# Defense Takeaways From NY Uber Arbitration Fees Ruling

By **William Farley, Martin Durkin and Mark Melodia** (May 3, 2022)

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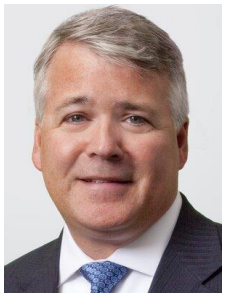

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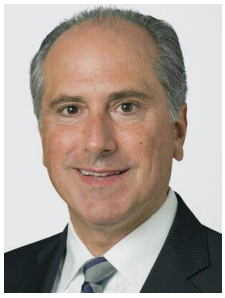

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The Appellate Division of the New York Supreme Court recently issued the latest significant ruling in the mass arbitration space, a litigation trend that has been gaining notoriety.

In mass arbitration, plaintiffs firms attempt to use companies' arbitration provisions as an offensive weapon against them by gathering thousands of low-dollar-value consumer claims and asserting them in individual arbitrations.

Because the company is on the hook for the majority of administrative fees often exceeding $1,000 under the standard consumer arbitration rules of some of the major arbitration administrators — such as the American Arbitration Association — merely paying these fees is extremely expensive even at the preliminary filing stages.

Thus, the plaintiffs' strategy appears to be burying the company in millions of dollars of obligatory filing, case management and arbitrator fees — due long before the merits of any claim are litigated — in an effort to extract a lucrative settlement.

Uber is among the handful of large companies facing claims in mass arbitration. In its April 14 opinion in Uber Technologies Inc. v. American Arbitration Association Inc., the Appellate Division unanimously affirmed the trial court order rejecting Uber's motion for preliminary injunction, in which Uber sought to enjoin the AAA from issuing any additional invoices.[1]

The Appellate Division found that Uber failed to establish a likelihood of success on the merits of any of its claims because (1) it could not demonstrate that the AAA had breached any agreed-upon terms by failing to charge reasonable fees; (2) the AAA was fully within its rights under its consumer arbitration rules to charge the fees; (3) Uber could not show any unlawful or unfair conduct by the AAA, as enforcement of the AAA fee schedule did not offend public policy and was not immoral or unethical; and (4) Uber could not seek a declaratory judgment when the remedy it was actually seeking was a monetary judgment.

**Case Background**

The case first arose in response to an initiative launched by Uber following the death of George Floyd, in which Uber announced it would waive delivery fees for Uber Eats customers who placed orders at certain Black-owned restaurants. The law firm Consovoy McCarthy PLLC then gathered more than 31,000 claimants who paid delivery fees to non-Black-owned restaurants and filed arbitration demands claiming that the fees constituted unlawful reverse race discrimination.

Uber's terms of use contains a provision mandating binding arbitration before the AAA and in accordance with the AAA's consumer arbitration rules. Under those rules, Uber, as the corporate defendant, was required to pay a $500 filing fee, a $1,400 case management fee

and a $1,500 arbitrator fee — for each individual case. For the 31,000 cases that Uber is facing, even after certain reductions in fees by the AAA, Uber was invoiced more than $91 million in arbitration fees.

When Uber challenged the enormous fees, the AAA invoked California Code of Civil Procedure, Sections 1281.97 to 1281.99, an arbitration rule providing that a drafting party that fails to pay arbitral administration fees under the arbitration administrator's rules within 30 days is deemed to be in material breach of the arbitration agreement and is in default of the arbitration. The rule also allows the arbitrator to impose severe sanctions on the breaching party, including entry of default judgment, monetary sanctions and order of contempt.

In response to the AAA's enforcement of the fees charged, Uber filed a complaint against the AAA and simultaneously filed the underlying motion for preliminary injunction.

**Takeaways**

Mass arbitration filings have been growing steadily over the last few months. Plaintiffs firms are not focused on a specific type of claim; the claims being pursued in mass arbitration are industry- and product-agnostic.

Recently, the areas of law under which mass arbitration claims are being filed have expanded beyond consumer protection and into employment contracts. And the number of plaintiffs firms filing these claims has increased outside of the handful of firms that started the trend.

Any business that includes arbitration provisions and class waivers in terms of service, user agreements or other contracts should be aware of, and preparing for, the mass arbitration trend. Businesses should take the following considerations into account:

***Are you sure you want to use mandatory arbitration in your terms?***

What was once a strong class action defense strategy now has substantial potential risks. It is a good time to rethink that strategy. Consider the variety of claims your business has faced historically, the intricacy of the elements of proof for those claims, and the difficulty of locating potential claimants.

For example, claims with relatively easy elements of proof or that require little supporting evidence, but turn on diverse factual situations that would present commonality challenges at class certification, may be prime targets for mass arbitration.

***The leverage is in the volume.***

Plaintiffs firms commonly seek to file as many claims as possible at the same time in an attempt to overwhelm businesses with filing fees and responsive pleading deadlines before the business is able to wrap its arms around the claims it is facing.

It is crucial to develop a robust case management system that is able to handle that intake and categorization of claims, and to track deadlines, fees, and arbitrator appointments and rulings. Ideally, the business will develop this system as a preventative measure on the front end, rather than waiting until thousands of claims have been filed.

***Review agreement terms that may affect mass arbitration.***

For example, while some consumer protection statutes require businesses to pay the majority of the arbitration fees, some large consumer-facing businesses offer to cover all the arbitration fees for consumers in their terms of service. While such an offer can be beneficial from a public relations standpoint, it can also materially increase the mandatory fees for each arbitration.

***Review the specifics of your arbitration provision.***

The devil is in the details, and those details may affect the entire trajectory of a mass arbitration matter.

For example, the decision to name a specific arbitration administrator, as opposed to leaving the decision to the business, can have significant implications if the arbitration administrator's rules impose high fees for the corporate defendant, do not have procedures for mass arbitration, or contain other provisions that provide disproportionate procedural advantages unrelated to the merits of claims and defenses.

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[1] Uber Techs., Inc. v. Am. Arb. Ass'n, Inc., No. 15732, 2022 WL 1110550 (N.Y. App. Div. April 14, 2022).