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As Mass Arbitrations Proliferate, Companies Have Deployed Strategies for Deterring and Defending Against Them

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Mass arbitration is a recent phenomenon in which thousands of plaintiffs—often consumers, employees, or independent contractors—bring arbitration demands against a company at the same time. Many mass arbitrations are the product of sophisticated advertising campaigns in which a plaintiffs' firm uses social media to generate a list of thousands of individual "clients." Other mass arbitrations arise after a court has enforced a class-action waiver in an arbitration agreement—instead of filing a single arbitration on behalf of the named plaintiff only, the plaintiffs' firm tries to replicate the failed class action by bringing thousands of arbitrations on behalf of would-be class members.

Mass arbitrations can impose significant, even crippling, costs on companies, particularly in light of the hefty filing fees that many arbitration providers charge. For example, if a company's filing-fee obligation is $2,000 per arbitration, a mass arbitration of 5,000 individuals could result in the arbitration provider invoicing the company for $10 million in nonrefundable filing fees. Equally large invoices—for case management fees and arbitrators' fees—can quickly follow.

Because mass-arbitration plaintiffs are often recruited on social media, with little-to-no vetting, a mass arbitration might include hundreds of plaintiffs who never had any relationship or dealings with the company. Nonetheless, it is often difficult to identify and eliminate those frivolous claims before the arbitrations commence, and many arbitration providers insist on the company paying nonrefundable filing fees regardless of whether the claims have merits. A recent California law (SB 707) raises the stakes even further by requiring companies to pay arbitration fees within 30 days, and failure to do so can lead to default judgments and liability for the plaintiffs' attorneys' fees.

Many companies, however, have deployed successful strategies for deterring and defending against mass arbitrations, primarily through the careful drafting of their arbitration agreements. Below, we identify a few of the strategies that have been deployed. This list is not exhaustive, not all strategies are right for each company, and mass arbitration tactics are evolving and changing rapidly.

1. **Informal dispute resolution clauses**. Companies can often reduce mass-arbitration costs by requiring the parties to engage in a mediation or informal dispute resolution conference before either side serves an arbitration demand. Those conferences can often result in the settlement or dismissal of many claims, and also deter the filing of frivolous claims, saving the company costly arbitration filing fees.
2. **Require individualized arbitration demands**. Plaintiffs' firms often try to initiate mass arbitrations by sending the company a single arbitration demand and appending a list of their purported clients. This tactic often fails to give companies sufficient information about the claimants bringing the arbitration demands, and also increases companies' nonrefundable filing fees. To deter this tactic, some

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companies have required claimants to serve individualized arbitration demands, each of which must clearly identify the claimant, their legal claims, the requested relief, and an express authorization by the claimant to bring the arbitration demand.

3. **Cost-splitting provisions.** Courts generally permit companies to require consumers, employees or independent contractors to bear some of the costs of arbitration, including the amount it would cost a claimant to file a lawsuit in a local court. Requiring claimants to pay for some arbitration fees can reduce the cost of a mass arbitration and deter the filing of frivolous claims.
4. **Fee-shifting for frivolous claims**. Companies may also consider inserting clauses in their arbitration agreements that allow the arbitrator to award fees and costs to the prevailing party if the arbitrator finds that the losing party filed a frivolous claim. This can be another useful tool for deterring frivolous mass arbitrations and, at a minimum, it incentivizes plaintiffs' counsel to vet claimants before bringing claims on their behalf.
5. **Offers of judgment**. In many jurisdictions, an offer of judgment shifts costs to the plaintiff if they recover less money at trial than the settlement offer. A company may be able to reduce its costs and exposure by making offers of judgment at the outset of a mass arbitration. While most jurisdictions automatically enforce offers of judgment in arbitration, companies may consider including provisions in their arbitration agreements that expressly permit offers of judgment, with cost-shifting.
6. **Selecting the arbitration provider**. Arbitration providers charge filing fees and other fees that vary widely. Some arbitration providers have dedicated fee schedules and other protocols for mass arbitrations. Companies should research and compare providers' fee schedules and mass-arbitration protocols before selecting a provider for their arbitration agreement. It is also advisable to include a provision in the arbitration agreement that allows either side to negotiate lower fees with the provider—without such a provision, the provider may be unwilling to enter into such negotiations.
7. **Reserve the right to settle claims on a class-wide basis**. A company facing a mass arbitration may wish to obtain global peace by entering into a class settlement that extinguishes all claims. No clause in an arbitration agreement should be necessary to allow a company to settle a class action. Indeed, for years, companies have settled class actions despite having arbitration agreements with class-action waivers. However, some plaintiffs' lawyers have argued that class-action waivers preclude companies from settling a class action. Therefore, in an abundance of caution, companies might consider adding a clause to their arbitration agreements that allows any party to settle claims on a class-wide basis.
8. **Establish a protocol for adjudicating a mass arbitration.** Some companies have inserted specific protocols in their arbitration agreements to help reduce the cost of a potential mass arbitration. For example, some arbitration agreements state that, in the event more than 100 similar arbitrations are filed at the same time, they will be "batched" into groups of 100, with each batch assigned to a single arbitrator and triggering a single filing fee. In this particular example, the batching protocol could potentially cut the company's arbitration costs by up to 99%. However, having arbitrators assigned to multiple arbitrations could create additional risk for the company. In addition to batching, there are other mass-arbitration protocols that offer different risk/cost profiles.

Conclusion

Mass arbitrations can create significant cost and risk for a company. Being proactive and drafting an arbitration agreement with an eye toward mass arbitration can help reduce that cost and risk.

We will continue to monitor closely and develop new strategies and approaches to mass

arbitration. If you have any questions or would like additional information about these or other developments, please reach out to any of your contacts at Gibson Dunn, any member of the firm's Class Actions practice group, or the author of this alert:

Michael Holecek – Los Angeles (+1 213-220-6285, mholecek@gibsondunn.com)

The following Gibson Dunn attorneys also are available to assist in addressing any questions you may have regarding this alert:

Christopher Chorba – Los Angeles (+1 213-229-7396, cchorba@gibsondunn.com)
Theane Evangelis – Los Angeles (+1 213-229-7726, tevangelis@gibsondunn.com)
Joshua S. Lipshutz – Washington, D.C. (+1 202-955-8217, jlipshutz@gibsondunn.com)
Dhananjay S. Manthripragada – Los Angeles (+1 213-229-7366, dmanthripragada@gibsondunn.com)

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