The Fight Against the Hurdles of Mass Arbitration: What Not to Do

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In this article, the authors explain that the permissible guardrails on mass arbitrations remain in flux, and that companies should be mindful to ensure that their rules governing mass arbitrations (and those of their preferred arbitration provider) do not infringe upon the rights of consumers to vindicate their claims, whether procedurally or substantively.

The arbitration landscape has changed drastically in recent years. Historically, businesses strongly preferred arbitration over court proceedings to litigate disputes. However, plaintiffs' attorneys have begun to leverage mass arbitrations to regain the upper hand in dispute resolutions. The trend began in response to widespread judicial enforcement of arbitration provisions containing class action waivers and has quickly gained traction in recent years. Mass arbitration filings exert significant pressure on companies to settle claims—even of dubious merit—in large part because many companies agree to bear the entirety of arbitration costs to ensure consumer access to arbitration and avoid a finding of unconscionability. Moreover, arbitration service providers frequently assess fees on a per claim basis, often requiring up-front payments from the parties. The result is steep up-front costs, which are incurred well before an arbitrator can determine the validity of the claims or defenses and, regardless of the merits of the claims, leading to significant pressure to

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settle. As one can imagine, the settlement leverage created by the outsized arbitration fees can be abused (and has been).

Several of the more prominent arbitration service providers, such as the American Arbitration Association® (AAA®), Judicial Arbitration and Mediation Services (JAMS), and National Arbitration and Mediation (NAM), have amended their mass arbitration rules in an effort to address some of these cost concerns. Still, businesses and defense counsel continue to look for alternative processes to avoid the potential for abuse.

Beyond changing fee structures[2] and outright refusing to pay fees up front,[3] arbitration organizations and companies have made considerable strides to revamp how mass arbitrations are adjudicated.[4] Drawing on class action and multidistrict litigation procedures, some arbitration organizations have recently made use of batching and bellwethering to address smaller numbers of claims, which can be extrapolated to decide the rest of the arbitration claims.[5] If an arbitrator determines that cases have common legal and factual issues, they can batch the claims together. Once batched, the parties choose a small number of bellwether cases to try on the merits. The decisions from these bellwether cases will then apply to the remaining claims in the mass arbitration.

A recent decision by the U.S. Court of Appeals for the Ninth Circuit provides insight into the pitfalls of some companies that have sought to utilize batching and bellwether proceedings to address the challenges of mass arbitrations. *Heckman v. Live Nation Entertainment, Inc.* demonstrates that companies must be careful to ensure their efforts to remedy the mass arbitration issues withstand judicial scrutiny.[6]

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[2] See AAA Consumer Mass Arbitration and Mediation Fee Schedule, amended Jan. 15, 2024, https://www.adr.org/sites/default/files/Consumer_Mass_Arbitration_and_Mediation_Fee_Schedule.pdf.

[3] Wallrich v. Samsung Elec. Am., Inc., 106 F.4th 609 (7th Cir. 2024).

[4] See U.S. Chamber of Commerce Institute for Legal Reform, Mass Arbitration Shakedown: Coercing Unjustified Settlements (2023).

[5] Bennett Rogers, Note, Elastic Batch and Bellwether Proceedings in Mass Arbitrations, 99 Notre Dame L. Rev. 1655, 1655 (2024).

[6] Heckman v. Live Nation Ent., 120 F.4th 670 (9th Cir. 2024).

Heckman began as an antitrust lawsuit against Live Nation and Ticketmaster. Live Nation and Ticketmaster sought to compel arbitration to a relatively new arbitration provider, New Era ADR, which, according to the court, had adopted new rules aimed to address some of the concerns associated with mass arbitrations. A principal difference in New Era's procedures is its subscription option whereby a company pays an annual subscription fee in lieu of fees on a per claim basis, which is designed to alleviate the prohibitive costs of mass arbitrations.

The Ninth Circuit affirmed the lower court's denial of the defendants' attempt to compel arbitration because the arbitration agreement was both procedurally and substantively unconscionable. While the court focused primarily on the arbitration provision's "Delegation Clause"—which delegated to the arbitrator authority to determine the validity of the arbitration agreement—it also honed in on several other components that were deemed to be unconscionable, providing a roadmap of what companies and arbitration service providers should consider in their future efforts to revamp their arbitration procedures to address the mass arbitration issues.

Procedural Unconscionability

In concluding that the Delegation Clause was procedurally unconscionable, the Ninth Circuit noted that the terms would take a consumer by "surprise" for a number of reasons. First, the terms were changed without notice and applied retroactively. Second, the terms on the website were "misleading," as they provided for "individual arbitration" yet incorporated New Era's rules that contained a bellwether process for mass arbitration claims. Third, the court emphasized the adhesive nature of the terms—that customers must either accept the terms as written or forfeit access to Ticketmaster's services—which was particularly problematic because Ticketmaster is a leading online ticket vendor, and thus, consumers have little to no choice but to accept the terms. Finally, the court found that New Era's rules were "so dense, convoluted and internally contradictory to be borderline unintelligible."

Taken together, these factors, according to *Heckman* court, demonstrated that the manner in which Ticketmaster bound users to its terms evinced an "extreme amount of procedural unconscionability[.]"

Substantive Unconscionability

More specific to New Era's mass arbitration procedures, the court also found four aspects of the terms to be substantively unconscionable: "(1) the mass arbitration protocol, including the application of precedent from the bellwether decisions to other claimants; (2) procedural limitations, such as the lack of a right to discovery; (3) the limited right of appeal; and (4) the arbitrator selection process."

Mass Arbitration Protocols

New Era's mass arbitration procedures apply where there are five cases involving common issues of law or fact. According to the Ninth Circuit, New Era's rules established a bellwether process through which New Era would determine which claims would be "batched" based on the similarity of questions of law and fact, and then proceed with three bellwether cases from within the batch. One would be chosen by the claimant, one by the defendant, and one by a process set forth by the arbitrator. However, whether cases involve common issues is left to the sole discretion of the arbitrator.

Most critically, however, the court noted that once the bellwether claims were adjudicated, the arbitrator had discretion to bind all other non-bellwether claimants in the batch to the results of the bellwether cases, which amounted to a violation of due process. It emphasized: "plaintiffs in the non-bellwether cases have no right to participate in the bellwether cases" and given the confidentiality of the bellwether proceedings, "plaintiffs in the non-bellwether cases will not even know the decision in the bellwether case . . . until that decision is invoked against them." In other words, the Ninth Circuit determined that New Era's

mass arbitration procedures could effectively bind individuals who had no right to participate in the proceedings, and who often did not even know of the rulings to which they would be bound. As the court emphasized: "A batched plaintiff whose case is not a bellwether case has no notice of the bellwether cases and no opportunity to be heard in those cases. Further, that plaintiff has no guarantee of adequate representation in those cases and has no right to opt out of the batched cases that will be bound by the results in the bellwether cases." And while a batched claimant may request removal from the batch to avoid being bound by the rulings in the bellwether process, they can only do so after the bellwether cases are tried and without any access to the records from those cases, leaving non-batched plaintiffs largely unable to contest the merits of the holdings. The result, according to the Ninth Circuit, was a violation of basic principles of due process.

Lack of Discovery

The court also found New Era's arbitration rules problematic because they did not allow for any discovery. Instead, adjudications were limited to (1) a complaint totaling 10 pages, (2) an evidentiary record and initial briefing limited to 10 documents, and (3) closing briefs limited to 15,000 characters.

The court held that the denial of discovery operated as a de facto frustration of a claimant's rights, and that the briefing limitations "border on the absurd." Taken together, the rules were "insufficient to 'vindicate' the rights of a single claimant, … let alone sufficient 'to protect the nonparties' interests' in a representative proceeding."

Limited Right of Appeal

The court also found New Era's limitation on the right of appeal substantively unconscionable. Per *Heckman*, the rules allowed the appeal of arbitration awards that grant injunctive relief but not from orders denying injunctive relief. The court noted that, practically, the defendant would most often be the

party appealing a grant of injunctive relief, whereas claimants would tend to appeal a denial. The effect of New Era's one-sided appeal, according to the court, effectively limited a right of appeal to Ticketmaster and Live Nation, which was substantively unconscionable.

Arbitrator Selection Provisions

Under the arbitrator selection rules, New Era could override a claimant's decision to disqualify an arbitrator, and each side—as opposed to each party—could seek to disqualify an arbitrator. The *Heckman* court found that such a procedure would effectively preclude one claimant from striking an arbitrator over the objections of another—an issue unlikely to exist for Ticketmaster and Live Nation. The claimants additionally argued that the fact that a single arbitrator could preside over multiple cases at once was improper, and that these provisions together violated California state law.

Ticketmaster and Live Nation argued that the state law was preempted by the Federal Arbitration Act (FAA). In rejecting this argument, the court remarked that "[i]t is clear that Congress did not have class-wide arbitration in mind when it passed the FAA." This appears to close off another avenue of circumventing individualized adjudication of mass arbitration claims.

Conclusion

Ultimately, *Heckman* neither endorses nor prohibits the use of batch and bellwether procedures in addressing mass arbitrations. Rather, it provides insight into what pitfalls to avoid when attempting to address today's mass arbitration challenges.

To avoid procedural unconscionability, companies and arbitration providers alike should ensure that the process for agreeing to any newly enacted terms and rules is fair, transparent, and not misleading. To that end, companies should ensure that consumers are provided with conspicuous notice of any impending changes to their existing terms, obtain their consent to be bound

by the new terms, and provide a reasonable opportunity to opt out of those terms. As evidenced by *Heckman*, courts consider the availability of reasonable alternatives to consenting to the terms, and thus, companies should be mindful of such considerations when determining whether to require consent to the new arbitration terms for consumers to continue using their services.

More to the point, adopting a batching and bellwether process for addressing mass arbitrations is not per se improper. However, the process must be carefully evaluated to ensure that claimants are not deprived of a meaningful ability to litigate their claims. Indeed, other courts in the Ninth Circuit have recently found that mass arbitration provisions were unconscionable where they mandated bellwether proceedings that limited the number of cases that could proceed against the respondent at one time, unnecessarily delaying the claims of the non-bellwether claimants.[7] However, a different case found that a company's requirement that mass arbitrations proceed in batches of 100 was not unconscionable where the batched proceedings could proceed "concurrently," as there was no indication that the process would result in any delay or that the arbitrator could not resolve any other concerns.[8]

At bottom, the permissible guardrails on mass arbitrations remain in flux, and companies should be mindful to ensure that their rules governing mass arbitrations (and those of their preferred arbitration provider) do not infringe upon the rights of consumers to vindicate their claims, whether procedurally or substantively.

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[7] MacClelland v. Cellco Partnership, 609 F. Supp. 3d 1024 (N.D. Cal. 2022); Pandolfi v. AviaGames, Inc., No. 23-CV-05971-EMC, 2024 WL 4051754 (N.D. Cal. Sept. 4, 2024).

[8] Kohler v. Whaleco, Inc., No. 24-CV-00935-AJB-DEB, 2024 WL 4887538 (S.D. Cal. Nov. 25, 2024).