Mass Arbitration Update: The Battlefield Expands

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

INTRODUCTION[1]

In recent years, mass-arbitration campaigns against businesses have proliferated. Although mass arbitrations have long been a legitimate method for claimants to take advantage of economies of scale by sharing the same counsel, some claimants' counsel have subverted this process. Instead of using the efficiencies of arbitration to obtain merits-based rulings quickly and inexpensively, the filing attorneys weaponize the arbitration fees that businesses pay to subsidize the cost of arbitration for consumers or employees. Because the business must pay the arbitration fees to have an opportunity to defend itself, the filing attorneys threaten to bring so many arbitrations that the arbitration fees are prohibitively expensive, making a defense on the merits impossible. To increase the number of cases filed—and hence the threatened arbitration fees—filing lawyers recruit as many claimants as possible and, sometimes, fail to vet their claimants properly to ensure that they are real people with colorable claims. Businesses targeted by this strategy are pressured to agree to settlements that reflect the amount of threatened arbitration fees rather than the merits of the underlying claims.

Previously, courts and major arbitration providers had been unreceptive to businesses' requests for intervention. But during the past year, new avenues opened up for businesses seeking to challenge these troublesome, if not outright improper, arbitrations (such as ones filed in the names of fictitious claimants), although it remains unclear whether these approaches will bear fruit. For example, an appellate court reversed an order forcing a business to pay millions of dollars in fees for arbitrations that the business contended had been improperly filed, but emphasized in its decision that arbitration providers have discretion to decide the consequences for non-payment of fees. The two largest arbitration providers, the American Arbitration Association ("AAA") and JAMS, amended their rules to make it feasible to challenge the propriety of mass arbitration filings

* Kevin S. Ranlett is a partner with Mayer Brown in Washington, D.C. Zachary D. Miller is a partner with Burr & Forman, LLP in Nashville, Tennessee. 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 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, Sabrina A. Neff & Christopher K. Odinet, *Introduction to the 2025 Annual Survey of Consumer Financial Services Law*, 80 BUS. LAW. 531 (2025).

at the outset. In addition, some courts have become more receptive to innovative arbitration procedures that make it less expensive to resolve mass arbitrations on the merits, although recent decisions show that courts remain attentive to ways that those procedures might be unfair to claimants. Finally, some businesses began fighting back directly by filing claims against the law firms bringing or threatening mass arbitrations. Although litigation on these and related issues continues and the outcomes are uncertain, the fight over abuses of the mass arbitration device is no longer as one-sided against businesses as it once appeared.

The Seventh Circuit Sides with Samsung in Arbitration Fee Battle

In a major decision, the Seventh Circuit reversed a district court order compelling Samsung to arbitrate with tens of thousands of mass arbitration claimants and pay all AAA fees for those arbitrations. The previous *Annual Survey* discussed a case in which the plaintiffs' law firm had filed nearly fifty thousand AAA arbitrations in the names of individuals who allegedly had purchased Samsung Galaxy devices.[2] Although Samsung had objected to the lack of proof that the claimants were actual Samsung customers, the AAA accepted the claims for administration and billed Samsung for initial administrative fees totaling $4,125,000.[3] Samsung continued to assert that the claimants had failed to show that they were real Samsung customers and refused to pay the AAA invoice for almost all of the claimants.[4] In accordance with AAA rules, the AAA gave the claimants an opportunity to advance Samsung's share of the arbitration fees pending reallocation in the final award, but the claimants refused.[5] In response, the AAA stated that "[b]ased on the claimants' and Samsung's statements declining to pay Samsung's portion of the filing fees . . . , the AAA will close [the cases]."[6]

The consumers petitioned the district court for an order compelling Samsung to arbitrate the claims and pay all AAA fees for the arbitrations.[7] The court granted the consumers' motion in its entirety.[8]

Samsung appealed the district court's order and the Seventh Circuit reversed.[9] The Seventh Circuit first held that it had appellate jurisdiction despite

2. Wallrich v. Samsung Elecs. Am., Inc., 691 F. Supp. 3d 867, 873 (N.D. Ill. 2023) (stating that 49,986 individual claimants had petitioned the court for an order compelling Samsung to arbitrate), *rev'd*, 106 F.4th 609 (7th Cir. 2024). *See* Zachary D. Miller, Kevin S. Ranlett & Rachel R. Friedman, *Mass Arbitration: The Uncertain Path Ahead*, 79 Bus. Law. 497, 498–501 (2024) (in the 2024 *Annual Survey*).

3. *Wallrich*, 691 F. Supp. 3d at 874.

4. *Id.* at 873–74. Samsung agreed to pay the fees for fourteen claimants now living in California, citing a California rule that provides for sanctions in the event of nonpayment. *Id.* at 874 (citing Cal. Code Civ. Proc. § 1281 *et seq.*).

5. *Id.* at 874.

6. *Id.*

7. *Id.* at 879.

8. *Id.* at 880–85.

9. Wallrich v. Samsung Elecs. Am., Inc., 106 F.4th 609 (7th Cir. 2024).

section 16(b)(1) of the Federal Arbitration Act ("FAA"), which bars interlocutory appeals from an order "granting a stay of any action under section 3 of this title."[10] The Seventh Circuit explained that the order below was entered under section 4—not section 3, which applies only to motions to compel arbitration of a lawsuit in which there are "substantive claims" that "are distinct from a request to arbitrate."[11] Although section 16(b)(2) also bars an interlocutory appeal from an order "directing arbitration to proceed under section 4," the order below was a "final appealable order," not an "interlocutory" one, as the order below "resolved the action's only claim for relief."[12]

Turning to the merits of the appeal, the Seventh Circuit began by holding that the consumers had not met their burden to prove the existence of valid arbitration agreements.[13] Although Samsung had conceded that any legitimate Samsung Galaxy purchaser could invoke arbitration, the consumers had failed to show that they were purchasers.[14] The Seventh Circuit emphasized that the claimants' "initial burden" of proof was modest, as they "could have submitted receipts, order numbers," "confirmation numbers," or even "declarations."[15] Instead, they submitted "copies of the[] arbitration demands made before the AAA," which was insufficient because "[n]o claimant submitted any declaration or otherwise attested under penalty of perjury to the facts alleged in the arbitration demands."[16] For similar reasons, the court also deemed a proffered spreadsheet of the consumers' contact information and form copies of Samsung terms to be insufficient.[17] The court added that the "AAA's determination that the consumers had met [its] filing requirements . . . also does not serve as evidence of an arbitration agreement" because that determination was not "substantive."[18] And the court refused the consumers' request to remand "to allow them to submit additional evidence," because "the summary judgment stage, which our posture is akin to, does not allow second chances."[19]

Finally, the Seventh Circuit held that even if the consumers had proven the existence of valid arbitration agreements, the district court had "exceeded its authority and the scope of the arbitration agreement" by ordering Samsung to pay arbitration fees.[20] Pointing to holdings by the Fifth and Ninth Circuits refusing to force a party to pay arbitral fees, the Seventh Circuit concluded that an order compelling payment of fees would be improper here as well.[21] It explained that by agreeing to arbitrate under the AAA rules, the parties had vested "discretion

10. *Id.* at 617 (citing 9 U.S.C. § 16(b)(1)).
11. *Id.* at 615.
12. *Id.* at 617.
13. *Id.* at 618–20.
14. *Id.* at 619–20.
15. *Id.* at 619.
16. *Id.* at 620.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 621 (citing Dealer Computer Servs., Inc. v. Old Colony Motors, Inc., 588 F.3d 884 (5th Cir. 2009); Lifescan, Inc. v. Premier Diabetic Servs., Inc., 363 F.3d 1010 (9th Cir. 2004)).

over the payment of administration fees, including the consequences that would stem from a party's refusal to pay those fees," to the AAA.[22] The court noted that "[i]f the AAA believed Samsung was abusing the arbitration process, [the AAA] could have stayed the case or threatened to decline administering future consumer arbitrations with Samsung."[23] But instead, the AAA "terminated the proceedings, opening the door for the consumers to pursue their claims in district court."[24] Because the parties' arbitrations had "proceeded in line with their agreement," including the AAA's discretion to decide "threshold arbitration fee disputes," "the arbitration[s] [were] complete, and the district court did not have the authority to flout the parties' agreement and disturb the AAA's judgment."[25]

The *Wallrich* decision is important for at least two reasons. First, it confirms that if a mass-arbitration defendant resists filings in the names of claimants who may not have arbitration agreements—or who may not even be real people—the claimants will bear the burden of proving in court that arbitration agreements exist. Second, *Wallrich*'s analysis of the arbitration fee issue highlights the limits on courts' power to second-guess an arbitration provider's exercise of its broad discretion under its rules to allocate arbitration fees, unless the parties' arbitration agreement specifies a different allocation or commits such disputes to the courts to resolve.

Mass Arbitration Clause Heads to the Ninth Circuit for Review

The court in *Heckman v. Live Nation Entertainment, Inc.* refused to compel putative antitrust class action plaintiffs to arbitrate their claims against the defendant, Live Nation Entertainment, Inc.[26] The parties disputed the enforceability of Live Nation's recent update to its arbitration agreement, which switched the arbitration provider from JAMS to New Era ADR.[27]

New Era's rules differed from JAMS's rules primarily in how they charge for and adjudicate mass arbitrations. New Era charges companies on a subscription basis, replacing the substantial per-case amounts that JAMS assesses with flat monthly pricing to prevent consumer attorneys from using aggregated filing fees to make it too expensive for companies to defend themselves.[28] New Era's rules also provide a bellwether process for mass arbitrations, under which three test cases are tried, after which global settlement discussions take place.[29] If no settlement is reached, the remaining cases are arbitrated, with the bellwether case results treated as precedent on common issues of law or fact.[30]

22. *Id.*
23. *Id.* at 622.
24. *Id.*
25. *Id.*
26. 686 F. Supp. 3d 939, 969 (C.D. Cal. 2023).
27. *Id.* at 946.
28. *Id.* at 947–48.
29. *Id.* at 959.
30. *Id.*

The plaintiffs argued that New Era's procedures require "consumers to engage in a novel and one-sided process that is tailored to disadvantage consumers."[31] The court agreed, holding that the "arbitration agreement (and more specifically, the delegation clause contained therein) [was] procedurally unconscionable to an extreme degree" and substantively unconscionable.[32]

The court's procedural unconscionability analysis began by noting the "take-it-or-leave it" nature of Live Nation's terms and the absence of an alternative option for ticket purchasers.[33] The court's criticism focused on how the arbitration clause was updated "in the midst of ongoing litigation," deeming it improper for Live Nation to have changed the arbitration clause in the way that it did.[34] Live Nation had altered the terms that customers must click on to buy new tickets "without giving any notice to existing customers" of the change, which "applied retroactively to already accrued claims."[35] Even worse, according to the court, was the fact that Live Nation "bur[ied] the true nature of this change" by incorporating "New Era's difficult-to-parse rules" rather than explaining in the clause itself how mass arbitrations would be handled.[36]

The court then held that four aspects of New Era's mass-arbitration protocol made the arbitration clause and its delegation provision substantively unconscionable. First, the court deemed New Era's rules to be ambiguous on whether arbitrators in follow-on cases had any power to disregard the "precedent" from bellwether cases, which, in the court's view, conferred "unfettered discretion" that "invites the potential for unfairness."[37] The court explained that claimants in later cases were not given notice of the bellwether proceedings, an opportunity to be heard, or an opportunity to opt out of the bellwether process.[38] The court stated that "a mechanical process for summarily disposing of an entire class of claimants based on an earlier proceeding to which they were not a party" would be "problematic" and "poses a serious risk of being fundamentally unfair to claimants."[39]

Second, the court held that other features of New Era's rules "exacerbate[d] the level of unfairness to claimants" in follow-on cases.[40] Specifically, the court criticized New Era for not guaranteeing a "formal process of discovery as a right," limiting "complaints" to "10 pages," "presentations of evidence" to "10 total references," and "argument" to "approximately[] 5 pages."[41]

Third, the court held that New Era's arbitrator-selection process violated the California Arbitration Act, and hence was unconscionable, because each claimant

31. *Id.* at 947.
32. *Id.* at 952.
33. *Id.*
34. *Id.* at 953.
35. *Id.*
36. *Id.*
37. *Id.* at 961.
38. *Id.* at 963.
39. *Id.* at 961, 963.
40. *Id.* at 963.
41. *Id.*

does not have an unfettered right to disqualify an arbitrator.[42] The court deemed this requirement of the California Arbitration Act non-waivable and not preempted by the FAA.[43]

Fourth, the court concluded that the arbitration agreement provision allowing appeals only of awards that *grant* injunctions, but not *deny* them, was one-sided in Live Nation's favor because only Live Nation would ever have an injunction granted against it.[44] The court noted precedent rejecting an unconscionability challenge to an arbitration agreement on the ground that it authorized appeals only of grants of injunctions.[45] But, the court distinguished that case as involving "traditional, bilateral arbitration," in which if one plaintiff were "denied injunctive relief during arbitration, another plaintiff could try again."[46] "[B]y contrast, a denial of injunctive relief for a bellwether plaintiff could effectively foreclose the ability of the *entire class* of claimants to obtain injunctive relief."[47]

The *Heckman* decision has been appealed to the Ninth Circuit, where it is pending as of this writing.[48]

Courts Reject Challenges to Bellwether Clauses

The district court's decision in *Heckman* is not the only court to hold a contractual bellwether process for mass arbitrations to be unconscionable because the particular way that company's process worked was unfair to subsequent claimants. In a case discussed in the 2023 *Survey*,[49] the district court in *MacClelland v. Cellco Partnership*[50] held that the bellwether process in that case was unconscionable because only ten claimants could arbitrate at a time, and there was no guarantee that later claimants' claims would not become time-barred while they waited for their turn to arbitrate.[51]

Since *MacClelland* was decided, at least two courts have rejected unconscionability challenges to bellwether clauses. In *Ruiz v. CarMax Auto Superstores, Inc.*,[52] the court granted a motion to compel arbitration of a wage-and-hour class action against CarMax.[53] Among the plaintiffs' arguments was the assertion

42. *Id.* at 964.
43. *Id.* at 964–65.
44. *Id.* at 965–66.
45. *Id.* at 965 (citing Sanchez v. Valencia Holding Co., 353 P.3d 741 (Cal. 2015)).
46. *Id.*
47. *Id.* at 966.
48. Heckman v. Live Nation Enter., Inc., 686 F. Supp. 3d 939 (C.D. Cal. 2023), *appeal docketed*, No. 23-55770 (9th Cir. Sept. 12, 2023).
49. *See* Zachary D. Miller, Kevin S. Ranlett & Rachel R. Friedman, *Mass Arbitration: Altering the Litigation Landscape*, 78 Bus. Law. 515, 520–22 (2023) (in the 2023 *Annual Survey*).
50. 609 F. Supp. 3d 1024 (N.D. Cal. 2022), *appeal docketed*, No. 22-16020 (9th Cir. July 13, 2022). The appeal in *MacClelland* has been held in abeyance on the parties' joint motion pending the disposition of a separate appeal of the grant of final approval to a class settlement in another case that would resolve the underlying claims in *MacClelland* and moot the *MacClelland* appeal. MacClelland v. Cellco P'ship, No. 22-16020 (9th Cir. Nov. 13, 2023) (order); MacClelland v. Cellco P'ship, No. 22-16020 (9th Cir. July 18, 2024) (order).
51. *MacClelland*, 609 F. Supp. 3d at 1044.
52. No. EDCV 23-1986, 2024 WL 1136332 (C.D. Cal. Jan. 18, 2024).
53. *Id.* at *1.

that CarMax's Mass Arbitration Protocol was unconscionable because it required arbitrations to proceed in "batches of 10," thus "severely delay[ing] arbitration" for other claimants.[54] The *Ruiz* court rejected the argument because, unlike the agreements in *MacClelland*, CarMax's agreements "provide for the tolling of any applicable statute of limitations."[55] The court thus concluded that CarMax's Mass Arbitration Protocol "constitutes 'a system to adjudicate a group of cases with the purpose of facilitating global or widespread resolution via ADR,' not one that 'formally bar[s] the timely adjudication of cases that do not settle."[56]

In *Brooks v. WarnerMedia Direct LLC*,[57] the court reached the same conclusion with respect to a bellwether clause in WarnerMedia's terms of service.[58] *Brooks* involved competing petitions to compel arbitration filed in the wake of an attempted mass arbitration. Although the arbitration claimants sought to enforce WarnerMedia's old arbitration clause, which called for AAA arbitration, WarnerMedia sought to enforce its updated arbitration clause, which called for arbitration before National Arbitration Mediation ("NAM").[59] The court did not render a final ruling on the petitions, instead ordering "limited, targeted discovery into" the arbitration claimants' "assent" to the updated clause.[60] But, the court rejected the claimants' threshold argument that the updated clause was "substantively unconscionable" because it uses a "staging procedure."[61]

The *Brooks* court observed that the "staging procedure" in WarnerMedia's arbitration agreement was a "far cry from that of *MacClelland*."[62] The court noted that instead of limiting claims to batches of ten, claims would proceed in larger groups—with "fifty claims" in the "first round," "one hundred claims" in the "second round," and "two hundred claims" in the "third round."[63] Because "many more arbitrations would occur in a much quicker timeframe than pursuant to the operative procedure in *MacClelland*," the court concluded that WarnerMedia's new agreement "presents less risk that the resolution of claims will be unduly delayed."[64] In addition, the court noted that WarnerMedia's agreement "tolls the applicable statute of limitations as soon as a consumer files a" pre-arbitration "Notice of Dispute," and so "there is no . . . risk" that "delays could lead to some plaintiffs' claims becoming time-barred."[65] The court also observed that WarnerMedia's "requirement that consumers prepare and sign a detailed notice of dispute" was not "so onerous or beyond the reasonable expectations of the user as to amount to substantive unconscionability."[66]

54. *Id.* at *6.
55. *Id.*
56. *Id.* (quoting *MacClelland*, 609 F. Supp. 3d at 1044).
57. No. 23 Civ. 11030, 2024 WL 3330305 (S.D.N.Y. July 8, 2024).
58. *Id.* at *17–18.
59. *Id.* at *1.
60. *Id.* at *19.
61. *Id.* at *17.
62. *Id.* at *18.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at *18 n.9 (quoting Bielski v. Coinbase, Inc., 87 F.4th 1003, 1014 (9th Cir. 2023)).

California Supreme Court to Decide Challenge to SB 707

In mass arbitrations involving claimants from California, the impact of Senate Bill 707, which added sections 1281.97 through 1281.99 to the California Arbitration Act,[67] has been enormous. The law requires arbitration providers to issue invoices to defendants "immediately" after the filing of arbitrations, which must be "due on receipt."[68] If the party that drafted the arbitration clause does not fully pay the invoices within thirty days, that party forfeits all rights to enforce the arbitration agreement and is deemed to have "materially breached the agreement," "waived" its right to arbitrate, and "default[ed]" in the proceedings.[69] The claimant can then choose whether to proceed in arbitration or in court.[70] In addition, the arbitrator or court "shall impose a monetary sanction . . . by ordering the drafting party to pay the reasonable expenses, including attorney's fees and costs, incurred by" the claimant.[71] The court may impose discretionary sanctions, including evidentiary sanctions, terminating sanctions, or contempt sanctions.[72]

SB 707 has magnified the ability of plaintiffs' lawyers to use the threat of mass arbitrations as a cudgel in settlement negotiations. Unsurprisingly, businesses that may be subject to SB 707 have been arguing that the FAA preempts the California law, contending that SB 707 was enacted to turbocharge efforts to leverage arbitration filing fees to coerce settlements from companies and therefore to deter the future use of consumer and employee arbitration agreements. The California Courts of Appeal decisions have been divided on whether SB 707 is preempted, with most decisions rejecting preemption.[73] But, the majority of federal courts to consider the issue have concluded that SB 707 is preempted, either in its entirety or as applied.[74] The California Supreme Court granted review of the decision in one of the cases in which the lower court had rejected preemption, in June 2024.[75]

67. Cal. Code Civ. Proc. §§ 1281.97–1281.99 (2024).
68. *Id.* § 1281.97(a)(2).
69. *Id.* § 1281.98(a).
70. *Id.* § 1281.98(b).
71. *Id.* § 1281.99(a); *see also id.* § 1281.98(d).
72. *Id.* §§ 1281.98(d), 1281.99(b).
73. *Compare* Hernandez v. Sohnen Enters., Inc., 102 Cal. App. 5th 222 (2024) (finding preemption), *and* Loeffler v. Demars & Assocs., No. 30-2017-0092377, 2020 WL 13687564 (Cal. Super. Ct. Aug. 14, 2020) (finding preemption), *with* Keeton v. Tesla, Inc., 322 Cal. Rptr. 3d 599 (Ct. App. 2024) (rejecting preemption), Hoshenshelt v. Superior Court, 318 Cal. Rptr. 3d 475 (Ct. App. 2024) (rejecting preemption), Suarez v. Superior Court, 317 Cal. Rptr. 3d 591 (Ct. App. 2024) (rejecting preemption), Espinoza v. Superior Court, 299 Cal. Rptr. 3d 751 (Ct. App. 2022) (rejecting preemption), *and* Gallo v. Wood Ranch USA, Inc., 297 Cal. Rptr. 3d 373 (Ct. App. 2022) (rejecting preemption).
74. *Compare* Miller v. Plex, Inc., No. 22-cv-05015, 2024 WL 348820 (N.D. Cal. Jan. 30, 2024) (finding preemption), Lee v. Citigroup Corp. Holdings, Inc., No. 22-cv-02718, 2023 WL 6132959 (N.D. Cal. Aug. 29, 2023) (finding preemption), *and* Belyea v. Greensky, Inc., 637 F. Supp. 3d 745 (N.D. Cal. 2022) (finding preemption), *with* Costa v. Melikov, No. CV 20-09467, 2022 WL 18228248 (C.D. Cal. Oct. 21, 2022) (rejecting preemption), *and* Postmates Inc. v. 10,356 Individuals, No. CV 20-2783, 2021 WL 540155 (C.D. Cal. Jan. 19, 2021) (rejecting preemption).
75. Hohenshelt v. Superior Court, 549 P.3d 143 (Cal. 2024) (granting review).

Despite these challenges to the California law, on June 29, 2024, Rhode Island enacted a law amending the Rhode Island Arbitration Act to duplicate the provisions of California's SB 707.[76] The Rhode Island law also requires that demands for arbitration inform defendants that they have twenty days to seek "to stay the arbitration" or else they waive objections "that a valid [arbitration] agreement was not made or has not been complied with."[77] As of the date of this writing, no court decision has addressed the new Rhode Island provisions.

Businesses Go on the Offensive

To increase the settlement leverage generated by arbitration fees, some lawyers bringing mass arbitrations seek to have as many claimants as possible. Commentators have raised concerns that some law firms pursuing this strategy have been cutting corners when recruiting claimants, often relying heavily on internet solicitations and inadequately vetting claimants.[78] During the past year, at least five businesses have filed lawsuits against arbitration claimants or their law firms, seeking to halt mass arbitration campaigns.

Valve Corp.

In late 2023, software company Valve Corp. filed a lawsuit against Zaiger LLC, a law firm that allegedly had recruited over 50,000 users of Valve's Steam gaming platform as claimants for a mass arbitration against Valve.[79] Valve asserted claims for tortious interference and abuse of process, arguing that Zaiger had improperly caused Valve customers to breach their contractual obligations to engage in a good-faith attempt at individual informal dispute resolution before arbitration and to refrain from pursuing "collective/representative" arbitrations.[80]

In the complaint, Valve alleged that Zaiger had promised litigation funders that it would "do no work to develop its clients' claims, instead using a 'passive' approach to 'copycat existing legal theories'" from a prior lawsuit against Valve, and did not request any money to "evaluate whether any Steam user actually has a valid dispute with Valve."[81] Valve further alleged that in recruiting claimants, Zaiger "never once ask[ed]" them "to input any factual details about their individual issues with Valve" and told them that they did not need to "engage[] with Valve in the required informal dispute resolution process" preceding arbitration under Valve's arbitration clause.[82] According to Valve, Zaiger's plan was

76. An Act Relating to Courts and Civil Procedure—Procedure in Particular Actions—Arbitration, S. 2671, § 1, R.I. 2024 Leg. Sess. (adopted June 29, 2024).

77. *Id.*

78. *See* Andrew J. Pincus, Archis A. Parasharami, Kevin Ranlett & Carmen Longoria-Green, Mass Arbitration Shakedown: Coercing Unjustified Settlements 35–38 (Feb. 2023), https://instituteforlegalreform.com/wp-content/uploads/2023/02/Mass-Arbitration-Shakedown-digital.pdf.

79. Complaint, Valve Corp. v. Zaiger LLC, No. 23-cv-1819 (W.D. Wash. Nov. 27, 2023), ECF No. 1–3.

80. *Id.* at 13–14.

81. *Id.* at 6.

82. *Id.* at 6, 9.

to "recruit 75,000 clients and then bring arbitrations on behalf of a subset (no more than 160) . . . to drive a settlement on behalf of all 75,000 of its clients," which Valve described as an improper "collective/representative arbitration" in breach of the claimants' arbitration agreements.[83]

In response, Zaiger moved to dismiss the complaint, arguing not only a lack of personal jurisdiction, but also that attorneys cannot tortiously interfere with their clients' contracts, that Valve's arbitration provision had not been breached, and that Zaiger did not act with improper purpose or through improper means in pursuing the mass arbitrations.[84]

On August 20, 2024, the court granted that motion, holding that it lacked personal jurisdiction and dismissing Valve's claims without prejudice, without reaching Zaiger's other arguments.[85] The court noted that none of the challenged arbitrations had been filed in Washington, and concluded that because Valve's claims centered on the filing of improper arbitrations, Zaiger's alleged recruitment of and contracting with Washington consumers do not sufficiently "relate to Valve's causes of action" to confer "specific jurisdiction in Washington."[86] The court acknowledged that Zaiger had sent demand letters to Valve in Washington.[87] But the court reasoned that those letters were required by Valve's arbitration clause, and so "Valve ha[d] failed to show that Zaiger's acts were aimed at Washington, rather than acts directed at an entity" that happened to be there.[88]

Epson America, Inc.

Printer manufacturer Epson America, Inc. filed two lawsuits against groups of claimants recruited by the Labaton law firm to pursue a mass arbitration of claims relating to Epson's allegedly configuring of its printers not to work with non-Epson ink cartridges.[89] According to the complaints, after Labaton threatened to file 13,000 individual arbitrations before JAMS if Epson did not agree to an immediate settlement, as part of the contractually required pre-arbitration dispute resolution process, Epson requested proof that the claimants actually owned Epson printers and some information about those printers.[90] Epson further informed Labaton that Epson's arbitration clause required that mass arbitrations be brought before FedArb, rather than JAMS.[91]

83. *Id.* at 11.

84. Motion to Dismiss at 1–3, Valve Corp. v. Zaiger LLC, No. 23-cv-1819 (W.D. Wash. Dec. 4, 2023), ECF No. 9.

85. Valve Corp. v. Zaiger, LLC, No. 23-cv-01819, 2024 WL 3917194, at *1 (W.D. Wash. Aug. 20, 2024).

86. *Id.* at *4.

87. *Id.* at *4–5.

88. *Id.* at *7.

89. *See* Complaint, Epson Am., Inc. v. Adams, No. 30-2023-01313431 (Cal. Super. Ct. Orange Cnty. Mar. 10, 2023) [hereinafter Adams Compl.]; Complaint, Epson Am., Inc. v. Arnoff, No. 30-2023-01315890 (Cal. Super. Ct. Orange Cnty. Mar. 10, 2023) [hereinafter Arnoff Compl.].

90. Arnoff Compl., *supra* note 89, at 40–41; Adams Compl., *supra* note 89, at 44–46.

91. Arnoff Compl., *supra* note 89, at 41.

Nonetheless, Labaton allegedly proceeded to file about 4,000 arbitrations before JAMS, after which Epson filed two lawsuits in California state court against groups of those 4,000 claimants.[92] The *Adams* complaint, filed against the claimants for whom Epson had no record that they were ever customers, sought a declaratory judgment that there is no arbitration agreement between the parties and that the claimants must dismiss their arbitrations before JAMS.[93] The *Arnoff* complaint, filed against the claimants who are Epson customers, seeks a declaratory judgment that they breached the arbitration agreements by skipping the mandatory informal dispute-resolution requirements and filing the arbitrations in JAMS instead of FedArb, and that the JAMS arbitrations must be dismissed.[94] Both lawsuits were pending as of this writing.

L'Occitane, Inc.

In February 2024, beauty and personal care product company L'Occitane, Inc. filed suit against Zimmerman Reed LLP, a law firm that allegedly purported to represent 3,144 visitors to L'Occitane's website seeking to arbitrate privacy claims.[95] In its lawsuit, L'Occitane alleged that although its arbitration agreement applied only to consumers who had purchased a product on its website, according to L'Occitane's review, over 90 percent of the purported arbitration claimants had never purchased anything from L'Occitane.[96]

In response to the complaint, 3,144 of Zimmerman Reed's clients filed a motion to compel arbitration, but did not accompany the motion with any declarations or other evidence that they had made purchases on the L'Occitane website or even visited the website at all.[97] The district court noted that L'Occitane faced "well over $1 million in arbitration fees just to initiate the 3,144 arbitrations Zimmerman Reed seeks to pursue."[98]

Before ruling on the motion to compel, the district court issued an order stating that the FAA applies only to a "contract evidencing a transaction involving commerce" and directing the parties to address whether visiting a website could create such a contract.[99] The claimants responded by pointing to the terms and conditions of the L'Occitane website, but in denying the claimants' motion to compel arbitration, the court stated:

92. *See supra* note 89.

93. Adams Compl., *supra* note 89, at 46–47.

94. Arnoff Compl., *supra* note 89, at 41.

95. Complaint at 2, L'Occitane, Inc. v. Zimmerman Reed LLP, No. 2:24-cv-01103 (C.D. Cal. Feb. 8, 2024) [hereinafter L'Occitane Compl.].

96. *Id.* at 11–12. L'Occitane also asserted other claims against Zimmerman Reed, including alleging that it and its clients had violated the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, by accessing the L'Occitane website after being notified that they were no longer authorized to visit or view the L'Occitane website. L'Occitane Compl., *supra* note 95, at 36–38.

97. L'Occitane, Inc. v. Zimmerman Reed LLP, No. 24-cv-01103, 2024 WL 2227182, at *3 (C.D. Cal. Apr. 12, 2024).

98. *Id.* at *2.

99. *Id.* at *4.

> Because Claimants have sought to compel arbitration based only on their theory that visiting the website is sufficient to come within the scope of the terms and conditions and trigger the arbitration agreement, the Court concludes that even accepting Claimants' dubious position that interacting with a website qualifies as a "transaction" for purposes of the FAA, the terms and conditions do not "evidence" that transaction. That is, in such circumstances, though the terms and conditions might be a "contract," and neither party disputes that the website effects "commerce," the terms and conditions do not memorialize or in any other way confirm that a transaction occurred.[100]

The court further noted that the claimants had not even satisfied their burden of proving that they had visited the website and had waived any right to submit new evidence on behalf of a smaller group of claimants who purportedly had actually made a purchase using the L'Occitane website.[101] Accordingly, the court held that the claimants' motion to compel arbitration must be denied.[102]

WarnerMedia and Discovery

In May 2024, media companies WarnerMedia Direct, LLC and Discovery Digital Ventures, LLC filed a petition under New York's Civil Practice Law and Rules section 7502(c) to disqualify Zimmerman Reed LLP from representing consumers in a mass arbitration campaign.[103] In support of their petition, WarnerMedia and Discovery alleged that attorneys at Zimmerman Reed had participated as claimants in two other similar mass arbitration efforts brought by competitor law firms.[104] WarnerMedia and Discovery further alleged that the attorneys had submitted sham claims in the other campaigns, violated ethical rules by bringing claims with two separate firms, and improperly obtained confidential information based on their roles as claimants in those separate arbitrations.[105]

In June 2024, Zimmerman Reed opposed the petition by arguing the petition was an improper attempt to "secure a litigation advantage" in the underlying mass arbitrations.[106] Zimmerman Reed contended that WarnerMedia and Discovery lack standing to disqualify it from representation, denied that their attorneys obtained "confidential information," argued that the petition was untimely, and insisted that they did not engage in unethical conduct by pursuing their own

100. *Id.*

101. *Id.*

102. *Id.* The court also entered orders dismissing L'Occitane's claim that Zimmerman Reed and its clients had violated the CFAA. *See* L'Occitane, Inc. v. Zimmerman Reed LLP, No. 24-cv-01103, 2024 WL 2227181, at *5 (C.D. Cal. Apr. 12, 2024) (dismissing claim against Zimmerman Reed); L'Occitane, Inc. v. Zimmerman Reed LLP, No. 24-cv-01103, 2024 WL 2106957, at *1 (C.D. Cal. Apr. 12, 2024) (dismissing claim against claimants).

103. *See* Petition, *In re* WarnerMedia Direct, LLC v. Zimmerman Reed LLP, No. 652500/2024 (N.Y. Sup. Ct. May 15, 2024).

104. *See id.* at 2. These mass arbitration efforts were separately brought against Warner and Discovery by the law firms of Keller Postman LLC and Labaton Keller Sucharow. *Id.* at 3.

105. *See id.* at 2.

106. *See* Respondent Zimmerman Reed LLP's Mem. of Law in Opp. to Petition for an Order Pursuant to CPLR § 7502 Disqualifying Counsel and for Additional Relief at 2, WarnerMedia Direct, LLC v. Zimmerman Reed LLP, No. 652500/2024 (N.Y. Sup. Ct. June 28, 2024).

separate claims in other mass arbitrations.[107] The court had not ruled on the petition as of this writing.

Tubi, Inc.

In May 2024, Tubi, Inc., a provider of video-on-demand streaming services, filed a complaint against Keller Postman LLC seeking declaratory and injunctive relief and damages.[108] The suit alleged that Keller engaged in a scheme to manufacture and file meritless arbitration claims *en masse* and to induce "tens of thousands" of Tubi users to breach their agreements with Tubi to attempt to resolve matters pre-suit.[109] Tubi alleged that Keller was attempting to "force Tubi to face tens of millions of dollars in non-refundable and upfront filing fees" with its arbitration provider.[110] Tubi alleged that Keller's conduct was "riddled with ethical violations from beginning to end" and that consumers could sign up to file an arbitration demand "in as little as two minutes."[111] Tubi alleged that this model allowed Keller to file 23,736 identical demands against Tubi with JAMS and resulted in Keller demanding $71,208,000 to settle the matter on behalf of its claimants.[112]

Tubi's lawsuit asserted claims against Keller for tortious interference based upon inducing its clients to ignore Tubi's informal dispute-resolution provision, as well as for declaratory relief that Keller's arbitration demands do not provide specific facts to allege violations of California law and that Keller has violated its ethical duties in bringing the demands.[113] The lawsuit was pending as of this writing.

JAMS and the AAA Create Mass Arbitration Rules and Fee Schedules

In May 2024, JAMS, a major arbitration provider, announced its new Mass Arbitration Procedures and Guidelines.[114] JAMS stated that "[t]he filing of dozens, hundreds or even thousands of individual claims may create administrative burden and onerous fees, as well as delay and potential unfairness to all Parties, all of which may impair the integrity of the Arbitration process."[115] Thus, JAMS created the new rules to apply when the parties agree to the procedures "in a pre- or post-dispute written agreement."[116]

107. *Id.* at 2–3.
108. *See* Complaint, Tubi, Inc. v. Keller Postman LLC, No. 24-cv-01616 (D.D.C. May 31, 2024).
109. *See id.* at 2.
110. *See id.* at 1–2.
111. *See id.* at 2–3.
112. *See id.* at 3–4, 26.
113. *See id.* at 29–31.
114. *JAMS Announces Mass Arbitration Procedures and Guidelines*, JAMS (May 2, 2024), https://www.jamsadr.com/news/2024/jams-announces-mass-arbitration-procedures-and-guidelines.
115. JAMS Mass Arbitration Procedures and Guidelines pmbl. (May 1, 2024), https://www.jamsadr.com/mass-arbitration-procedures.
116. *Id.* proc. 1(a).

Most significantly, the rules allow for the appointment of a "process administrator" to "determine preliminary and administrative matters" related to the mass arbitration, such as compliance with JAMS's "filing requirements" and any "applicable conditions precedent" to arbitration, as well as "[w]hether to batch, consolidate or otherwise group the . . . claims" for any purpose, including "discovery, arbitrator appointments, merits hearings or otherwise."[117] The new rules also require claimants commencing arbitration to provide their full contact information and the "applicable arbitration agreement," effectively requiring the claimant to demonstrate that he or she does have an arbitration agreement with the defendant business.[118] The rules also require the filing attorney to provide a "sworn declaration . . . averring that the information in the Demand is true and correct to the best of the representative's knowledge,"[119] thus making it easier for arbitrators and courts to impose sanctions if a lawyer files knowingly false or unverified claims.

JAMS also adopted a new fee schedule for mass arbitrations.[120] The schedule lowers the initial filing fee that must be paid to $7,500 (with at least $5,000 paid by the business), regardless of the number of arbitrations filed.[121] Once that fee is paid, a process arbitrator may be appointed to hear threshold challenges to filings.[122]

The new JAMS mass arbitration rules and fee schedule are similar to the AAA's Mass Arbitration Supplementary Rules and Fee Schedules for consumer and employment mass arbitrations adopted in January 2024.[123] Like the JAMS rules, the AAA rules limit the business's initial administrative fee once a mass arbitration has been filed to a manageable amount of $8,125 regardless of the number of cases filed, authorize process arbitrators to decide threshold administrative issues, and require filing counsel to affirm the accuracy of information provided in the demands for arbitration.[124]

The new rules and fee schedules thus make it easier to resist abusive mass arbitrations by making it affordable to obtain a process arbitrator to hear challenges to the filing of arbitrations in the names of nonexistent customers or workers and by making it easier for businesses to hold claimants' counsel

117. *Id.* proc. 3(a) & (e).
118. *Id.* proc. 2(a)–(b).
119. *Id.* proc. 2(c).
120. *Mass Arbitration Procedures Fee Schedule*, JAMS (May 1, 2024), https://www.jamsadr.com/files/uploads/documents/massarbitrationprocedures-fs_4.29.24.pdf.
121. *Id.*
122. *Id.*
123. *Mass Arbitration Supplementary Rules*, AAA (Jan. 15, 2024), https://www.adr.org/sites/default/files/Mass_Arbitration_Supplementary_Rules.pdf; *Consumer Mass Arbitration and Mediation Fee Schedule*, AAA (Jan. 15, 2024), https://www.adr.org/sites/default/files/document_repository/Consumer_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf; *Employment/Workplace Mass Arbitration and Mediation Fee Schedule*, AAA (Jan. 15, 2024), https://www.adr.org/sites/default/files/document_repository/Employment-Workplace_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf.
124. AAA Mass Arbitration Supplementary Rules MA-2, MA-6, MA-10.

responsible for improperly filed arbitrations. One key difference between the JAMS and AAA rules, however, is that the JAMS rules apply only if there is a "pre- or post-dispute written agreement" to apply the new rules,[125] which means that JAMS might continue to apply its old rules to some mass arbitrations.

125. JAMS Mass Arbitration Procedures and Guidelines proc. 1(a) (May 1, 2024), https://www.jamsadr.com/mass-arbitration-procedures.