

# LITIGATION MINUTE: THE CHANGING LANDSCAPE OF MASS CLAIMS PROCEDURES

## MASS ARBITRATION SERIES: PART TWO OF FOUR

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### WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

As discussed in our [6 September edition](#) of Litigation Minute, mass arbitration filings allow plaintiffs' lawyers to take advantage of the asymmetry in filing fees that major arbitration institutions charge—to individual claimants versus corporate defendants—to gain significant settlement leverage before any claims are heard on the merits.

Some arbitral institutions have made efforts to develop procedures to ensure that claims are heard on their merits rather than aggregated and used as a mechanism to force settlements. For example, the American Arbitration Association (AAA), the International Institute for Conflict Prevention and Resolution (CPR), FedArb, and newcomer New Era ADR have developed new procedures for handling mass claims in consumer and employment contexts. When selecting an arbitral institution for your arbitration provisions, it is important to understand the institution's approach to mass arbitration claims.

In a minute or less, here is what you need to know about this evolving landscape.

#### The AAA Approach

AAA, perhaps the leading arbitral body, issued its "Supplementary Rules for Multiple Case Filings," which aim to streamline large-volume (25 or more) consumer or employment filings involving the same or related parties. The new rules are applied at AAA's discretion, and largely encourage the parties to agree to certain additional procedures, such as scheduling orders that set deadlines across multiple cases, and limitations on briefs, motions, or discovery.

The rules contemplate the appointment of both a Process Arbitrator, who may decide such issues as the allocation of payment advances on administrative and arbitrator fees, and one or more Merits Arbitrators.

The AAA also issued a "Multiple Case Filings Administrative Fee Schedule." For cases filed by individuals, companies' initial filing fees remain higher (up to three times that paid by the individual), but the four fee tiers are dependent upon how many cases have been filed. After 3,000 cases, the individual pays US\$50 per case, and the company pays US\$75. However, in order to advance to the arbitrator selection process, individuals pay only US\$100, and companies must pay US\$1,750 per case.

#### Other Providers Offer a Test-Case Approach

Similar to the approach taken in multidistrict litigation (MDL), a number of arbitral providers use test cases when administering mass arbitration claims. CPR's procedure for mass employment cases (more than 30 nearly identical cases) uses randomly-selected test cases that proceed while the remaining cases are put on hold. The

decisions rendered in the test cases are used to encourage the remaining claimants to reach a global resolution. Upon a determination that the mass claim protocol applies, the company must pay CPR an “initiation fee,” negotiated with CPR prior to referencing the protocol in the company's agreements. Additional fees are incurred as test cases proceed.

FedArb's mass arbitration procedures establish a similar test-case protocol. The parties agree on a panel of former federal judges to hear a fixed number of cases, and an MDL-type panel of judges decides dispositive issues common to all cases. The FedArb filing fees, like AAA's, are tiered depending upon the number of cases filed.

Newcomer New Era ADR also uses an MDL-style bellwether case approach to mass arbitrations. New Era's offering is unique in several respects:

- All proceedings are virtual;
- All proceedings (not just for mass claims) are streamlined and expected to be completed in 60 days; and
- A subscription service is offered, which charges a one-time flat fee per case, including all filing and arbitrator fees.

### Stay Tuned for the Next Edition in This Series

As arbitration was originally viewed as a more efficient and cost-effective alternative to litigation, ADR providers are unsurprisingly pivoting to combat the inefficiencies created by mass arbitrations. However, not everyone is pleased with the new procedures rolled out by these companies.

In the next edition, we will discuss how courts have reacted when mass arbitration tactics and procedures have been challenged.

## KEY CONTACTS



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