

## Advisory | Class Action Litigation



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### Stemming the Tide of Mass Arbitration

#### I. Executive Summary

In the last two years, plaintiffs' firms have devised a strategy to weaponize companies' arbitration agreements against them: file thousands of individual arbitrations at once, trigger massive fee obligations to initiate the claims, and leverage those obligations to force a settlement before the company can defend the merits. Thus far, courts have been unwilling to intercede. One California judge, commenting on the decades of advocacy for enforcement of arbitration agreements, called the trend "poetic justice."<sup>1</sup>

That opinion, however, assumes the claims are filed in good faith and have at least some merit. Yet the manufacturing of mass claims is nothing new.<sup>2</sup> And the mass arbitration model is susceptible to abuse given the minimal requirements for initiating a claim, the lack of oversight, and the mandatory fees companies must pay as soon as a claim is filed, meritorious or not, genuine or contrived. The result is a new frontier of aggregated dispute resolution: mass arbitration to extract payouts not tied to any real injuries or wrongdoing but, instead, the exposure a company faces to administer the cases in the arbitral forum.

This GT Advisory revisits the Supreme Court rulings that set the stage for the mass arbitration phenomenon and discusses how companies have reacted to mass filings. It then explains why the mass

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<sup>1</sup> *Abernathy v. Doordash, Inc.*, No. 3:19-cv-07545-WHA (N.D. Cal. filed Nov. 15, 2019), ECF No. 76 [Transcript], at p. 27.

<sup>2</sup> See, e.g., Francesca Mari, *The Atlantic*, *The Lawyer Whose Clients Didn't Exist* (May 2020), available at, [www.theatlantic.com/magazine/archive/2020/05/bp-oil-spill-shrimpers-settlement/609082/](http://www.theatlantic.com/magazine/archive/2020/05/bp-oil-spill-shrimpers-settlement/609082/).

arbitration model has inherent potential for abuse and offers practical suggestions for companies facing the threat of mass filings. Finally, this GT Advisory identifies developments to watch.

## II. How We Got Here: The Plaintiffs' Bar's Response to the Rigorous Enforcement of Arbitration Agreements

### A. The Supreme Court's enforcement of class action waivers sets the stage for mass individual claims.

Although much-maligned by consumer and employee groups, arbitration can provide significant mutual benefits, like efficiency, speed, flexibility, confidentiality, and simplified procedural and evidentiary rules. Over the last decade, however, one feature of arbitration has received the most attention from parties and courts alike: the class action waiver. Today's growing trend of mass arbitration has its genesis in the 2011 decision *AT&T Mobility Servs. v. Concepcion*, where the Supreme Court upheld the enforceability of an arbitration contract that prohibited individual consumers from bringing or participating in class action litigation.<sup>3</sup>

*Concepcion* involved a dispute by consumers over sales taxes charged for a cell phone advertised as free.<sup>4</sup> The sale and servicing agreement for the phone contained an arbitration provision requiring all claims to be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."<sup>5</sup> The plaintiffs (the *Concepcions*) sued in federal court, and AT&T moved to compel arbitration. The district court denied the motion, finding the class action waiver unconscionable under the California Supreme Court's decision in *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005). The Ninth Circuit affirmed, ruling that the Federal Arbitration Act (FAA) did not preempt California's so-called "Discover Bank Rule."<sup>6</sup>

The United States Supreme Court reversed, finding that the principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms.<sup>7</sup> The Court held that the Discover Bank Rule interfered with the purposes and objectives of the FAA and was therefore preempted.<sup>8</sup> The majority also rejected plaintiffs' argument that "class proceedings are necessary to prosecute small-dollar claims," finding that the *Concepcions* actually might have been better off pursuing individual arbitration:

As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of \$7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be "essentially guarantee[d]" to be made whole, 584 F.3d, at 856, n. 9. Indeed, the District Court concluded that the *Concepcions* were better off under their arbitration agreement with AT&T than they would have been as participants in a class action, which "could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars." [Citation.]<sup>9</sup>

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<sup>3</sup> *AT&T Mobility v. Concepcion*, 563 U.S. 333, 352 (2011).

<sup>4</sup> *Id.* at 337.

<sup>5</sup> *Id.* at 336.

<sup>6</sup> *Id.* at 340 (explaining the Discover Bank Rule as a rule of California law classifying most class action waivers in consumer contracts as unconscionable).

<sup>7</sup> *Id.* at 344 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

<sup>8</sup> *Id.* at 352.

<sup>9</sup> *Id.* at 351-52 (internal citation omitted).

In the wake of *Concepcion*, the Supreme Court has repeatedly enforced arbitration provisions precluding class or representative actions. In 2013, the Supreme Court reversed the Second Circuit and held that the FAA does not permit courts to invalidate a class action waiver on the ground that the cost of individually arbitrating a federal statutory claim could exceed the potential recovery.<sup>10</sup> And in 2018, the Court applied *Concepcion* in the employment context, holding that the National Labor Relations Act did not supersede Congress' instruction in the FAA that arbitration agreements providing for individualized proceedings must be enforced.<sup>11</sup>

The Court's rigorous enforcement of arbitration agreements according to their terms continued in a pair of 2019 opinions: *Henry Schein, Inc. v. Archer & White Sales, Inc.* and *Lamps Plus, Inc. v. Varela*. In the former, the Court held that, when the parties' arbitration agreement delegates arbitrability questions to an arbitrator, "a court possesses no power to decide the arbitrability issue."<sup>12</sup> In the latter, the Court held that ambiguity is an insufficient basis to find that the parties agreed to class-wide arbitration, and that any such intent must be expressed clearly rather than in general language commonly used in arbitration agreements.<sup>13</sup>

In sum, *Concepcion* and its progeny distilled three principles that set the stage for the mass individual arbitration trend:

- (1) Arbitration provisions requiring parties to arbitrate individually, and not in a class or collective action, must be enforced according to their terms under the FAA;
- (2) Courts possess no power to decide arbitrability disputes where the parties have delegated that power to an arbitrator; and
- (3) Class-wide or collective proceedings in arbitration are not available to the parties unless the arbitration agreement clearly and unequivocally expresses otherwise.

#### **B. Claimant-friendly cost provisions generate a wave of individual arbitration claims.**

While rulings like *Concepcion* and *Epic Systems* provided the kindling for the mass arbitration phenomenon, the one-sided cost provisions often included in companies' arbitration agreements provided the spark. Indeed, despite the Supreme Court's enforcement of class action waivers under the FAA, courts continued to scrutinize consumer and employment arbitration agreements, regularly invalidating agreements that imposed forum costs on the claimant that could stifle claims.<sup>14</sup> To avoid potential invalidation of their arbitration agreements and accompanying class action waivers, businesses routinely

<sup>10</sup> *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 237-238 (2013).

<sup>11</sup> *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630-32 (2018).

<sup>12</sup> *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019).

<sup>13</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418-19 (2019) (relying on *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), which concluded similarly as to silence in an arbitration agreement).

<sup>14</sup> See *Italian Colors*, 570 U.S. at 236 (explaining that "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable" could still invalidate an arbitration agreement); *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) (invalidating arbitration agreement notwithstanding *Concepcion* where the agreement imposed administrative and filing costs that could "effectively foreclose pursuit of the claim"); *Capili v. Finish Line, Inc.*, 699 F. App'x 620, 622 (9th Cir. 2017) ("The district court properly determined that the cost-sharing provision was substantively unconscionable. The provision required Capili, a retail employee making \$15 per hour, to pay up to \$10,000 at the outset of arbitration, not including the fees and costs for legal representation.").

offered (and continue to offer) claimant-friendly terms requiring the business to pay for all administrative and arbitrator fees in any arbitration.<sup>15</sup>

In or about 2018, recognizing the massive fee obligations companies would face from thousands of individual claims filed at once, a few plaintiffs' firms began "testing a new weapon in arbitration: sheer volume."<sup>16</sup> Early, publicized examples involved employment misclassification claims against "gig economy" companies like Uber, Postmates and DoorDash.<sup>17</sup> Mass arbitration claims spread to the consumer context rapidly, with firms utilizing targeted online advertising and claim submission websites to aggregate claimants.<sup>18</sup>

Over the last two years, with multiple courts having shown an unwillingness to step in, the mass arbitration trend is only gaining momentum.

### III. Initial Responses to Mass Arbitration Filings

Facing thousands of claims and millions in fees to initiate them, companies have employed various approaches to try to combat the mass arbitration trend. Three of these initial approaches have included: (i) refusing to pay arbitration fees; (ii) asking a court to halt the arbitrations; and (iii) seeking approval of class settlement in parallel litigation. Thus far, these approaches generally have been unsuccessful for businesses seeking to put an end to the mass claims.

**First**, several companies have understandably balked at the astronomical sums invoiced by arbitration providers. DoorDash, for example, refused to pay the AAA's fees when faced with thousands of employment misclassification claims by alleged couriers. Without payment, the AAA closed the cases. The claimants responded with a petition to compel arbitration in federal court. On February 10, 2020, Judge William Alsup of the Northern District of California granted the claimants' petition and compelled arbitration of 5,010 individual claims, concluding that:

For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order.<sup>19</sup>

<sup>15</sup> The default rules of popular arbitration providers like the American Arbitration Association ("AAA") also typically require the business to cover arbitration costs in the consumer and employment context. *See, e.g.,* AAA Consumer Rules, Costs of Arbitration (requiring the business to pay all administrative, filing and arbitrator fees, except for a \$200 filing fee to the claimant).

<sup>16</sup> Michael Corkery and Jessica Silver-Greenberg, *The New York Times*, 'Scared to Death' by Arbitration: Companies Drowning in Their Own System (April 6, 2020), available at, [www.nytimes.com/2020/04/06/business/arbitration-overload.html](http://www.nytimes.com/2020/04/06/business/arbitration-overload.html).

<sup>17</sup> *See, e.g., Adams v. Postmates, Inc.*, 414 F. Supp. 3d 1246 (N.D. Cal. 2019); *Abernathy v. Doordash, Inc.*, 438 F. Supp. 3d 1062 (N.D. Cal. 2020); *Abadilla v. Uber Technologies*, No. 3:18-cv-07343 (N.D. Cal. filed Dec. 5, 2018).

<sup>18</sup> *See, e.g.,* Alison Frankel, Reuters, *Mass consumer arbitration is on! Ed tech company hit with 15,000 data breach claims* (May 12, 2020), available at, [www.reuters.com/article/legal-us-otc-chegg/mass-consumer-arbitration-is-on-ed-tech-company-hit-with-15000-data-breach-claims-idUSKBN22O33E](http://www.reuters.com/article/legal-us-otc-chegg/mass-consumer-arbitration-is-on-ed-tech-company-hit-with-15000-data-breach-claims-idUSKBN22O33E); Alison Frankel, Reuters, *FanDuel wants N.Y. state court to shut down mass consumer arbitration* (Jan. 14, 2020), available at, [www.reuters.com/article/us-otc-fanduel/fanduel-wants-n-y-state-court-to-shut-down-mass-consumer-arbitration-idUSKBN1ZD2SK](http://www.reuters.com/article/us-otc-fanduel/fanduel-wants-n-y-state-court-to-shut-down-mass-consumer-arbitration-idUSKBN1ZD2SK).

<sup>19</sup> *Abernathy*, 438 F. Supp. 3d at 1067-1068.

Making matters more difficult, the State of California enacted legislation (Senate Bill 707) effective Jan. 1, 2020, that provides severe consequences for nonpayment of arbitration fees in the consumer and employment contexts:

In an employment or consumer arbitration that requires, either expressly or through application of state or federal law or the rules of the arbitration administrator, the drafting party to pay certain fees and costs before the arbitration can proceed, if the fees or costs to initiate an arbitration proceeding are not paid within 30 days after the due date, the drafting party is in material breach of the arbitration agreement, is in default of the arbitration, and waives its right to compel arbitration under Section 1281.2.<sup>20</sup>

If the company does not pay, a consumer or employee may: “(1) Withdraw the claim from arbitration and proceed in a court of appropriate jurisdiction[,] [or] (2) [c]ompel arbitration in which the drafting party shall pay reasonable attorney’s fees and costs related to the arbitration.”<sup>21</sup> The law also states, “[t]he court shall impose a monetary sanction against a drafting party that materially breaches an arbitration agreement pursuant to subdivision (a) of Section 1281.97 or subdivision (a) of Section 1281.98, by ordering the drafting party to pay the reasonable expenses, including attorney’s fees and costs, incurred by the employee or consumer as a result of the material breach.”<sup>22</sup> In addition to monetary sanctions, the court may issue evidentiary sanctions, terminating sanctions, and even hold the drafting party in contempt.<sup>23</sup>

At least two companies have argued that these California statutes are preempted by the FAA.<sup>24</sup> In January 2021, Judge Philip S. Gutierrez of the Central District of California rejected the argument, reasoning that:

[R]ather than render arbitration agreements invalid or unenforceable, SB 707 encourages arbitration by changing the remedies available to non-drafting parties when drafting parties delay the process and refuse to pay required fees. Cal. Civ. Proc. Code § 1281.97(a)-(d). Therefore, SB 707 is pro-arbitration because it makes arbitration more effective and efficient. Instead of nullifying arbitration agreements, the law ensures a speedy resolution under their terms by preventing parties . . . from holding hostage employees’ or consumers’ validly arbitrable claims.<sup>25</sup>

**Second**, some companies have asked courts to step in and rule that the mass claims are in violation of the parties’ agreements that require claims to proceed individually. For example, in *Adams v. Postmates, Inc.*, in response to a motion to compel arbitration of 5,257 employment misclassification claims, Postmates filed a cross-motion seeking an order compelling the claimants to “refile their respective arbitration demands in a manner that . . . includes more details and to proceed before the arbitrator in an ‘individual’ manner.”<sup>26</sup> The court ordered the parties to arbitrate but otherwise declined to enter the fray, relying on *Henry Schein, Inc.* and finding that, under the parties’ arbitration agreement, “it is within the arbitrator’s exclusive authority to determine the sufficiency of Petitioners’ arbitration demands and how the arbitration should be conducted.”<sup>27</sup> The Ninth Circuit affirmed the district court’s decision, holding that

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<sup>20</sup> Cal. Code Civ. Proc. § 1281.97.

<sup>21</sup> *Id.*

<sup>22</sup> Cal. Code Civ. Proc. § 1281.99(a).

<sup>23</sup> *Id.*

<sup>24</sup> See *Goobich v. Excelligence Learning Corp.*, No. 5:19-cv-06771-EJD, 482 F. Supp. 3d 986, 989 (N.D. Cal. 2020); *Postmates Inc. v. 10,356 Individuals*, No. CV 20-2783 PSG (JEMx), 2020 U.S. Dist. LEXIS 70210, at \*21 (C.D. Cal. Apr. 15, 2020).

<sup>25</sup> *Postmates Inc. v. 10,356 Individuals*, No. CV 20-2783 PSG (JEMx), 2021 U.S. Dist. LEXIS 28554, at \*21 (C.D. Cal. Jan. 19, 2021).

<sup>26</sup> *Adams*, 414 F. Supp. 3d at 1248.

<sup>27</sup> *Id.* at 1252-1255.



whether the claimants’ mass claims violated the arbitration agreement’s class action waiver was an issue for the arbitrators.<sup>28</sup>

The following year, Postmates received another set of 10,356 arbitration demands filed by the same plaintiffs’ firm, each of which alleged worker misclassification and violations of California wage and hour laws, among other things.<sup>29</sup> Postmates took the offensive and sought a temporary restraining order in federal court enjoining the claimants from participating in a “de facto class arbitration.”<sup>30</sup>

On April 15, 2020, Judge Gutierrez denied Postmates’ TRO request, finding, among other things, that Postmates was unlikely to succeed on the merits “in demonstrating: (1) that the Court, rather than the arbitrator, may decide this question and/or (2) that [the claimants] are proceeding as ‘de facto class arbitration.’” The court also ruled that it was not clear that Postmates would suffer any “irreparable harm.”<sup>31</sup>

Other companies seeking judicial intervention to halt mass arbitrations have run into similar outcomes, with courts unwilling to let the parties out of arbitration and back into court.<sup>32</sup>

**Third**, businesses facing class action allegations in parallel litigation have sought approval of class settlements to provide releases from class members, including those that filed arbitration demands. But attempts at court approval have been met with fierce objection from the arbitration claimants’ counsel, as well as the likelihood of opt-outs from a significant portion of individuals who filed arbitration demands (at the direction of counsel).

In one recent example that garnered attention, Northern District of California Judge Charles R. Breyer denied Intuit’s request for approval of a class settlement that would have potentially resolved thousands of mass arbitration claims. In that case, Intuit was sued in a putative class action in federal court based on allegations that it misdirected taxpayers who qualified for free services to paid products.<sup>33</sup> Intuit denied the allegations and moved to compel individual arbitration of the claims.<sup>34</sup> The district court denied the motion to compel, but the Ninth Circuit reversed, upholding the arbitration provision in Intuit’s Terms of Use, including the class action waiver.<sup>35</sup>

While the putative class action was proceeding and on appeal, however, plaintiffs’ firm Keller Lenkner was busy collecting and filing tens of thousands of individual arbitration cases based on the same allegations.<sup>36</sup> After employing numerous strategies to close the mass arbitrations without success, Intuit ultimately agreed to a \$40 million class settlement in the hopes of putting an end to consumers’ claims.<sup>37</sup> Among other provisions, the class settlement called for a temporary injunction blocking arbitration proceedings from continuing unless the class members opted out of the settlement.<sup>38</sup> The proposed settlement also

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<sup>28</sup> *Adams v. Postmates, Inc.*, 823 F. App’x 535, 536 (9th Cir. Sept. 29, 2020).

<sup>29</sup> *Postmates*, 2020 U.S. Dist. LEXIS 70210, at \*9.

<sup>30</sup> *Id.* at \*12.

<sup>31</sup> *Id.* at \*17-21.

<sup>32</sup> *See, e.g., Intuit Inc. v. 9,933 Individuals*, No. 20STCV22761 (Sup. Ct. L.A. Cnty. Oct. 6, 2020) (denying request for preliminary injunction staying approximately 9,933 individual arbitration claims to allow claims to be heard in an alternate forum).

<sup>33</sup> *Arena v. Intuit Inc.*, 444 F. Supp. 3d 1086, 1088 (N.D. Cal. 2020).

<sup>34</sup> *Id.*

<sup>35</sup> *Dohrmann v. Intuit, Inc.*, 823 F. App’x 482, 483-85 (9th Cir. 2020).

<sup>36</sup> Alison Frankel, Reuters, *Intuit defends \$40 million class settlement, attacks mass arbitration firm* (December 9, 2020), available at, [www.reuters.com/article/legal-us-otc-intuit/intuit-defends-40-million-class-settlement-attacks-mass-arbitration-firm-idUSKBN28J34A](https://www.reuters.com/article/legal-us-otc-intuit/intuit-defends-40-million-class-settlement-attacks-mass-arbitration-firm-idUSKBN28J34A).

<sup>37</sup> *Id.*

<sup>38</sup> *Arena v. Intuit, Inc.*, No. 3:19-cv-02546-CRB, at ECF No. at 162 [Motion for Preliminary Approval].

required individual signature of opt-out notices using an ID supplied by the settlement administrator for the opt-out to be effective.<sup>39</sup>

The day after Intuit filed its motion for preliminary approval of class settlement, Keller Lenkner sought to intervene in the class action, arguing that the class settlement was a bad deal for its clients and protesting the requirements for delivering a successful opt-out.<sup>40</sup> On March 5, 2021, Judge Breyer issued an opinion denying preliminary approval, finding “the proposed settlement provide[d] class members with inadequate compensation and set[ ] forth opt out procedures that unduly burden all class members, but especially those who have already begun to pursue claims through arbitration.”<sup>41</sup> Had the settlement been approved, Intuit still could have faced a significant number of opt-outs from individuals represented by Keller Lenkner.

#### IV. Mass Arbitration: A Model Susceptible to Abuse

As shown above, many judges have been unmoved by companies’ protestations against mass arbitration and unwilling to intervene. Yet the lack of oversight of this newly emergent model has created a system ripe for abuse.

To begin with, there are few requirements for initiating an arbitration demand with providers like the AAA and JAMS. A consumer initiating a claim with the AAA need only “briefly explain the dispute,” provide basic contact information, state “what the claimant wants,” and submit a \$200 filing fee along with a copy of the arbitration agreement.<sup>42</sup> As companies that have faced mass arbitration filings can attest, the filings typically consist of thousands of boilerplate demands with nothing more than a short paragraph of legal conclusions and no individualized details about the claim or claimant other than a name and address. There is often little to no information available to evaluate the claims. And digging into the details of the claims, when possible, usually reveals that a significant portion are invalid on their face. At present, however, so long as the arbitral provider deems that the claim meets its minimum, barebones requirements, arbitration fees will be assessed almost immediately.

Further, absent party agreement, there is no mechanism to prevent the immediate triggering of arbitration fees following the filing of arbitration demands *en masse*, regardless of whether the demands have any basis in fact or law.<sup>43</sup> And even if the parties’ arbitration agreement or the applicable arbitral rules provide for fee-shifting where claims are asserted frivolously or in bad faith, those remedies generally do not arise until after the business has incurred substantial cost. Thus, once the demands are filed, companies may be on the hook for millions before they ever have an opportunity to show an arbitrator that the claims are utterly meritless.

In addition, the rules of organizations like the AAA and JAMS require the company to pay fees that often exceed the value of any individual damages the claimant supposedly suffered. For example, the AAA’s Consumer Rules require the business to pay:

- An initial filing fee of between \$75 and \$300 per case, depending on how many arbitrations are filed;

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at ECF No. at 163 [Letter from Keller Lenkner to Judge Breyer].

<sup>41</sup> *Arena v. Intuit Inc.*, No. 19-cv-02546-CRB, 2021 U.S. Dist. LEXIS 41994, at \*9 (N.D. Cal. Mar. 5, 2021).

<sup>42</sup> AAA Consumer Rules, R-2, Starting Arbitration under an Arbitration Agreement in a Contract.

<sup>43</sup> See AAA Consumer Rules, Costs of Arbitration (requiring the business’ payment of filing fees “as soon as the AAA confirms in writing that the individual filing meets the filing requirements,” and requiring the business’ payment of case management and arbitrator fees prior to arbitrator appointment); JAMS Streamlined Arbitration Rules & Procedures, Rule 26 (requiring payment of JAMS fees and expenses “at the time of the commencement of the Arbitration,” and requiring deposit of arbitrator fees “prior to the Hearing”).

- A case management fee of \$1,400 per case; and
- Arbitration compensation of between \$1,500 and \$2,500 per case, depending on whether the arbitrations are decided through documents alone or a live hearing. If the arbitrations are resolved through a live hearing, the AAA assesses an additional \$500 hearing fee.<sup>44</sup>

Thus, if 1,000 consumer arbitrations are filed with the AAA and conducted through live hearings, the minimum fees to the business, up front, are \$4,662,500. Put another way, a company could face over \$900,000 in arbitration fees for every 200 consumer arbitrations filed with the AAA. Many mass arbitration filings involve several thousand boilerplate demands that have been aggregated on the Internet, without proper vetting.

Adjudicating thousands of individual claims at once also presents logistical challenges, with many plaintiffs' firms unable to handle the volume of claims they file. Yet where the parties' arbitration agreement prohibits class-wide or collective arbitration proceedings, providers like the AAA and JAMS will not consolidate claims, even where efficiency plainly dictates it.<sup>45</sup> Nor will the providers stay claims without party agreement.<sup>46</sup>

Generally speaking, the lawyers driving these matters have no interest in litigating thousands of individual arbitrations. Rather, they seek to leverage a settlement as a way for the business to avoid paying the high filing and administrative fees that most arbitrable forums assess almost immediately. The result is one that nobody bargained for: contrived mass claims not tied to the merits or any actual damages but, instead, the avoidance of arbitration fees.<sup>47</sup>

## **V. Shifting the Balance of Power: Responses Companies May Consider When Facing Mass Arbitration Threats**

Although mass arbitration has placed an enormous strain on companies, creative defenses and forward-thinking approaches to arbitration provisions may help turn the tables. Whether a company is facing claims already or seeking to position itself for potential future claims, below are practical suggestions that may help businesses shift the balance back in their favor.

### **A. Do not ignore the claim notice letter.**

Many laws, such as certain state consumer protection statutes, require claimants to provide pre-suit notice before initiating a claim.<sup>48</sup> These laws may contain safe-harbors for companies who make reasonable settlement offers in response to the notice, limiting the claimant from obtaining recovery beyond what was offered.<sup>49</sup> In addition, businesses may require, in the arbitration provision itself, that claimants provide notice of a claim before filing an arbitration.

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<sup>44</sup> See AAA Consumer Rules, Costs of Arbitration.

<sup>45</sup> See AAA Consumer Rules (declining to provide any default rules for combining or consolidating mass claims); JAMS Streamlined Arbitration Rules & Procedures, Rule 6(e) (allowing for consolidation in JAMS' discretion "unless the Parties' Agreement or applicable law provides otherwise").

<sup>46</sup> Depending on the claims presented, a company may also face inconsistent outcomes across the cases, with arbitrators reaching contrary decisions on the same legal issues.

<sup>47</sup> The frequency and speed with which mass claims can be gathered is increasing as well, with plaintiffs' firms becoming more adept at collecting claimants through Internet advertising and claim aggregation websites.

<sup>48</sup> See, e.g., Cal. Civ. Code § 1782(a); Ala. Code § 8-19-10(e); Ga. Code § 10-1-399(b); Mass. Gen. Laws ch. 93A, § 9(3); Me. Rev. Stat. Ann. tit. 5 § 213(1-A).

<sup>49</sup> See, e.g., Ala. Code § 8-19-10(e); Ga. Code § 10-1-399(b); Mass. Gen. Laws ch. 93A, § 9(3); Me. Rev. Stat. Ann. tit. 5 § 213(1-A).



In either scenario, it is important not to ignore claim notice letters. Companies can evaluate the allegations and circumstances to determine whether offering relief voluntarily might be a viable cost-saving measure. Regardless, companies may use the notice process to probe for information about the claims. Once claims are filed and the business is assessed arbitration fees, much of the negotiating leverage for the claimants' attorneys is gone, and thus there may be motivation for the claimants to provide information and agree to postpone filing. More often, an information exchange process will reveal that a large percentage of the claims are invalid, thus limiting the number of claims and potential exposure considerably.

### **B. Scrutinize the arbitral rules, contract and applicable substantive law.**

If claims are threatened or filed, companies may wish to scrutinize the arbitration provider's rules, the delegation of powers in the arbitration contract, and the applicable substantive law to determine if procedural defenses are available.

As one example, under the AAA's Consumer Rules, "[i]f a party's claim is within the jurisdiction of a small claims court, either party may choose to take the claim to that court instead of arbitration . . . [a]fter a case is filed with the AAA, but before the arbitrator is formally appointed to the case by the AAA, . . . [by] send[ing] a written notice to the opposing party and the AAA that it wants the case decided by a small claims court. After receiving this notice, the AAA will administratively close the case."<sup>50</sup>

Although this straightforward rule (and those like it) may dispose of mass arbitration claims where each is individually low-value, in practice, claimants' counsel will vigorously oppose closure of the cases, leading to disputes about whether the arbitration provision's language overrides the arbitral rules, and whether an arbitrator or court has the power to decide the issue.<sup>51</sup> If an arbitrator must decide the issue, the company will still have to pay fees to have cases initiated and arbitrators appointed, defeating the purpose.

Companies wishing to preserve the ability to close mass cases in favor of litigating in small claims court (where there are no comparable fees generally) can ensure that their arbitration agreements expressly reserve the right to elect small claims court.<sup>52</sup> Companies also may wish to evaluate the delegation of oversight powers in their arbitration agreements, including whether they wish to delegate the power to decide all arbitrability disputes to the arbitrator, or whether they wish to carve out any discrete oversight powers to the court, such as, for example, allowing the court to decide if the claimants' conduct has violated the collective action waiver in the agreement or to resolve disputes regarding the business' right to elect the small claims court forum. By delegating specific, threshold issues to the court, companies may be able to seek court review rather than having the threshold dispute referred to an arbitrator, which will require fee payment.<sup>53</sup>

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<sup>50</sup> AAA Consumer Rules, Rule R-9(b).

<sup>51</sup> *Intuit*, No. 20STCV22761 (Sup. Ct. L.A. Cnty. Oct. 6, 2020) (agreeing with claimants that the parties' arbitration agreement excluded R-9(b) because it preserved the small claims option to claimants only but finding that the court had authority to address the dispute).

<sup>52</sup> *Thompson v. Ford of Augusta, Inc.*, No. 18-2512-JAR-KGG, 2019 U.S. Dist. LEXIS 24659, at \*14 (D. Kan. Feb. 15, 2019) ("The Agreement provides for arbitration if either party elects, but only Plaintiff may elect small claims court. . .").

<sup>53</sup> In addition to the arbitral rules and contract language, parties can analyze the substantive law that applies to the claims to determine if it provides an independent basis for seeking a preliminary review of arbitration claims in court. *See FanDuel, Inc. v. Nick Badii, et al.*, Index No. 650211/2020 (N.Y. Sup. Ct. filed Jan 9, 2020) (contending that, under New York law, which governed the company's consumer contracts, state courts have the authority to conduct a threshold review of arbitration demands and to stay permanently claims the court deems to be untimely).

**C. Consider fee-shifting mechanisms.**

Fee-shifting mechanisms are another powerful tool that businesses may wish to evaluate early, especially as these mechanisms may differ according to substantive state law. In California, for example, two types of fee-shifting mechanisms include Code of Civil Procedure Section 998 offers of judgment and Code of Civil Procedure Sections 128.5 and 128.7 sanctions for bad faith litigation tactics.

**First**, Section 998 authorizes a party to serve an offer of compromise “to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time.”<sup>54</sup> If an offer under Section 998 is rejected, and the recipient obtains a better result at the trial or hearing in the matter, the offer is moot. But if a Section 998 offer is rejected and the recipient fails to obtain a better result, two outcomes follow: (1) the recipient may recover pre-offer costs and attorneys’ fees (if allowed by statute), but “shall not recover his or her postoffer costs,” and (2) the recipient “shall pay the defendant’s costs from the time of the offer.”<sup>55</sup> Attorneys’ fees are included as “postoffer costs” that a claimant cannot recover if he rejects a 998 offer and fails to recover more at the hearing.<sup>56</sup> “The language of section 998 on its face prevents a plaintiff who rejects a settlement offer that is greater than the recovery it ultimately obtains at trial from recovering ‘postoffer’ costs and attorney fees. . . . Such a plaintiff may only recover its preoffer costs to which it would otherwise be entitled, including preoffer attorney fees [where authorized] . . . .”<sup>57</sup>

By its express terms, Section 998 applies in arbitrations where the parties agreed to arbitrate their disputes, as will be true of almost all arbitrations governed by California law:

Not less than 10 days prior to commencement of trial or arbitration (as provided in Section 1281 or 1295) of a dispute to be resolved by arbitration, any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. . . .<sup>58</sup>

In the context of an arbitration, California courts have ruled that an offeror’s post-offer costs under Section 998 include the “costs of arbitration,” and those costs may be offset from an arbitration award where the recipient fails to obtain more following the hearing.<sup>59</sup>

California’s substantive policy of encouraging the parties to assess realistically their likelihood of recovery under Section 998 is particularly well-served in the context of mass individual arbitrations claiming *de minimis* damages. The majority of individual suits in these mass arbitrations will never be brought to a hearing. Instead, claimants’ counsel uses the threat of arbitration fees to attempt to extract a settlement payment disproportionate to any individual claimant’s actual harm or merit. Section 998 was enacted to encourage settlements under these circumstances by requiring parties to “assess realistically their positions prior to trial.”<sup>60</sup> Despite the clear statutory language, JAMS recently adopted an interpretation of its Consumer Arbitration Minimum Standards (“CMS”) barring the use of Section 998 offers, finding that cost-shifting conflicts with the objectives of the CMS to protect consumers from arbitration costs.<sup>61</sup>

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<sup>54</sup> Cal. Code Civ. Proc. § 998(b).

<sup>55</sup> Cal. Code Civ. Proc. § 998(c)(1).

<sup>56</sup> *Id.* § 998(a), § 1033.5(a)(10)(C).

<sup>57</sup> *Duale v. Mercedes-Benz USA, LLC*, 148 Cal. App. 4th 718, 726 (2007); *accord Scott Co. of California v. Blount, Inc.*, 20 Cal. 4th 1103, 1112 (1999).

<sup>58</sup> Cal. Civ. Proc. Code § 998(b).

<sup>59</sup> *Storm v. Stand. Fire Ins. Co.*, 52 Cal. App. 5th 636, 646 (2020).

<sup>60</sup> *Stell v. Jay Hales Dev. Co.*, 11 Cal. App. 4th 1214, 1231 (1992), *disapproved on other grounds by Citizens for Covenant Compl. v. Anderson*, 906 P.2d 1314 (Cal. 1995).

<sup>61</sup> JAMS National Arbitration Committee, Final Report and Recommendation re: Consumer Arbitration Minimum Standards and Offers to Allow Judgment (Jan. 14, 2021).

Businesses may want to consider JAMS and other providers' acceptance of cost-shifting mechanisms like Section 998 offers in deciding what provider should be set forth in their arbitration agreements.

**Second**, California law allows a party to recover its fees and costs directly from opposing party counsel where the opposing party or its counsel engage in bad faith tactics, such as filing frivolous claims or intentionally causing undue and unnecessary expense.<sup>62</sup> California Code of Civil Procedure section 128.7(b) additionally provides:

By presenting . . . a pleading, petition, written notice of motion, or other similar paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following conditions are met: . . . (2) The claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument . . . (3) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.<sup>63</sup>

And where that section is violated, "the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation."<sup>64</sup>

California courts have held that these sanctions provisions may apply in arbitration, and that arbitrators are empowered to sanction counsel, even if counsel is not a signatory to the arbitration agreement.<sup>65</sup> Thus, advising claimants' counsel at the outset of the company's intent to seek fees and costs for the claimants' improperly vetted and frivolous claims may show that claimants' counsel shares considerable risk for the arbitration fees the business is required to pay.

**D. Negotiate an efficient administration of the proceedings short of class arbitration.**

Providers like the AAA and JAMS have, in the past, generally been unwilling to offer any alternative fee structures not set forth in their rules, on the premise that doing so would favor one party over the other and impact the provider's neutrality. Similarly, providers generally refuse to consolidate or combine any matters where the parties' arbitration agreement calls for the individual resolution of claims, unless both parties agree.

Still, where the parties reach agreement, efficiencies can be achieved. To this end, while claimants' counsel is unlikely to agree to any alternative fee arrangements that would reduce the amount of arbitration fees the business is required to pay, companies often can negotiate the efficient administration of cases and delayed timing of fee assessments. For example, if the parties agree, providers will typically stay the assessment of case management and arbitrator fees pending settlement discussions or while an initial "bellwether" set of arbitrations is litigated.

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<sup>62</sup> See Cal. Code Civ. Proc. § 128.5(a) ("A trial court may order *a party, the party's attorney, or both*, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay.") (emphasis added); Cal. Code Civ. Proc. § 128.5(b)(2) ("Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party."); *W. Coast Dev. v. Reed*, 2 Cal. App. 4th 693, 702 (1992) ("[T]he prosecution of a frivolous action may in itself [be] evidence from which a finding of subjective bad faith may be made.").

<sup>63</sup> Cal. Code Civ. Proc. § 128.7(b).

<sup>64</sup> Cal. Code Civ. Proc. § 128.7(c).

<sup>65</sup> See, e.g., *David v. Abergel*, 46 Cal. App. 4th 1281, 1284 (1996) (explaining that section 128.5 empowers arbitrators to impose sanctions in arbitration); *Bak v. MCL Fin. Group, Inc.*, 170 Cal. App. 4th 1118, 1124-26 (2009) (finding that section 128.5 applies to counsel's sanctionable conduct, even if counsel is not a signatory to the arbitration agreement); see also *In re Marriage of Sahafzadeh-Taeb & Taeb*, 39 Cal. App. 5th 124, 135-141 (2019) (explaining that section 128.5 sanctions are proper where an attorney's tactics are committed with an improper motive and result in an opponent incurring additional costs).

Businesses also can negotiate with claimants' counsel to allow for other procedural efficiencies, such as: allowing a majority ruling in a smaller set of arbitrations to control a common issue across a larger set of cases; joint administrative orders or conferences; assigning a limited panel of arbitrators to decide the cases; and/or coordination for discovery. The bottom line is that arbitrations are a party-driven processes, and where the parties agree, arbitration providers and arbitrators typically will abide by those agreements, especially where the purpose is to promote efficiency.

Although claimants' counsel may be reticent to make the process more efficient initially, claimants who actually seek to adjudicate claims often have little choice but to agree, since counsel may not have the resources to arbitrate hundreds or thousands of cases at once. Agreeing to stay the bulk of the cases for adjudication of a small, initial set may also be appetizing to claimants' counsel, who will want to test their theories before committing to prosecuting hundreds or thousands of claims. If the company believes in the merits of its defenses, winning an initial set of cases may provide strong leverage in resolving the remainder.

#### **E. Consider individual settlement negotiations.**

Another way to stave off arbitration fees is through individual settlement resolutions, as often claimants' counsel will agree to stay all claims and expenditures while the parties attempt to negotiate resolution. In fact, as the threat of arbitration fees is often the claimants' greatest leverage, claimants' counsel is incentivized to maintain this leverage while pursuing a potential resolution. Again, companies can use any negotiations as an opportunity to gather information that purportedly supports the claims and to rule out invalid claims, as often the number of individuals that counsel claims to represent will be cut in half, or more.

Negotiating a large number of individual settlements poses challenges that companies will need to navigate, however, assuming settlement is something the company is willing to consider at all. To confirm that each claimant's claim is real, companies may require that claimants provide certain supporting information to trigger a payment obligation under the settlement. Parties also will need to coordinate how releases will be obtained and payments will be made, and companies may prefer to hire a settlement administrator to process the exchanges on a mass scale.

Still, companies must understand that they are not buying finality of all claims, but only releases from individuals who participate in the settlement. Strategies can be employed, though, to help ensure that claims do not continue, including through representations and warranties in the settlements and confidentiality provisions.

#### **F. Consider amending the arbitration agreement.**

Although it is a prospective measure, perhaps the strongest way a company can avoid or limit mass arbitration filings in the future is by amending its arbitration agreement to address the claimants' filing strategy preemptively. Terms that companies can consider include, but are not limited to:

- Mutual consent to delineated consolidation procedures in arbitration where the claim is one of many related claims;<sup>66</sup>
- Selecting an arbitral body or rules that provide for more efficient procedures for mass filings—for example, the International Institute for Conflict Prevention & Resolution (CPR) recently adopted an

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<sup>66</sup> A class action waiver that bars consolidation of any kind in court or arbitration could be amended carefully to allow for specific consolidation procedures in arbitration.

employment-related mass claims protocol, which, among other things, allows for stays of mass claims for test cases;<sup>67</sup>

- Incorporating pre-filing notice procedures that require a period of time before arbitration demands can be filed, and that call for reasonable information a claimant must provide in the notice process before filing a claim;
- Allowing for fee reallocation where claims are asserted in bad faith or for improper purposes;
- Incorporating fee-shifting procedures similar to an offer of judgment if the business makes a settlement offer of a certain amount, and the consumer rejects that offer and fails to obtain a greater award (although some arbitration providers like JAMS may not enforce);
- Permitting court oversight of the interpretation of class or collective action waivers or limitations, such that the court is empowered to address disputes regarding manipulation or breach of the parties' arbitration agreement; and/or,
- Allowing either party to elect to have a dispute heard in small claims court regardless of whether the claimant files in arbitration first.

When amending the arbitration agreement, striking a balance between what is needed to ameliorate the risk of mass claims and what is needed to ensure that the contract will still be enforced by a court may go a long way. Some or all of the types of provisions above may assist a company that believes it will be a target of mass arbitration claims in the future.

## **VI. How Will Arbitration Providers Adapt?**

As the mass arbitration trend gains steam in 2021, businesses will be watching keenly how arbitration providers adapt. Will mainstream providers like the AAA and JAMS change their rules to address mass arbitration scenarios, and will new providers emerge to provide competition?

Effective November 1, 2020, the AAA amended its Consumer Arbitration Rules to provide for an alternative fee structure for what it calls “Multiple Consumer Case Filings.”<sup>68</sup> Yet the amended fee structure only reduces the initial filing fee to between \$75 and \$300 per case, depending on how many arbitrations are filed.<sup>69</sup> The change hardly moves the needle for a company facing thousands of demands, especially since administrative and arbitrator costs may exceed \$4,000 per case.

Thus far, the AAA and JAMS have appeared unwilling to institute mass claims protocols to provide for greater oversight and efficiencies. Providers may not be aware that their arbitration fee structures are being manipulated by claimants' counsel to leverage resolutions that bear no relationship to the substance of the claims. But there can be little doubt that claimants' counsel are weaponizing administrative expenses and arbitration deposit protocols to create tremendous exposure in cases with limited substantive value. Where companies capitulate to this financial pressure, claimants' counsel are able to leverage settlements based solely on the desire to avoid arbitration expense.

This apparent unwillingness to address the mass arbitration phenomenon head-on also has created an urgent need for new providers. Some businesses, for example, have switched to the CPR because of its

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<sup>67</sup> See CPR, *CPR Launches New Mass Claims Protocol and Procedure* (Nov. 6, 2019), available at [www.cpradr.org/news-publications/press-releases/2019-11-06-cpr-launches-new-mass-claims-protocol-and-procedure](http://www.cpradr.org/news-publications/press-releases/2019-11-06-cpr-launches-new-mass-claims-protocol-and-procedure); see also *McGrath v. Doordash, Inc.*, No. 19-cv-05279-EMC, 2020 U.S. Dist. LEXIS 207491, at \*28 (N.D. Cal. Nov. 5, 2020) (compelling arbitration under CPR Rules and rejecting plaintiffs' argument that the CPR forum was biased due to its mass claims protocol).

<sup>68</sup> AAA, Consumer Arbitration Rules, available at [www.adr.org/sites/default/files/Consumer-Rules-Web.pdf](http://www.adr.org/sites/default/files/Consumer-Rules-Web.pdf)

<sup>69</sup> *Id.* at pp. 32-37.



lower administrative filing fees and mass claims protocol. One court already has granted a motion to compel arbitration pursuant to CPR rules.<sup>70</sup> Other businesses in the crosshairs may soon follow suit. And other arbitral providers may see an opportunity in the market and come forward with mass claims protocols, driving competition.

While businesses wait and see how market forces play out, they may be wise to evaluate their own arbitration agreements and plan their defenses accordingly.

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<sup>70</sup> *McGrath*, 2020 U.S. Dist. LEXIS 207491, at \*28.