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Not on Your Own Terms: The Problem with Drafting Mass Arbitration Provisions for Consumer Contracts

Martin G. Durkin and William F. Farley[1]

In this article, the authors provide a brief history of notable court rulings addressing mass arbitration provisions in consumer contracts, including the recent opinion by the U.S. Court of Appeals for the Ninth Circuit in *Heckman v. Live Nation Ent., Inc.*, and advocate for an alternative "less is more" approach to dealing with mass arbitration in consumer contracts.

In the wake of the explosion of mass arbitration campaigns over the past several years, consumer-facing companies have been employing several different methods to protect themselves from the growing trend. These tactics, many of which have been unsuccessful, include bringing claims against arbitration providers and bringing claims against the claimants themselves, who are the respondent company's own customers.

Another popular approach is for companies to revise the arbitration provisions within the "terms of use" presented to consumers to specifically address the mass arbitration phenomenon. These terms most commonly include provisions for "batching" claims (in which the mass arbitration campaign is divided into groups of claims (20, 30, 50, etc.) that are litigated sequentially), and/or "bellwether" claims (in which a small group of claims is selected to serve as a representative sample of the larger group for either mediation or ruling purposes). In theory, this approach should be effective in mitigating some of the most burdensome

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aspects of mass arbitration—namely, excessive administrative fees, and lack of capacity to defend thousands of claims at once. In actuality, mass-arbitration-specific provisions often cause more issues than they resolve. These provisions raise unique procedural issues that are scrutinized both publicly in federal court and privately before an arbitrator or arbitration provider.

This article provides a brief history of notable court rulings addressing mass arbitration provisions in consumer contracts, including the recent opinion by the U.S. Court of Appeals for the Ninth Circuit in *Heckman v. Live Nation Ent., Inc.*[2] and advocates for an alternative "less is more" approach to dealing with mass arbitration in consumer contracts.

Notable Rulings on Mass Arbitration Provisions

Although mass arbitration may seem like a new trend, there are federal court rulings analyzing discrete issues, such as the validity of mass-arbitration-specific provisions within consumer contracts, dating back several years. Historically, these rulings are somewhat of a mixed bag, but slightly favor the refusal to enforce procedures specific to mass arbitration. The common denominator in each case is the courts' determination of whether the mass arbitration procedures are unconscionable for the consumer.

For example, *McGrath v. DoorDash* involved a motion to compel arbitration filed in an FLSA class action matter where the arbitration provision contained a "Mass-Claims Protocol."[3] The Mass-Claims Protocol applied any time more than 30 individual employment-related arbitration claims of nearly identical nature were filed against DoorDash in close proximity to one another.[4] The protocol further provided that 10 claims would be chosen at random and resolved within 120 days of the initial pre-hearing conference; and thereafter the results of the initial cases are given

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

[3] See McGrath v. DoorDash, Inc., No. 19-CV-05279-EMC, 2020 WL 6526129 (N.D. Cal. Nov. 5, 2020).

[4] Id. at *4.

to a mediator who will try to resolve the remaining claims.[5] After a mediation period of 90 days, the parties are able to opt out of arbitration process and proceed in court.[6]

In addressing the validity of the Mass-Claims Protocol, the court considered the ultimate question of whether it was fair and impartial, and found no favoritism in favor of DoorDash.[7] The court found that the terms would not cause delay in resolving the claimants' claims, and found that it was fair that the test cases were chosen at random, the claimant has a greater role in selecting the arbitrator than the respondent, the respondent pays for the mediation fees, and, most importantly, after the mediation process, a claimant can choose to opt out and go back to court.[8] Notably, the court made these findings despite evidence from another case against DoorDash, showing that the company had recently changed its arbitration provision to switch from using the American Arbitration Association® (AAA®) to a provider called CPR, and that DoorDash (through its counsel) participated in drafting CPR's Mass-Claims Protocol.[9]

Following the *McGrath* decision, and among the proliferation of mass arbitration filings, arbitration providers began to amend their rules to address mass arbitration. In August 2021, AAA amended its rules to add "Supplementary Rules of Multiple Case Filings." These rules applied when 25 or more similar demands were filed against or on behalf of the same party or related parties, and where representation of the parties was consistent or coordinated across the cases. The AAA Multiple Case Filing rules encouraged parties to agree to efficient processes such as an agreed-upon scheduling order across multiple cases, appointment of a special master to oversee common procedural issues, hearing cases on the documents rather than in person, and assigning multiple cases to a single arbitrator. These rules also provided for global mediation across all the cases within

[5] Id.

[6] Id.

[7] Id. at *10.

[8] Id.

[9] Id. at 9-11.

120 calendar days of the respondent's answer, which was to take place concurrently with the arbitrations without staying proceedings, and with allowance to any party to unilaterally opt out of mediation. In or around December 2021, the arbitration provider National Arbitration and Mediation (NAM) adopted similar rules.[10]

Shortly after the new AAA rules went into effect came the highly publicized *MacClelland v. Cellco P'ship* decision in the U.S. District Court for the Northern District of California. *MacClelland* involved a motion to compel arbitration in a false advertising class action against Verizon.[11] Although the ruling addresses many issues, most relevant here is the discussion on the substantive unconscionability of the arbitration provision. The court found that many of the arbitration provisions were substantively unconscionable, including a 180-day contractual statute of limitations, punitive damages waiver, public injunctive relief waiver, exculpatory clause and discovery limitation, and mass arbitration provision.[12] The mass arbitration provision applied if 25 or more customers brought similar claims with coordinated counsel, and provided that each side shall select five cases to proceed in a bellwether proceeding.[13] No other cases could be filed until the first 10 were resolved.[14] If the parties were unable to resolve the remaining cases, each side was to select another five cases and

[10] AAA went on to further amend and rename its rules to the "Mass Arbitration Supplementary Rules" in January 2024. These rules built upon the prior amendments by, among other things, further specifying the role of the limited service neutral to oversee procedural issues, now named the Process Arbitrator, and implementing a new fee schedule. In April 2024, AAA expanded the applicability of the Mass Arbitration Supplementary Rules to business-to-business, commercial, construction, and internation cases. In May 2024, the Judicial Arbitration and Mediation Services (JAMS) adopted similar "Mass Arbitration Procedures and Guidelines."

[11] MacClelland v. Cellco P'ship, 609 F. Supp. 3d 1024 (N.D. Cal. 2022).

[12] Id. at 1034-44.

[13] Id. at 1040.

[14] Id.

continue with the process until all remaining claims are resolved either through settlement or arbitration.[15]

The court looked to the practical implications of the bellwether provision, noting that there were 2,712 claimants and AAA's statistics show that the average disposition time of an arbitration takes a little under seven months.[16] The court acknowledged plaintiffs' argument that, based on these statistics, it could take 156 years for all the claims to be resolved through the bellwether process, and found that it was unreasonably favorable to Verizon.[17] The court also found that claims could be barred due to the length of delay in adjudication coupled with the statute of limitations, as the arbitration provision expressly reserved the right to raise a statute of limitations defense.[18] The court then distinguished *McGrath*, finding that the provision in *McGrath* was materially different because the test cases were to be resolved within 120 days of the initial pre-hearing conference followed by a 90-day mediation period with the ability to opt out and proceed in court.[19] The court also found that the arbitration provision was contrary to AAA's Supplementary Rules for Multiple Case Filings, which did not require a party to wait a set amount of time before initiating an arbitration demand or for arbitrations to proceed in tranches, and provided a mediation process that did not delay proceedings and allowed parties to opt out.[20]

Ruling on mass-arbitration-specific provisions continued into 2024 with courts continuing to focus on the extent to which such provisions would delay the resolution of claims, or prevent claims from being asserted due to the statute of limitations. For example, in *Ruiz*, the court found a mass arbitration protocol requiring cases to proceed in batches of 10 to be enforceable, even in the wake of *MacClelland*, because the protocol provided for

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[15] Id.

[16] Id. at 1041.

[17] Id. at 1041-42.

[18] Id. at 1042.

[19] Id.

[20] Id. at 1043-44.

a tolling of any applicable statute of limitations.[21] On the other hand, in *Pandolfi*, the court found a bellwether mass arbitration provision requiring cases to proceed sequentially in batches of 20 to be unconscionable.[22] The court found that the provision would likely cause delay because the bellwether provision even applied to the threshold issue of arbitrability, which was delegated to the arbitrator, and each case could be assigned to only one arbitrator.[23] Further, the court found the statute of limitations provision unconscionable because it shortened statutory claims to one year after accrual, and applied only to consumers and not defendant.[24]

These rulings all culminated with the district court and Ninth Circuit rulings in the *Heckman* cases. *Heckman* involved a motion to compel arbitration filed in an antitrust class action against Live Nation and Ticketmaster based on alleged supra-competitive fees on tickets purchases.[25] Unlike the other cases discussed above, the *Heckman* district court decision begins with a lengthy discussion about the arbitration provider selected in Live Nation's arbitration provision, New Era ADR.[26] The court noted that New Era pitched its services to Live Nation's counsel before it had conducted any arbitrations or finalized its rules governing mass arbitration procedures, although the nature of counsel's involvement in shaping the rules is disputed.[27]

The court then addressed procedural unconscionability of the arbitration provision, which it found was present "to an extreme degree" because the contract at issue was a contract of adhesion, and the terms of use were materially changed in the midst of

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[21] Ruiz v. CarMax Auto Superstores, Inc., No. EDCV231986JGBKKX, 2024 WL 1136332, at *6 (C.D. Cal. Jan. 18, 2024).

[22] Pandolfi v. AviaGames, Inc., No. 23-CV-05971-EMC, 2024 WL 4051754 (N.D. Cal. Sept. 4, 2024).

[23] Id. at *5-6.

[24] Id. at 11.

[25] Heckman v. Live Nation Ent., Inc., 686 F. Supp. 3d 939 (C.D. Cal. 2023), aff'd, 120 F.4th 670 (9th Cir. 2024).

[26] Id. at 947-48.

[27] Id.

ongoing litigation, to be applied retroactively to already accrued claims, without providing adequate notice, and while burying the true nature of the claim in difficult-to-parse rules.[28]

Turning to substantive unconscionability, the court took issue with many aspects of the mass arbitration procedure. The court first summarized the mass arbitration rules as follows:

> [The mass arbitration rules] apply if a neutral determines there are more than five cases presenting the same or similar evidence, witnesses, or issues of law and fact. Rules 2(x), 6(b)(ii)(1), 6(b)(iii)(3)(a). Although New Era may initially group together cases for administrative purposes, the ultimate determination as to whether those cases involve common issues is made by the neutral. Rules 2(x)(ii), 6(b)(ii)(2). Once that determination is made, three bellwethers are selected—one by each side and one according to an unspecified process determined by the neutral. Rule 6(b)(iii)(3). After the neutral renders a decision in the three bellwethers, the parties must conduct settlement discussions. Rule 6(b)(4). If the parties reach an agreement, individual claimants or respondents may opt their particular case out of that settlement agreement. Rule 6(b)(iii)(4). If no agreement is reached, "each party shall provide the neutral with the case(s) that such party believes involve individualized issues of law and/or fact that should not be subject to Precedent" from the bellwether cases. Rule 6(b)(iii)(4)(d). As to the remaining cases, determinations made from the bellwether cases "will act as Precedent on subsequent cases with Common Issues of Law and Fact as applied to those Common Issues of Law and Fact, solely as determined by New Era ADR affiliated neutral(s)." Rule 6(b)(iii)(5)(a). Precedent "shall be applied" in the same manner in later filed cases as well. 6(b)(iii)(5)(b). The neutral creates a process for resolving the individualized issues in the remaining cases. Rule 6(b)(iii)(6). "Precedent will still apply to all Common Issues of Law and Fact in the Remaining Cases." Rule 6(b)(iii)

[28] Id. at 953.

(6)(b). "Only if a party can demonstrate that there are no Common Issues of Law and Fact will a case be removed from the Mass Arbitration." Rule 6(b)(iii)(6)(c).[29]

Although the opinion was ultimately addressing the delegation clause in the arbitration provision, the court noted that the enforcement of the delegation clause turns on the fairness of the agreement's actual terms, thus, it reviewed the mass arbitration rules as a whole.[30] The court found that the use of bellwether cases as precedent was uniquely problematic, especially as to thousands of cases at once, where an arbitrator was granted sole discretion in determining whether to group similar cases together and how to apply precedent to those cases.[31] The court further noted that interested claimants receive neither notice of the precedential cases or an opportunity to be heard because the prior cases are confidential by nature, and there is no ability for claimants to opt out of the process.[32]

The court also addressed the appeal procedure of the arbitration provision, which it found unconscionable because it provided the right to appeal a grant, but not a denial, of injunctive relief.[33] The court found that while the provision nominally applies to both parties, in practicality it favors only the defendant because only the consumer-claimants would be the party pursuing any real form of injunctive relief.[34]

Finally, the court briefly addressed the plaintiffs' argument that the class action waiver was substantively unconscionable under California law based on the Supreme Court of California's decision in *Discover Bank v. Superior Court*,[35] which held that class waivers are unenforceable in consumer contracts of

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[29] Id. at 959.

[30] Id. at 958.

[31] Id. at 960-62.

[32] Id. at 962.

[33] Id. at 965-66.

[34] Id.

[35] Discover Bank v. Superior Court, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 (2005).

adhesion.[36] In rejecting plaintiffs' argument, the court noted that the U.S. Supreme Court overruled *Discover Bank* in *AT&T Mobility LLC v. Concepcion*,[37] and found that the Federal Arbitration Act (FAA) preempts state law.[38]

Live Nation and Ticketmaster then appealed to the Ninth Circuit. In affirming the district court, the Ninth Circuit took an even more critical view of the New Era mass arbitration procedures, noting that they were internally inconsistent, poorly drafted, and riddled with typos.[39] As to procedural unconscionability, the court took issue with the attempt to bind consumers who merely browse a website, unilaterally modifying the terms of use without prior notice, and applying to terms not only prospectively but retroactively.[40] The court also found that terms misleading in that they specifically stated that all claims would be resolved by "individual arbitration," but then provided for claims to be batched and common issues and facts resolved together.[41]

As to substantive unconscionability, the court emphasized the fact that claimants in non-bellwether cases would have no right to participate in the prior cases that affect their rights, and will not even know the decision in the bellwether case that is invoked against them, which violates due process and could deprive the person of adequate representation.[42] Further, the court found that the limitations on discovery were "absurd" and the appeal provisions stacked the deck in Live Nation and Ticketmaster's favor so that they could "arbitrate thousands of claims in a single go, and if they lose, simply go back to JAMS to take an appeal."[43]

Finally, the court addressed the preemption issues raised at the district court. Perhaps the most notable portion of the

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[36] Heckman v. Live Nation Ent., Inc., supra note 2 at 966-67.

[37] Discover Bank in AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011).

[38] Heckman v. Live Nation Ent., Inc., supra note 2 at 966-67.

[39] See Heckman, 120 F.4th at 678-80.

[40] Id. at 683.

[41] Id.

[42] Id. at 684.

[43] Id. at 686 (internal quotation omitted).

opinion is the court's "alternate and independent ground" for finding that the application of California unconscionability law to the Ticketmaster agreement is not preempted by the FAA.[44] The court addressed the Supreme Court of California holding in *Discover Bank*, and found that the later holding in *Concepcion* only stands for the principle that the FAA preempts applications of *Discover Bank* that "pose[] an 'obstacle' to the objectives of the FAA."[45] The court found that when Congress enacted the FAA, it "was designed to be a fair and efficient alternative to bilateral judicial proceedings," and that "[i]t is certainly beyond dispute that [the dispute resolution contemplated by New Era's rules] is not arbitration as envisioned by the FAA. . . ."[46] Thus, the court held that the application of California law to Ticketmaster's terms and New Era's rules is not preempted by the FAA, and that the class waiver was unenforceable under the California rule in *Discover Bank*.[47]

What's Next? How to Deal with Mass Arbitration Provisions Going Forward

As indicated by the case law discussed above, it is becoming increasingly difficult for consumer-facing companies to draft enforceable arbitration provisions that address the mass arbitration trend. Drafting an enforceable protocol requires striking the delicate balance of providing terms that are clear and unambiguous, fair and impartial as to the consumers and the company, would not cause delay or lapse of a claim due to statute of limitations, and would be effective in administering thousands of claims. And, even if care is taken to check all those boxes, there is still a chance of drawing a federal judge that disfavors attempts to modify mass arbitration procedure through consumer contracts.

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[44] Id. at 689-90.

[45] Id.

[46] Id.

[47] Id.

However, there is another way.

As may be expected, for large mass arbitration campaigns, the mass arbitration providers do not have the capacity or a roster of neutrals massive enough to govern thousands of claims at the same time, especially considering that there are dozens of plaintiffs' firms filing mass arbitrations consistently. Similarly, plaintiffs' firms generally do not have the capacity to prosecute thousands of claims simultaneously. They will push for the arbitration providers to begin processing all the claims together to gain leverage by imposing exorbitant administrative fees on the respondent company. But they do not actually have the ability or desire for every claim to be heard in tandem.

As a result, once the parties are fully embroiled in litigating mass arbitration claims, they are forced to work together, along with the arbitration providers, to come up with an efficient process for handling the claims. This often includes tactics such as assigning batches of claims (i.e., 20, 30, 50) to different arbitrators, agreeing to have cases heard on a documents-only basis as opposed to live hearings, and streamlining discovery across all cases. In fact, many of these tactics are encouraged by arbitration providers' mass arbitration rules and procedures.[48] The only way for the parties to make meaningful progress through a large number of claims is to build in efficiencies.

Thus, many of the safeguards that companies are now trying to draft into their terms of use, and which are being challenged in the courts, are processes that are achieved naturally out of necessity when handling a large number of claims. There is no need to include a batching provision in your terms of use that specifies the number of claims that each arbitrator is assigned, or that those batches must proceed sequentially, because a similar

[48] See AAA Mass Arbitration Supplementary Rules at p. 3 ("Parties are encouraged to agree to additional processes that make the resolution of their Mass Arbitration more efficient, such as: An agreed-upon Scheduling Order setting forth deadlines across multiple cases, including those for submission of documents and witness lists, completion of discovery, and filing of motions. . . . An agreement that cases be heard on the documents, rather than by in-person, telephone, or videoconference hearings. . . . An agreement to assign multiple cases to a single arbitrator. . . ."), https://www.adr.org/sites/default/files/Mass-Arbitration-Supplementary-Rules.pdf.

logical process will more than likely be implemented with the help of a process arbitrator and/or by agreement of the parties.

Thus, instead of trying to draft a convoluted procedure that may fail under judicial scrutiny, it is better to focus on provisions that are fair and provide the flexibility to implement a logical and efficient procedure, depending on the circumstances of the claim(s) a company is facing at the time of filing. For example, instead of dictating the arbitration provider that must govern over the claims in the terms of use, the terms could provide that the parties will mutually agree on the appointment of an arbitrator or use of an arbitration provider at the time the claimants make their arbitration demand. The terms could include certain logical qualifications (such as requiring that the arbitrator(s) be a former judge, or have experience in the subject matter of the claims at issue), that provide procedural guardrails, but do not need to be overly rigid. Further, if the parties are unable to agree on the governing arbitrators or providers, the terms could provide for a process to resolve such disagreements in court.

It should now be obvious that the mass arbitration practice area is constantly evolving, and there is no way to predict what impactful court rulings will be issued or how arbitration providers will react through amendments to their rules and procedures. Perhaps a court rules that certain batching procedures are acceptable, but those procedures differ from the way batches are defined or administered in pre-drafted terms of use. Or, perhaps one arbitration provider amends their rules to implement a new and more efficient mass arbitration procedure ahead of others in the market. A "less is more" approach to drafting arbitration provisions allows companies to observe the ever-changing mass arbitration landscape, and implement the fairest and most efficient process for handling claims at the moment they face them.