How to Avoid Mass Arbitration Claims

Litigation and Dispute Resolution

Cheat Sheet

- While many companies include arbitration clauses in consumer agreements, they should understand the risk of defending mass arbitrations, AI Internet arbitration claims, and the resulting costs.
- There are steps companies can take to limit these threats by adjusting their alternative dispute resolution clauses.

Don’t be a target

A wide range of industries are being targeted by class action lawyers filing “mass arbitrations” or individual arbitration claims that can be completed in five minutes through the development of artificial intelligence by the web site www.FairShake.com.

This impacts sectors such as telecommunications, cable, finance, home warranty, tax preparation, home security, education, travel, food delivery, transportation, or any other company that relies on arbitration to resolve customer disputes.

As detailed in the New York Times, this start-up and numerous class action law firms are turning arbitration into a weapon to help consumers file thousands of complaints with the American Arbitration Association (AAA). Each such matter can cost the targeted company almost US$5,000 in administrative, arbitrator, and hearing fees, not counting any outside counsel fees incurred.

When arbitration became acceptable and common place in consumer disputes

In *AT&T Mobility LLC v. Vincent Concepcion*, 563 U.S. 333, 131 S.Ct. 1740 (2010), the Court held that the Federal Arbitration Act (FAA) was designed to promote arbitration and that it preempted any state law prohibiting arbitration clauses requiring consumers to waive their rights to class-action lawsuits.

A UC Davis Law Review article published in 2019 found that 81 companies in the Fortune 100 used arbitration clauses in connection with consumer agreements and that 78 of these agreements included class-action waivers.

At the time, this list included Walmart, Amazon, General Motors, Costco, Verizon, Walgreens, Alphabet, Comcast, UPS, Disney, and Facebook. As well, "[m]ore than sixty [60] percent of United States retail e-commerce sales are covered by broad consumer arbitration agreements."

Read more in the Class Action Trends Report by Jackson Lewis PC

The proliferation of class-action lawyers' filing "mass arbitrations"

Mass arbitrations have been described as a recent phenomenon in which thousands of plaintiffs — often consumers, employees, or independent contractors — bring demands alleging the same improper conduct against a company at the same time.

For example, the law firm Keller Lenkner LLC is a major player in this area having filed about 40,000 arbitration complaints against Intuit (TurboTax), more than 12,500 arbitration claims against Uber and over 6,000 arbitration claims against DoorDash. Keller Lekner reports that it has secured more than US$375 million in related settlements.

It is worth noting that the use of arbitration in employment matters in cases of sexual assault or sexual harassment is now barred as the result of President Biden's signature on March 3, 2022, of the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which amended the FAA. Arbitration is still lawful for class or collective wage and hour cases, sex/gender discrimination, Equal Pay Act, and related claims.

The corporate backlash

As a condition of employment, DoorDash required individuals who delivered food called "Dashers" to agree to arbitrate "all disputes arising out of or relating to this Agreement, [including] CONTRACTOR's classification as an independent contractor" and required the arbitrations to be administered by the AAA . *Abernathy v. DoorDash, Inc.*, 438 F.Supp.3d 1062, 1064 (N.D. Cal. 2020).

The agreement also provided that the parties "mutually agree that by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard or arbitrated as, or to participate in, a class action, collective action and/or representative action..." In turn, the AAA's Commercial Arbitration Rules required each individual claimant to pay a filing fee of US$300 and the responding company to pay a filing fee of US$1,900.

During 2019, over 6,000 Dashers filed arbitration claims with the AAA alleging that they had been improperly classified as independent contractors rather than employees. The Dashers paid over US$1.2 million in filing fees to the AAA. However, DoorDash refused to pay the nearly US$12 million in administrative filing fees that the AAA billed to DoorDash.

Even the largest retailer on the planet has been affected by the filing of mass arbitrations.

Rather than relying on the AAA to arbitrate these matters, DoorDash required Dashers to sign a new contract in which they agreed to accept new arbitration procedures instituted by the International Institute for Conflict Prevention & Resolution (CPR).

In rejecting DoorDash's request to have the arbitration complaints resolved by CPR, the court held that pursuant the FAA the original contract agreed to between DoorDash and the Dashers must be honored; thereby requiring arbitration by the AAA.

Even the largest retailer on the planet has been affected by the filing of mass arbitrations. In July of 2021, Amazon announced the removal of the mandatory arbitration and class action waiver provisions from its consumer terms of service.

Amazon made this change after Keller Lenkner LLC served approximately 75,000 arbitration complaints against Amazon, alleging that Alexa devices recorded customers without their consent. Amazon's new Conditions of Use require that any dispute or claim must be adjudicated in the state or federal courts in King County, Washington.

Which party pays the arbitration fees?

The FAA permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. at 339. This saving clause permits arbitration clauses in agreements to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability."

In order to avoid having courts (and in every state the standard may be different) declare arbitration clauses in adhesion contracts unenforceable because of one or more of these contract defenses, class-action lawyers often recommend that companies pay all administrative, arbitrator compensation and hearing fees.

Companies wishing to use the AAA to resolve disputes must submit their arbitration clause to AAA. The cost of reviewing the clause and maintaining it is US$500, with a Registry fee of US$500 charged each calendar year thereafter. When complaints are submitted by complainants to the AAA against a particular company, it is this clause that informs the AAA as to which party(s) will be paying for the proceedings.

The automation of the filing of arbitration complaints

The website www.FairShake.com uses AI to generate complaints against companies that rely on the AAA to resolve customer disputes. FairShake accepts complaints against approximately 100 consumer-facing companies offering services including telecom, banking, credit bureaus, credit cards, home warranty, tax preparation, home security, on-line universities, gyms and fitness, and

travel.

FairShake recently claimed that over 65 percent of its clients are offered compensation and successful claims average US$600; its website mentions that if a claimant settles their claim, FairShake's fee is 10 or 20 percent of the settlement amount.

After an individual completes a questionnaire detailing their claim, FairShake generates a complaint that is sent the target company's legal department. If the matter is not resolved within 30 days, FairShake will generate an email to the complainant offering them the option to file a complaint with the AAA. If the complainant clicks "yes," a pro-se complaint against the target company is issued.

> Essentially, the process uses the threat of a AAA arbitration proceeding as a hammer to push settlements.

Within two weeks of receiving the AAA complaint, any company that has agreed to pay all arbitration fees will receive a US$500 invoice for an Initial Administrative Fee from the AAA. Approximately five to six weeks later, the AAA will issue additional invoices for a Case Management Fee and Arbitrator's Compensation for US$1,400 and US$2,500, respectively.

Should the arbitrator decide at a preliminary hearing that live testimony is not necessary to decide the case, they may order a Desk/Documents-Only Arbitration be held. Essentially, this becomes similar to a motion for summary judgment. The arbitrator's Compensation Fee for a Desk Arbitration is US$1,500.

If a virtual or in-person hearing is held, the AAA will charge an additional US$500. In addition to any outside counsel fees that your company incurs, each AAA complaint may cost your company almost US$5,000 in administrative, arbitrator compensation and hearing fees.

Although some FairShake complainants demand several thousands of dollars, many complaints are in the hundreds of dollars, or even less. Given the cost of litigation, targeted companies have an obvious incentive to settle. Essentially, the process uses the threat of a AAA arbitration proceeding as a hammer to push settlements.

Read more in the *Docket* article "Litigation Nightmares: How to Tame Class Actions and Multidistrict Litigation"

How to draft arbitration clauses to limit the risk of mass arbitrations and Fairshake complaints

There are several potential strategies to avoid mass arbitrations and the submission of FairShake complaints. In light of the trend described above, companies may consider adapting their alternative dispute resolution (ADR) clause by incorporating the following concepts:

- Similar to the ADR approach utilized in commercial agreements, require customers to use good faith efforts to participate in a company-paid mediation hosted by the company's designated ADR provider.

- If the complaint is not resolved through mediation, require the consumer to pay a fee of between US$250 to US$300 (approximating the amount of filing fees necessary to file a lawsuit in small claims court) to the company's designated ADR provider in order to file an arbitration claim.

- Include language that would allow either party to seek sanctions (in the form of administrative and arbitration compensation fees) if the arbitrator finds that the claim or defense is frivolous or brought for an improper purpose.

- Prohibit the consolidation of claims, class certification, or any similar aggregation of claims in arbitration.

- As FairShake's AI system is designed to submit arbitration claims only to the AAA, designate another ADR provider to conduct mediations and arbitrations.

Please keep in mind that under the FAA, arbitration clauses are subject to "generally applicable contract defenses, such as fraud, duress, or unconscionability" and may be invalidated based upon the laws of the relevant jurisdiction(s). You should engage experienced counsel to help you draft an ADR clause in order to increase the chance that it will survive any challenge to its validity.

Connect with in-house colleagues. Join ACC.

Disclaimer: The information in any resource in this website should not be construed as legal advice or as a legal opinion on specific facts, and should not be considered representing the views of its authors, its authors' employers, its sponsors, and/or ACC. These resources are not intended as a definitive statement on the subject addressed. Rather, they are intended to serve as a tool providing practical guidance and references for the busy in-house practitioner and other readers.

Michael R. Booden

Counsel, Legal and Regulatory Affairs

U.S. Cellular

Michael R. Booden is counsel, legal and regulatory affairs with U.S. Cellular where he has a leadership role in negotiating and drafting complex commercial transactions, responding to regulatory inquiries and defending the organization in consumer arbitrations. He is also an adjunct professor at the University of Illinois Chicago School of Law. Booden is a Certified Information Privacy Professional (CIPP/US/E) through the International Association of Privacy Professionals. He has served as either first or second chair in over 30 trials in state and federal courts and before administrative judges. After graduating from law school, Booden served as Judicial Law Clerk to John J. Stamos, who formerly served on the Illinois Appellate Court and Illinois Supreme Court. Mr. Booden is a past president of the Chicago Chapter of ACC and a past chair of the ACC Litigation Network.