitration or mediation costs, including filing fees, administrative expenses, and arbitrator time. Many of these provisions also included an obligation for the company to shoulder the cost for initiating mediation.[5]

RECENT CASES AND DISPUTES

As explained by Sir Isaac Newton in his *Third Law of Motion*, for every action there is an "equal and opposite" reaction, and advances in technology, artificial intelligence, and marketing have reduced the barriers to arbitration and resulted in the rise of "mass arbitration" across the United States. This phenomenon has caused companies to take a step back and reconsider the cost-benefit analysis of requiring mandatory arbitration. For example:

- *Adams v. Postmates, Inc*., 2020 WL 1066980 (N.D. Cal. Mar. 5, 2020) involved 5,257 individuals who worked as delivery drivers for Postmates, all of whom signed Postmates' Fleet Agreement, which classified them as independent contractors, not employees, and contained a class action waiver and Mutual Arbitration Provision requiring all disputes to be brought through final binding arbitration instead of filing a lawsuit in court. In March and April 2019, petitioners tendered a total of 5,274 individual arbitration demands to AAA alleging they were misclassified in violation of the FLSA, thereby triggering Postmates' obligation to pay the arbitration filing fees of approximately $10 million dollars. Postmates refused to pay those filing fees, claiming the arbitration demands lacked sufficient detail and asserting that arbitration had not been properly commenced. Petitioners subsequently

[5] JAMS, JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness, https://www.jamsadr.com/consumer-minimum-standards/ (last visited May 13, 2024).

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