

LITIGATION MINUTE: WHAT IS MASS ARBITRATION?

MASS ARBITRATION SERIES: PART ONE OF FOUR

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

For decades, companies have struggled to find a solution to the problem of expensive and disruptive class action lawsuits. When the U.S. Supreme Court held—in *AT&T Mobility LLC v. Concepcion*—that arbitration clauses and class action waivers in consumer and employment agreements were enforceable, it may have seemed like game, set, and match for defendants. As long as plaintiffs had to file arbitration actions to resolve any claims, the incentive for plaintiffs' attorneys to aggregate and capitalize on claims seemed to evaporate.

In recent years, however, clever counsel devised an alternative strategy, perhaps even more effective than class actions in wresting settlements from companies.

In a minute or less, here is what you need to know about the current state of mass arbitration.

Mass Arbitration Emerged as an Alternative to Class Actions

The new strategy: give companies what they asked for. Plaintiffs' firms began filing thousands of arbitration claims and forcing defendants to immediately pony up millions in filing fees. Although this involves an initial investment in filing fees by plaintiffs' firms, that investment can be well worth the massive settlement leverage gained (without the burden of demonstrating the merits of the claims).

Due to the asymmetries in the arbitration filing fees, initially designed to make the process fairer for plaintiffs, an investment in fees by plaintiffs' firms imposes a corresponding obligation on respondents to pay up to seven times the plaintiffs' investments.

Mass Arbitrations Are Financially Punishing

These mass arbitration claims began to appear around 2018, when a handful of plaintiffs' firms filed thousands of arbitration demands against large corporations. In each case, the mass arbitration demands immediately triggered the respondent's obligation to pay millions of dollars in filing and arbitrator fees at the outset.

For example, in one case, a company faced over 12,000 arbitration demands with initial filing and arbitrator fees at US\$1,500 per demand—for a total of over US\$18 million in initial fees due. The plaintiffs' lawyers also sought reimbursement for their share of the filing fees under the arbitration agreement. Another company faced mass arbitration filings with a price tag approaching US\$20 million in initial fees.

Mass arbitration claims can be financially devastating to defendants. In some cases, plaintiffs' firms use social media campaigns to locate thousands of claimants, rendering it impossible to perform the due diligence that

would typically attend a single arbitration filing. Due to the confidentiality of arbitrations, the exact settlement numbers are unclear, but one plaintiffs' firm boasted obtaining over US\$200 million in mass arbitration settlements.

Mass Arbitrations Focus on Employment and Consumer Disputes

Initially, mass arbitration claims focused on employment actions that had previously been subjects of class actions (typically wage-and-hour disputes). Product claims followed. Today, any company with an arbitration provision in its employment agreements or product warranties is at risk of a mass arbitration filing.

Stay Tuned for the Next Edition in This Series

In Part 2 of this series, we will review new procedures that arbitral bodies have adopted to address mass arbitrations.

Part 3 of this series will discuss how the courts have responded to developments in mass arbitrations.

In Part 4, we will discuss potential strategies for revising arbitration provisions in order to blunt the force of this evolving tactic.

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