

Class Action Monitor

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Mass Arbitration: A New Wrinkle in an Old Problem

By David Singh and Amy Le

Since 2018, a plaintiffs' strategy known as "mass arbitration" has become increasingly popular. In mass arbitration, plaintiffs' lawyers file thousands of individual arbitrations against a single company. This forces companies to pay arbitration organizations hundreds and thousands, if not millions, of dollars in filing fees. These staggering up-front costs often outstrip the collective worth of the claims and force companies to settle long before the matter is resolved, no matter the merits of the claims. While many attempts to end mass arbitrations have met with limited success, new approaches to drafting arbitration agreements and changes in arbitral organizations' rules may help mitigate the risk of mass arbitration.

***AT&T v. Concepcion* and the Rise of the Class-Action Waiver**

Mass arbitration is a response to the increasingly common use of class-action waivers in arbitration agreements. In *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the Supreme Court accelerated a rising trend by blessing the use of class-action waivers, provisions which require plaintiffs to seek relief in their individual capacities rather than as part of a class. In *Concepcion*, the Court held that the Federal Arbitration Act (FAA) pre-empted Californian courts from categorically finding that class-action waivers within arbitration provisions rendered those provisions unconscionable and thus unenforceable. According to the majority opinion, requiring parties to engage in class arbitration interfered with fundamental attributes of arbitration—such as its informality, speed, and cost-effectiveness—and eroded protections for defendants.

Many commentators predicted that *Concepcion* would spark a meteoric increase in the number of class-action waivers in arbitration agreements.

While it remains unclear whether this prediction was borne out across the board, mandatory arbitration agreements and class-action waivers have come to dominate certain industries. For instance, by 2015, seven of the eight largest facilities-based mobile wireless providers, covering 99.9% of subscribers, had mandatory arbitration clauses in their 2014 customer agreements, and 85.7% of those arbitration clauses included express class-action waivers.

CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 2.3, at 7, § 2.5.5, at 44–45 (2015).

Even outside those industries, however, class-action waivers have become increasingly popular. A recent study found that 81 of the 100 largest U.S. companies have used arbitration agreements in connection with consumer transactions, and 78 of those companies included class-action waivers in their arbitration agreements. Imbre Stephen Salazai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019). This proliferation of class-action waivers has allowed companies to guard themselves against costly and inefficient class actions both in court and in arbitration.

Plaintiffs' Strategies and Defendants' Reactions

In response to the widespread use of class-action waivers, plaintiffs' lawyers have begun adopting new strategies, such as mass arbitration. The first step in this strategy is often an advertising campaign by a plaintiff firm in which plaintiffs recruit individual plaintiffs. The plaintiff firm then brings hundreds or thousands of arbitration demands against a company at the same time, forcing the defendant to the negotiating table by requiring them to pay the filing fees for each claim, sometimes far exceeding the worth of the claim. If the arbitration administrator is JAMS, for instance, the company must pay an initial filing fee of \$1,500 for consumer claims and \$1,350 for employee claims. In one recent mass arbitration case, these filing fees totaled \$12 million.

So far, judges have been receptive to plaintiffs' arguments that the terms of arbitration agreements allow for mass arbitration, with one judge going as far as to call it "poetic justice" for companies' decades-long insistence that arbitration agreements be enforced as written. *Abernathy v. Doordash, Inc.*, No. 3:19-cv-07545-WHA (N.D. Cal. filed Nov. 15, 2019), ECF No. 76 [Transcript], at 27. Defendants, however, have argued that these mass arbitrations are no justice at all. After all, mass arbitration encourages huge settlements based solely on avoiding arbitration fees, rather than the merits of the claim or any damages incurred by the plaintiffs. Indeed, the magnitude of mass arbitrations makes it difficult for plaintiffs' firms to vet each plaintiff properly, meaning that hundreds of frivolous claims may slip through the cracks. Yet because arbitration organizations' filing fees are usually nonrefundable, companies may end up thousands of dollars in the hole even after proving that the claims were frivolous.

Courts have thus far been largely unsympathetic to defendants' attempts to end mass arbitrations. Defendants have argued that mass arbitrations violate class action-waivers. However, some courts have held that this question is properly addressed by the arbitrator(s), rather than a court, which means that the defendant must still pay the filing fees. Other defendants have refused to pay these exorbitant arbitration fees, only for courts to compel arbitration regardless of defendants' protests that many of the claims were frivolous. The State of California further tilted the scale in favor of plaintiffs by enacting a law that requires defendants to pay arbitration fees within 30 days or face severe sanctions. SB 707, *codified at* Cal. Code Civ. Proc. § 1281.97.

Finally, defendants litigating parallel class action lawsuits have tried using class settlements to obtain releases from all class members, including those who have filed arbitration demands. However, at least one court has denied preliminary approval for such a class settlement, finding, among other things, that the proposed settlement "unduly burden[ed] all class members, but especially those who have already begun to pursue claims through arbitration." *Arena v. Intuit Inc.*, No. 19-cv-02546-CRB, 2021 U.S. Dist. LEXIS 41994, at *9 (N.D. Cal. Mar. 5, 2021).

While defendants' attempts to combat the mass arbitration strategy have largely failed, companies may be able to revise their arbitration provisions to mitigate the risk of the mass arbitration strategy. For example, companies should consider revising their arbitration provisions to require good faith attempts to resolve the dispute before any party may commence an arbitration; this will make it more burdensome for plaintiffs' counsel to employ a mass arbitration strategy and would provide the opportunity to "pick off" individual claimants with stronger claims. Companies should also consider adding cost-sharing provisions permitting companies to require the claimant to bear some of the costs of the arbitration (such as the cost that a plaintiff would incur in filing the claim in a court) or cost-shifting provisions for frivolous claims. Such a cost-shifting provision would be tantamount to a Rule 11 standard and should thus withstand state law unconscionability challenges. Companies should also consider adding provisions to their arbitration agreements requiring individualized arbitration demands specifying detailed information about each claimant's claim and/or provisions specifying that only one dispute regarding the same issue can be arbitrated at a time and that serially filed matters will be arbitrated in the order in which they were filed.

Arbitration Organizations' Changes

Companies should also consider specifying that the arbitration will be administered by an arbitration organization with specific procedures for mass arbitrations. Some arbitration organizations have developed mass arbitration procedures given the risk that, if they do not, arbitration may no longer be an attractive means of dispute resolution for companies. For instance, the International Institute for Conflict Prevention and Resolution (CPR) recently created a distinct procedure for mass arbitrations in the employment context. Claims filed with CPR trigger this procedure when more than "30 individual employment-related arbitration claims of a nearly identical nature are, or have been, filed with CPR against the same Respondent(s) in close proximity to one another." Once the procedure is triggered, CPR randomly selects a number of test cases to present to a mediator. After all test cases are decided, the mediator works with the parties to reach a global resolution using the test cases as examples.

Such mass arbitration procedures may help streamline the process for defendants and make it less costly. If more arbitration organizations follow suit, mass arbitration may soon become a less attractive option for plaintiffs' lawyers.

Conclusion

Mass arbitration poses a new wrinkle in the old problem of preventing costly and inefficient class actions. While several courts have been skeptical of attempts to combat mass arbitration, there may be ways to revise these arbitration agreements to include provisions that dissuade the filing of mass arbitrations or, at the very least, reduce their impact. Because mass arbitration is so new, however, these provisions have been largely untested.

Companies seeking to revise their arbitration agreements in light of this new threat should thus obtain industry- and jurisdiction-specific legal advice on this subject.

Third Circuit Cements Three-Way Split on Issue Classes

By Drew Tulumello, Pravin Patel, and Brian Liegel

When facing a motion for class certification, litigators and corporate counsel are well acquainted with the familiar requirements of Rule 23(b)(3) classes – which require common questions of fact or law to predominate over individualized issues and that a class action is superior to other methods of adjudication. A class action defense strategy generally depends, therefore, on arguments that the predominance and superiority requirements, as well as those of Rule 23(a), are not satisfied for the class as a whole. Often, certification of a Rule 23(c)(4) issue class is an afterthought, raised in a perfunctory manner by class counsel at the end of their motion (if at all). But, as Judge Posner recognized long ago, the prospect of a case certified “as a class action with respect to particular issues” rather than as a whole, still carries with it significant settlement pressure no matter the strength of plaintiffs’ claims. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-99 (7th Cir. 1995).

Rule 23(c)(4) provides that “[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues.” The circuit courts, however, are divided in a three-way split as to when an issue class under may be certified:

1. The Fifth Circuit holds that a plaintiff must still establish Rule 23(b)(3)’s predominance standard for the case as a whole and “cannot manufacture predominance through nimble use of subdivision (c)(4).” *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.1 (5th Cir. 1996). This approach has been followed by several district courts within the Eleventh Circuit that “have emphatically rejected attempts to use the (c)(4) process for certifying individual issues as a means for achieving an end run around the (b)(3) predominance requirement.” *In re Atlas Roofing Corp. Chalet Shingle Prod. Liab. Litig.*, 321 F.R.D. 430, 447 (N.D. Ga. 2017) (citations omitted).
2. The Second, Fourth, Sixth, and Ninth Circuits have adopted a view that does not require common issues to predominate for the entire claim in order for issue certification. In these circuits, courts are instructed to identify particular issues that are appropriate for certification and then apply the Rule 23(a) and (b) analysis with respect to that issue – even if an entire cause of action (or the claims as a whole) could not be certified. See, e.g., *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 226 (2d Cir. 2006).
3. “Rather than joining either camp in the circuit disagreement,” the Third Circuit has taken a unique two-step approach. First, the issue class must satisfy the Rule 23 requirements. Second, the Third Circuit requires courts to apply a non-exhaustive set of factors from the American Law Institute’s Principles of Aggregate Litigation to determine whether or not certification of an issue class is appropriate. These factors include the types of claims in question, complexity of the case, efficiencies to be gained by issue certification, and analysis of the impact of partial certification on the right of class members and defendants, such as the need to reexamine evidence and findings from resolution of the common issues, which can violate the Seventh Amendment. See *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011).

The Third Circuit Cements Its “Appropriateness” Standard

The Third Circuit recently returned to analyze issue classes in *Russell v. Educational Commission for Foreign Medical Graduates*, 15 F.4th 259 (3d Cir. 2021). There, it addressed two issues that the district courts had lacked guidance after its decision in *Gates*. First, how should the *Gates* multi-factor “appropriateness” standard be applied? Second, may an issue class be certified if it does not resolve liability?

In *Russell*, a foreign-educated doctor applied to a United States residency program and required certification from the Commission of his foreign degree, English-language proficiency, and passage of the first two steps of the United States Medical Licensing Examination. After obtaining that certification in 1992, the doctor was not accepted into a residency program. He submitted a second application for certification two years later, this time altering his name and falsely stating that he had never applied for certification before. The Commission granted this second certification, but later invalidated it after learning of his false application. The doctor then applied for and was granted certification under a new fictitious name and practiced medicine in the United States for several years. After his arrest for use of fake identification documents, several of his former patients sued the Commission alleging negligent infliction of emotional distress. The district court certified an “issue class” with respect to the issues of duty and breach on the negligence claim, leaving for individualized proceedings the issues of causation, injury, damages, and any affirmative defense.

The Third Circuit granted interlocutory review and reversed the certification of the issue class. The court instructed district courts to first consider whether the issue class satisfies Rule 23(a) and, second, if so, to consider whether the issue class satisfies Rule 23(b). If these two criteria are satisfied, district courts are to apply the nine *Gates* factors to determine if it is “‘appropriate’ to certify the[] issues as a class.” *Russell*, 15 F.4th at 270. The Third Circuit held that the district court failed to rigorously consider the *Gates* factors because it did not analyze the effect that certification of an issue class would have on the “effectiveness and fairness of resolution of remaining issues.” *Id.* at 272. For example, given the multiple actors that played a role in the doctor’s fraud, the certification of an issue class and jury finding of breach may place “undue pressure to settle” on the Commission despite substantial defenses with respect to causation which would have to be raised in individual trials. *Id.* Likewise, the Third Circuit identified a likelihood that each individual jury would need to reexamine evidence already considered in an issue-class trial, which is disfavored by the *Gates* factors. *Id.*

Second, and importantly, the Third Circuit explained that an issue class may still be appropriate even though it does not resolve liability entirely. *Id.* at 269. In so holding, the court rejected arguments that “issues” certifiable under Rule 23(c)(4) must be able to resolve liability.

Conclusion

Until the Supreme Court intervenes to resolve the three-way circuit split, practitioners must be aware of the particular standard affecting their case. Rule 23(c)(4) should not change the requirement that under Rule 23 a plaintiff must meet one of the requirements of Rule 23(a) and one of the subsections of Rule 23(b) with respect to a cause of action. An issue class provides the court with a tool to manage a case that is certifiable under Rule 23(a) and (b) by allowing for a trial on particular issues – in the same way Federal Rule of Civil Procedure 42(b) permits separate trials on separate issues. The circuits that read Rule 23(c)(4) to allow a court to certify a class action where the action cannot satisfy the Rule 23(b)(3) requirements conflicts with the text of Rule 23 and would reduce “Rule 23(b)(3)’s predominance requirement to a nullity.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 36 (2013).

Even in those circuits that do not require plaintiffs to make proper predominance showings in issue class certification, companies facing litigation have substantial defenses. Plaintiffs still have the burden to prove that their issue class meets the rigorous class certification requirements of Rule 23(a) and (b). In addition, courts frequently refuse to certify issue classes where it will not materially advance the litigation as a whole. *See, e.g., Reitman v. Champion Petfoods USA, Inc.*, 830 F. App’x 880, 882 (9th Cir. 2020); *In re St. Jude Med., Inc.*, 522 F.3d 836, 841 (8th Cir. 2008); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008). In the meantime, Supreme Court intervention on this issue is sorely needed to bring uniformity to federal court class action practice.

About Weil's Class Action Practice

Weil offers an integrated, cross-disciplinary class action defense group comprising lawyers with expertise across our top-rated practices and hailing from our eight offices across the U.S.

Whether our clients face a nationwide class action in one court or statewide class actions in courts across the country, we develop tailored litigation strategies based on our clients' near- and long-term business objectives, and guided by our ability to exert leverage at all phases of the case – especially at trial. Our principal focus is to navigate our clients to the earliest possible favorable resolution, saving them time and money, while minimizing risk and allowing them to focus on what truly matters—their businesses.

For more information on Weil's class action practice please visit our [website](#).

Class Action Honors (cont.)

Class Action Practice Group of the Year

— *Law360, 2019 and 2015*

2022 Litigation Department of the Year - Honorable Mention

— *The American Lawyer*

Ranked among the top 5 firms nationally for Consumer Class Actions.

— *Chambers USA, 2021*

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