Alternatives
TO THE HIGH COST OF LITIGATION
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ADR Practice Special Report

Mass Arbitration Clauses: How Have They Fared So Far?

BY MATTHEW H. ADLER

> "Be careful what you wish for, lest you get it."
>
> —*Aesop's Fables*

* * *

For decades, representatives of business interests fought to place disputes, especially business-to-consumer ("B-to-C") disputes, into arbitration rather than court. A second front in this battle developed in which these same interests collided over whether the arbitration clauses in the B-to-C contract could also contain a ban on class actions or, in the words of some cases and clauses, a ban on "collective actions."

Those bans prevented consumers from joining with other consumers to bring claims in arbitration that they would be able to bring in court were they not constrained to arbitration. The result was, essentially, a rout. Again and again, courts upheld arbitration clauses over state law and other objections, and upheld the collective action bans within those clauses.

As a result, there was a genuine financial disincentive for both client and lawyer in pursuing grievances against businesses. The one-two punch of the arbitration agreement/class action ban meant that consumer recovery would be limited to small individual losses, and lawyer recovery would be unable to benefit from class-wide attorneys' fees.

The point was not lost on our courts. "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?" So wrote Justice Stephen G. Breyer in dissent in the Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*, which upheld an arbitration clause's ban on class actions despite an express state rule invalidating such bans. 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (available at https://bit.ly/4h2wfud).

Voicing the same sentiment in similar circumstances, Seventh U.S. Circuit Court of Appeals Judge Richard Posner wrote that "'only a lunatic or fanatic sues for $30.'" *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (available at https://bit.ly/4h1vvp3), cited in Justice Ruth Bader Ginsburg's *DIRECTV* dissent. *DIRECTV Inc. v. Imburgia*, 577 U.S. 47, 67 (2015) (Ginsburg, J., dissenting) (available at https://bit.ly/3BHrENP).

The step-by-step legal game between the plaintiffs' bar and business interests did not end there. Plaintiffs' lawyers started filing thousands of arbitrations at once, "individual" to be sure in the sense that there was no single, "collective" case number–but most frequently articulating the same legal and factual grievances as one another and often brought by the same (or same group of) counsel.

And just like that, businesses were facing the curse of what they had asked for, because now they had to pay filing fees and arbitrator fees

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CPR

CPR News

2025 Annual Meeting Registration Is Open

Registration is now open for the 2025 CPR Annual Meeting, on Wednesday-Friday, Feb. 5-7, in Miami.

"Calming the Waves: Managing Conflict with ADR," the meeting's title and theme, will offer 11 panels over two-and-a-half days, as well as a welcome cocktail reception, all meals, coffee/snack breaks, multiple networking opportunities, the Annual CPR Awards Dinner, and more.

The meeting will feature a keynote speech by Judge Rosemary Barkett, who sits on the Iran-U.S. Claims Tribunal in the Hague, Netherlands. She is also a judge ad hoc on the International Court of Justice. She previously served on the Eleventh U.S. Court of Appeals and was the first woman Florida Supreme Court Chief Justice.

The meeting will be held at the Miami Marriott Biscayne Bay, which is offering registrants discounted room rates. Full details on registering, including early bird discounts, and room reservations are available at CPR's 2025 Annual Meeting website at https://bit.ly/3Ca8bWc.

CPR anticipates providing CLE for New York and Florida. The CPR Institute has been certified by the New York State Continuing Legal Education Board as an Accredited Provider of continuing legal education in New York. For New York admitted attorneys, this course is non-transitional and for experienced attorneys only.

In past years, the CPR Annual Meeting has been approved for 10-12 New York CLE credits in the categories of Professional Practice; Cybersecurity Ethics; Diversity, Inclusion and Elimination of Bias..

Full CLE details and hardship provisions are available at the meeting link above, under FAQs.

In addition to Judge Barkett's keynote address, the seminars will address ethics, international and domestic arbitration, mediation, dispute prevention, and other topics for resolving commercial disputes effectively and efficiently. The panels will include "Dispute Prevention: Moving from Theory to Practice"; "Crisis Management ADR: Mediating the Existential Conflict"; "The Changing Face of International Arbitration in Latin America: Practical Considerations, Opportunities and Challenges"; "Refocusing on the 'Alternative' in ADR: Innovative Paths to Resolving Business Disputes"; "The Roberts Court's Treatment of the Federal Arbitration Act"; "Practicing Dispute Prevention: Proven Dispute Prevention Mechanisms for Avoiding B2B Disputes and Fostering Better Business Relationships"; "Bifurcation–Achieving Balance for the Efficient and Fair Resolution of Disputes"; "Mitigating Risks and Navigating Potential Disputes in Latin America," and "Dispute Resolution in the Tech Sector."

In addition, CPR's perennial Corporate Counsel Roundtable will return, and an ethics session also will be featured, ""Immunity and Independence: Outer Limits on Arbitrator Ethics: Where is the Line?"

More session details, including panelists, were being added at press time to the 2025 CPR Annual Meeting website linked above.

Sponsors receive many benefits, including free registrations, and are available at a variety of levels. Contact Helena Tavares Erickson at herickson@cpradr.org; the current updated sponsor list can be found on the meeting website linked above and directly at https://bit.ly/4fcnRXz.

The 2025 CPR Annual Meeting Steering Committee is led by Co-Chairs Effie D. Silva, General Counsel of Fresh Delmonte Produce Inc., based in Coral Gables, Fla., and Philip Greenberg, Deputy General Counsel of Veru Inc., a Miami biopharmaceutical company.

Alternatives

CPR

Editor: **Russ Bleemer**

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Back to School on Dispute Management

Why 'Winning' Is Not Always the Best Approach: A Lesson from the Big Three and the UAW

BY KATE VITASEK

In November 2023, the United Auto Workers announced on its website that a six-week labor conflict between the Big Three automotive manufacturers was officially over. The agreement was met with great sighs of relief—but only after the disruptive power-based moves from both parties led to an estimated $10.4 billion in economic net losses. Sara Powers, "Economic losses reach $10.4 billion in sixth week of UAW strike," *CBS News Detroit* (Nov. 2, 2023) (available at https://cbsn.ws/3NjL0ey).

Shortly after the strike ended, I wrote a Forbes article that both sides should have no illusions that this labor contract would bring long-term peace between the UAW and the automakers. Kate Vitasek, "Automakers and UAW Labor Dispute Ends, But Likely Only Temporarily," *Forbes* (Nov. 29, 2023) (https://bit.ly/4eCDg3h).

And I was right. The parties are back at each other's throats, this time with Stellantis—a conglomerate with several major auto brands, including Chrysler, Dodge, Fiat and others. Stellantis announced it had several suits against the United Auto Workers and 23 local units, saying the union's decision to strike mid-contract violates the terms of the contract reached last fall. David Shepardson and Ben Klayman, "Stellantis files new lawsuits against United Auto Workers union," Reuters (Oct. 7, 2024) (available at https://reut.rs/4eEbJ1v).

Why was I so confident?

The UAW and automakers have a predictable pattern of labor disputes that sets the precedent that adversarial tit-for-tat behaviors are not only acceptable–but expected.

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As an academic studying the art, science, and practice of highly collaborative business relationships, I submit the UAW and automakers could escape the cycle of adversarial behaviors with dispute prevention practices.

A Vicious Cycle Of Distrust

The UAW and automakers have a deep-rooted pattern of management-labor disputes dating as far back as 1913.

The Carriage and Wagon Workers Union launched initiatives to include production workers–not just skilled workers–in their fight for labor rights, rivaling the American Federation of Labor (AFL) long before the first motorized automobiles were accessible to the broader population. Jack W. Skeels, "Early Carriage and Auto Unions: The Impact of Industrialization and Rival Unionism," 17(4) *ILR Review* 566 (July 1964) (available at https://bit.ly/3Y6xZd4).

As cars became more mainstream, major production sites, such as Detroit, were in upheaval. In 1932, an incident where Ford laid off 80% of its workforce without unemployment benefits sparked a hunger march comprising 3,000 participants. Global Nonviolent Action Database, "Unemployed Detroit auto workers conduct Hunger March to protest Ford Motor Company's policies, United States, 1932" (available at https://bit.ly/3U28ZTm). Police attempts to disperse them resulted in four deaths, prompting another march of 60,000 participants (March 12, 1932). Pinching need paved the way for the rise of the UAW from its predecessor union and was formally founded following a convention in 1935.

Fast forward to the Flint Sit-Down Strike in 1948 (see the Library of Congress research guide at https://bit.ly/3ZY69m0), the 10-week International Harvester strike in the 1950s, solidarity efforts with the civil rights movement (see, e.g., "U.A.W. Strikes All Plants Of International Harvester," *N.Y. Times* (Jan. 14, 1971)(available at https://nyti.ms/3YjLqrA), navigating gas price spikes effect on auto industry workers in the 1970s.

The last major dispute? In 2019, 46,000 UAW members campaigned a strike against General Motors Co. for more than a month, resulting in a four-year contract that expired—serendipitously—in 2023. With each contract negotiation and ensuring labor disputes, the parties simply up the ante and set the precedence that their adversarial tit-for-tat behaviors are not only acceptable–but expected. Dan Rosenzweig-Ziff, "The autoworker strikes that changed America," *Washington Post* (Sept. 16, 2023) (available at https://bit.ly/3U2inGf).

A Broken Negotiation Process

The UAW-Automaker strikes are a classic example of how typical, old-school power-based negotiation approaches fuel a virtual circle of distrust.

Take, for example, UAW President Shawn Fain's livestream video to UAW members on Oct. 6.– three weeks into the strike. In the video (at https://bit.ly/4fdtTHp), Fain stresses "winning" and using "power" 10 times each and uses adversarial phrases such as "fight like hell," "stand up," "hammer," and "threat."

But Stellantis isn't an angel either. In fact, Stellantis Chief Executive Officer Carlos Tavares, has a track record of flexing his muscles with the UAW and its suppliers. For example, in 2022, the Detroit-based Butzel law firm criticized Stellantis for "strong-arming suppliers with staggeringly one-sided" contract language in 2002. Kate Vitasek, "Tips to Prevent and Avoid Adversarial Supplier Relationships,"

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Forbes (April 5, 2022) (available at https://bit.ly/4eHfC5I).

The result is that Stellantis is firmly at the bottom of the WRI (a report that measures the original equipment manufacturers' relationships with the supply base), with lots of litigation flying in both directions. Dave Andrea, "2024 WRI Study results: Stronger relationships bring major advantages," Plante Moran blog post (June 17) (available https://bit.ly/4eFdiw8).

If you were a company with the size and power of Stellantis, would you simply back down as the UAW flexes its muscles? The typical answer is "no" because the automaker's leadership would appear weak if it did not stand up to Fain and the union members.

And if you were the UAW with nearly 50,000 members, would you bow down to the automaker's management? Once again, the typical answer is "no" because the UAW leaders would also appear weak.

The result is a pattern of adversarial tit-for-tat behaviors that lead to an escalating dual each time a contract expires.

There is also a scientific reason the parties find themselves in an escalating dual. It is called game theory. University of Michigan Prof. Robert Axelrod's book, *The Evolution of Cooperation* helped put the concept of game theory on the map with his pioneering study of the prisoner's dilemma, studying the economic impact of choosing collaboration versus power-based approaches.

So what happens when parties choose to be adversarial and use their power? Axelrod describes this as tit-for-tat behavior. Simply put, if you are adversarial, expect your counterpart to be adversarial.

Axelrod's advice? The best tactics for "winning" are (1) Always return cooperation for cooperation, (2) Be fair with your partner, and (3) Don't try to be tricky and game the system for your benefit. The lessons are simple but very profound: Playing a game cooperatively to achieve a mutual goal is always better than playing it with self-interest in mind.

More on that below. But now that the UAW and Stellantis are back at it, rather than focus on classic dispute resolution of their suit, they should consider a more collaborative approach that could not only help them resolve their dispute but also lay a foundation for a strong, trusting relationship.

Collaboration Research

At a most fundamental level, neither side trusts the other. But how can you break the cycle of distrust?

Fighting? Strong-Arming? Try Collaborating

The goal: Escaping a cycle of recurring adversarial processes.

The setting: The auto industry. Stellantis versus the UAW.

The idea: Dispute prevention, including 'formal relational contracting,' breaks the pattern and gets ahead of a back story that has dictated the processes.

I submit one solution the automakers and the UAW could use is formal relational contracting, which was profiled in an HBR article, David Frydlinger, Oliver Hart and Kate Vitasek, "A New Approach to Contracts: How to Build Better Long Term Strategic Partnerships," *Harvard Business Rev.* (September-October 2019) (available at https://bit.ly/4f2cQaP), and further detailed in the book, David Frydlinger, Kate Vitasek, Jim Bergman, & Tim Cummins, Contracting in the New Economy (Palgrave Macmillan 2021).

A *formal relational contract* changes the nature of contracting by specifying mutual goals and establishing governance structures to keep the parties' expectations and interests aligned over the long term. Simply put, the parties replace negotiating with a contractual commitment and processes for collaborating, prioritizing a commitment to a healthy long-term relationship over the specific deal points.

Research into the art, science and practice of collaborative approaches dates back to the 1940s, when the mathematician John von Neumann and economist Oskar Morgenstern used mathematical analysis to model competition and cooperation in living things. John von Neumann and Oskar Morgenstern, "Theory of Games and Economic Behavior: 60th Anniversary Commemorative Edition" (Princeton University Press 2007) (available at https://bit.ly/4h5Feeg).

Interest in collaborative approaches grew when researchers John Nash, John C. Harsanyi and Reinhard Selten won a Nobel Memorial Prize in Economic Sciences in 1994. Their work inspired academics around the world to delve deeper into game theory. See definition on the Stanford Encyclopedia at https://plato.stanford.edu/entries/game-theory/.

Game theory is the study of the outcome of strategic interactions among decision makers. By using rigorous statistical methods, researchers can model what happens when people choose to cooperate or choose to take an aggressive, power-based approach to negotiation.

Many business leaders are taught strategies focusing on using their power and playing to win–often at the other party's expense. Kate Gibson, "4 Strategies for Shifting the Power Balance in Your Business," Harvard Business School Online *Business Insights* blog (Aug. 9, 2022) (available at https://bit.ly/3A1s1lR). In game theory, this is known as a zero-sum game, and it's an easy trap to fall into.

But not every game has a clear winner or loser. In economics, a win-win game is called a nonzero-sum game. In this sort of situation, people aren't fighting over whose slice of a pie will be larger. They're working to grow the pie for everyone.

A second dimension of game theory is whether people are playing a one-shot or a repeated game. Think of a one-shot game like going to the flea market: You probably won't see your trading partner again, so if you're a jerk to them, the risk of facing the consequences is low.

An interesting twist uncovered by studying repeated games is that when one party uses their power in a negotiation, it creates the urge for the other party to retaliate.

Robert Axelrod, who is a mathematician turned game theorist, coined this a "tit-for-tat" strategy. His research, perhaps best known in the book cited above, "The Evolution of

Cooperation," uses statistics to show that when individuals cooperate, they come out better than when they don't.

Leaving Money On the Table

Another Nobel laureate, U.S. economist Oliver Williamson, has offered negotiating advice that most would call a paradigm shift—and some would call heresy. That advice? Always leave money on the table – especially when you'll be returning to the same "game" again. Why?

According to Williamson, it sends a powerful signal of trustworthiness and credibility to one's negotiating partner when someone consciously chooses to cooperate and build trust. See Kate Vitasek, Karl Manrodt, Richard Wilding & Tim Cummins, "Unpacking Oliver—Ten Lessons to Improve Collaborative Outsourcing" (available at https://bit.ly/3Ua1Tfr) (report).

The opposite approach leads to lost trust and what the Nobel laureate economist Oliver Hart calls "shading." This is a retaliatory behavior that happens when a party isn't getting the outcome it expected from a deal and feels the other party is to blame. Oliver Hart & John Moore, "Contracts as Reference Points," Vol. CXXIII *Quarterly J. of Economics* 1 (February 2008). Simply put, non-collaborative approaches cause distrust and create friction, which adds transaction costs and inefficiencies.

The million-dollar question is whether collaborative approaches work in practice. And from my vantage point as a scholar, the answer is yes. In fields as diverse as health care to high-tech, I see growing real-world evidence backing up the insights of game theory. See, e.g., Kate Vitasek & Bill DiBenedetto, A New Day, New Way: The *Island Health—Hospitalist* Journey to Vested (available at https://bit.ly/488j2M9) (case study), and Kate Vitasek & Jeanne Kling, "The Innovators Dilemma: How *Intel* and *DHL* Drove a Paradigm Shift in Procurement" (available at https://bit.ly/3Ns58v3) (case study).

* * *

I submit it would work for the Big Three automakers and the UAW as well–if they choose to give it a chance.

Let's look at the Big Three–UAW relationship in the context of game theory. First, the relationship is a classic example of a zero-sum game with union and management pitted against each other as each party seeks to keep the most pie for their organization.

Second, the Big Three and UAW are in a repeated game in that they find themselves facing each other at the negotiation table with each contract expiration cycle. The way they behave in today's negotiation can and does impact future negotiations, leading to a classic negative tit-for-tat cycle, creating a predictable pattern with each party fighting harder with each contract renewal cycle.

The Big Three-UAW should face the hard fact they are in a repeated game: The Big Three need their employees, and the employees need the Big Three. And when they do this the next step should be to open their minds that the best way forward is through cooperation versus a series of spiraling power-based moves and countermoves.

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on a massive level. In *Wallrich v. Samsung Elecs. Am. Inc.*, discussed below, for example, filing fees exceeded $4 million. 106 F.4th 609 (7th Cir. 2024) (available at https://bit.ly/4eFElrd).

The back-and-forth dance continued: Businesses produced procedures designed to lower the costs and simplify the processes of "mass arbitration." The result was mass arbitration clauses, sometimes inserted directly into the parties' contract and sometimes incorporated through the adoption of institutional rules, as leading arbitration institutions such as the American Arbitration Association, the International Institute for Conflict Prevention-CPR, [which publishes this newsletter], JAMS Inc., and New Era ADR designed clauses on mass arbitration.

The typical mass arbitration clause creates a "bellwether" class of cases, numbering from 10 to 20 to 50, depending on the clause, which must be heard before other cases progress in arbitration. The theory is that the results of the early bellwether sampling will influence settlement or the substantive outcome of the remaining cases.

As this article is written in the autumn of 2024, mass arbitration clauses are the focus of increasing litigation, just like their progeny–class action bans–had previously been vigorously litigated. The battle continues.

The results are so far divided, but do give some clue as to the types of clauses that are more, and less, likely to survive judicial review. Generally speaking, mass arbitration clauses appear to be on their way to being enforced, with tweaks along the way that have eliminated concerns that claimants will lose their cases for statute of limitations reasons. The results also suggest a coming circuit court split similar to the prior arbitration battles, which suggests that ultimately, there will need to be U.S. Supreme Court action.

Battle Over Legitimacy

> "And you may ask yourself, 'Well, how did I get here?'"
>
> —*Talking Heads, "Once in a Lifetime"*

* * *

The decades-long U.S. courts battle over the legitimacy of (i) mandated arbitration and then (ii) class and collective action bans within those mandated arbitration clauses has been covered at length in our legal literature. Only the highlights are reviewed here so as to set the stage for the examination of mass arbitration clauses.

Early arbitration jurisprudence centered around what has become known as the "savings clause" of the Federal Arbitration Act. While the act is a federal statutory commandment to enforce arbitration clauses, Section 2 recognizes that ultimately an arbitration clause is just a contract (albeit a federally favored one), and so provides that a court can invalidate an arbitration clause on the same basis as it would invalidate any other contract–e.g., fraud, lack of capacity, or violative of public policy.

That led to a series of cases in which states would pass laws stating that arbitration itself, in a B-to-C posture, violated public policy such that courts should simply refuse to enforce the

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arbitration agreement, on the basis of the Section 2 savings clause. See, e.g., *Marmet Health Care Center Inc. v. Brown*, 565 U.S. 530 (2012) (available at https://bit.ly/3Ab7Fqe) (West Virginia statute prohibiting arbitration of wrongful death cases against nursing homes struck down as incompatible with the FAA).

The courts made short work of that, finding that states could not simply categorize arbitration agreements as illegal merely because they mandated arbitration. This violated, so the courts held, the FAA's mandate by failing to put arbitration agreements on an "equal footing" with other contracts. See, e.g., *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (available at https://bit.ly/486nzig) ("Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts"); *Concepcion*, 563 U.S. at 339 ("courts must place arbitration agreements on an equal footing with other contracts"); *Rent-A-Cntr., W. Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (available at https://bit.ly/3Ynvdle) ("Section 2 of the FAA places arbitration agreements on an equal footing with other contracts").

These cases established the guiding principle that whatever may be the reason for striking down an arbitration agreement, it could not be the simple point that it was an arbitration agreement. There had to be more.

This became particularly clear in a number of cases that had their origin in California. In *Concepcion*, the California law contained something called the "*Discover Bank* Rule," from a case that banned bans: that is, the California Legislature made it a matter of state law policy that a ban on collective action, in a dispute resolution clause, violated California law. 563 U.S. at 352; see also *Discover Bank v. Superior Court*, 113 P.3d 1100 (2005) (available at https://bit.ly/4899bG4).

Notably, but ultimately without relevance to the judicial result, the ban-on-the-ban considered in *Concepcion* applied to both arbitration and litigation. The ban-on-bans did not, therefore, single out arbitration agreements. A ban on collective action in a dispute resolution clause that called for litigation violated the *Discover Bank* rule just as much as a collective action ban in an arbitration clause.

It mattered not. The Supreme Court, in an opinion by Justice Antonin Scalia, held that class actions were antithetical to arbitration and thus that the *Discover Bank* Rule violated the Federal Arbitration Act and the "liberal" federal approach to arbitration agreements that the Supreme Court established in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (available at https://bit.ly/4hl2S6H).

ADR in Batches

The controversial process: Mass arbitration.

The latest: After appearing to get past judges' scrutiny as a settlement option, a federal panel casts doubt.

The future: Tighter rules will cure the *Heckman v. Live Nation* October surprise. But will both sides get comfortable with the process?

Undaunted, the plaintiffs' bar tried again, and again in California. In *DirecTV*, the parties tried to relate back their law to *Discover Bank* notwithstanding the *Concepcion* holding, writing into their clause that if the "law of [the] state" would make class action waivers unenforceable, then there would be no arbitration at all. *DIRECTV*, at 577 U.S. at 50. The entire arbitration clause would be thrown out.

The Supreme Court would have none of that. Justice Breyer wrote that the parties "[i]n principle . …might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California including the *Discover Bank* Rule and irrespective of that rule's invalidation in *Concepcion*." *DIRECTV*, 577 U.S. at 54.

The problem was that in harkening back to *Discover Bank*, the DIRECTV clause was found to be as offensive to arbitration as was the *Concepcion* class action ban. Justice Ginsburg, in one of a notable series of dissents to the line of pro-arbitration/pro-ban cases, found this curious: "Pre-revolutionary Russian law, but not California's 'home state laws' operative and unquestionably valid in 2007? Makes little sense to me." *DIRECTV Inc.*, 577 U.S. at 64 (Ginsburg, J., dissenting).

This trend continued unabated, and not just in B-to-C cases. In *American Express Co. v. Italian Colors Restaurant*, a merchant doing business with AmEx sought to join with other merchants in an antitrust case against American Express, notwithstanding an arbitration clause with a class action ban. 570 U.S. 228 (2013) (available at https://bit.ly/4eZIAOx).

The merchant argued that it needed to file suit in concert with others in order to be able to afford an expert, which it argued was essential to its chances of success in the antitrust action. This argument invoked the "effective vindication" doctrine, in which obstacles to one's pursuit of federal rights should be cleared so that one's federal rights can "effectively" and properly be "vindicate[d]." Id. at 235.

Again, it mattered not: the Supreme Court, with Justice Scalia again writing for the majority, struck down the ban, stating, "Truth to tell, our decision in [*Concepcion*] all but resolves this case." Id. at 238. Justice Elena Kagan, in dissent, argued that this gave too little force to effective vindication, and observed of recent Supreme Court arbitration jurisprudence that "[t]o a hammer, everything looks like a nail." Id. at 252 (Kagan, J., dissenting).

Other cases followed, including *Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2018) (available at https://bit.ly/3Ubibox) (upholding a collective ban in statutory labor employment contract cases), and *Lamps Plus Inc. v. Varela*, 587 U.S. 176 (2019) (available at https://bit.ly/47EkhAS), in which, writing for a 5-4 Court, Chief Justice John G. Roberts Jr. reversed the Ninth Circuit's finding that even the absence of a ban could permit class action-style arbitration: "Class arbitration is not only markedly different from the 'traditional individualized arbitration' contemplated by the FAA, it also undermines the most important benefits of that familiar form of arbitration." 587 U.S. at 183.

In an extensive passage that will likely be replayed in the battles to come, especially as the courts consider the rights of "absent" litigants while bellwether cases proceed, Roberts went on at length as to why class arbitrations are so antithetical to arbitration itself:

> [I]t is important to recognize the "fundamental" difference between class arbitration and the individualized form of arbitration envisioned by the FAA. In individual arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." Class arbitration lacks those benefits. It "sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." Indeed, we recognized just last Term that with class arbitration "the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away and arbitration would wind up looking like the litigation it was meant to displace." Class arbitration not only "introduce[s] new risks and costs for both sides," it also raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class—again, with only limited judicial review.

587 U.S. at 184–85 (citations omitted).

The door slammed shut even more on challenges to these bans when consumer advocates sought, for a brief time won, and then lost, relief on this point at the administrative law level. In 2016, the Consumer Financial Protection Bureau issued proposed rule changes that would have invalidated class action bans in pre-dispute arbitration agreements between consumers and financial businesses. See CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court, Consumer Financial Protection Bureau (May 5, 2016).

The rules, however, never went into effect, a casualty of the change of presidential administrations and the opposition the rules would have encountered on Capitol Hill. On Nov. 1, 2017, President Donald J. Trump signed a joint resolution passed by Congress under the Congressional Review Act disapproving, and extinguishing, the CFPB's Arbitration Agreements Rule (see https://bit.ly/4e4OQ6a).

Undaunted by all of this, and in a possibly ominous sign of things to come, the Ninth Circuit recently poked its thumb in the eye of the *Concepcion* line of cases as applied to mass arbitration clauses. In *Heckman v. Live Nation Entertainment*, 2024 U.S. App. Lexis 27277 (Oct. 28, 2024) (available at https://bit.ly/48tIewN), the Ninth Circuit was so displeased by a particular set of mass arbitration rules, from an institution called New Era ADR, and which had been adopted by Live Nation for its ticket sales to consumers, that it resurrected the *Discover Bank* rule that had presumably been dead since *Concepcion*.

The Ninth Circuit panel held, "It may not be too much to say that this method of dispute resolution contemplated by New Era's Rules is 'unworthy even of the name of arbitration.' Id at *41 (internal citation omitted). Accordingly, the opinion states, "we hold .. . that the FAA does not preempt California's *Discover Bank* rule as it applies to mass arbitration." Id.

In a concurring opinion, Circuit Judge Lawrence Vandyke concluded that the FAA "just does not apply to the type of mass 'arbitration' contemplated by Live Nation's agreements." Id.

Thus, as this article goes to press, mass arbitration clauses appear to be per se invalid in the Ninth Circuit. That makes this very much a developing story.

The Dawn of Mass Arbitrations

> "I read the news today, oh boy. Four thousand holes in Blackburn, Lancashire
>
> —*The Beatles, "A Day in the Life"*

At a certain point, the plaintiffs' bar realized that challenging arbitration was a dead end, and challenging the class action bans in those arbitration clauses were just as dead an end–and so, rather than bring a single, collective action, they started filing hundreds and sometimes thousands of arbitrations at once.

From the standpoint of a class action lawyer, "mass" arbitrations preserved some of the attractive elements of the litigation class action structure, with an added bonus. If a plaintiffs' lawyer represented all of the many arbitration claimants in a mass arbitration, that lawyer could still be entitled to fees as part of a settlement or individual awards, and could coordinate the prosecution of the claims, as in court.

The defendant/respondent, meanwhile, would still be subject to huge risk if all cases broke against it—and this time, given that the actions were indeed "individual," without the procedural prerequisite of class certification. If a plaintiffs' firm files 4,000 individual cases, and by definition under the arbitration clause of each of those claimants' contracts with the respondent collective action is banned, then there is no class certification process to go through. Instead, there is, in a very real sense, an instant "class" staring down the barrel of the gun at a single respondent entity.

The advantages continue at the other end of the case: absent a judge, there is no need to go through a lengthy approval process in the event of a settlement and class petition. The agreement would simply be bilateral as between plaintiffs' lawyers and the business respondent.

But the real kicker, the previously hidden bonus to the class action bar, came with filing fees. In mass arbitration, and, notably, absent the more recent institutional rules concerning mass arbitration that are the subject of this article, the respondent business/employer is usually responsible for the significant majority of filing fees. Those fees can be massive. It is largely because of these filing fees that the institutions designed their mass arbitration clauses. See the next section below, Enter Mass Arbitration Provisions.

All disputes have expenses, of course, and in litigation a plaintiff must pay a nominal filing fee. But our courts exist as part of a publicly funded system and so do not have to be financed dollar-for-dollar by court users. Arbitration, by stark contrast, is a private affair. They are paid for by the parties who arbitrate. Arbitration institutions charge fees to administer the case, and arbitrators bill for the time they spend on the case. All of this is paid by party fees.

The game-changer was the imposition of huge fees on businesses in employment and consumer cases. Prior to the adoption of institutional mass arbitration rules, there was significant fee shifting to the respondent in institutional arbitration consumer and employment cases. For example, under the AAA's old Commercial Arbitration Rules, each

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individual paid a filing fee of $300, while the responding company paid a filing fee of $1,900 *per case.*

Businesses would on occasion challenge the draconian (to them) effects of fee shifting as the mass arbitration era dawned. But the fees were in the contract, and/or rules. Arbitration is a contract, and so these challenges consistently lost. See, e.g., *Abernathy v. DoorDash Inc.*, 438 F.Supp.3d 1062, 1067–68 (N.D. Cal. 2020) (available at http://bit.ly/3muRgGA) (upholding fee shifting where arbitration agreements contained a class action waiver, drivers filed more than 5,000 individual arbitrations, and the applicable arbitration rules required the drivers to pay a filing fee of $300 and DoorDash to pay a filing fee of $1,900 for each arbitration. The court granted the motion to compel arbitration and ordered DoorDash to pay more than $9 million in arbitration filing fees).

Similarly, in *Adams v. Postmates Inc.*, No. 19-3042 SBA, 2020 WL 1066980 (N.D. Cal. Mar. 5, 2020) (available at https://bit.ly/40gdYU2), the court rejected Postmates' claim of irreparable harm resulting from more than $10 million in arbitration filing fees, and chastised Postmates for challenging the class action waivers that they created.

Across the country in New York state court, in *Uber Techs Inc. v. Am. Arb. Ass'n Inc.*, 167 N.Y.S.3d 66 (1st Dep't 2022) (available at https://bit.ly/3U8A07l), a law firm filed more than 31,000 substantively identical arbitration demands with AAA on behalf of the Uber Eats customers against Uber. After the AAA invoiced it for more than $10 million for case management fees for a batch of 7,771 cases, Uber sued the AAA, claiming the fees were unlawful.

The court, in a comment that underscores the ironic realignment that is the subject of the present article, denied Uber's motion for a preliminary injunction, noting that Uber "made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision."

The consequences were obvious. Businesses that might have been comforted by being in arbitration instead of before a jury, and so could avoid jury awards, lengthy discovery and then appeal, all of a sudden found themselves faced with a significant up-front expense.

Plainly, something had to be done. What was the point of fighting all those arbitration battles from *Concepcion* through *Lamps Plus* if the end result was an exploding cigar? And so, it was back to the contractual dance that has characterized the back-and-forth between the corporate and arbitration bars these past few decades.

Now, instead of a battle about arbitration vs. court, or class action bans, or delegation clauses, there came a new frontier: mass arbitration provisions.

Enter Mass Arbitration Provisions

"We have met the enemy, and he is us."

—*Walt Kelly, "Pogo"*

* * *

We come back always to the mantra that "arbitration is a contract"—see *Moses H. Cone,* 460 U.S. at 24; *Rent–A–Cntr.,* 561 U.S. at 67; *Concepcion*, 563 U.S. at 339—and so, the business bar responded to mass arbitration not unlike the manner in which it responded to collective actions: by trying to control them through contract.

This broke down into two distinct paths: direct and institutional. In direct clauses, the particular consumer/employment contract addresses the possibility of mass arbitrations and imposes certain rules and processes. In institutional clauses, the contract simply refers to a particular arbitration institution's rules, which then apply.

An example of a direct clause is the Verizon Communications Inc. clause struck down in two cases considered below in this article, *MacClelland v. Cellco Partnership,* 609 F.Supp.3d 1024 (2022) (available at https://bit.ly/43WDNIk), and *Achey v. Cellco Partnership,* 475 N.J. Super. 446 (2023) (available at https://bit.ly/3UeZEaL).

Institutional clauses vary, not surprisingly, by institution. An excellent summary of earlier versions of certain institutional rules is set forth in Maximilian Zorn, "The Response: Divergent Approaches to Mass Arbitration, and the Effect on Practice in State and Federal Courts," 41 *Alternatives* 87 (June 2023) (describing at length the then-current mass arbitration rules of the AAA, JAMS and CPR). See the rules at AAA, CPR, JAMS, and New Era.

Both the American Arbitration Association and JAMS supplemented their Mass Arbitration Procedures in April 2024, and May 2024, respectively, to address the rising number of mass arbitrations and, in response, the increased reference in B-to-C contracts to institutional mass arbitration clauses. The updated institutional rules provide guidelines ranging from the definition of mass arbitration to the specific disputes process arbitrators may or may not determine.

The AAA defines mass arbitration as 25 or more similar demands, while JAMS sets the threshold at 75 or more. AAA's rules apply automatically if the threshold is met, whereas JAMS requires both parties to opt-in through a written agreement.

The AAA charges a flat $8,125 initiation fee and varying per-case fees, while JAMS charges a flat filing fee between $5,000 and $7,500, plus additional fees. Both organizations may appoint a Process Arbitrator or Administrator to handle preliminary procedural and administrative disputes. The AAA does not require a bellwether process but mandates mediation within 120 days, whereas JAMS does not mandate mediation or test cases.

Both sets of rules require affirmations or declarations of the accuracy of information for each case. See the comparisons of key current AAA and JAMS provisions at the top of the next page.

In contrast, CPR's Employment-Related Mass Claims Protocol requires the decisions from randomly selected initial round test cases to be used to provide examples for a mediator when 30 or more similar claims against one employer are filed. While the test cases go forward, the others stand by.

The proliferation of institutional mass arbitration clauses has, predictably, set off a new wave of litigation regarding the propriety of those rules. The second half of this article, which follows immediately below, turns to that current battlefield.

Updated Mass Arbitration Rules: Key 2024 Provisions

	AAA	JAMS
Definition of Mass Arbitration	25 or more similar demands for arbitrations filed against or on behalf of the same party or related parties where representation of all parties is consistent or coordinated across arbitrations. (MA-1(b)(i).)	75 or more similar demands for arbitrations, or such other amount as specified in the parties' agreement, filed against the same party or related parties by individual claimants represented by either the same law firm or law firms acting in coordination. (Procedure 1(c).)
Applicability of Rules	Apply if the threshold for mass arbitration is met. (MA-1(c)).	Apply only when both parties have opted into the application of the rules in a pre- or post-dispute written agreement. (Procedure 1(a).)
Fees	Business to pay (1) a flat initiation fee of $8,125; (2) for cases that proceed beyond initiation, per case fees of $325 per case for the first 500 cases, $250 per case for cases 501 to 1,500, $175 per case for cases 1,501 to 3,000, and $100 per case for case 3,001 and beyond; (3) arbitration appointment fee of at least $450 per case; (4) final fee of $600; and (5) arbitrator and mediator compensation. (MA-10(a)).	Business to pay (1) a flat filing fee of $7,500; (2) for cases that proceed beyond initiation, arbitrator appointment fee of at least $2,000 per arbitrator appointed; (3) arbitrator compensation; and (4) case management fee assessed at 13% of arbitrator compensation. (Procedure 7(a).)
Process Arbitrator	AAA may appoint a Process Arbitrator with authority to hear administrative or procedural disputes before the claims proceed to arbitration. (MA-6(c)).	JAMS may designate a Process Administrator to hear and determine preliminary and administrative matters in a Mass Arbitration. (Procedure 3(a), (e).)
Bellwether or Mediation Clause	Do not require parties in mass arbitration to follow a bellwether process. Rules provide for mediation within 120 calendar days from the established due date of the answer. Any party may unilaterally opt out of mediation upon written notification but AAA may, in its sole discretion, appoint a mediator to facilitate the parties' discussions. (MA-9).	Do not include mandatory mediation or test cases. Process Administrator may determine whether to batch, consolidate or otherwise group the demands or claims. (Procedure 3 (e)(vi).)
Affirmation Requirement	Requires mass arbitration claims to "include an affirmation that the information provided for each individual case is true and correct to the best of the representative's knowledge." (MA-2).	Each demand must be accompanied by a sworn declaration from counsel averring that the information in the demand is true and correct to the best of the representative's knowledge. (Procedure 2)(c).)

Recent Jurisprudence

"What are we gonna do now?"

—The Clash, "Clampdown"

* * *

Writing about the common law is always a daunting and humbling experience because what is written today can be gone or modified tomorrow–or even today. This is especially the case in an actively litigated subject matter like mass arbitration clauses—indeed, two of the cases discussed here were issued as this article was going to press. The cake is still being baked.

That stated, a number of cases in the past several years give a view of what has worked and not worked–for both sides–so far. Several themes emerge from court consideration of the substantive unconscionability of mass arbitration clauses:

- *Delay.* Does the bellwether approach, which creates a category of test cases that proceed before other cases, work a hardship on those who are not in the initial set (or, as the case develops, sets) of cases? Are there workarounds available to accommodate for the delay concerns?
- *Counsel.* By using common counsel as a basis for finding that cases qualify for mass arbitration rules, are consumers deprived of their right to counsel?
- *Precedent.* What precedential effect, and with what element of formality, should the early test cases have on later arbitrations?
- *Process.* Who decides battles about the applicability of mass arbitration clauses, the court or the arbitrator or a special arbitrator? And do delegation clauses come into play here?
- *Delay:* By definition, a bellwether provision builds delay into the process.

In cases governed by a "bellwether" standard, whether from the express language of the arbitration clause itself or from institutional rules, claims not selected for early treatment are compelled to wait their turn. If a case is not picked for the first bellwether group (one that, as the cases and rules show, varies by institution and/or contract clause but generally seems to run from 10 to 50), then that consumer simply has to sit and wait.

Maybe their claim will be called in the second group; maybe it will be called in the third or fourth group; maybe it will not get called at all because the bellwether system will have "worked" in that the test cases lead to a settlement.

All of those are potential outcomes, but the one very real and immediate outcome is that mass arbitration means that the "mass" of cases is not heard immediately.

This has provoked concerns, invalidations of certain rules, and fixes. The concerns were set out at length in a case that became a leading touchstone of challenges across the country to mass arbitration clauses: the Northern District of California's 2022 decision in *MacClelland*, cited above.

MacClelland did not concern an "institutional" mass arbitration clause, but, rather, a clause crafted by Verizon. The Verizon customer contract contained a bellwether provision which applies when "25 or more customers initiate notices of dispute with Verizon Wireless raising similar claims, and counsel for the Verizon Wireless customers bringing the claims are the same or coordinated for

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these customers." *MacClelland,* 609 F.Supp.3d at 1040.

In that instance, the claims would proceed in batches of 10, with five selected from each side, "to proceed first in arbitration in a bellwether proceeding." The rub was that the other cases just sat there: "[T]he remaining cases shall not be filed in arbitration until the first ten have been resolved." From there, the cases would proceed, 10 by 10, "until the parties are able to resolve all of the claims, either through settlement or arbitration." And if any party tried to get around this, "[a] court will have authority to … enjoin the mass filing of arbitration demands against Verizon." Id.

California's Northern District found Verizon's arbitration provision "unconscionable" for two related reasons of delay. First, while the cases were proceeding on the arbitration ark 10 by 10, the rest just sat there; and second, they sat there while the limitations period on their claims kept running.

As to the first point, the court noted that based on AAA statistics "showing that the average disposition time for an arbitration takes a little under seven months, Plaintiffs calculate that it would take approximately 156 years to resolve the claims of all of Plaintiffs' counsel's clients." Id.

As to the second point, "the provision is pregnant with the risk that claims will be effectively barred when coupled with the statute of limitations" since "the Agreement expressly reserves Verizon's right to raise a statute of limitations defense in arbitration." Id. at 1042.

One year later, the New Jersey Appellate Division followed *MacClelland* to the letter in rejecting a virtually identical Verizon clause on unconscionability grounds. *Achey*, 475 N.J. Super. at 459. The same Verizon clause was at issue, with the bellwether being triggered by common counsel and common claims, and the arbitrations then proceeding in batches of 10. As with *MacClelland*, there was no tolling provision.

The N.J. Appellate Division opened its analysis by noting that a consumer arbitration agreement is by nature a "contract of adhesion" and so "requires further analysis of unconscionability." Id. at 455. From there, the court relied heavily on the California federal court *MacClelland* case: "Our decision in this matter is guided by *MacClelland* as we find its reasoning sound and the result equitable." Id. at 456. The Appellate Division took special offense at the delay in the non-bellwether claims, finding that "the same concerns addressed by the *MacClelland* court underlie our decision here." Id. at 457.

Recognizing that delay can be a problem, and delay without tolling the limitations period a problem on steroids, other mass arbitration rules attempt to address those issues, and have found judicial success. The *MacClelland* court itself distinguished its holding from that of an early mass arbitration case from the same court. *MacClelland,* 609 F.Supp.3d at 104.

In that earlier case, *McGrath v. DoorDash*, the bellwether provision had required that the cases would "be resolved within 120 days of the initial pre-hearing conference." No. 19-CV-05279-EMC, 2020 WL 6526129, at *4 (N.D. Cal. Nov. 5, 2020) (available at http://bit.ly/3KCNgvM). Additionally, a claimant could opt out after an initial 90-day mediation period. Id. Unlike the *DoorDash* clause, the Verizon clause at issue in *MacClelland* and *Achey* had neither a quick resolution nor an opt-out built into its mass arbitration provisions.

By sharp and revealing contrast, New York's Southern District, in a 2024 case, approved a mass arbitration clause where the time frames were quick and the claimants were able to opt out. *Brooks v. Warnermedia Direct*, No. 23 Civ. 11030 (KPF), 2024 WL 3330305 (S.D.N.Y. July 8, 2024) (available at https://bit.ly/4hdoAJM).

In the case, HBO Max updated its Terms of Use to switch arbitration institutions to National Arbitration and Mediation, or NAM, from the AAA. The central issue in the case was whether there was assent to this change, an issue on which the court ultimately ruled required further factual discovery.

The court did rule, in issues common and important to the continuing mass arbitration jurisprudence, that parties can under certain circumstances bring on mass arbitration rules in midstream, and that reference to the AAA rules thus incorporates the rules into the arbitration agreement. Id.

Central to the present article, the court then turned to whether the NAM rules would be substantively fair if the evidence ultimately favored the finding that the consumers somehow—through their use or otherwise of HBO Max—accepted the NAM terms. Id. The plaintiff consumers, predictably, relied on *MacClelland*, and argued that the clause was unfair because the bellwether grouping meant that many claims would expire for limitations reasons. The Southern District rejected this argument:

> The arbitration procedure set forth in the NAM Agreement is a far cry from that of *MacClelland.* For instance, the NAM Agreement's arbitration procedure allows

The Mass Scope

While the accompanying article focuses on the specifics of mass arbitration clauses, and which provisions have and have not been upheld, the court battles have been broader.

Almost every case involves a dispute as to proper notice and offer/acceptance, since many of the mass arbitration clauses are of more recent vintage than the consumer agreements themselves, and so have been grafted on midstream. These instances fall under the category of "procedural unconscionability" and reduce to the question of whether the parties actually made a mass arbitration agreement.

Another relatively common feature of these cases is the degree to which the parties are deemed to have incorporated institutional rules, since the rules of the leading institutions now include mass arbitration provisions.

A third feature is the degree to which delegation clauses—which allow the arbitrator to determine arbitrability (that is, whether the parties agreed to arbitrate in the first place)—allow the arbitrator to make determinations as to the mass arbitration.

All three of these are beyond the scope of the present article but are worth watching as this debate develops as future cases on the validity of mass arbitration clauses are highly likely to contain at least one of these three procedural elements.

—By Matthew H. Adler

> fifty claims to proceed in the first round, one hundred claims to proceed in the second round, and two hundred claims to proceed in the third round, meaning many more arbitrations would occur in a much quicker timeframe than pursuant to the operative procedure in *MacClelland*. … The NAM Agreement thus presents less risk that the resolution of claims will be unduly delayed. And while the *MacClelland* court was concerned that delays could lead to some plaintiffs' claims becoming time-barred, there is no such risk here, as the NAM Agreement tolls the applicable statute of limitations as soon as a consumer files a [notice of dispute].

Id.

Similar to the SDNY *Brooks* decision, California's Northern District returned to the subject of delay in *Silva v. Whaleco*, No. 24-cv-02890-SK, 2024 U.S. Dist. LEXIS 187951 (N.D. Cal. Oct. 10, 2024) (available at https://bit.ly/3NLg1Im). The *Silva* arbitration clause "batched" cases where 25 or more arbitration demands "of a substantially similar nature" were filed by the "same firm or group of law firms." Id. at *15 n.3. In that situation, the AAA would "administer the arbitration demands in batches of 100 Arbitration Notices per batch … concurrently." Id.

The word "concurrently" served as the saving factor for this mass arbitration clause. Because the batches would be administered concurrently, the court found the *Silva* clause distinguishable from bellwether clauses that "delay litigation for the next batch of litigants." "Courts found those bellwether provisions to be unconscionable because litigants could not prosecute their claims until earlier groups of litigants had resolved their claims, and thus, this system created undue delay and caused an a priori chilling effect." Id. at *15.

By contrast, the concurrent batching "eliminat[es] any concern that litigants' claims will be stalled until prior batches of claims are resolved." Id. at *15. The court thus distinguished both *MacClelland,* cited above, and *Pandolfi v. AviaGames*, No. 23-CV-05971-EMC, 2024 WL 4051754 (N.D. Cal. Sept. 4, 2024) (available at https://bit.ly/4faW89d), discussed below.

The lessons to be learned from these cases have been incorporated into more contemporary arbitration rules. To survive review, perhaps even in California (note the *MacClelland/McGrath* difference there), a bellwether provision should provide for (a) an opt-out provision; (b) a strict time frame for the arbitrator(s) to decide the case; and (c) the tolling of all non-batched claims while they wait in line.

Right to Counsel: What makes for "mass"?

One defining characteristic is the nature of the claim itself. Mass arbitration clauses generally define "similar" claims as a qualifying aspect for mass treatment. But the clauses usually do not stop there, and go on to include in the qualifying criteria for "mass" treatment the identify of claimants' counsel.

Where counsel is the same for thousands of claims, or even "coordinating" such claims with others, certain rules and clauses count this toward mass treatment.

At a practical level, this makes great sense, as it simply reflects the reality that plaintiffs' firms coordinate mass filings. Thousands of filings do not happen by accident or at random. But certain courts have found that the qualifying criteria of common counsel can be a problem.

A claimant who may want Lawyer A to represent him/her/them, but who realizes that Lawyer A is "common" to the thousands of others who are bringing arbitration claims, is faced with a choice: go with Lawyer A and qualify for commonality and thus mass treatment, or pick some other lawyer so as to avoid commonality and mass arbitration?

In a recent case, *Pandolfi v. AviaGames*, 2024 WL 4051754, linked above, California's Northern District found this choice troubling. Most of the *Pandolfi* discussion is taken up with the interaction between the delegation clause and the bellwether mass arbitration clause, but toward the end of the decision, the court set its sights on the bellwether clause in particular.

The clause was a hybrid of a customized, ad hoc clause combined with the AAA's Supplementary Rules for Multiple Case filings. The particulars were (a) a number; (b) a commonality requirement; and (c) similar counsel. Specifically, the mass arbitration rules applied where there were "(25) or more similar claims are asserted … *by the same or coordinated counsel or are otherwise coordinated*." Id. at *7-8 (emphasis added).

The *Pandolfi* court took issue in particular with the coordinated counsel requirement: "As Plaintiffs argue, to avoid the bellwether provision, players would have to find different counsel, which affects the right to counsel of their choice or indeed, the ability to find any counsel at all." Id. at *29.

The court found that this can be a problem especially "where the individual claims are small (as consumer claims often are)," and so "it may be difficult to find an attorney who represents only a single or small number of similarly situated clients." Id. As of the time of this publication, no other courts have implemented the *Pandolfi* ruling and precedent.

The *MacClelland* and *Achey* decisions discussed above also recited, but did not deal extensively with, the choice of counsel issue (focusing instead, as noted, on the delay issue). This suggests that even if the delay issue is ameliorated through the fixes identified above such as tolling, opt-out and strict time limits, the choice of counsel issue can remain as a block to mass arbitration clauses.

Based on the progression of these cases through the courts, it may ultimately be fruitful to eliminate counsel entirely as a criterion for mass treatment, and focus merely on the identity/similarity of claims.

Precedent: The practical point of a bellwether provision is to provide guidance as to future decisions in "similar" cases. That is why the initial cases are sometimes referred to as "test" cases.

Certain dispositive legal or factual issues might be clarified. Claimants may see how they have to amend certain claims. Respondents may assess their exposure. Issues such as damages, standing, limitations periods, and other defenses may be clarified. Dipping a toe in the arbitral waters is intended to lead to greater clarity as the bulk of the cases may proceed.

But arbitration is not court. There is no binding precedential authority in arbitration. At the most basic legal level, there is no grounds for requiring the arbitrator(s) in cases 51-100 to rule in the same manner as the test cases in batch 1-50 were decided.

This is not the Eastern District of Pennsylvania being beholden to the Third Circuit–or even showing deference to another E.D. Pa. judge. And, further, Chief Justice Roberts'

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warning in *Lamps Plus*, about adjudicating absent members' claims in arbitration remains a relevant concern. See *Lamps Plus*, 587 U.S. at 184–85 (available at https://bit.ly/47EkhAS).

These issues were featured in a 2023 decision (preceding the federal circuit court opinion cited above), *Heckman v. Live Nation Ent. Inc.*, 686 F. Supp. 3d 939 (C.D. Cal. 2023) (available at https://bit.ly/3Ug9hG9). California's Central U.S. District Court rejected an institutional clause that gave "Precedent" great force. The clause, by a new institutional player, New Era ADR, provided for an initial selection of "three bellwethers," one each from the parties and one by a neutral. From there:

> When significant factual findings and legal determinations have been made in one or more proceedings on the platform ("Lead Decisions"), New Era ADR affiliated neutrals may apply these determinations in the same manner and with the same force and effect to the Common Issues of Law and Fact contained in other proceedings. … Such determinations made from the Lead Decisions are known as "Precedents."

Id. at 960.

This was too much for the court, which found the definition of Precedent to be "vague" and the power given to the arbitrator to apply "Precedent" to be overly "discretionary." Id. at 962. "The potential due process concerns associated with adjudicating thousands of claims on the basis of vague 'Precedent' at the sole discretion of the neutral are notable given the lack of other procedural safeguards present in Multi District Litigation (MDL) rules and class actions. For instance, the Rules do not provide notice to interest[ed] parties (the arbitrations are private) or an opportunity for them to be heard. There is no process for appointing leadership or impartial [decisionmakers] making determinations as to adequacy of counsel." Id.

The court found these issues to be exacerbated by the absence of an opt-out clause. It is one thing to be bound by "precedent" in a case not one's own, and quite another to then be forced to remain there without the ability to escape into a private arbitration of one's own.

Affirming this decision in October 2024, the Ninth Circuit zeroed in on the "precedent" feature. See *Heckman v. Live Nation Entm't*, cited above. "It is black-letter law that binding litigants to the rulings of cases in which they have no right to participate–let alone case[s] of which they have no knowledge–violates basic principles of due process." Id. at *26.

The court rejected Live Nation's defense that this was no different from MDL rules ("The comparison is inapt, as a quick review of MDL procedures makes clear," id. at *27, as well as Live Nation's defense that the arbitrator did not have to apply precedent, and its application was instead "[d]iscretionary[:] "It is true that the Rules provide that an arbitrator 'may' apply the 'precedent' created by the decisions in the bellwether cases. … However, it is obvious that anything more than an occasional failure to apply precedent established in the bellwether cases would defeat the very purpose of the mass arbitration protocol." Id. at *28.

The Ninth Circuit's harsh language may have been influenced as well by several unique features of the New Era fact pattern. The Ninth Circuit noted that Live Nation's lawyers were involved with New Era's rules: "While the parties dispute the extent of their collaboration, it is undisputed that New Era and Defendants' attorneys, Latham & Watkins LLP, have shown 'a remarkable degree of coordination.'" 2024 U.S. App. LEXIS 27277 at *8. The Court then noted that the rules were "inconsistent, poorly drafted, and riddled with typos, and that Live Nation's counsel struggled to explain the Rules at oral argument." Id.

From there the Ninth Circuit then took the opportunity to take the New Era agreement completely out of the protection afforded arbitration agreements since the *Concepcion* line reviewed above in the "Battle Over Legitimacy" section of this article. To the Ninth Circuit, the New Era clauses were so bad that it wasn't an arbitration agreement at all, and, since not, therefore outside FAA protection: "the FAA simply does not apply to and protect the mass arbitration model set forth in Ticketmaster's Terms and New Era's Rules." Id. at *39.

One could fairly read the majority opinion as being restricted only to overbearing and unfair mass arbitration clauses such as New Era's, and not to all of mass arbitration. Judge Vandyke's concurring opinion in *Heckman* stakes out more aggressive ground, and would invalidate all mass arbitration agreements on the basis that they are not the type of "arbitration" that qualifies for FAA protection and preemption:

> The scheme that New Era has created, which among other arbitration novelties includes "bellwether cases" and "batch proceedings," is an entirely new form of dispute resolution *intentionally designed* to avoid individual, bilateral adjudication of claims—exactly the attributes of arbitration the Supreme Court in *Concepcion* recognized that the FAA protects. Supreme Court precedent thus leaves no doubt that New Era's system of collective arbitration is not what Congress set out to protect in the FAA.

2024 U.S. App. LEXIS 27277 at *6–47 (Vandyke, J. concurring)(emphasis is in the opinion). See New Era' response in the box on the following page. Live Nation has since moved for rehearing in the Ninth Circuit. In its petition for rehearing, Live Nation concentrates on those portions of the opinion which may suggest that all mass arbitration procedures are invalid and outside of the FAA, and argues that the holding "threatens to block parties from adopting sensible measures to address the new phenomenon of mass arbitration filings." Live Nation cautions against an interpretation of the holding which strikes down only New Era's mass arbitration clause, arguing instead that the decision creates "massive uncertainty over whether and how the FAA protects" any mass arbitration clause, and that there is a "major point of uncertainty" as to whether the decision goes "beyond New Era's mass arbitration protocols." Petition at 1, 12, 13.

The Precedent provision seems isolated for the present to the *New Era* institutional clause, and that clause is unlikely to be used again given the Ninth Circuit's ruling. It may be that by giving formality to "precedent," New Era simply put in writing what all other clauses anticipate: that precedent, whether or not we capitalize it as a defined term in mass arbitration rules, will play a role.

To instead make that power express and binding can, as *Pandolfi* shows, offend due process and indeed the very nature of arbitration, which is still held to be a "private" process. One should therefore not expect future clauses to give express binding authority to "Precedent." As with the *Pandolfi* decision, other courts' interpretation of *Heckman* in their own cases have yet to arise.

New Era ADR Slaps Back

Unsurprisingly, since the recent Ninth Circuit U.S Circuit Court of Appeals mass arbitration decision calls into question its entire business model—at the very least on the West Coast—New Era ADR cofounders issued a statement. "The Ninth Circuit Got It Very Wrong in *Heckman v. Live Nation*," *Law.com* (Nov. 4) (available at https://bit.ly/3YGbuw3).

New Era was unblinking in restating its mission as one which attacks plaintiffs' firms strategy in forcing settlements through high filing fees, saying that it has "been clear that New Era's solution for mass arbitrations disincentivizes the financial gamesmanship where the sole strategy is leveraging filing fees to force settlements regardless of a case's merits."

New Era's attack on the decision takes aim at both plaintiffs' firms and New Era's institutional competitors. It states, "The Ninth Circuit parroted arguments directly from plaintiffs' counsel with a vested financial self-interest in keeping the case in court or a legacy arbitration forum."

New Era denied in particular that its rules engage in batching, stating instead that "New Era administratively groups cases based on (1) common issues of law and fact and (2) whether the same law firm or a coordinated group of firms brings the cases." One might struggle to distinguish this from "batching" of "bellwether cases."

As noted in the accompanying article, New Era's unique rules on "precedent" in its bellwether cases served as the primary basis for the Ninth Circuit's finding that the New Era clause is "substantively unconscionable."

Also unblinking in its defense of its precedent clause–which is unique among the clauses surveyed in the accompanying article–New Era states "not only does each and every claimant have an opportunity to argue that precedent shouldn't apply to their case, but each case is further considered individually by an arbitrator to determine whether precedent should apply."

One could argue that this rather begs the question, unpresented by any other institution's mass arbitration clause, as to whether the precedent feature should exist in the first place and whether it is necessary to otherwise accomplish the goals of mass arbitration.

We can expect to see these defenses arising in future litigations regarding New Era clauses, especially if outside the Ninth Circuit where *Heckman* would not automatically bind the district court, as well as in any cert. petition Ticketmaster may file. Going forward, however, it seems unlikely that institutional clauses will contain the "precedent" feature.

—By Matthew H. Adler

PROCESS: While not as neatly and cleanly categorized as such issues as timeliness, there appears to be significant remaining tumult regarding what can broadly be described here as procedural issues in mass arbitration. At a basic level, these concern a problem endemic to arbitration: *Who* decides *what* issue?

Historically, this question has been answered as "courts decide arbitrability, arbitrators decide process, unless the parties delegate all issues to the arbitrator." See *Prima Paint v. Flood and Conklin Mfg. Co.*, 388 U.S. 395 (1967) (available at https://bit.ly/3NvaqpG) (establishing process/arbitrability divide), and *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (available at https://bit.ly/4f8UJ2W) (establishing delegation principle so long as the delegation clause is clear and precise).

Where does mass arbitration fall on this continuum? In holding—or not—parties to mass arbitration clauses, are courts making a ruling on arbitrability itself? Or is mass arbitration simply a process issue that can be referred to the arbitrator pursuant to the now nearly universal delegation clauses inherent in most business to consumer contracts and institutional arbitration clauses?

Two 2024 cases, both from influential courts, shed some, but not great, light on this question, and seem to land on the discretion given arbitral panels. In *BuzzFeed Media Enterprises Inc. v. Anderson*, No. 2023-0377-MTZ, 2024 WL 2187054 (Del. Ch. May 15, 2024) (available at https://bit.ly/3C12WrG), the Delaware Court of Chancery considered in part the AAA's Rules for Multiple Case Filings, which allowed for a "Process Arbitrator" and a "Merits Arbitrator." The rules therefore divided even a "delegated" case into process and merits categories. While not the central thrust of the case, the Chancery Court appeared to approve of this division. Id. at *10, n. 112.

A different process question arose in the Seventh U.S. Circuit Court of Appeal's recent 2024 ruling in *Wallrich v. Samsung Electronics America Inc.*, 106 F. 4th 609 (7th Cir. 2024) (available at https://bit.ly/4hcXUIM). *Wallrich* is a curious case. It gets to the correct result, at least in this author's mind, but only after following two circuitous routes.

First, strange for a decision that rests on the intricacies of the arbitration contract, the Seventh Circuit first held that claimants had failed to demonstrate that *they* were parties to an arbitration agreement with Samsung. There was no question, including by Samsung, that Samsung's terms and conditions required arbitration over any disputes between the company and a consumer purchasing its product.

But in this particular case and on the particular evidence submitted to the court, the Seventh Circuit found that no consumer had submitted evidence that that consumer, in particular, was bound to the agreement–or was even a consumer. "The consumers could have submitted almost anything to meet their burden of proving the existence of an arbitration agreement. For example, they could have submitted receipts, order numbers or [purchase] confirmation numbers. … [or] declarations. … They did not." Id. at 619.

The Seventh Circuit could have ended the case right there since the plaintiffs/claimants had brought the suit as one to compel arbitration and the court found the absence of any such binding agreement. Instead, the court pressed on, in a paragraph beginning with "Even if," and found that even if the parties had an agreement to arbitrate, Samsung did not breach it by refusing to pay its share of the filing fees. Id. at 620.

To get to that result, the Seventh Circuit took another curious route. According to the court, the parties had a delegation clause which allowed the AAA to decline to exercise jurisdiction and instead terminate the action. That delegation clause was found in the parties' adoption of institutional rules, and so, pausing right there, *Samsung* is a strong and recent endorsement for this modern three-way bank shot: (a) the terms and conditions in a consumer contract (b) may themselves adopt institutional rules which (c) are then applied in a mass arbitration context.

To be clear: at no point in the bilateral consumer/Samsung contract did any consumer

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opt for the AAA mass arbitration procedures. Those rules came in indirectly. (This highlights an important distinction between the JAMS and AAA rules: JAMS requires express adoption of its mass arbitration rules.)

The odd thing is that the court did not need to operate on delegation clause principles here. A delegation clause eradicates the classic *Prima Paint* distinction by which courts decide arbitration jurisdiction while arbitrators decide procedures. *Prima Paint*, 388 U.S. at 403–04.

Here, at least if one gets to the "Even if" portion of the decision, there was no question of arbitrability. The case was arbitrable. From there, the case turned simply on the AAA's interpretation of its own rules, which, again, the AAA has power to do, delegation clause or not.

What the AAA decided to do was nothing—or, more particularly, the AAA decided *not* to press Samsung to pay its share of the fees. Instead, it exercised its discretion at several stages, all as permitted expressly by its rules, with the end result being that it terminated the case:

> The arbitration agreement allegedly entered into between Samsung and the consumers delegated threshold arbitration fee disputes to the AAA. The parties thus bargained for the AAA's discretion over the payment of administrative filing fees, including the consequences that would stem from a party's refusal to pay those fees. After Samsung refused to pay its fees, the AAA, in line with its rules (which it applies in its discretion) allowed the consumers to advance Samsung's fees. If the consumers had advanced the fees, Samsung would have arbitrated the merits of the consumers' claims. However, the consumers declined. The AAA then could have stayed the arbitration, as requested by the consumers, but it chose not to. Instead, it terminated the proceedings, opening the door for the consumers to pursue their claims in district court.

Wallrich, 106 F. 4th at 620.

This the consumers did not like: They pushed the court to push Samsung to arbitrate, no doubt so that the sword of Damocles of $4 million in fees before the case even got started could continue to dangle over Samsung's corporate head. The Seventh Circuit refused to order arbitration:

> Rather than take this route [of pursuing their claims on the merits in district court], the consumers sought an order compelling Samsung to arbitrate and to pay the required fees. But this request was outside the district court's authority. Samsung and the consumers' arbitration proceeded in line with their agreement. The AAA considered the dispute and terminated the arbitration within its discretion. At that point, arbitration was complete, and the district court did not have the authority to flout the parties' agreement and disturb the AAA's judgment.

Id.

The Seventh Circuit cited to cases from other circuits which allowed the AAA to terminate an arbitration for non-payment of fees instead of making the other party pay those fees and then taxing any result to the final award. Both *Dealer Computer Servs. Inc. v. Old Colony Motors Inc.*, 588 F.3d 884 (5th Cir. 2009) (available at https://bit.ly/407doIf) and *Lifescan Inc. v. Premier Diabetic Servs. Inc.*, 363 F.3d 1010 (9th Cir. 2004) (available at https://bit.ly/3YrP2YG) approved of the AAA's choice in those cases to simply end the arbitration.

Both those cases allowed AAA to terminate the arbitration upon nonpayment of fees rather than force the arbitration to go forward. The Seventh Circuit declined to distinguish those cases on the basis of a "means test" argument, rejecting the consumers' argument that since Samsung could have afforded the $4 million, it should have been made to pay that amount.

In one of the more ironic lines of modern arbitration jurisprudence, the Seventh Circuit concluded: "The Federal Arbitration Act does not grant the consumers an unfettered right to arbitrate." *Wallrich*, 106 F. 4th at 621.

This line must surely drive plaintiffs' lawyers to distraction. Consumers had been fighting for more than 20 years to *avoid* arbitration, only to be forced repeatedly by SCOTUS and lower court precedent not only into arbitration but into individualized arbitration.

Now, having found what they thought was a favorable procedural vehicle within arbitration–the prospect of "mass" filing fees to be held over the head of those who had fought so hard for so long for arbitration–consumers and their representatives were once again defeated, this time by the AAA's exercise of jurisdiction within its particular rules.

Wallrich thus stands as a recent and powerful decision by an influential circuit in favor of the business community still being able to limit its potential exposure in mass arbitration decisions. From a business perspective, the ship held: the clause allowing the AAA to shut down the arbitration and kick the consumers to court was upheld.

This obviously counsels in favor of including a reference to institutional rules in one's Terms and Conditions, and also, of course, of having those T&Cs afford leeway when the specter of massive filing fees rears its head.

All that stated, Samsung's victory may be viewed as both lucky and pyrrhic: lucky in that the AAA could just as soon have exercised its contractual discretion and required Samsung to pay up, and pyrrhic since by winning on the arbitration fee issue, Samsung could wind up back in district court in a class action.

In the *Brooks* case discussed above, the Southern District of New York distinguished *Wallrich*. HBO Max argued that *Wallrich* supported "its position that the Court may not order it to pay AAA's registration fees." *Brooks*, 2024 WL 3330305, at *6. Since the AAA in *Wallrich* had, as just seen, terminated the case upon non-payment, the lower (and reversed) court in *Wallrich* had, in *Brooks*' words, "represented an end-run around how the AAA had chosen to apply its own rules." Id. at *7.

By contrast, "[h]ere, the AAA made it clear that it remains available to administer the parties' arbitrations. … Accordingly, an order compelling the parties to proceed to arbitration in accordance with the AAA's rules would not circumvent the AAA's interpretation and application of its own rules in its administration of the instant dispute." Id.

Taken together, the 2024 decisions in *Wallrich* and *Brooks* show that substantial power resides in the institutions and, in particular, on their discretion regarding whether and how to proceed when fees are not paid.

Consultation Period-Offer of Judgment

One potentially quite powerful feature of the new mass arbitration clauses has not yet been considered by the courts: the combination of a required consultation period with an offer of judgment. Consider this excerpt from a current arbitration clause used by Roku, a streaming services technology company, in its customer contract:

> **C. Required Informal Dispute Resolution.** Except for IP Claims (defined in Section 1(D)) and Claims requiring a temporary restraining order, if either of us has a Claim against the other, both of us must first attempt to resolve the Claim informally before the Claim may be brought in arbitration. You and Roku will make a good-faith effort to negotiate for 45 days towards the resolution of any Claim, or for a longer period as mutually agreed in writing by you and Roku, (**"Informal Resolution Period"**) from the day you or Roku receive a written notice of a Claim from the other party (a **"Claimant Notice"**) meeting the requirements described below.
>
> * * *
>
> The Informal Resolution Period is designed to allow the party who has received a Claimant Notice to make a fair, fact-based offer of resolution if it chooses to do so. During the Informal Resolution Period, you and Roku will participate in an individual meet-and-confer (**"Meet-and-Confer"**) in person or via teleconference or videoconference. The Meet-and-Confer will address only the Claims between you and Roku. If you are represented by counsel, your counsel may participate in the Meet-and-Confer, but you will still need to be present for the Meet-and-Confer. Roku will participate through one of its representatives, and its counsel may also be present. You or Roku can file a Claim in arbitration only upon completion of the Meet-and-Confer for your Claim and only after the end of the Informal Resolution Period.
>
> * * *
>
> The statute of limitations and any filing-fee deadlines for a Claim will be tolled for the duration of the Informal Resolution Period for that Claim so that you and Roku can engage in this informal dispute-resolution process.
>
> * * *
>
> **Offers of Settlement**. Either party may, but is not obligated to, make a written settlement offer for a Claim. If an arbitration decision or award is later issued that is less favorable than the last written offer of settlement that a party did not accept, then that party must pay all reasonable costs and fees—including arbitration fees—incurred by the offering party after the written settlement offer was made.

Wallrich's Instant Legacy

In a companion case involving essentially the same clause and respondent as *Wallrich*—see the discussion in the main article—but decided a short time later, the Seventh U.S. Circuit Court of Appeals reinforced its *Wallrich* holding. *Hoeg v. Samsung Elecs. Am., Inc.*, No. 24-1274, 2024 WL 3593896 (7th Cir. July 31, 2024) (available at https://bit.ly/4dRFI4E).

The factual difference between *Hoeg* and *Wallrich* is that the *Hoeg* parties first proceeded to mediation, which proved unsuccessful, and then the consumers pressed for (mass) arbitration.

The Seventh Circuit ruled that this difference did not matter, and so the *Hoeg* plaintiffs were no more successful than had been the *Wallrich* plaintiffs in demanding mass arbitration–and at best were premature:

> We view the consumers' case in this appeal as presenting one of two possible scenarios. The first scenario is on all fours with *Wallrich.* The consumers filed arbitration demands before the AAA; Samsung refused to pay its share of administrative fees; the AAA terminated the arbitration in its discretion; and the consumers sought to compel arbitration in district court due to Samsung's refusal to pay fees. The second scenario is a bit more nuanced. Specifically, because the AAA indicated that it would allow the consumers to refile their claims if mediation failed, one could argue that arbitration has not yet been completed, which would slightly distinguish the posture of this case from that of *Wallrich.*

Hoeg, 2024 WL 3593896, at *1.

—By Matthew H. Adler

This binding arbitration agreement is publicly available on Roku's website (available at https://bit.ly/3BWY32Y). The combination of these two clauses within an overall mass arbitration clause would require each individual consumer to negotiate with the business. The provision gives the business the opportunity to make a monetary offer to that consumer which, if turned down, then exposes the consumer to attorneys fees (and costs) from that point forward in the arbitration should the consumer lose the case.

Assume a situation where an individual consumer, whose claim may not be very high in the first place (that being the very reason for the "mass" filing), is offered $1,000 for a claim in which the consumer might at most obtain $10,000.

That consumer lawyer will have to explain that choice, which in and of itself places a burden on the consumer's lawyer(s). A typical consumer may not wish to take that risk and may instead opt for the quick $1,000.

This imposes, to be sure, individual negotiation obligations on the business that could be quite time-consuming, but on the flip side, the outcome of this negotiation-and-threat structure could dramatically reduce the class.

Offers of judgment provisions are routinely sustained in contract cases. Whether it is permissible to extend them to arbitration—again keeping in mind that arbitration is a contract and that attacks on arbitration for being adhesion clauses have fared poorly—is an issue worth tracking as this debate goes forward.

Early Stages

> "And isn't it ironic?
> Don't you think?"
>
> *—Alanis Morissette, "Ironic"*

* * *

We are still in the early stages of court consideration of mass arbitration clauses. The table has flipped over completely, with the plaintiffs' bar, as the *Samsung* cases show, favoring mass arbitration and the business bar prepared to live with it so long as the parties' arbitration

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agreement provides protection, guidance, and a lack of either chaos or high fees.

It is likely that, given the manner in which the Supreme Court has protected arbitration agreements especially in the 20-plus years since *Concepcion*, mass arbitration agreements will continue to be upheld, but with tweaks.

With the notable exception of the concurring opinion in the Ninth Circuit's recent *Heckman* opinion, the courts that have held outright that certain mass arbitration clauses are substantively unconscionable stopped short of saying that, by definition, any mass arbitration clause would be invalid (the *Heckman* majority opinion, as noted above, is unclear as to its reach to all mass arbitration or just to the particular rules considered in that case). More courts might otherwise in a different era have joined this conclusion. It would not be the greatest of stretches to argue that justice delayed is justice denied and so any procedure that makes a party wait in line before its case is heard is not "arbitration" at all.

But we are not there. Rather, assuming issues such as timeliness and right to counsel are ironed out in the cases to come, and that "precedent" provisions are eliminated, mass arbitration rules in at least some form are likely here to stay absent a dramatic reversal of Supreme Court precedent upholding party choice in arbitration clauses.

Consumers' Uphill Fight

Another 2024 case supporting the view that attacks on mass arbitration clauses based on "unconscionability" face an uphill battle is *Caimano v. H&R Block*, No. CV 23-3272, 2024 WL 3295589 (E.D. Pa. July 3, 2024) (available at https://bit.ly/48bmNAw), in which an H&R Block mass arbitration clause was attacked on the basis of both procedural and substantive unconscionability.

The bellwether provision—discussed extensively in the accompanying article—applied where "25 or more claimants submit … similar claims and are represented by the same or coordinated counsel". Id. at *4. In such circumstances, there would be an initial bellwether group of 20 cases.

The provision plainly was drafted with limitations objections in mind, because "arbitrators are encouraged to resolve the cases within 120 days of appointment" and the non-bellwether cases were tolled until they were decided in arbitration. Id.

The federal district court did not, however, rule on the substantive fairness of this provision as it resolved only procedural unconscionability, in favor of H&R Block, finding that an agreement was formed and plaintiffs were given proper notice.

"Because Plaintiffs cannot establish that the Agreement was procedurally unconscionable, the Court need not address substantive unconscionability. Accordingly, the Arbitration Provision is valid and enforceable." Id. at *13. *Caimano* thus does not contribute to the evolving discussion about substantive unconscionability in mass arbitration clauses.

—By Matthew H. Adler