MASS ARBITRATION DEFENSE STRATEGIES & ARBITRATION AGREEMENT DRAFTING

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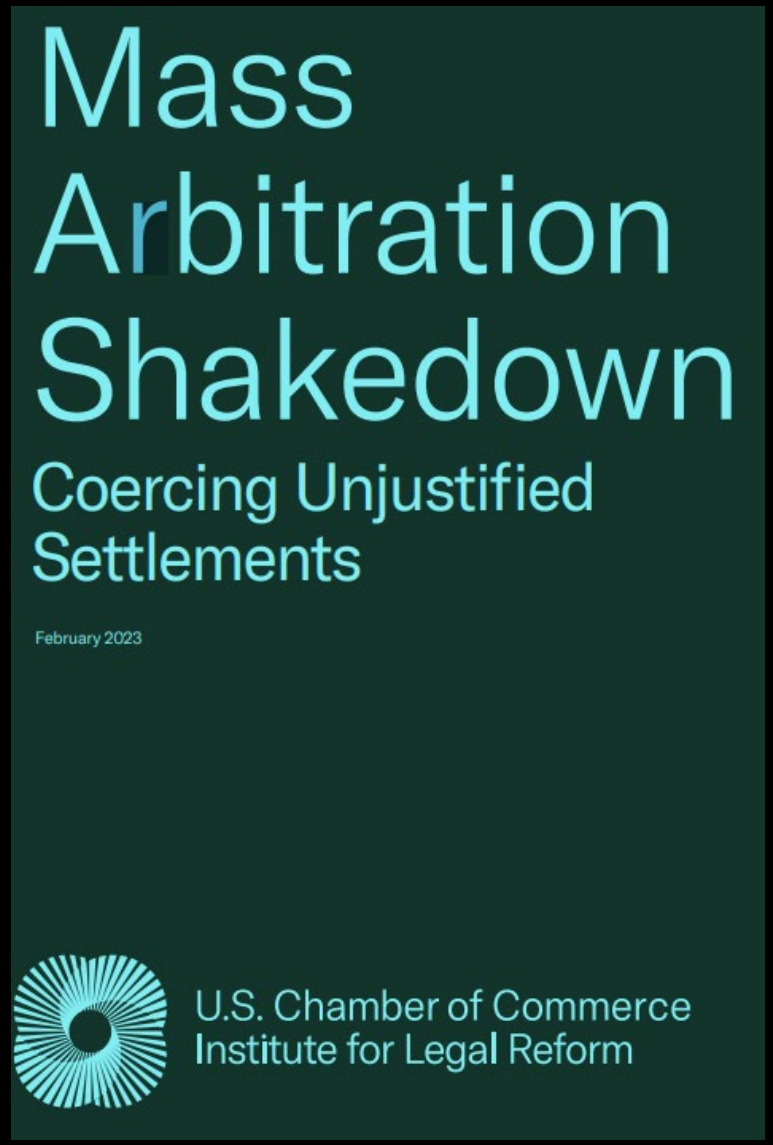
THE DEMAND

- **“More than 10,000 individuals** have retained our firm to pursue claims against your company. We are prepared to serve **simultaneous individual demands for arbitration** on behalf of each client with the American Arbitration Association.
- Proceeding to arbitration would obligate the company to pay AAA more than $30 million in initial fees and costs. These numbers will continue to grow as additional individuals engage our firm every day.
- Before we serve demands on AAA that will trigger the company’s obligation to pay these costs, it would be sensible for the parties to explore early resolution.”



THE ISSUES

> ... [A]busive mass arbitrations are the 21st-century equivalent of the abusive class actions that characterized the last part of the 20th century—claims that can be brought regardless of merit solely for the purpose of extracting a settlement unrelated to the merits by leveraging the threat of huge costs.

A 10,000-claimant mass arbitration with AAA could lead to $30 million in fees and costs:

- **$1,125,000** in initial Filing Fees
- **$14 million** in Case Management Fees; and
- **$15 million** in Arbitrator Compensation.

Multiple Consumer Case Filing Fee: $300, $225, $150, or $75 per case depending on tier, due once the individual claimant meets the filing requirements; Business must pay both the Individual's Filing Fee and Business's Filing Fee if the case is filed by Business, due at the time the arbitration is filed.

Case Management Fee: $1,400 for 1 arbitrator or $1,775 for 3 arbitrators will be assessed and must be paid prior to the arbitrator appointment process.

Arbitrator Compensation: $1,500 per case*

HOW DID WE GET HERE?
ARBITRATION & THE FAA

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,

559 U.S. 662 (2010)

- The path to mass arbitration arguably began when the Supreme Court held that parties can't be compelled to class arbitration without their clear agreement, drawing on the fundamental differences between class and individual arbitration.

"[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. . . . This is so because ***class-action arbitration changes the nature of arbitration*** *to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."*

AT&T Mobility LLC v. Concepcion,

563 U.S. 333 (2011)

- A year later, the Court addressed the California *Discover Bank* rule prohibiting contractual class-action waivers in adhesion contracts.
- Drawing on *Stolt-Nielsen*'s reasoning, the Court held that the *Discover Bank* rule was preempted because it was inconsistent with the traditional "bilateral" arbitration contemplated by the FAA

"[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."

Epic Sys. Corp. v. Lewis,

138 S.Ct. 1612 (2018)

- In 2018, the Court reaffirmed and expanded Concepcion, holding that the NLRA, which authorizes employees to file "collective actions," does not override a contractual agreement to arbitrate individually.

"Concepcion's essential insight remains: courts may not allow a contract defense to reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent. Just as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,' Concepcion teaches that we must be alert to new devices and formulas that would achieve much the same result today."

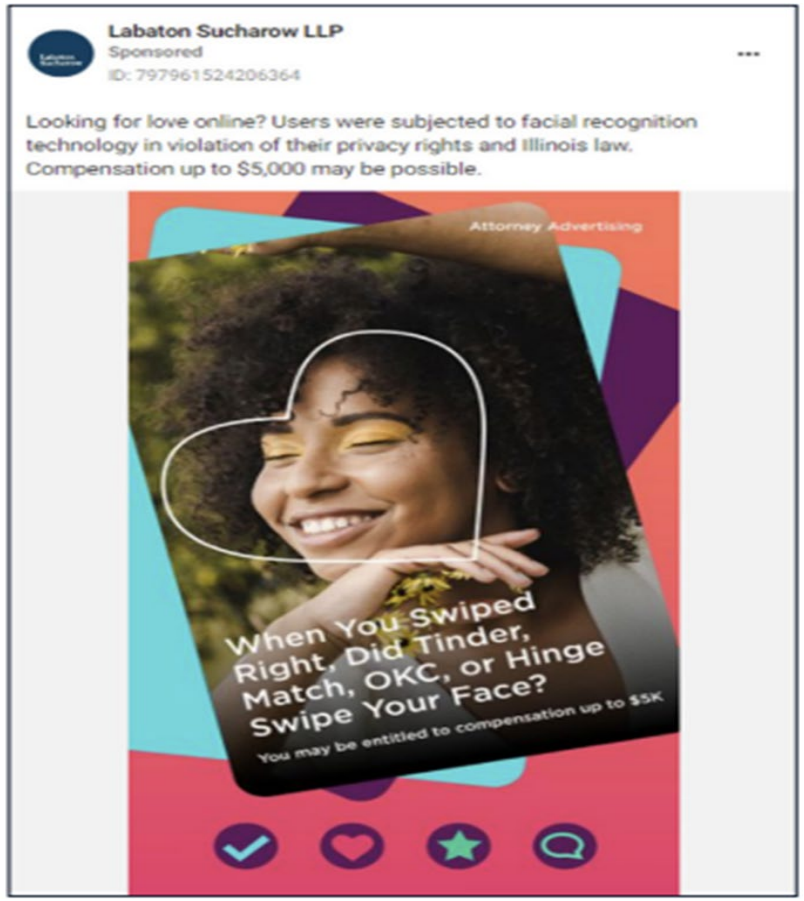
EMERGING MASS ARBITRATION TRENDS

TURNING TO MASS ARBITRATIONS

THE SET-UP

Of course, these coercive gambits can succeed only if the plaintiffs' lawyers are able to amass a large "inventory" of claimants.

- *Mass Arbitration Shakedown: Coercing Unjust Settlements*, U.S. Chamber of Commerce (Feb. 2023)



THE TARGETS

Mass arbitrations can affect any company, but targets tend to:

- Have large pools of potential plaintiffs with low value claims;
- Have plaintiff populations that are reachable by and susceptible to social media advertising;
- Have arbitration agreements where the company pays all arbitration fees; and
- Operate in Plaintiff-friendly states.

Targets can be in any industry, including large employers, the gig economy, and consumer product and services

CASE STUDY

California's SB 707

- Mass arbitrations will continue to proliferate, especially in states that pass legislation making them easier to pursue.
- For instance, California's SB 707 requires employers using arbitration agreements to pay the costs and fees associated with any arbitration demand within 30 days' of the due date. An employer that fails to do so is in material breach of the arbitration agreement and faces default, waiver of the right to arbitrate, or other sanctions.
- Numerous parties have attacked SB 707 as preempted by the FAA, but to date lower courts have split on that question.

DETERRING MASS ARBITRATIONS: DRAFTING ARBITRATION AGREEMENTS

DRAFTING STRATEGIES

Gibson Dunn has been at the forefront of developing strategies to prevent mass arbitrations through better arbitration agreements.

Strategies include:

- Thoughtful choice of provider;
- Fee shifting for frivolous or harassing demands;
- Batching or bellwethering;
- Informal dispute resolution conferences;
- Arbitration demand content and verification requirements.

CHOOSING THE RIGHT ARBITRATION PROVIDER

MULTIPLE FILING RULES | ARBITRATION PROVIDER

Some arbitration providers have adopted special rules governing mass arbitrations, including:

- Reduced fee schedules for multiple filings;
- Provisions for an administered settlement approval process; and/or
- Use of test cases and mandatory mediation.
- However, most require agreement of the parties to implement special procedures.

FEE SHIFTING PROVISIONS

Frivolous Claims

- Arbitral forums may provide for fee or cost shifting if a claim or counterclaim was filed for purposes of harassment or is patently frivolous.
- These can be strengthened by adding a provision to the Agreement itself.

Offers of Judgement/Settlement

- Federal Rule of Civil Procedure 68 and analogous state statutes generally permit recovery of costs if any final judgment is less favorable than an unaccepted offer of judgment.
- Absent a provision in the arbitration agreement, however, the availability of offers of judgment in arbitral proceedings varies by state.

BATCHING PROVISIONS

- Individual arbitrations are “batched” into groups assigned to a single arbitrator and incurring a single administrative fee.
- For example, a 5,000-claimant mass arbitration could proceed as 50 batches of 100 claimants, with each batch assigned to a different arbitrator.

BELLWETHER PROVISIONS

- Bellwether cases are selected to be arbitrated individually while remaining demands are stayed.
- Usually followed by a global mediation following the resolution of the bellwethers.

CASES ADDRESSING MASS ARBITRATION PROTOCOLS

- *McGrath v. DoorDash, Inc.*, No. 19-cv-05279-EMC (N.D. Cal. Nov. 5, 2020) (granting motion to compel arbitration)
- *MacClelland v. Cellco P'ship*, No. 21-cv-08592-EMC (N.D. Cal. July 1, 2022) (denying motion to compel arbitration) (appeal to 9th Cir. No. 22-16020)

DEFEATING MASS ARBITRATIONS: THE WAR OF ATTRITION

ARBITRATING MASS ARBITRATIONS

- Even after a mass arbitration is filed, consider amending the arbitration agreement. Counsel often engage new clients even as arbitrations are pending.
- Claimants' counsel is often not seriously interested in individually arbitrating thousands of claims. Forcing them to do so can often lead to a settlement as plaintiffs' counsel's resources dwindle.
- Consider scheduling a global mediation following the resolution of initial cases.
- Claimants' counsel necessarily invests little time in each client's case. That can be exploited. For example, insisting on discovery from claimants can lead to dismissals when counsel can't get in touch with their clients.

ETHICAL CONCERNS

Remain vigilant to potential ethical violations, such as:

- Unauthorized practice of law
- Lawyer solicitation violations
- Failure to adequately investigate each client's claims
- Failure to inform clients of settlement offers
- Restrictions applicable to aggregate settlements
- Conflicts of interest

"It is hard to imagine that any plaintiffs' counsel could solicit and represent that many individuals and pursue or settle their claims while complying with the ethical rules designed to ensure that clients are not victimized ...."

- U.S. Chamber of Commerce Inst. for Legal Reform

MCLE Certificate Information

- Approved for 1.0 hours General PP credit.
- CLE credit form must be submitted by **April 26, 2023.**
- Form Link:

  https://gibsondunn.qualtrics.com/jfe/form/SV_9GoD5TO0tUUIlLs
- **Please direct all questions regarding MCLE to CLE@gibsondunn.com.**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