

Recent Developments in Arbitration Agreements & Mass Arbitration

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The Demand

“More than 10,000 individuals have retained our firm to pursue claims against your company. We are prepared to serve simultaneous individual demands for arbitration on behalf of each client with the American Arbitration Association.

Proceeding to arbitration would obligate the company to pay AAA more than \$30 million in initial fees and costs. These numbers will continue to grow as additional individuals engage our firm every day.

Before we serve demands on AAA that will trigger the company’s obligation to pay these costs, it would be sensible for the parties to explore early resolution.”



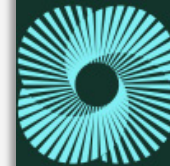
The Issue

... [A]busive mass arbitrations are the 21st-century equivalent of the abusive class actions that characterized the last part of the 20th century—claims that can be brought regardless of merit solely for the purpose of extracting a settlement unrelated to the merits by leveraging the threat of huge costs.

Mass Arbitration Shakedown

Coercing Unjustified Settlements

February 2023



U.S. Chamber of Commerce
Institute for Legal Reform

The Result

- **Samsung Users Press 50k Arbitration Face Scan Claims, Law360**
(Oct. 11, 2022).
- **Verizon's \$100 Million Settlement Gets Thumbs Down from Lawyers for 10,000 Customers, Reuters** (Jan. 22, 2024).
- **Uber Loses Appeal to Block \$92 Million in Mass Arbitration Fees, Reuters** (Apr. 18, 2022).
- **TurboTax Maker Intuit Faces Tens of Millions in Fees in a Groundbreaking Legal Battle Over Consumer Fraud, ProPublica** (Feb. 23, 2022).
- **Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us, The Wall Street Journal** (June 1, 2021).

Emerging Mass Arbitration Trends

01

Turning to Mass Arbitrations

☰ The New York Times

'Scared to Death' by Arbitration: Companies Drowning in Their Own System

Lawyers and a Silicon Valley start-up have found ways to flood the system with claims, so companies are looking to thwart a process they created.



Mass arbitration: the ultimate pawn promotion strategy of legal chess?

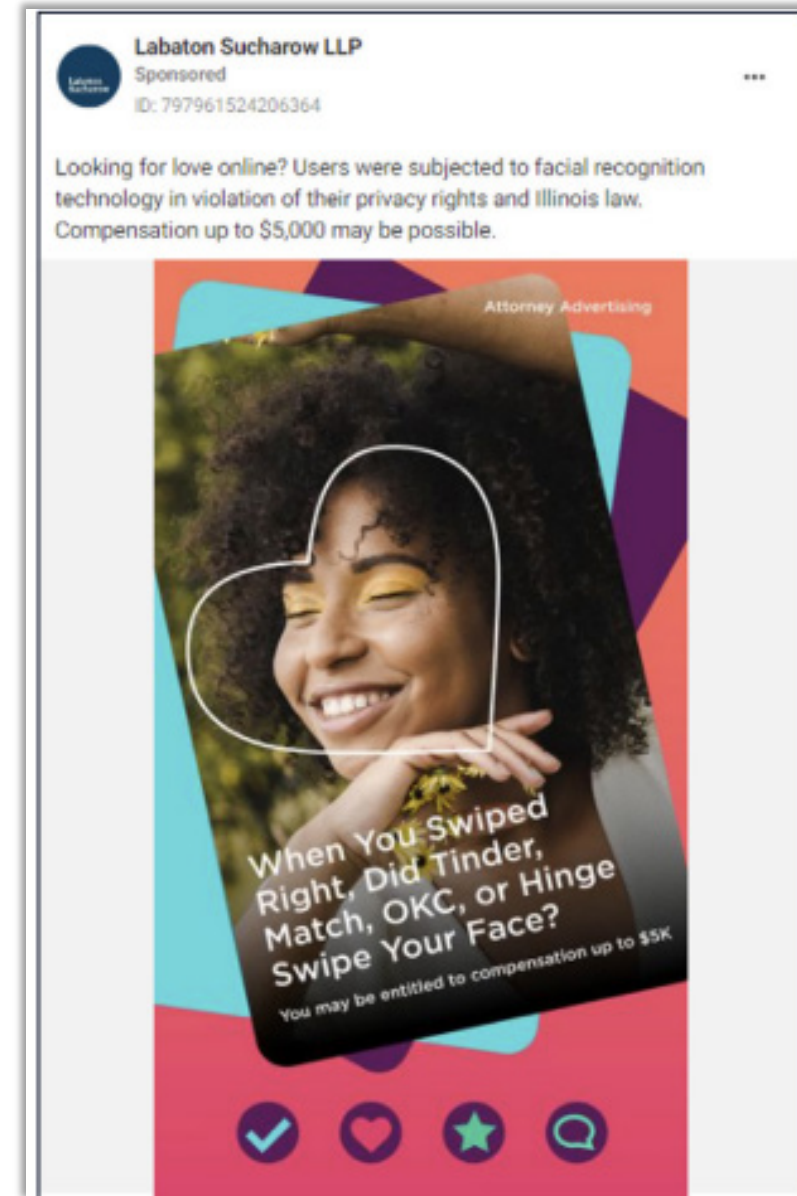
Discover a more predictable & cost-effective way to grow your law practice.



The Set Up

Of course, these coercive gambits can succeed only if the plaintiffs' lawyers are able to amass a large "inventory" of claimants.

Mass Arbitration Shakedown: Coercing Unjust Settlements, U.S. Chamber of Commerce (Feb. 2023)



The Targets

Mass arbitrations can affect any company, but targets tend to:

- Have large pools of potential plaintiffs;
- Have plaintiff populations that are reachable by and susceptible to social media advertising;
- Have arbitration agreements where the company pays all arbitration fees; and
- Operate in Plaintiff-friendly states.

Targets can be in any industry, including large employers, the gig economy, and consumer product and services

Gibson Dunn

A 10,000-claimant consumer or employment mass arbitration with AAA could lead to **\$6 million+** in initiation and appointment fees alone:

- **\$1,383,125** in Initiation Fees and Per Case Fees;
- **\$4.5-6 million** in Arbitrator Appointment Fees, depending on method.

Initiation Fees	Individuals: \$3,125; Business: \$8,125 (per mass arbitration filed). The initiation fee is credited toward Per Case Fees.
Per Case Fees	\$325 (first 500), \$250 (501 to 1,500), \$175 (1,501 to 3,000), and \$100 (3,001 and beyond) per case
Direct Merit Arbitrator Appointment Fees	\$450/case for the business and \$50 per case for the individuals
Rank/Process Appointment Process Fees	\$600/case for the business and \$75 per case for individuals (arbitrator appointment fees are non-refundable in the event of settlement or withdrawal)
Final Fee	(due at time hearing is scheduled or final submission in a desk arbitration): \$600/case
Merits Arbitrator Compensation	\$300/hour
Process Arbitrator/Mediator	paid at market value

Case Study: California's SB 707

- Mass arbitrations will continue to proliferate, especially in states that pass legislation making them easier to pursue.
- For instance, California's SB 707 requires employers using arbitration agreements to pay the costs and fees for any arbitration demand within 30 days of the due date. An employer that fails to do so is in material breach of the arbitration agreement and faces default, waiver of the right to arbitrate, or other sanctions.
- Numerous parties have attacked SB 707 as preempted by the FAA; the California Supreme Court has granted review on that issue (*Hohenshelt v. Superior Court*, No. S284498 (Cal.), review granted June 12, 2024).

Deterring Mass Arbitrations: **Drafting Arbitration Agreements**

02

Drafting Strategies

Gibson Dunn has been at the forefront of developing strategies to address mass arbitrations – and deter frivolous filings – through better arbitration agreements. Strategies include:

- Thoughtful choice of provider;
- Batching or bellwether provisions;
- Informal dispute resolution conferences;
- Arbitration demand content and verification requirements;
- Fee shifting for frivolous or harassing demands.

Choosing the Right Arbitration Provider



Multiple Filing Rules

Some arbitration providers have adopted special rules governing mass arbitrations, including:

- Reduced fee schedules for multiple filings;
- Provisions for an administered settlement approval process; and/or
- Use of test cases and mandatory mediation.
- However, many require agreement of the parties to implement special procedures.

Batching vs. Bellwether Provisions

1

Batching

Individual arbitrations are “batched” into groups assigned to a single arbitrator and incurring a single administrative fee.

2

Bellwether

“Test cases” are selected to be arbitrated individually while remaining demands are stayed. Usually followed by mediation.

3

Hybrid

Small batch of cases moves forward while other cases are stayed, followed by mediation. If mediation unsuccessful, larger batches move forward.

Fee Shifting Provisions

Fee-Shifting for frivolous claims

- May be included in arbitration provider's rules
- May be included in arbitration agreement

Offers of judgment/settlement

- Federal Rule of Civil Procedure 68, analogous state statutes (varies by state)
- May be included in arbitration agreement

Defeating Mass Arbitrations: **The War of Attrition**

03

Arbitrating Mass Arbitrations

- Even after a mass arbitration is filed, consider amending the arbitration agreement. Counsel often continue soliciting new clients.
- Claimants' counsel is often not seriously interested in individually arbitrating thousands of claims. Forcing them to do so can often lead to a settlement as plaintiffs' counsel's resources dwindle.
- Consider scheduling a global mediation following the resolution of initial cases.
- Claimants' counsel necessarily invests little time in each client's case. That can be an advantage. For example, insisting on discovery from claimants can lead to dismissals when counsel can't get in touch with their clients.

Ethical Concerns

Remain vigilant to potential ethical violations, such as:

- Unauthorized practice of law
- Lawyer solicitation violations
- Failure to adequately investigate each client's claims
- Failure to inform clients of settlement offers
- Restrictions applicable to aggregate settlements
- Conflicts of interest

“It is hard to imagine that any plaintiffs’ counsel could solicit and represent that many individuals and pursue or settle their claims while complying with the ethical rules designed to ensure that clients are not victimized ...”

U.S. Chamber of Commerce Inst. for Legal Reform

Mass Arbitrations: Recent Caselaw Developments

04

Seventh Circuit Confirms Arbitrator's Delegated Authority to Resolve Mass Arbitration Fees Dispute

Wallrich v. Samsung Electronics America, Inc., 106 F.4th 609
(7th Cir. 2024):

The Seventh Circuit reversed the district court's order requiring Samsung to pay over \$4 million in initial arbitration filing fees, on the grounds the mass arbitration plaintiff failed to prove the existence of an agreement to arbitrate.

- The plaintiffs' evidence—copies of their arbitration demands, a spreadsheet of names and addresses, copies of Samsung's agreement, and AAA's determination they had met filing requirements—was insufficient to establish the existence of an agreement.
- Even if there had been a valid agreement, threshold fee disputes were delegated to the arbitrator. Once AAA terminated the proceedings, the plaintiffs could have pursued their claims in court. But district court had no authority to order Samsung to pay fees.

Decisions Upholding Mass Arbitration Protocols

McGrath v. DoorDash, Inc., 2020 WL 6526129 (N.D. Cal. Nov. 5, 2020):

The Court granted DoorDash’s motion to compel arbitration over Plaintiffs’ objection that CPR’s Mass-Claims Protocol was unfair:

- No “significant delay in resolution of the Dashers’ claims,” because initial batch of 10 cases would be decided within 120 days, followed by 90-day mediation period.
- Terms of the Mass-Claims Protocol “appear[ed] fair,” because (1) test cases chosen randomly; (2) claimant has greater role in selecting arbitrator; and (3) respondent pays mediation fees.

Decisions Upholding Mass Arbitration Protocols

Ruiz v. CarMax Auto Superstores, Inc., 2024 WL 1136332 (C.D. Cal. Jan. 18, 2024): The Court granted the motion to compel arbitration and rejected the plaintiff's argument that the arbitration agreement, which contained a batching provision, was unconscionable

- Batching provision, which provided that claims would move forward in groups of 10, was not substantively unconscionable because it did not restrict the number of claims that could be filed at one time, and it provided for the tolling of applicable statutes of limitations.

Decisions Striking Mass Arbitration Protocols

Heckman v. Live Nation Entertainment, Inc., 686 F. Supp. 3d 939 (C.D. Cal. 2023) (appeal filed, 9th Cir., No. 23-55770): The Court denied Defendants' motion to compel arbitration on the grounds the delegation clause was substantively and procedurally unconscionable:

- Defendants unilaterally and without notice changed Terms of Use to select new arbitration provider with mass arbitration protocol, which applied retroactively.
- The protocol provided that the initial three bellwether cases would set precedent for remaining cases; lacked right to discovery; arbitration selection provisions were one-sided; and limited right of appeal.

Decisions Striking Mass Arbitration Protocols

MacClelland v. Cellco P'ship, No. 21-cv-08592-EMC (N.D. Cal. July 1, 2022) (appeal filed, 9th Cir., No. 22-16020): The Court denied the motion to compel arbitration on the ground that Defendant's mass arbitration provision was substantively unconscionable.

- The agreement provided that claims would move forward in batches of 10, and additional claims could not even be filed until claims in existing batch were resolved. Given number of claims, some claims would not be heard for years, and there was a “risk that claims will be effectively barred when coupled with the statute of limitations.”
- See also *Achey v. Cellco P'ship*, 475 N.J. Super. 446 (App. Div. 2023) (review granted, N.J. Sup. Ct. Sept. 11, 2023)

Decisions Striking Mass Arbitration Protocols

Pandolfi v. AviaGames, Inc., 2024 WL 4051754 (N.D. Cal. Sept. 4, 2024):

The Court denied the defendant's motion to compel arbitration on the grounds that the batching/bellwether provision rendered both the delegation clause and the agreement as a whole unconscionable.

- Even though the provision tolled the statutes of limitations, the Court held the bellwether provision, which allowed for arbitration of 20 claims at a time, resulted in unacceptable delay. The Court also concluded the provision was unconscionable because it applied to any “coordinated” representation, and because, as a practical matter, only customers' claims would ever be subject to the provision.

Mass Arbitration Protocols: Takeaways

- Batching/bellwether provisions should not prevent filing of claims, and applicable statutes of limitations should be tolled.
- Companies should provide employees/customers with notice of important changes to arbitration agreements.
- Beware of other unconscionability issues (e.g., ability to opt out, arbitrator selection, rights to discovery, etc.).
- Delegation provisions in arbitration agreements that delegate arbitrability issues to the arbitrator may be helpful.

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