Mass Arbitration: Altering the Litigation Landscape

*By Zachary D. Miller, Kevin S. Ranlett, and Rachel R. Friedman**

INTRODUCTION[1]

For years, the *Annual Survey* has covered the consistently favorable treatment that federal courts, including the U.S. Supreme Court, have shown to the Federal Arbitration Act ("FAA")[2] and private arbitration agreements. Starting twenty years ago, courts in California, and eventually in a number of other states, began holding that arbitration agreements in form consumer or employee contracts were unconscionable or otherwise unenforceable under state law unless those agreements permitted class proceedings.[3] Other courts rejected challenges to agreements for traditional individual arbitration unless the agreement included other features that made individual arbitration infeasible.[4]

When plaintiffs challenged the enforcement of agreements for individual arbitration as unconscionable under state law, the principal question faced by courts

* Zachary D. Miller is a partner with Burr & Forman, LLP in Nashville, Tennessee. Kevin S. Ranlett is a partner with Mayer Brown LLP in Washington, D.C. Rachel R. Friedman is a partner with Burr & Forman, LLP in Birmingham, Alabama. The views expressed in this survey are those of the authors and are not intended to represent the views of their firms or their clients.

1. This article is one in a series of works covering recent updates in various areas of consumer financial services law. For an overview of the other articles in this issue of *The Business Lawyer*, *see* John L. Ropieguet, Eric J. Mogilnicki & Christopher K. Odinet. *Introduction to the 2023 Annual Survey of Consumer Financial Services Law*, 78 BUS. LAW. 497 (2023).

2. Ch. 392, 61 Stat. 671 (1947) (codified as amended at 9 U.S.C. §§ 1–16 (2018)). *See*, *e.g.*, Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, *Arbitration Year in Review: Back to Basics (But with Some New Twists)*, 76 BUS. LAW. 675, 679–80 (2021) (in the 2021 *Annual Survey*); Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, Jr., *Arbitration Developments:* Concepcion*—The Supreme Court Decisively Steps In*, 67 BUS. LAW. 629 (2012) (in the 2012 *Annual Survey*).

3. *See* Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867–68 (Ct. App. 2002) (holding that arbitration clause that prohibited class arbitration in a form consumer credit card agreement is unconscionable under California law and violates state public policy); *see also* Homa v. Am. Express Co., 558 F.3d 225, 233 (3d Cir. 2009) (same under New Jersey law); Lowden v. T-Mobile USA, Inc., 512 F.3d 1213, 1218–19 (9th Cir. 2008) (Washington law); Shroyer v. New Cingular Wireless Serv. Gentry v. Super. Ct., 165 P.3d 556, 569–70 (Cal. 2007) (California law); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250 (Ill. 2006) (Illinois law); Discover Bank v. Super. Ct., 113 P.3d 1100, 1110 (Cal. 2005) (California law). Each of these decisions was later abrogated by *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

4. *See, e.g.*, Cicle v. Chase Bank USA, 583 F.3d 549, 555 (8th Cir. 2009) (applying Missouri law); Gay v. CreditInform, 511 F.3d 369, 381–82 (3d Cir. 2007) (Pennsylvania law); Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (Georgia law); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175 (5th Cir. 2004) (Louisiana law).

was whether the FAA preempted the state laws at issue.[5] In 2011, the Supreme Court resolved this question in *AT&T Mobility LLC v. Concepcion*,[6] which held that the FAA preempts state laws invalidating arbitration agreements that prohibit class arbitration. The Supreme Court followed that decision with *American Express Co. v. Italian Colors Restaurants*,[7] in which the Court held that Federal Rule of Civil Procedure 23 does not establish any right to class proceedings and that courts must "rigorously enforce" arbitration agreements according to their terms, even for claims that allege a violation of a federal statute.[8] And in *Epic Systems Corp. v. Lewis*,[9] the Court held that section 7 of the National Labor Relations Act[10] did not overcome the FAA's mandate that courts enforce arbitration clauses in employment agreements.[11]

These decisions have cemented the protection of arbitration agreements as a matter of law, to the benefit of businesses, consumers, and employees alike. As the Supreme Court has explained, in enacting the FAA, "Congress . . . had the needs of consumers, as well as others in mind."[12] Arbitration "is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearing and discovery devices[.]"[13] And these benefits "often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation."[14] Without arbitration, "the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set) [would be left] without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery."[15]

Nonetheless, critics of arbitration have objected to the inability to pursue consumer and employee class or collective actions in court or arbitration.[16] Although these critics typically devoted their efforts to resisting the enforcement of arbitration agreements, in recent years, some have instead embraced arbitration as a tool for extracting settlements from companies.[17]

5. *See* Alan S. Kaplinsky, Mark J. Levin & Martin C. Bryce, Jr., *Arbitration Developments: Post-*Concepcion*—The Debate Continues*, 68 BUS. LAW. 649, 649 (2013) (in the 2013 *Annual Survey*).
6. 141 S. Ct. 1740 (2011).
7. 133 S. Ct. 2304 (2013).
8. *Id.* at 2309 (citations omitted).
9. 138 S. Ct. 1612 (2018).
10. 29 U.S.C. § 157 (2018).
11. *Epic*, 138 S. Ct. at 1632.
12. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995).
13. *Id.* (quoting H.R. REP. NO. 97-542, at 13 (1982)).
14. *Id.*
15. *Id.* at 281.
16. *See* Alex Burnino, *A Modest Proposal: Review of the National Consumer Law Center's Model State Consumer and Employee Justice Enforcement Act*, 95 OR. L. REV. 569, 580 (2017); *see also* Ashley M. Sergeant, *The Corporation's New Lethal Weapon: Mandatory Binding Arbitration Clauses*, 57 S.D. L. REV. 149, 164–65 (2012).
17. *See* Kaplinsky, Levin & Bryce, *supra* note 1, at 679–80.

"Mass arbitration," as the term will be used in this survey, refers to the "simultaneous filing of hundreds or even thousands of individual arbitration demands against the same company by the same law firm."[18] Because companies heavily subsidize the cost of arbitration for their customers and employees, mass arbitration typically requires the company to pay "astounding" fees, often in the millions of dollars upfront.[19] These fees are due well before any neutral party has the opportunity to assess the legitimacy or merit of the claims asserted, or even whether the purported claimant is a customer or employee of the defendant business at all.

The consequences for a business for refusing to pay these fees is dire: the plaintiffs might be able to obtain a court order forcing the business to pay the fees despite any objections, and if the company still refuses, it may be deemed to have waived the ability to compel arbitration of all claims, leading to the class action litigation that arbitration was intended to replace. Arbitration providers may refuse to administer any future arbitrations, rendering the arbitration agreement potentially unenforceable in all future cases. And in California, businesses can face even harsher penalties, including default judgment on the claims against them.[20] As a result, the filing of mass arbitrations is rapidly emerging as a new vehicle for strike suits against businesses. This survey focuses on recent efforts to address mass arbitration in courts.

New York Appellate Court Allows $91.6 Million Arbitration Fee

In 2020, Uber's platform, "Uber Eats," adopted a promotion to signal solidarity with those protesting racial inequalities following the death of George Floyd: Uber waived its delivery fee for orders placed at qualifying Black-owned restaurants.[21] In response, the law firm of Consovoy McCarthy PLLC enlisted over 31,000 people who it claimed were Uber Eats customers that had paid a delivery fee to a non-Black owned restaurant, whom the law firm described as victims of "unlawful reverse race discrimination."[22] The law firm filed individual demands

18. *Id.* at 679. Other commentators have described mass arbitration as when "firms amass thousands of clients who have allegedly suffered a common harm by a common defendant . . . [and] file hundreds or thousands of individual arbitration demands . . . with the stated intent of arbitrating each individual case until a satisfactory aggregate settlement is reached." J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1322 (2022).

19. *Id.* at 345–46. The AAA charges a single consumer case filing fee for a claimant of $200, with the remainder of the fees incurred in arbitration charged to the respondent. *See Consumer Arbitration Rules: Costs of Arbitration*, Am. Arbitration Association (Nov. 1, 2020), https://www.adr.org/sites/default/files/Con sumer_Fee_Schedule_2.pdf. In JAMS, "[f]or matters involving consumers, the consumer is only required to pay $250," with the rest of the cost borne by the respondent. *Arbitration Schedule of Fees and Costs*, JAMS, https://www.jamsadr.com/arbitration-fees (last visited July 27, 2022).

20. Effective January 1, 2020, amendments to the California Rules of Civil Procedure authorize a consumer to obtain sanctions against a drafting party for failure to pay fees or costs to initiate or continue arbitration within thirty days after the due date. Cal. Civ. Proc. Code § 1281.97–.99 (West 2020).

21. Uber Techs., Inc. v. Am. Arbitration Ass'n, Inc., No. 655549/2021, 2021 WL 4789153 (N.Y. Sup. Ct. Oct. 14, 2021), *aff'd*, 167 N.Y.S.3d 66 (App. Div. 2022).

22. *Id.* at *1.

for arbitration in the names of these customers with the American Arbitration Association ("AAA") and, in December 2020, the AAA accepted the demands and agreed to administer the claims.[23]

According to the AAA fee schedule, for each arbitration, regardless of who wins, Uber must pay a $500 filing fee, a $1,400 case-management fee, and a $1,500 arbitrator fee, for a total of approximately $107 million in fees.[24] Following fruitless negotiations between the parties as to how to administer the cases, the AAA began billing Uber in stages for the arbitration fees.[25] When the AAA sent Uber an initial bill for $10.879 million, Uber filed a complaint against the AAA in New York state court alleging that its invoicing was so wildly disproportionate to the AAA's costs that it constituted breach of contract and violated a number of other common law doctrines and California's Unfair Competition Law.[26] To preserve the status quo until its claims could be heard, Uber moved for a preliminary injunction requiring the AAA to extend payment deadlines and refrain from issuing additional invoices or terminating arbitrations for nonpayment, but the trial court denied Uber's motion.[27]

On appeal, the Appellate Division affirmed denial of the preliminary injunction, stating that Uber had failed to demonstrate a likelihood of success on any of its claims.[28] The court held that there was nothing requiring the AAA to reduce the fees listed on its consumer fee schedule or tie Uber's fees to the AAA's "reasonable, actual costs."[29] The court also found that the AAA was "fully within its express rights under the [consumer arbitration rules] to charge the fees set forth in the fee schedule" and was not required to exercise its discretion to reduce those fees.[30] Additionally, the court held that the AAA's enforcement of its standard consumer fee schedule for the claims "[did] not offend public policy, and is not immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."[31] Noting that there was a lack of irreparable harm because money damages were available as a remedy, the court concluded by addressing the equities of the situation:

> The balance of the equities weighs in favor of AAA. While Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it 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.[32]

23. Uber Techs., Inc. v. Am. Arbitration Ass'n, Inc., 167 N.Y.S.3d 66, 68 (App. Div. 2022).
24. *Id.*
25. *Id.*
26. *Id.* The torts included breach of the implied covenant of good faith and fair dealing, unjust enrichment and restitution, and unfair competition in violation of California's Unfair Competition Law.
27. *Id.*
28. *Id.* at 69.
29. *Id.*
30. *Id.* (citations omitted).
31. *Id.*
32. *Id.* at 70 (citations omitted).

TikTok Class Opt-Out Procedure Unsuccessfully Challenged

For firms considering the development of a mass arbitration practice, "a substantial technology apparatus," which may require "millions . . . in up-front investment and continued spending on maintenance and management.[33] Firms minimize these costs by automating the claims and client sign-up process, choosing to forgo the typical process of actually investigating claims, confirming that clients are who they say they are, and obtaining their informed consent before committing to file legal actions on their behalf.[34]

As demonstrated by *In re Tiktok, Inc., Consumer Privacy Litigation*,[35] some mass arbitration firms do not even bother to obtain their own clients' signatures to authorize the claims. That issue arose following a class-action settlement that had been submitted for preliminary approval by the court.[36] Another law firm, one that routinely engaged in mass arbitration, asserted that it had been retained by 957 class members who wished to opt out of the putative settlement class and arbitrate their claims individually.[37] In the names of those class members, the law firm objected to the class settlement, contending that the standard terms of that settlement, which required class members to "complete, sign, and mail-in individual paper opt-out forms" in order to opt out of the class, were "so onerous that it violat[ed] their due process rights."[38] In other words, the mass-arbitration firm had solicited its clients online, and sought to be excused from a duty to communicate with them to ask them to sign opt-out forms.

Rejecting the objection, the court held that "opting out is an individual right that must be exercised individually."[39] The court highlighted a host of other courts that had "routinely enforced the requirement that class members individually sign and return a paper opt-out form," describing the process as "vital to ensuring that the class member is individually consenting to opt-out."[40] And the court specifically rejected attempts "by lawyers to opt out class members *en masse*," quoting a prior decision observing that "mass unsigned opt outs are highly indicative of a conclusion that . . . counsel did not spend very much time evaluating the merits of whether to opt out in light of the individual circumstances of each of their clients and in consultation with them."[41]

33. Glover, *supra* note 17, at 1336.

34. *Id.* In *In re Centurylink Sales Practices & Securities Litigation*, MDL No. 17-2795 (MJD/KMM), 2020 WL 3513547, at *7 (D. Minn. June 29, 2020), the defendants attempted to disqualify claimants' counsel by asserting that they had violated applicable ethical rules by "refusing to spend 15 minutes to evaluate and discuss its clients' individual claims pre-arbitration . . . ." The court held that if the law firm failed to adequately advise its clients, standing to raise those concerns lay with the firm's clients, not with the defendant. *Id.*

35. 565 F. Supp. 3d 1076 (N.D. Ill. 2021).

36. *Id.* at 1092.

37. *Id.*

38. *Id.*

39. *Id.* (citation omitted).

40. *Id.*

41. *Id.* (quoting *In re* Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mex., 910 F. Supp. 2d 891, 939 (E.D. La. 2012), *aff'd sub nom. In re* Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014)).

Finally, the court addressed the objectors' novel theory that the settlement agreement negotiated between the plaintiffs and the defendants violated the FAA by "abrogating Defendants' arbitration agreements with opt-in class members," therefore waiving their right to arbitrate and instead settling on a classwide basis.[42] The court rejected this argument, stating that it is "well established that parties may waive their own rights to arbitrate" just as they could waive any other contract right.[43] Thus, the court rejected any amendment to the opt-out procedure and objection to the class settlement by the arbitration claimants and granted the parties' motion for preliminary approval of the class settlement.[44]

"Mass Arbitration" Provision Is Rejected as Unconscionable

The onslaught of mass arbitrations has led some companies to amend their customer agreements by making them less susceptible to abusive mass arbitrations.[45] The goal of these revisions generally is to prevent the cost of arbitration from being so prohibitively high that claims must be settled regardless of their merits. One such contractual provision was addressed in *MacClelland v. Cellco Partnership*,[46] where Verizon attempted to model the bellwether process used by courts to resolve mass torts by including the following provision in its consumer contracts:

> If 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 these customers, the claims shall proceed in arbitration in a coordinated proceeding. [Counsel] shall each select five cases to proceed first in arbitration in a bellwether proceeding. The remaining cases shall not be filed in arbitration until the first ten have been resolved. If the parties are unable to resolve the remaining cases after the conclusion of the bellwether proceeding, each side may select another five cases to proceed to arbitration for a second bellwether proceeding. This process may continue until the parties are able to resolve all of the claims, either through settlement or arbitration. A court will have authority to enforce this clause and, if necessary, to enjoin the mass filing of arbitration demands against Verizon.[47]

The *MacClelland* plaintiffs brought a class action against Verizon under California law, arguing that the arbitration clause in their customer agreements with Verizon was unconscionable under California law because, among other reasons, it required mandatory bellwether proceedings.[48] Plaintiffs' counsel in the matter

42. *Id.* at 1093.
43. *Id.* (citing St. Mary's Ctr. of Evansville, Inc. v. Disco Aluminum Prods. Co., 969 F.2d 585, 590 (7th Cir. 1992)).
44. *Id.* at 1094.
45. *See* Kaplinsky, Levin & Bryce, *supra* note 1, at 681 (noting that companies are considering having an arbitration clause not name an arbitration administrator).
46. No. 21-cv-08592-EMC, 2022 WL 2390997 (N.D. Cal. July 1, 2022), *appeal docketed*, No. 22-16020 (9th Cir. July 13, 2022).
47. *Id.* at *11.
48. *Id.* at *1–2.

represented 2,712 Verizon customers and contended that, based upon the seven months on average that counsel claimed it takes to arbitrate a claim, it would take 156 years to resolve each of their clients' claims under the bellwether provision.[49] Plaintiffs' counsel noted that most of their clients' claims would become time-barred while their cases waited their turn to be selected as bellwether proceedings.[50]

Following the hearing, Verizon notified the court that it would soon be amending the customer agreement to "expressly provide that, upon initiating a notice of dispute or filing a complaint in court, the statutes of limitations applicable to a customer's dispute are tolled until the completion of the coordinated arbitration proceeding."[51] The court declined to consider the amendment, ruling that the contract forbade changes from being applied to preexisting disputes.[52]

The court then found that the bellwether provision used by Verizon was substantively unconscionable under California law.[53] The court acknowledged that "[i]t is one thing to set up a bellwether system to adjudicate a group of cases with the purpose of facilitating a global or widespread resolution via ADR."[54] But the court cautioned that "[i]t is another to formally bar the timely adjudication of cases that do not settle," which the court found to be the defect in Verizon's bellwether clause.[55] Specifically, the court observed that requiring a potential consumer to wait "months [or], more likely years" before they could even submit an arbitration demand, leading to consumers "in the queue who are not able to file within the limitations period" having their claims "be forever barred," was "unreasonably favorable to Verizon" and "contravenes public policy."[56] The court also held that the clause lacked "mutuality" because Verizon was able to assert claims in its arbitrations without delay.[57]

Finally, the court contrasted Verizon's bellwether provision with the bellwether provision upheld in *McGrath v. DoorDash*[58] and with how the cases would have been resolved under the AAA's Supplementary Rules for Multiple Case Filings.[59] Under the *McGrath* provision, modeled after the Employment-Related Mass Claims Protocol of the International Institute for Conflict Prevention & Resolution, ten randomly selected test cases are arbitrated, followed by mediation.[60]

49. *Id.* at *11.
50. *Id.* at *13.
51. *Id.* (internal quotation marks omitted).
52. *Id.*
53. *Id.* at *12.
54. *Id.* at *14.
55. *Id.*
56. *Id.* at *12–13 (internal quotation marks omitted).
57. *Id.*
58. No. 19-cv-05279-EMC, 2020 WL 6526129, at *4 (N.D. Cal. Nov. 5, 2020) (upholding mass arbitration provision because there was no evidence that those choosing to arbitrate would face "inordinate delays").
59. *See MacClelland*, 2022 WL 2390997, at *14 (citing Am. Arbitration Ass'n, Supplementary Rules for Multiple Case Filings 3 (Aug. 1, 2021), https://www.adr.org/sites/default/files/Supplementary_Rules_MultipleCase_Filings.pdf).
60. *McGrath*, 2020 WL 6526129, at *4.

Claimants whose claims are not settled following the mediation may choose either to arbitrate or to opt out and go to court.[61] The AAA Supplementary Rules of Multiple Case Filings apply when twenty-five or more similar demands for arbitration are filed against or on behalf of the same party or related parties, and where representation of the parties is consistent or coordinated across the cases.[62] But, as the *MacClelland* court described it, a global mediation is optional, and the cases do not proceed in tranches.[63] The *MacCelland* court concluded that Verizon's bellwether provision "had little in common" with these approaches.[64]

The court then held that because Verizon's agreement also included four other provisions that the court deemed unconscionable, none of them should be severed to try to salvage the arbitration provision.[65] The court therefore denied Verizon's motion to compel arbitration.[66]

Conclusion

The practice of mass arbitration is in its infancy and courts are only now starting to address the legality of attempts by companies to adopt procedures to facilitate the early resolution of mass claims and to safeguard against abusive mass arbitrations. But with consumer advocates describing mass arbitration as a "transformational phenomenon in civil justice" that has "upended the defense bar's forty-year campaign to eliminate claims through forced arbitration and class-action waivers,"[67] mass arbitrations are likely here to stay.

61. *Id.*
62. Am. Arbitration Ass'n, Supplementary Rules for Multiple Case Filings 4 (Aug. 1, 2021).
63. *MacClelland*, 2022 WL 2390997, at *14.
64. *Id.*
65. *Id.* at *16.
66. *Id.*
67. *See* Glover, *supra* note 17, at 1378, 1385.