LITIGATION MINUTE: PROTECT YOUR COMPANY AGAINST MASS ARBITRATIONS

MASS ARBITRATION SERIES: PART FOUR OF FOUR

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

As discussed in the first three editions of this Mass Arbitration series, little relief may be available once a company is caught in the mass arbitration trap. Mass arbitrations can be frustrating for companies that initially sought to streamline the dispute resolution process by mandating arbitration, but now find themselves subject to massive arbitration fees while forced to navigate complex procedural brambles.

While certain retroactive tactics may be used against a mass arbitration (e.g., offers of judgment, settling claims on a class-wide basis), the most effective avoidance strategy—apart from eliminating mandatory arbitration clauses and facing potential class actions—is to carefully craft provisions with mass arbitration in mind. Although there is no substitute for preparing provisions alongside trusted counsel to meet the needs of specific situations, there are several strategies to consider.

Pre-Arbitration Dispute Notices, Informal Dispute Resolution, and Mediation

One way to potentially blunt the mass arbitration tactic is to require individual claimants to provide the company with a pre-arbitration dispute notice (with a description of the claim), and allow the parties an opportunity to resolve the claim—either through informal dispute resolution, mediation, or both—before arbitration is filed. For example, the parties may agree that the consumer or employee must send a claim notice to a designated email address and engage in good faith negotiations for 30 days before filing arbitration.

Plaintiffs' counsel may ignore these requirements and proceed with a mass arbitration demand. Depending on the arbitral institution, the respondent company may be required to pay the applicable filing fees before challenging the claims for failure to follow dispute resolution procedures. Companies should consult with counsel about methods to bolster these provisions, including potential fee-shifting or cost-shifting clauses for failure to comply and nondelegation clauses requiring courts to decide arbitrability.

Selecting a Provider With Adopted Mass Arbitration Procedures

As discussed in our 13 September edition of Litigation Minute, certain arbitral institutions have adopted procedures to ensure that mass arbitrations are resolved on their merits rather than wielded as a sword to extract early settlements. Some providers employ procedures and fee structures that are more effective in quickly and fairly resolving mass claims. Companies should study the procedures of stalwarts like AAA and JAMS, as well as innovative newcomers like New Era ADR, to determine which would best suit the needs of their particular agreements.

Companies may also consider including provisions that expressly contemplate the appointment of a procedural arbitrator in certain circumstances, as well as the negotiation of fees with the provider in the event of a mass arbitration.

Terms to Consider

Batching

Companies may consider provisions that require "batching" similar claims, to be adjudicated together in groups (e.g., 25, 100). However, the Northern District of California recently rejected a batching provision as unconscionable.[1] The provision, in this case, required one batch of cases be resolved before the following batch is filed, which the court held could result in unreasonable delays.

Fee-Shifting

Although there are limitations to the ability to shift fees and costs to consumers or employees, provisions that shift these fees and costs where claimants bring frivolous or bad-faith claims may be worth considering.

Small Claims Court

Companies may consider agreeing that claimants may file low-value claims in the small claims court in the jurisdiction where the claimant resides. While this approach removes the incentive of mass arbitration, it would also require the company to appear in these potentially far-reaching jurisdictions to resolve disputes.

Final Thoughts

While mass arbitration has gained significant traction in recent years, it is unlikely to continue indefinitely. Because mass arbitration is designed to prevent the resolution of disputes on the merits, arbitral institutions will likely continue to develop procedures to close the loopholes exploited by this tactic. Until then, revisiting your arbitration provisions with trusted counsel is crucial to protecting your company against mass arbitrations.

FOOTNOTES

[1] *MacClelland v. Cellco Partnership*, No. 21-CV-08592-EMC, 2022 WL 2390997 (N.D. Cal. July 1, 2022)

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