Mass Arbitration Update: The Uncertain Path Ahead

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INTRODUCTION[1]

Years ago, to avoid the risk of massive settlements that often resulted from class actions and to reduce the cost of dispute resolution, businesses began entering into agreements for subsidized individual arbitration with their customers and employees, under which the business pays most or all of the arbitration fees. Recently, some plaintiff's lawyers have turned those arbitration agreements into a new vector of attack by pursuing mass arbitrations. Under this strategy, a firm threatens to file many thousands of copycat individual arbitration demands against a company in the names of claimants who are recruited online. The goal is not actually to arbitrate the claims, but to inflict massive per-case arbitration fees on the targeted company. If the fees are high enough, the company cannot afford to pay them in order to have an opportunity to defend itself. Instead, it is forced to succumb to a settlement, regardless of the merits of the claims.[2]

Companies have responded to the mass arbitration threat in different ways. Some have abandoned arbitration altogether, resigning themselves to facing unrestricted class actions. Most are continuing to try to achieve the efficient, merits-based decision-making that arbitration promises, or at least to avoid the worst abuses of mass arbitrations. To do so, some companies are revising their arbitration provisions to account for, and rein in, mass arbitration;[3] some are refusing to pay exorbitant arbitration filing fees in an effort to divert mass arbitration claims to courts;[4] and others are persuading arbitrators or arbitration providers

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1. This survey is one in a series of works covering recent updates in various areas of consumer financial services law. For an overview of the other surveys in this issue of *The Business Lawyer*, see John L. Ropiequet, Eric J. Mogilnicki & Christopher K. Odinet, *Introduction to the 2024 Annual Survey of Consumer Financial Services Law*, 79 BUS. LAW. 479 (2024).

2. For additional background on the emergence of mass arbitrations, see Zachary D. Miller, Kevin S. Ranlett & Rachel R. Friedman, *Mass Arbitration: Altering the Litigation Landscape*, 78 BUS. LAW. 515, 515–22 (2023) (in the 2023 *Annual Survey*).

3. *See* Achey v. Cellco P'ship, 293 A.3d 551, 555 (N.J. Super. Ct. App. Div. 2023); McGrath v. DoorDash, Inc., No. 19-cv-05279, 2020 WL 6526129, at *4 (N.D. Cal. Nov. 5, 2020).

4. *See* Petition to Compel Arbitration, Wallrich v. Samsung Elecs. Am., Inc., No. 22-cv-05506 (N.D. Ill. Oct. 7, 2022) [hereinafter Wallrich Petition]; Uber Techs., Inc. v. Am. Arb. Ass'n, Inc., 167 N.Y.S.3d 66, 70 (App. Div. 2022).

to require claimants' counsel to vet their clients properly before arbitrations are accepted for administration and fees are assessed.[5] As discussed below, a few courts have addressed these divergent strategies, with varying outcomes.

Samsung Refuses to Pay Filing Fees in Effort to Thwart Mass Arbitrations

In two recent mass arbitrations alleging violations of Illinois' Biometric Information Privacy Act ("BIPA"), Samsung has refused to pay even its own share of the initial filing fees charged by the arbitration administrator, stopping those mass arbitrations before they start. In response, the plaintiffs' firms representing the claimants have filed lawsuits in federal court seeking to compel Samsung to pay the filing fees and to arbitrate the BIPA claims.[6] In the past, companies have petitioned courts for relief from the massive filing fees in mass arbitrations, but have been unsuccessful.[7] Samsung's strategy, which makes the plaintiffs' lawyers seek recourse in court instead, may have greater success.

The first lawsuit arising out of these mass arbitrations against Samsung, *Wallrich v. Samsung Electronics America, Inc.*,[8] was filed in the names of 49,986 consumers who had filed individual arbitrations asserting BIPA claims before the American Arbitration Association ("AAA"). The second lawsuit, *Hoeg v. Samsung Electronics America, Inc.*,[9] was filed by a different plaintiffs' firm in the name of 1,025 arbitration claimants, although the firm in fact claimed to represent roughly 60,000 consumers "all of whom have identical [BIPA] claims against Samsung." In both lawsuits, the plaintiffs asserted that although they had met the AAA's filing requirements, Samsung had either refused or failed to pay its share of the filing fees on time, which amounted to over $2.5 million for the *Wallrich* mass arbitration and $311,000 for the *Hoeg* mass arbitration.[10]

5. *See* Mosley v. Wells Fargo & Co., No. 22-cv-01976, 2023 WL 3185790, at *1 (S.D. Cal. May 1, 2023).

6. *See* Complaint, Hoeg v. Samsung Elecs. Am., Inc., No. 23-cv-1951 (N.D. Ill. Mar. 28, 2023) [hereinafter Hoeg Complaint]; Wallrich Petition, *supra* note 4.

7. *See, e.g.*, *Uber Techs., Inc.*, 167 N.Y.S.3d at 70 (affirming denial of Uber's request for a preliminary injunction which sought to enjoin the American Arbitration Association from charging Uber $107 million in case management fees in mass arbitration, noting that Uber "made the business decision to preclude class . . . claims in its arbitration agreement . . . and AAA's fees are directly attributable to that decision"); *see also* Miller, Ranlett & Friedman, *supra* note 2, at 517–18 (discussing *Uber Techs., Inc.*).

8. Wallrich Petition, *supra* note 4, at 1. In fact, Samsung reported that plaintiffs' counsel had threatened to file over 100,000 arbitrations. Response to Motion to Compel Arbitration at 23, Wallrich v. Samsung Elecs. Am., Inc., No. 22-cv-05506 (N.D. Ill. Dec. 5, 2022) [hereinafter Wallrich Response].

9. Hoeg Complaint, *supra* note 6, at 1, 5 n.5.

10. *Id.* at 2, 4–6; Wallrich Petition, *supra* note 4, at 4–5. Those initial filing fees would have been only a drop in the bucket compared to the millions of dollars in AAA fees that Samsung would have been charged if the mass arbitrations proceeded, even if Samsung won every case. *See* Consumer Arbitration Rules, *Costs of Arbitration*, Am. Arb. Association, https://www.adr.org/sites/default/files/Consumer_Fee-Schedule.pdf (last visited Jan. 9, 2024) [hereinafter AAA Costs of Arbitration] (explaining that initial filing fee for the business is $75 to $300, whereas remaining arbitration costs total $4,400 for in-person, virtual, or telephonic hearing arbitrations).

The *Wallrich* claimants alleged that Samsung indicated it would proceed with the arbitrations only if they paid Samsung's share of the fees.[11] The *Hoeg* claimants alleged that after the AAA declined to stay Samsung's deadline to pay its share of the filing fees until after a scheduled mediation, Samsung failed to pay the fees.[12] In both cases, the AAA allegedly responded to the non-payment by administratively terminating the mass arbitrations, after which the claimants filed complaints in federal court seeking an order requiring Samsung to arbitrate and to pay its share of fees.[13]

Both mass arbitrations were subject to the AAA's Multiple Consumer Case Filing Fee Schedule, which applies where twenty-five or more similar claims for arbitration are filed against the same party and counsel for the parties is consistent across all cases.[14] Pursuant to these rules, the business must pay its share of the initial filing fees almost immediately after the AAA determines that the claimant meets the filing requirements, and those fees are generally nonrefundable, even if the mass arbitration is later settled or withdrawn before any cases are actually arbitrated or even assigned to arbitrators.[15] In each complaint, the claimants alleged that Samsung's actions amounted to a breach of the parties' arbitration agreement, and that Samsung's "refusal to honor its contract and pay its share of the filing fees deprived Petitioners the ability to proceed with their arbitrations under the very terms that Samsung itself selected and imposed."[16]

In both *Wallrich* and *Hoeg*, Samsung has responded to the motions to compel arbitration by criticizing the business model of both plaintiffs' firms, contending that the firms' conduct in filing mass arbitration demands is abusive and designed solely to extract large settlement payments from Samsung.[17] Samsung contended that the plaintiffs' firms filed the underlying arbitrations irrespective of the merits of the claims, sometimes without ever actually speaking to all of the represented consumers.[18] Samsung also stated in each case that the spreadsheet of claimants that the plaintiffs' firms provided contained multiple "deficiencies," such as the inclusion of claimants who are deceased, who have submitted fictitious personal

11. Wallrich Petition, *supra* note 4, at 4.

12. Hoeg Complaint, *supra* note 6, at 5; Motion to Compel Arbitration at 12, Hoeg v. Samsung Elecs. Am., Inc., No. 23-cv-1951 (N.D. Ill. May 4, 2023) [hereinafter Hoeg Motion].

13. Hoeg Complaint, *supra* note 6, at 5; Wallrich Response, *supra* note 8, at 29.

14. Hoeg Complaint, *supra* note 6, at 2–3; Wallrich Petition, *supra* note 4, at 2; *see* AAA Costs of Arbitration, *supra* note 10.

15. *See* AAA Costs of Arbitration, *supra* note 10.

16. Wallrich Petition, *supra* note 4, at 5; *see also* Hoeg Complaint, *supra* note 6, at 9 (almost identical language).

17. Response to Motion to Compel Arbitration at 8, Hoeg v. Samsung Elecs. Am., Inc., No. 23-cv-1951 (N.D. Ill. June 14, 2023) [hereinafter Hoeg Response] (alleging that the plaintiffs' counsel's "playbook" is to "threaten to file an enormous number of substantially identical arbitration demands regardless of the underlying merits of the claims, and seek to use the specter of millions of dollars in arbitral fees to extract a hefty settlement"); Wallrich Response, *supra* note 8, at 9, 13 (alleging that plaintiffs' counsel's actions amounted to a "patent abuse of the arbitration process" which is based on a business model of "extracting settlements by threatening and then filing (where massive settlements are not forthcoming) enormous numbers of individual arbitration demands").

18. Hoeg Response, *supra* note 17, at 8; Wallrich Response, *supra* note 8, at 14.

information, who are not Illinois residents, or who have not owned Samsung devices.[19]

In one of the cases, Samsung explained that in order to "prevent the unnecessary expenditure of resources by the AAA . . . and Samsung, to ensure that the interests of consumers were protected, and to preserve the integrity of the arbitration process," it therefore informed the AAA that it would not pay the filing fees.[20] In the other case, Samsung contended that the parties jointly asked the AAA to stay proceedings, including Samsung's payment obligation, before its payment deadline expired, but the AAA nonetheless decided to close the arbitrations rather than staying the proceedings.[21] Samsung further alleged that for at least 241 claimants, both plaintiffs' firms have inexplicably and impermissibly insisted that they represent the same claimant and filed duplicative arbitrations in their names.[22] Given these deficiencies, Samsung contended, the plaintiffs in *Wallrich* and *Hoeg* failed to meet their burden to prove, for each and every claimant, that they actually are Samsung customers with whom Samsung has agreed to arbitrate.

In *Wallrich*, Samsung contended that its refusal to pay the AAA filing fees fully complied with the AAA Rules, which "do[] not mandate the payment of arbitration fees by any party."[23] Rather, according to Samsung, under the AAA's rules, if one party chooses not to pay its default share of the fees, the other party may choose to advance the full fees and seek to recoup them in arbitration, although recovery would be denied if the arbitrator determines that the claims were filed for the purpose of harassment or were "patently frivolous."[24] Samsung asserted that the *Wallrich* plaintiffs could have chosen to proceed with their arbitrations by advancing Samsung's share of the fees and then recovering them later, but rather than take the risk that the arbitrators would deny recovery because the claims are frivolous, the plaintiffs instead requested that the AAA close the arbitrations so that the plaintiffs could ask a court to force Samsung to pay the fees.[25] Samsung contended that, in doing so, the plaintiffs have waived any right to arbitrate that they might have had.[26]

In addition, in both *Wallrich* and *Hoeg*, Samsung argued that the court lacks the authority to order Samsung to pay fees because payment of fees is a procedural issue that is for arbitrators and arbitration administrators to resolve; that the plaintiffs failed to prove the existence of arbitration agreements with Samsung and so cannot obtain relief; that the plaintiffs' motions to compel arbitration are in violation of the prohibition on collective actions in the arbitration agreements; and that the plaintiffs are not entitled to equitable relief because they have an adequate remedy at law, i.e., paying the arbitration fees and then

19. Hoeg Response, *supra* note 17, at 27–28; Wallrich Response, *supra* note 8, at 14.
20. Wallrich Response, *supra* note 8, at 22.
21. Hoeg Response, *supra* note 17, at 27.
22. *Id.* at 29.
23. Wallrich Response, *supra* note 8, at 10.
24. *Id.* at 10 (citing AAA Rule R-44(c)); *id.* at 30 (citing AAA Rules R-44(c) and MC 10-(d)).
25. *Id.* at 10.
26. *Id.*

seeking recovery in the arbitration or joining other pending class actions asserting BIPA violations against Samsung.[27] It remains to be seen whether the court will side with Samsung or the consumers and what consequences may exist for Samsung should the consumers prevail; however, at least for now, Samsung has succeeded in delaying a large arbitration fee payout.

New Jersey Court Deals Additional Blow to Verizon Mass Arbitration Provision

Verizon has attempted to address abusive mass arbitration by amending their customer contracts. Among other terms that were amended, Verizon revised its account agreement by adding a bellwether arbitration clause, modeled after the bellwether trials often used to resolve mass tort litigation.[28] Under the procedure set forth in the agreement, if twenty-five or more customers represented by the same counsel brought arbitrations against Verizon that asserted similar claims, the cases would proceed in stages, with only ten arbitrations moving forward at any time.[29] If the cases do not settle, the arbitrations would continue in batches of ten until all are resolved.[30]

In *Achey v. Cellco Partnership*,[31] a New Jersey appellate court refused to compel arbitration of a class action against Verizon on grounds that Verizon's arbitration agreement—including the mass arbitration bellwether provision—was unenforceable because it was "permeated by provisions which are unconscionable and violative of New Jersey public policy." Relying heavily on the reasoning of *MacClelland v. Cellco Partnership*,[32] a California federal court decision which had previously found that Verizon's mass arbitration provision was unconscionable, the court held that the bellwether provision was "unconscionable on its face because it gives all decision-making power to defendants as to how long the 'batching process' would continue and leaves plaintiffs without any protection to ensure that their claims would be heard in a timely manner."[33]

The *Achey* court emphasized that the agreement failed to include a time limit for the bellwether process or any provision for tolling of customers' claims.[34] Taking into account that the agreement also shortened the applicable statute of limitations to 180 days for at least some types of claims, which the court found to be unconscionable in and of itself, the court agreed with the *MacClelland* court that

27. Hoeg Response, *supra* note 17, at 34, 39, 42; Wallrich Response, *supra* note 8, at 11 n.4, 35, 38.

28. Paul D. Rheingold, Litigating Mass Tort Cases § 10:45 (2023) ("A common solution for the problem of trying a mass of cases arising out of the same disaster is first to try a selected group of plaintiffs. This approach has been called many things, including a test case, representative plaintiff trial, and a bellwether case . . . . Virtually every new mass tort [Multidistrict Litigation (MDL)] involves the use of bellwether cases.").

29. 293 A.3d 551, 555 (N.J. Super. Ct. App. Div. 2023).

30. *Id.*

31. *Id.* at 553–54.

32. *Id.* at 557–60 (citing MacClelland v. Cellco P'ship, 609 F. Supp. 3d 1024 (N.D. Cal. 2022)). For a discussion of *MacClelland*, see Miller, Ranlett & Friedman, *supra* note 2, at 520–22.

33. *Achey*, 293 A.3d at 558.

34. *Id.*

the agreement created a risk that claims would be effectively barred if they were not chosen for an initial bellwether proceeding.[35] The court concluded that these provisions, combined with another provision that purported to limit the types of claims and evidence customers could assert, had a "cumulative effect" of "render[ing] the arbitration agreement 'unenforceable for lack of mutual assent.'"[36] Accordingly, the court found that the objectionable provisions could not be severed from the remainder of the agreement, and reversed the lower court's order granting Verizon's motion to compel arbitration.[37]

Verizon has filed a petition for review with the New Jersey Supreme Court.[38] That petition was pending as of this writing.

Federal Court Refuses to Consider Challenge to Arbitrator's Order Governing Pleading Requirements in Consolidated Arbitration

While innovative contract terms designed to dissuade mass arbitration have been heavily scrutinized by courts, once arbitration begins, courts generally refrain from adjudicating interim disputes that arise during the pendency of the arbitration. For instance, in *Mosley v. Wells Fargo & Co.*,[39] a federal court refused to hear challenges to procedural rulings raised by the plaintiffs in a consolidated arbitration against Wells Fargo. The plaintiffs were claimants in a pending consolidated arbitration against Wells Fargo that was proceeding pursuant to the AAA's Supplementary Rules for Multiple Case Filings.[40] The law firm representing the plaintiffs filed nearly identical demands for more than 3,000 Wells Fargo customers.[41] Contending that the plaintiffs' firm appeared not to have conducted basic due diligence to confirm that the arbitration claimants had incurred the overdraft fees at issue in the arbitration, or, for that matter, were even Wells Fargo customers, Wells Fargo requested that the process arbitrator overseeing the proceedings order the plaintiffs to provide certain minimal information establishing the claimants' entitlement to bring arbitrations before the cases were accepted for administration.[42] The process arbitrator granted the request and required the plaintiffs' firm to amend each demand to include the claimant's Wells Fargo account number and allegations that the claimant had enrolled in the overdraft program and had in fact incurred an overdraft fee.[43] The process arbitrator

35. *Id.* (citing *MacClelland*, 609 F. Supp. 3d at 1042). The court declined to consider Verizon's argument that the limitations periods for the claims were already tolled.

36. *Id.* at 560.

37. *Id.* at 558, 560.

38. Achey v. Cellco P'ship, No. 088253 (N.J. June 26, 2023).

39. No. 22-cv-01976-DMS-AGS, 2023 WL 3185790, at *1 (S.D. Cal. May 1, 2023), *appeal docketed*, No. 23-55478 (9th Cir. May 30, 2023).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

also required plaintiffs' counsel to sign the amended arbitration demands—signaling that counsel might be subject to sanctions if they filed frivolous arbitration demands.[44]

Rather than comply with the process arbitrator's ruling, the plaintiffs sued in federal court, arguing that Wells Fargo had breached the arbitration agreements by procuring the process arbitrator's order, and requesting an injunction against continuance of the arbitrations. The plaintiffs also sought a declaratory judgment that Wells Fargo's overdraft fees violated Regulation E and California state law.[45] Wells Fargo opposed the requested injunction on the ground that the plaintiffs were seeking to litigate an issue of arbitrability that the arbitration agreement delegates to the arbitrator, and also moved to compel arbitration of the plaintiffs' underlying claims.[46]

In response, the plaintiffs argued that their claims fell within a carve-out provision of the arbitration agreement, which permitted litigation of "provisional or ancillary remedies such as injunctive relief."[47] The court rejected that position, noting that "such relief is only permitted 'on arbitrable claims if interim relief is necessary to preserve the status quo and the meaningfulness of the arbitration process,'" which the court did not find applicable.[48] The court further found that it could not rule on the plaintiffs' claims for declaratory relief regarding the propriety of the overdraft fees because it would require the court to "determine the merits of the dispute that Plaintiffs have already submitted to arbitration."[49]

The court next rejected the plaintiffs' contention that the process arbitrator's order requiring additional information in arbitration filings was a "final and binding" order, such that it was subject to judicial review under the Federal Arbitration Act.[50] The court noted that the order was "not an award on the merits but a procedural order that addresses claim filing requirements," and "it is well-settled that questions of procedure relating to arbitration are not reviewable by courts."[51] The court therefore compelled arbitration of the plaintiffs' claims.[52] The plaintiffs have appealed to the Ninth Circuit, where briefing is ongoing as of this writing.[53]

Conclusion

Although the enormous threat that mass arbitration poses to businesses is clear, the proper way for businesses to respond to that threat remains murky.

44. *See* Exhibit G to Motion for Preliminary Injunction at 2, Mosley v. Wells Fargo & Co., No. 22-cv-01976 (S.D. Cal. Jan. 10, 2023).
45. 2023 WL 3185790, at *2.
46. *Id.* at *3.
47. *Id.*
48. *Id.* (quoting Toyo Tire Holdings of Ams., Inc. v. Cont'l Tire N. Am., Inc., 609 F.3d 975, 981 (9th Cir. 2010)).
49. *Id.* at *4.
50. *Id.*
51. *Id.*
52. *Id.* at *5.
53. *See* Order, Mosley v. Wells Fargo & Co., No. 23-55478 (9th Cir. May 26, 2023).

Businesses are likely to continue to develop various strategies for combating mass arbitrations and to avoid caving in to massive settlement demands supported only by the *in terrorem* effect of large arbitration fees. But the early returns on these strategies are mixed. Arbitration agreements written to mitigate the prohibitive costs of mass arbitration are facing close scrutiny. Refusals to pay filing fees to stop abusive mass arbitrations are being challenged in court, and so too are arbitrators' own efforts to require plaintiffs' firms to vet their clients before filing arbitrations in their names. It is hoped that appellate courts will provide additional guidance on these issues.