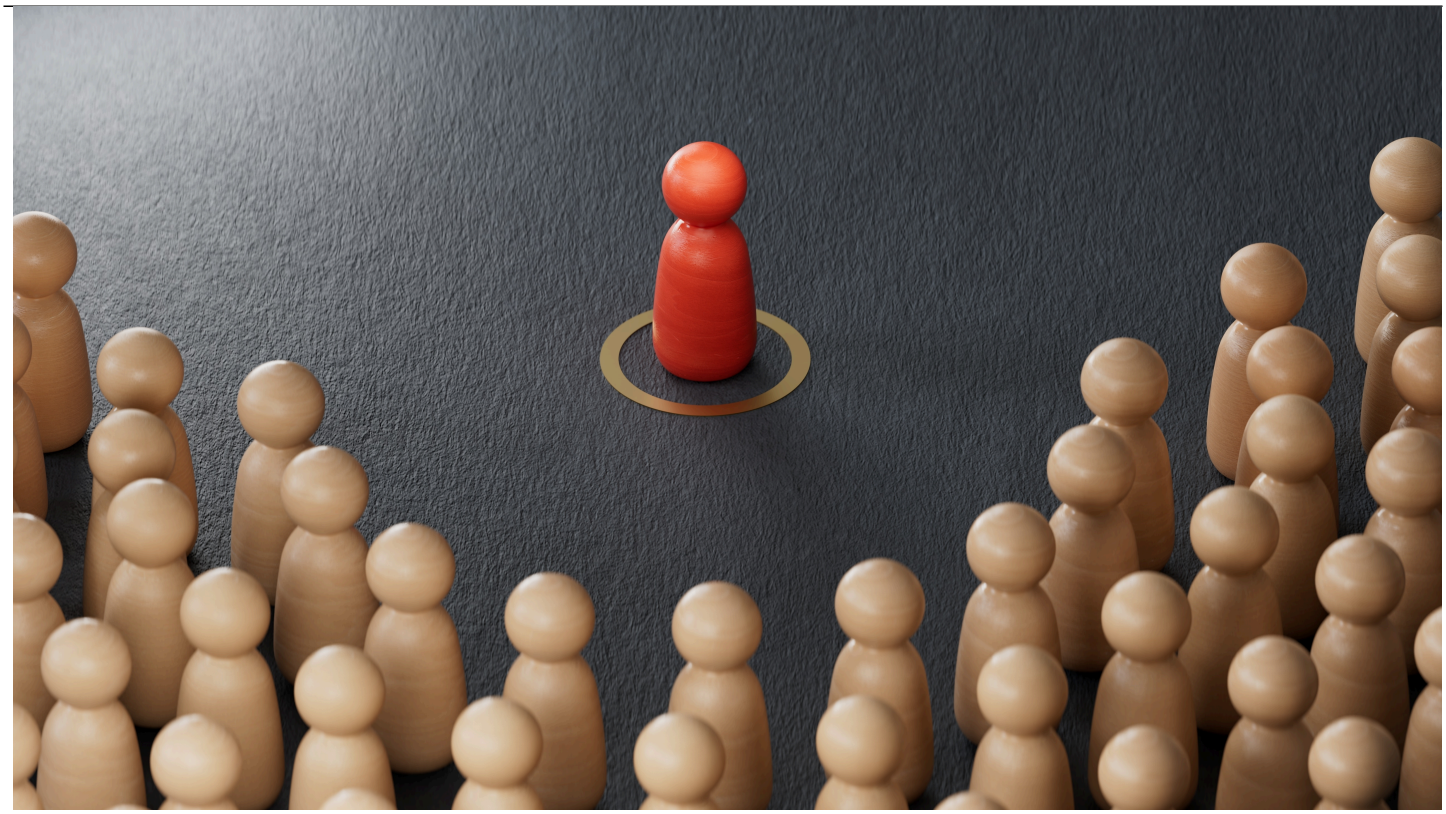
ACC DOCKET
INFORMED. INDISPENSABLE. IN-HOUSE.

Mass Arbitration Needs Massive Change

Litigation and Dispute Resolution

Technology, Privacy, and eCommerce



Banner artwork by fengdr2020 / *Shutterstock.com*

Cheat Sheet

- **Challenges.** In-house counsel are reassessing the value of arbitration due to its significant shift.
- **Unfairness.** Mass arbitration forces companies to either pay high upfront fees for individual arbitrations or settle, regardless of the merit of the claims.
- **New rules and potential solutions.** The American Arbitration Association (AAA) has proposed new rules aimed to reduce fees while other companies may consider the “bellwether approach.”
- **Strategies for companies.** Reevaluate arbitration clauses and consider mitigation tactics.

In recent years, the alternative dispute resolution landscape has shifted dramatically with the introduction of mass arbitration, a tactic employed by plaintiff’s attorneys to inundate defendants with hundreds (or even thousands) of arbitration demands against a single defendant.

Arbitration was once heralded as a streamlined alternative to traditional litigation, but mass arbitration has proven to be expensive, time-consuming, and inefficient. Mass arbitration usually involves a large number of claims filed simultaneously by a single law firm or coordinated group of firms against a single company. Plaintiffs typically don't pay upfront because arbitration organizations and companies often agree to cover the costs.

With numerous corporate giants — like TurboTax, DoorDash, and CenturyLink — falling into mass arbitrations that cost them millions in arbitration fees alone, companies are left asking themselves one question: Is enforcing arbitration provisions even worth it?

Who is the real winner?

The unfairness inherent in mass arbitration has not gone unnoticed. In February 2023, the US Chamber of Commerce released a report titled "Mass Arbitration Shakedown: Coercing Unjustified Settlements," characterizing mass arbitration demands as "blackmail." The report ignited a fiery debate over the ethicality and legality of mass arbitration tactics, noting that mass arbitration is the "21st century equivalent of the abusive class actions that characterized the last part of the 20th century."

Instead of evaluating a claim's merits, companies are forced to focus instead on the risk of expensive arbitration fees (which they are required to pay up-front). These fees are not chump change. Thus, companies find themselves in a lose-lose situation: either pay substantial upfront fees for each individual arbitration to mainstream arbitration providers, such as the American Arbitration Association (AAA) or JAMS, or be strong-armed into settlement. This dilemma puts considerable financial pressure on defendants, regardless of the value or merits of the claims. In fact, companies that investigated claims in actual or threatened mass arbitrations have found that a significant percentage of claimants — up to 80 percent or more — did not have a valid claim.[i]

Companies are not the only ones abused by mass arbitration — consumers lose, too. In arbitration, not only do consumers lose their right to a jury trial, but they also lose their right to appeal adverse decisions. The only real "winner" in mass arbitration are plaintiffs' counsel, who stand to win significant attorneys' fees. For all these reasons, the mass arbitration system is far from fair.

Companies are not only the ones abused by mass arbitration — consumers lose, too.

AAA's mass arbitration rules

In response to the mounting pressure, AAA adopted mass arbitration rules aimed at streamlining proceedings. As recently as January 15, 2024, AAA amended its Consumer Mass Arbitration and Mediation Fee Schedule, which provides a sliding scale for reduced filing fees when more than 25 claims are filed against the same party, and counsel for the parties is consistent or coordinated across all cases[ii] — potentially on top of per-case fees between US$100-$325 depending on the number of arbitrations filed. Meanwhile, JAMS has staunchly refused to create mass arbitration rules, and instead maintains a US$3,500 filing fee for matters involving three or more parties.

ACC Resource: **Top 10 Issues for Employers Surrounding the Use of Arbitration to Resolve Employment Disputes**

The “bellwether” approach

Companies too are forced to reconsider their arbitration provisions in response to the escalating threat of mass arbitrations. Some well-known companies are leading the charge and exploring new strategies to address mass arbitrations, drawing inspiration from the multidistrict litigation framework by exploring the feasibility of a bellwether approach to mass arbitration. This “bellwether method” seeks to expedite resolution and foster global settlements by allowing each party to select representative cases for adjudication.

For example, one *Fortune* 1000 company requires claimants to go through an informal settlement process in which they must personally participate in a telephone or videoconference with the company within the first 60 days of their dispute. Only after a claimant goes through this process can they file a claim in arbitration. And when 25 or more similar claims are filed by the same or coordinated counsel, all of the cases must use bellwether proceedings.

Similarly, one education company’s terms provide for an informal dispute process before any small claims or arbitration is filed. If the informal process is unsuccessful, there are two options:

(1) File a claim in small claims court, or

(2) File an arbitration with AAA. Importantly, the company requires claims involving less than US$15,000 to be resolved through “non-appearance-based” individual arbitration, based solely on the written submissions of the parties. Anything over US$15,000 may be resolved by phone, video conference, or written submissions.

This company’s terms also specifically call out “Mass Arbitration Rules” that apply when 25 or more claimants raise substantially identical disputes, and counsel for the claimants are the same or coordinated across the disputes. Under these rules, all claimants must still complete the informal dispute process mentioned above, and the mass arbitration goes through a “bellwether” procedure. Following the arbitrations, the parties must mediate in good faith, and all other claims pending in the mass arbitration must be dismissed without prejudice. If neither the mediation nor bellwether proceedings are successful, the claimants whose disputes haven’t been litigated must pursue claims in small claims court or with FairClaims, Inc. (an online dispute resolution service) — not in arbitration or a court of law.

Unfortunately, for companies looking to quickly mitigate their risk of mass arbitration by implementing this bellwether-style procedure — it’s still unclear whether utilizing this procedure will be enough. Two district courts have found Verizon’s terms of use — which contain a similar bellwether process for arbitrations — unconscionable, and one case is currently on appeal to the Ninth Circuit.[iii]

So, what else can companies do to avoid being caught in mass arbitration limbo? Some potential mitigation tactics include:

Mitigation tactics

Opt for small claims court

The AAA rules allow parties to resolve disputes in small claims court instead of arbitration, assuming jurisdiction is proper. This offers companies a way to avoid exorbitant arbitration fees. Companies can also consider including bilateral small claims court language in consumer or employment contracts.

Use fee-shifting when possible

Courts continue to scrutinize fee-shifting provisions to ensure they are not “cost prohibitive” to plaintiffs. However, some companies have had success in implementing fee-shifting provisions that require claimants to pay part of the filing fee in the amount it costs to file a lawsuit in court. Companies should also consider including a “Bad Faith” provision in their arbitration provision, which would allow the arbitrator to shift fees to the claimant if it found the action was brought frivolously or in bad faith.

Implement a notice and cure provision

Some companies have included in their arbitration provisions a clause requiring claimants to give notice of their complaint before commencing an arbitration proceeding, to provide the business with an opportunity to resolve the matter informally. This promotes the individualized assessment of disputes and allows for individual settlement offers based solely on the claim’s merits.

Choose an arbitration provider carefully

Selecting an arbitration provider is an important decision, and will have a huge impact on mass arbitration proceedings. AAA and JAMS are the most popular arbitration providers, mainly due to their experience in the industry and extensive list of arbitrators. But some companies are exploring alternative forums that may have lower fees — like New Era ADR, International Institute for Conflict Prevention and Resolution (CPR), ADR Services, or National Arbitration and Mediation (NAM).

Develop a strategy for mass arbitration

As mass arbitration continues to reshape the legal landscape, companies are confronted with critical decisions regarding the efficacy and viability of arbitration agreements. Some companies have opted

to eschew arbitration clauses altogether, while others are embracing innovative strategies to navigate the complexities of mass arbitration.

The advent of mass arbitration highlights the need for creative and forward-thinking approaches to dispute resolution. By critically evaluating arbitration clauses and proactively addressing associated risks, companies can chart a course towards fair and equitable resolution in an era of unprecedented legal challenges.

Join ACC

Katherine Heaton

Claims Focus Group Leader - Cyber Services & InfoSec Claims

Beazley

Katherine Heaton is an attorney at Beazley, one of the largest cyber insurance companies in the world. As a cyber focus group leader, she advises the company of legal risk and trends in cyber issues to help make claims and underwriting decisions. Heaton has been focused on wrongful collection and privacy class actions for years. She is a certified information privacy professional (CIPP/US) and a member of the International Association of Privacy Professionals (IAPP). Prior to joining Beazley, Heaton was a class action litigator at a top tier law firm.

Heaton earned her law degree from the University of Washington School of Law and obtained two master’s degrees in physics and philosophy as well as an undergraduate degree in philosophy, which includes a year abroad at the University of Oxford.

Anna Gadberry

Associate

Shook, Hardy & Bacon

Shook, Hardy & Bacon Associate Anna Gadberry is a class action and complex litigator, with a focus on high-stakes commercial disputes and privacy matters. Prior to joining Shook, Gadberry gained valuable insight and experience as a law clerk and/or intern for three courts in Missouri including the Supreme Court of Missouri. Working closely with judges, she learned to develop effective and efficient arguments for her clients and she is noted for her skills in legal writing.

Gadberry earned her law degree from the University of Missouri School of Law and her B.A. from Truman State University. When she’s not advocating for clients, she volunteers with Kansas City Community Gardens. Gadberry also serves on Shook’s Search Committee.

Jenn Hatcher

Partner

Shook, Hardy & Bacon

Shook, Hardy & Bacon Associate Jenn Hatcher focuses her practice on class action and complex litigation, as well as appellate work, with an eye on privacy and security law. A litigator at the forefront of privacy and cybersecurity-related class action defense, she has built a reputation depending clients in novel lawsuits that require quick thinking, creative solutions, and long-range strategic sensibilities. Hatcher is a skilled legal writer and advocate, which she attributes to her experience clerking for the Missouri and Nevada Supreme Courts.

Hatcher earned her law degree from William S. Boyd School of Law, University of Nevada, Las Vegas, her M.Ed., summa cum laude, American College of Education and her B.S. in English from the University of Nevada.

A former high school teacher, Hatcher uses that experience in her active pro bono practice helping juveniles work through the legal system, ranging from delinquency to adoption proceedings.