
# THE ADVOCATE

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2024 MID-YEAR REPORT

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# EXECUTIVE SUMMARY

Labaton Keller Sucharow is pleased to present *The Advocate: 2024 Mid-Year Report*. Standing on the horizon of law and technology, Labaton Keller Sucharow's Alternative Dispute Resolution Practice is one of the nation's premier practices focused on representing consumers and investors in large volume arbitrations, or so-called mass arbitrations. The Alternative Dispute Resolution Practice represents clients in cases as diverse as data privacy, including wrongful data collection, data sharing, and data breaches, consumer banking, predatory lending, unfair and deceptive practices, and securities.

Labaton Keller Sucharow continually monitors for opportunities to help consumers and investors assert their legal rights in individual arbitration where they have previously been barred from doing so by a class action waiver and mandatory arbitration clause.

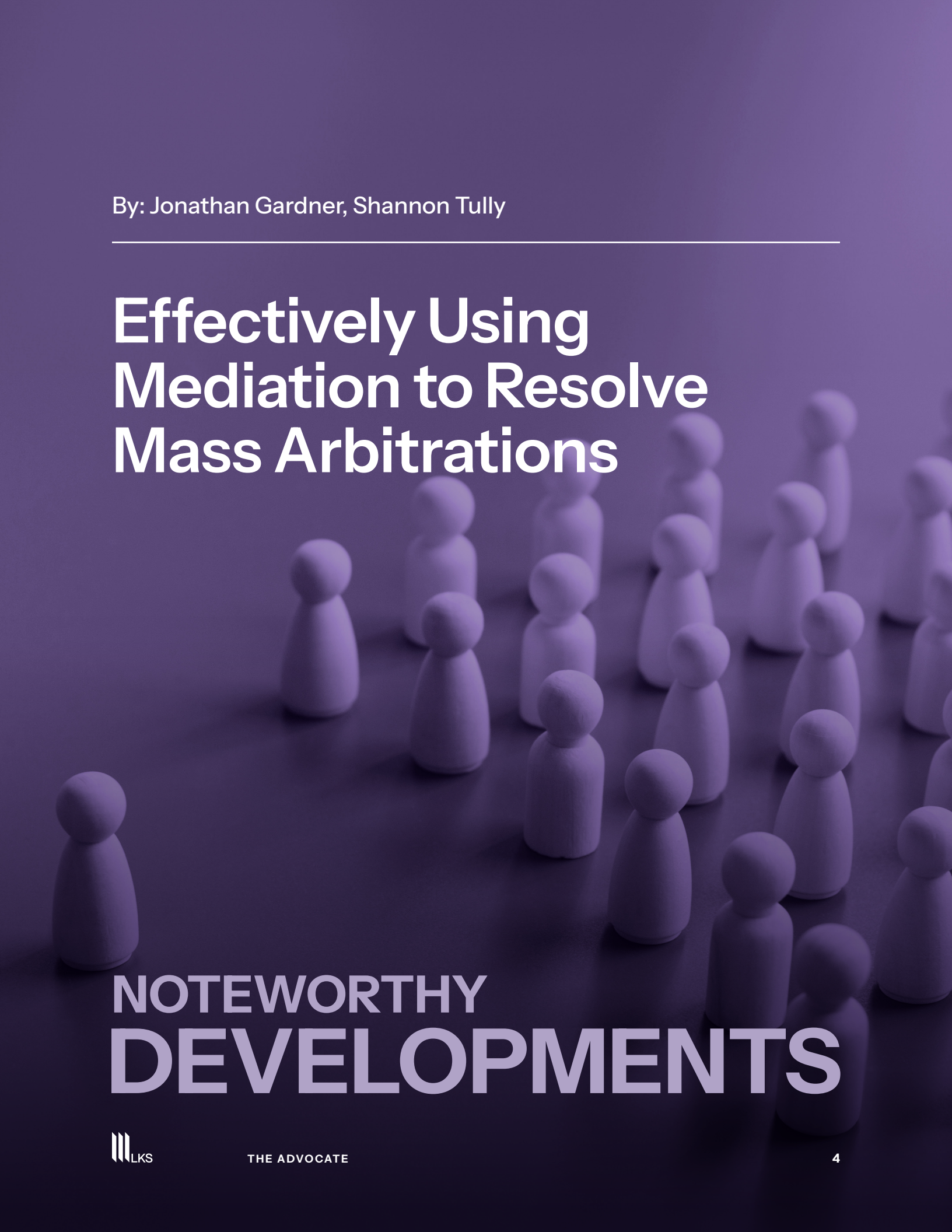
Featured in this edition:

- The benefits of utilizing mediation to resolve mass arbitrations;
- Changes to mass arbitration rules designed to enhance fairness and streamline processes;
- The rise of new arbitration providers; and
- A case study of several actions involving telecommunications giant Verizon.

We would be happy to provide comprehensive assessments and recommendations regarding any of the topics discussed or highlighted in *The Advocate.*

By: Jonathan Gardner, Shannon Tully

# Effectively Using Mediation to Resolve Mass Arbitrations



## NOTEWORTHY DEVELOPMENTS

Mediation plays a pivotal role in resolving mass arbitrations, offering significant value to both parties involved and the arbitration system. Mass arbitrations involve numerous individuals pursuing similar claims against a common defendant through arbitration and presenting unique challenges and opportunities for resolution. This article explores the value of mediation in mass arbitrations, the various approaches that can enhance its effectiveness, and some cautions to consider.

## THE VALUE OF MEDIATION IN MASS ARBITRATIONS

1. **Efficiency and Expediency:** Mass arbitrations often involve hundreds or even thousands of claimants with similar claims. Mediation streamlines the process by providing a structured yet flexible platform for the parties to discuss their positions and negotiate solutions and global settlements. This framework can significantly expedite the resolution process compared to traditional litigation and arbitration proceedings, saving time and costs for all involved parties[1]. Indeed, mediation is highly encouraged by the major consumer arbitration forums and, in specific forums, a requirement under the organization's mass arbitration rules and procedures.[2]

2. **Cost-Effectiveness:** Arbitration is typically considered a cost-effective alternative to litigation and mediation further enhances cost savings. By facilitating negotiations and settlements outside of court and before initiating arbitration, mediation helps the parties avoid the costs of the arbitrable forum's fees. In mass arbitrations, where the cumulative costs can be substantial, mediation offers a pragmatic solution for achieving resolution while mitigating financial burdens on the parties, especially where the individual claims are straightforward.

3. **Customized Solutions and Flexibility:** Mediation empowers the parties to craft tailored solutions that address their needs and interests. This flexibility is invaluable in mass arbitrations where individual circumstances vary among claimants. Mediation sessions provide a forum for creative problem-solving, allowing parties to explore innovative settlement structures that account for differences between individual claimants without formal discovery. Sometimes, multiple groups of arbitration claimants represented by different law firms can attend

[1] *Gaines v. Fidelity Nat'l Title Ins. Co.*, 62 Cal. 4th 1081, 1103 (2016) (mediation's very purpose "is to resolve disputes in a fair, timely, appropriate, and cost-effective manner.")

[2] *See, e.g.*, AAA Mass Arbitration Supplementary Rules, MA-9 (Amended and effective Jan 15, 2024) ("Within 120 calendar days from the established due date for the Answer, the parties shall initiate a global mediation of the Mass Arbitration pursuant to the applicable AAA-ICDR mediation procedures or as otherwise agreed to by the parties"), https://www.adr.org/sites/default/files/Mass_Arbitration_Supplementary_Rules.pdf; *compare* https://www.jamsadr.com/mass-arbitration-procedures (mediation is not a requirement but encouraged).

the same mediation session. However, in those circumstances, it is important for the parties to have early and clear discussions regarding the ground rules for the participation of multiple claimant law firms in the same mediation session.

4. **Confidentiality and Privacy:** Confidentiality is a hallmark of mediation, enabling parties to engage in candid discussions without fear of their statements being used against them in later proceedings.[3] In mass arbitrations, where reputational considerations and sensitive information may be at stake, confidentiality safeguards encourage open communication and foster trust between parties. This confidentiality extends to the content of discussions and the terms of any settlement, allowing parties to maintain privacy regarding resolving their disputes.

## APPROACHES TO MEDIATION IN MASS ARBITRATIONS

1. **Pre-Mediation Preparation:** Effective mediation begins with thorough preparation. That preparation is even more critical in mass arbitrations, where settlement negotiations usually occur before arbitration has commenced and without formal discovery or dispositive motion practice. Before mediation sessions, the parties usually engage in pre-mediation discussions to identify key issues, gather relevant information to assess the valuation of each claim, voice concerns about the validity of the claims or claimants, and evaluate their respective positions. Because mass arbitration settlements are confidential and not subject to court approval, there is no public precedent to assist the parties in drafting term sheets and negotiating non-monetary terms. Sophisticated mass arbitration counsel has developed their own settlement terms, but firms or companies that have yet to engage in any mass arbitrations may not be familiar with specific issues that arise in mass arbitration settlements. As a result, the parties should exchange and negotiate the term sheets before the mediation and discuss any non-monetary terms and structural impediments to the settlement. This preparation lays the groundwork for productive negotiations and ensures that parties enter mediation sessions with a clear understanding of their goals and priorities.

[3] *In re Teligent, Inc.*, 640 F.3d 53, 57-58 (2d Cir. 2011) (confidentiality of mediation communications and information is essential to its validity and effectiveness).

2. **Experienced, Neutral Mediator Selection:** The selection of a neutral mediator is critical to the success of mediation in mass arbitrations. Parties should seek a mediator with expertise in the dispute's subject matter and experience handling mass arbitrations or complex arbitration cases involving multiple claimants. A skilled mediator can ease communication, manage power imbalances, and guide parties toward mutually acceptable resolutions or at least help narrow the parties' issues if a global resolution is not possible. An experienced mediator will also be familiar with mass arbitration procedures and rules – which often change depending on the administrator. They will also be familiar with settlement structures. On the other hand, an inexperienced mediator may not grasp the distinctions between class actions and mass arbitrations, leading to inefficient use of time and frustrated parties.

3. **Structured Negotiation Process:** Mediation sessions in mass arbitrations adhere to a structured format, ensuring efficiency and fairness. Each party can present their perspective, identify interests and concerns, and propose solutions. The mediator facilitates constructive dialogue and negotiation, helping parties bridge their differences and reach a consensus. This structured process is a crucial element in the success of mass arbitration mediation.

4. **Innovative Problem-Solving:** Given the complexity of mass arbitrations, creative problem-solving techniques may be employed during mediation to overcome impasses and achieve resolution. Parties should be encouraged to think outside the box regarding settlement structures.

## CAUTIONS TO CONSIDER BEFORE PROCEEDING TO MEDIATION TO RESOLVE MASS ARBITRATIONS

1. **Success Isn't Guaranteed:** While mediation can be an effective avenue in resolving mass arbitrations, there is no guarantee mediation will be successful. The most important factor is how willing and committed the parties are to settle the case, which is often defined by their agreements

to share information and discuss disputed issues prior to mediation.

2. **Potential for Incomplete Resolution:** When a mediation effort is unsuccessful, it not only delays resolution but can also make the case more difficult to win a formal arbitration proceeding. For instance, if a robust information exchange framework is not negotiated beforehand, it is not unusual for parties to present only the best evidence that supports their case during the negotiation process. One party may thus feel like they need additional discovery in formal arbitration to value their case. If the parties cannot resolve the dispute during mediation, they essentially have a free peek at their adversary's arguments and evidence that will likely be presented during arbitration.

3. **Unnecessary Posturing and Gamesmanship**: Mediation only works if the parties involved in the dispute are willing to compromise and communicate with each other in good faith. Companies facing mass arbitration have tried to "win" the mediation, focus unnecessarily on issues divorced from the underlying factual and legal disputes, or use the mediation process to simply attack the opposing side. Experienced mass arbitration counsel and mediators know that mass arbitration is not going away, and attempting to deter well-resourced claimants from pursuing their cases will create unnecessary time delays and costs without reaching a global resolution.

In conclusion, mediation plays a vital role in resolving mass arbitrations by offering a cost-effective, efficient, and collaborative approach to dispute resolution. By embracing mediation and adopting effective strategies tailored to the unique dynamics of mass arbitrations, parties can achieve fair and durable outcomes that uphold the principles of justice and equity.

By: Melissa H. Nafash, Alexander Schlow

# AAA and JAMS Seek to Balance Efficiency and Fairness with New Mass Arbitration Rules

## NOTEWORTHY DEVELOPMENTS

In mid-January 2024, American Arbitration Association ("AAA") issued a comprehensive update of its Mass Arbitration Supplementary Rules and accompanying fee schedule.[1] AAA's updated rules apply whenever "twenty-five or more similar Demands for Arbitration are filed against or on behalf of the same party or related parties" and "representation of the parties is consistent or coordinated across the cases," and seek both to clarify and streamline resolution of issues that frequently arise in the mass arbitration context. The updated Mass Arbitration Supplementary Rules provide for expedited adjudication of procedural and threshold factual issues on a collective basis, while maintaining claimants' rights to fair, individualized adjudication of the merits of their claims.

## BACKGROUND

Traditionally, arbitration providers like AAA and JAMS did not have formalized procedures or rules to deal with thousands or tens of thousands of employees or consumers bringing similar claims en masse. When mass arbitrations were brought, AAA would attempt to work with the parties to reach consensus on ways to improve efficiency (including through agreement to proceed via its Class Arbitration rules). However, in the absence of any such agreement, AAA would administer mass arbitration demands in the same manner it would any other individual demands—appointing merits arbitrators and charging arbitration fees on a claimant-by-claimant basis.

This approach was consistent both with private arbitration's fundamental nature as a creature of contract and with the Supreme Court's holding that no party could be compelled to submit to class arbitration absent an explicit contractual promise. Nevertheless, many defendant companies refused to pay arbitration fees when confronted with mass arbitration claims, arguing that mass arbitration tactics violated the parties' agreement or its class action waiver. Some companies even argued the reverse position, claiming that the arbitration providers were enabling extortionate tactics when they refused to consolidate mass arbitration claims and pass the assumed resulting fee

[1] American Arbitration Association, *Mass Arbitration Supplementary Rules* (amended and effective Apr. 1, 2024) https://www.adr.org/sites/default/files/Mass-Arbitration-Supplementary-Rules.pdf.

savings onto the companies. Uber Technologies Inc. went so far as to sue AAA in New York State court, seeking an injunction against AAA preventing it from administering a mass arbitration brought against it by drivers alleging they had been misclassified as independent contractors.[2]

Courts were generally unsympathetic to these positions, ordering resistant companies to arbitrate pursuant to their agreements. The New York Appellate Division, First Department even rejected Uber's bid to enjoin AAA from administering the mass arbitration against it. Still, these preliminary disputes taxed AAA's administrative staff and consumed the parties' time and resources with months of procedural sparring before even a single claim would be arbitrated.

In 2021, AAA formally attempted to address these issues with the introduction of its Supplementary Rules for Multiple Case Filings, the precursor to the Mass Arbitration Supplementary Rules. Among other attempts to "streamline the administration of large volume filings involving the same party, parties, and party representative(s), or related party, parties and party representative(s)," these initial rules created the role of a global "Process Arbitrator" empowered to collectively decide "administrative issues," such as whether filing requirements had been met and which AAA rules would apply, across all individual claims included in the mass arbitration. However, defendant companies remained resistant, continuing to refuse to pay AAA's fees and leaving mass arbitration claimants without a clear remedy before AAA.

Further, the cabining of the Process Arbitrator's authority to "administrative" issues did not allow Process Arbitrators to address other issues raised by mass arbitration defendants, such as enforceability of specific arbitration provisions and satisfaction of conditions precedent. These limitations meant that companies continued to refuse to pay their fees, and even where fees were paid, parties continued to squabble over procedural and jurisdictional questions rather than the merits of individual claims, even after Process Arbitrator decisions.

[2] *Uber Techs., Inc. v. Am. Arbitration Ass'n, Inc.*, 204 A.D.3d 506 (1st Dep't 2022).

## AAA'S 2024 AMENDMENT

AAA's January 15, 2024 amendment, which applies to mass arbitrations filed after that date, seeks to address these remaining issues through two significant changes: (1) expansion of the Process Arbitrator's authority and (2) a restructuring of the timing and the amount of arbitral fees that both reduces overall costs for all parties and allows the parties to put certain issues before a Process Arbitrator prior to incurring individualized costs for each claimant's merits arbitration.

The amended rules now allow the Process Arbitrator to address contractual filing requirements, notice requirements, or other conditions precedent; disputes regarding payment of fees; and the rules applicable to subsequent merits arbitrations. The Process Arbitrator's decision must be rendered no later than 30 days after the parties' final submissions on any disputed issues and are subject to review for abuse of discretion by individual merits arbitrators. After the Process Arbitrator's decision, the individual claims of each claimant are assigned to merits arbitrators. In appropriate circumstances, multiple cases may be assigned to the same merits arbitrator, but merits arbitrators must always "decide each case on its own merits" rather than collectively.

Under the updated rules, the parties are only invoiced for individualized administrative and arbitrator fees following the Process Arbitrator's adjudication of any such "not fact-specific" disputes. It remains to be seen whether these changes will result in meaningful shifts in litigant behavior, but AAA's new rules show that it is responding to the emergence of mass arbitration by attempting to directly address party concerns raised in prior mass arbitrations.

As mass arbitration matures and AAA's new rules are tested in current and future cases, parties and their counsel should gain more guidance as to how Process Arbitrators address frequently occurring disputes. In addition, other providers seem to be shifting toward mass arbitration administration models

substantially similar to AAA's approach, suggesting that an informal consensus is developing around administration of mass arbitrations.

## JAMS 2024 MASS ARBITRATION PROCEDURES AND GUIDELINES

Compared to AAA, JAMS initially administered mass arbitrations the same way it did individual ones, with no formal mass arbitration processes or bulk adjudication of common issues absent party agreement. As late as March 2023, JAMS President Kimberly Taylor, Esq. stated that JAMS' "role as the administrator of the parties' arbitration proceedings prohibits us from modifying or changing the arbitration agreement absent express agreement of the parties. . . . Each matter is commenced and managed separately because that is what the pre-dispute contract requires."[3]

This policy resulted in the same frictions and disputes discussed with respect to AAA above: unless the parties could successfully negotiate their own bellwether or batching process, corporate defendants often chose to default on paying arbitral fees rather than attempting to litigate thousands of individualized claims before individual JAMS arbitrators. This frustrated the purpose of arbitration—efficient, speedy dispute resolution.

As of May 1, 2024, however, JAMS has changed its approach. It now allows parties to opt into its Mass Arbitration Procedures and Guidelines, which are "intended to facilitate the fair, expeditious and efficient resolution of Mass Arbitrations."[4] These new procedures are quite similar to AAA's latest rules, allowing JAMS to appoint a "Process Administrator" with most of the same adjudicative authority as AAA's Process Arbitrator (as well as additional authority to determine threshold jurisdictional and arbitrability disputes). Also similar to AAA, only a small initial filing fee, and fees for the appointment of a Process Administrator, are initially required to access Process Administrator adjudications. Additional fees for individual merits

[3] Insight from the President: JAMS Policy Regarding Mass Arbitration Filings, https://www.jamsadr.com/blog/2023/jams-policy-regarding-mass-arbitration-filings.
JAMS Mass Arbitration Procedures and Guidelines, *available at* https://www.jamsadr.com/mass-arbitration-procedures.

arbitrators are only charged following a Process Administrator decision that allows claims to move forward. Finally, the new JAMS rules, like the new AAA rules, allow for the possibility of assigning multiple individual arbitrations to a single merits arbitrator but require individual adjudication of each claim.

## FUTURE DEVELOPMENTS

The primary difference between the JAMS and AAA approaches is that the JAMS rules remain exclusively "opt-in," either through explicit reference in arbitration clauses or by party agreement at the time of filing, consistent with JAMS' strong commitment to enforcing parties' agreements to arbitrate as they are written. By contrast, AAA's new rules apply by default to any newly-filed case fitting AAA's definition of a "mass arbitration," relying on contractual incorporation of applicable AAA rules for enforceability. This difference in approach may allow for future insights on whether claimants, companies, and their respective attorneys believe that these new rules are fair (or advantageous to one side or another)—if companies with arbitration clauses specifying JAMS begin to specifically require use of the updated JAMS rules, corporate acceptance of the JAMS approach to mass arbitration can be inferred.

That said, AAA and JAMS (the two most established ADR providers in the United States) have now adopted substantially similar approaches to mass arbitration. This may very well establish a new standard for mass arbitration administration.

Mass arbitration remains relatively novel (at least by the standards of legal development), but AAA and JAMS seem to be anticipating continued growth in the mass arbitration space.

By: Jonathan D. Waisnor, Brandon Heitmann

# New Arbitration Providers

## NOTEWORTHY DEVELOPMENTS

In response to the rise of mass arbitrations, corporations have sought out creative "solutions" to managing these complex cases. Dissatisfied with traditional arbitration providers' administration of mass arbitration claims, some corporations have elected to use new arbitration providers whose rules address their complaints; that is, they have lower initiation and filing fees, consolidate claims and common issues, and place other limitations on the mass filing of arbitration claims.

Not only do these new arbitration providers not have an extensive track record of impartiality or independence from companies, but they also possess rules that appear to have been designed to disfavor arbitration claimants and, in certain circumstances, their rules have been declared unconscionable in federal court. Further, in response to the growing need for efficient mass arbitration administration, the two largest arbitration providers—American Arbitration Association ("AAA") and JAMS—recently instituted new mass arbitration protocols aimed at efficiently determining procedural issues while allowing claims to proceed to merits determinations. Thus, the JAMS and AAA mass arbitration protocols may reduce the risk case for a company engaged in mass arbitration.

## CORPORATE DISSATISFACTION WITH MASS ARBITRATION ADMINISTRATION

Regardless of how many individual claims are filed, arbitration administrators have traditionally processed and administered mass arbitration claims in accordance with the parties' underlying arbitration agreements, which called for individual arbitration, and their consumer due process protocols, which capped the fees consumers were responsible for. As a result, many corporations refused to pay arbitration fees, seeking to "strategically" default on their fee obligations to prevent the claims from moving forward. Concurrently, companies argued to the administrators that because the claims involved common issues of law and fact, the administrators should

consolidate the claims, despite the presence of class and consolidation waivers in the relevant agreements and several Supreme Court cases holding that class or collective arbitration was inconsistent with the informal, efficient nature of arbitration.[1] Efforts to convince administrators to impose consolidated arbitration and block mass arbitrations in court both failed.[2]

## LAUNCHING OF NEW ARBITRATION PROVIDERS

In response to these complaints, new arbitration providers were launched that provided different structures for the administration of mass arbitrations. One such provider is FedArb.[3] FedArb developed its own ADR-MDL Framework for Mass Arbitration Proceedings.[4] FedArb has amended its rules several times in recent years and now offers a three-step, MDL-type process. This begins with the company having the opportunity to file a "Pre-Filing Fee Motion."[5] This rule requires the parties to meet and confer to undertake reasonable efforts to resolve disputed issues, "including an obligation by the Company to use reasonable efforts to share information necessary for claimant's counsel to verify that the list of potential claimants are valid and have complied with all prefiling requirements."[6] Thereafter, the company can file a motion surrounding "claimant's failure to comply with the contractual terms of the arbitration agreement (*e.g.*, submission of requisite identifying information, requirement to engage in informal resolution) or claimant's failure to make a prima facie claim."[7] This motion will be heard by a retired federal judge and will be decided prior to the invoicing of any filing fees.[8] The notion that a company may effectively file a motion to dismiss before the case is assigned to a merits adjudicator is unprecedented.

Next, after the filing of any Pre-Filing Fee Motion, the claims will proceed to an "MDL Tribunal."[9] To proceed, the company must pay $100 per claimant that remains following any Pre-Filing Fee Motion. The tribunal consists of three arbitrators who will decide (1) any dispositive motions the parties elect to bring (including counter claims), (2) all discovery disputes, (3) all common

[1] *See AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011) and *Epic Systems Corp. v. Lewis*, 823 F.3d 1147 (7th Cir. 2016).

[2] *Abernathy v. Doordash, Inc.*, 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020); *Adams v. Postmates, Inc*., 414 F. Supp. 3d 1246, 1254 (N.D. Cal. 2019), aff'd, 823 F. App'x 535 (9th Cir. 2020).

[3] FedArb, *FedArb Rules*, https://www.fedarb.com/fedarb-rules (last visited June 6, 2024).

[4] FedArb, ADR-MDL™ Framework for Mass Arbitration Proceedings, https://www.fedarb.com/framework-for-mass-arbitration-proceedings-adr-mdl/ (last visited June 6, 2024).

[5] FedArb ADR-MDL Rule 1(c).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] FedArb ADR-MDL Rule 1(e).

issues of fact or law, (4) any common damages issues, and (5) any other motion either side deems relevant."[10] It is unclear how quickly this process can take place, whether the company is entitled to make multiple or serial dispositive motions, or whether the outcome is binding across individuals who have yet to file claims.

Finally, following disposition of these issues, a claimant can elect to either (1) complete a Claims Submission Form[11] with any individual information needed to process the claim or (2) proceed to individual arbitration[12] consistent with the MDL Tribunal's rulings.

Another new provider is New Era ADR ("New Era").[13] New Era was launched in April 2021 and is billed as "simplified dispute resolution." Like FedArb, New Era also has mass arbitration specific rules.[14] New Era's most recent mass arbitration rules apply to any five or more claims against a common respondent that arise out of common issues of law or fact and are brought by coordinated counsel.[15] Upon the commencement of a mass arbitration, New Era will appoint a "Neutral" to oversee the case and determine whether common issues of law or fact exist amongst the claims.[16] Thereafter, both claimants and respondents will select one "bellwether case" from the filed cases and a third bellwether will be selected through a process determined by the Neutral.[17] Following the resolution of the bellwether cases, the parties will conduct a settlement conference to determine the viability of settlement.[18] If the claims still proceed after the settlement conference, the Neutral may determine if any decisions in the bellwethers will have precedential impact on the rest of the claims.[19] If the Neutral decides to apply precedential decisions, they can decide the remaining claims.[20] If the Neutral decides not to apply the precedential decisions, the cases will be removed from the mass arbitration filing.[21] New Era charges $500 per claim for any mass arbitration claim that is filed, in addition to a flat $3,000 mass arbitration case fee.[22] Both the business and the consumer are required to split the filing fee evenly,

[10] Id.

[11] FedArb ADR-MDL Rule 1(f). FedArb does not detail the contents or substance of a Claims Submission Form in its' rules.

[12] It is also unclear from FedArb's rules what additional fees, if any, are associated with this process. Under FedArb rules for non-mass arbitration filings, Claimants are to pay $50 and the company is to pay $1,500, plus administrative fees of $1,000.

[13] New Era ADR, https://www.neweraadr.com/ (last visited June 6, 2024).

[14] New Era ADR Rules and Procedures Rule 1(b)(iv).

[15] *Id.*

[16] New Era ADR Rules and Procedures Rule 6(b)(iii)(1).

[17] New Era ADR Rules and Procedures Rule 6(b)(iii)(3).

[18] New Era ADR Rules and Procedures Rule 6(b)(iii)(4).

[19] New Era Rules and Procedures Rule 6(b)(iii)(5). The parties are permitted to submit a 1,000-word statement to the Neutral arguing either for or against applying decisions in the bellwether cases to the remaining claims.

[20] *Id.*

[21] *Id.*

[22] New ERA ADR Fee Schedule Rule 1.

whereas the business is required to pay the flat case fee.[23] However, New Era offers subscription arrangements for businesses that allow them to dramatically reduce the amount of filing fees owed.[24] These arrangements are opaque, and it is unclear whether an arbitration provider would be violating state laws surrounding disclosure of relevant and material information relating to bias if it refuses to disclose to litigants the amount of subscription-based revenue paid to the administrator by the company.[25]

New Era and the New Era rules have faced scrutiny in recent years. In *Heckman v. Live Nation Entertainment, Inc*., consumers sued Live Nation and Ticketmaster, alleging various anticompetitive practices in violation of the Sherman Antitrust Act.[26] Defendants moved to compel arbitration pursuant to an arbitration agreement that called for administration by New Era. Plaintiffs opposed the motion on the grounds that New Era's rules were procedurally and substantively unconscionable.[27] Plaintiffs pointed to evidence that Live Nation was New Era's "anchor client" and only source of revenue, thus the rules were drafted with unfair corporate bias.[28] The court noted that some of the evidence could show an inference of bias.[29] The court was also troubled by New Era's shifting interpretation of the rules, which changed based upon tentative court rulings and conversations with Live Nation's corporate counsel.[30]

Regarding New Era's rules, the court declined to enforce New Era's administration of the claims.[31] Finding an extreme level of procedural unconscionability n connection with the rollout of the adoption of New Era, the court held that a number of elements were substantively unconscionable: (1) New Era's application of precedent from bellwether decisions to bind subsequent claimants in a mass arbitration, (2) the lack of a right to discovery sufficient to vindicate complex claims, (3) arbitrator selection provisions, and (4) a unilateral right of appeal for the company.[32] New Era has since amended its rules in an attempt to address these problems, but the overall question of

[23] *Id*. Similarly, ADR Services, Inc. does not have published, mass arbitration rules but does have a mass arbitration fee schedule. ADR Services' fee schedule calls for a $250 filing fee per claimant as well as a $295 per party administrative fee for each case filed. Under these rules, claimants' fee obligations are more than double that of the company. https://www.adrservices.com/wp-content/uploads/2022/10/ADR-Mass-Consumer-Non-Employment-Fee-Schedule-Eff-11-5-21.pdf

[24] New Era ADR Rule 6(b)(iii)(2)(a).

[25] California Code of Civil Procedure §1281.96(a)(11) requires arbitration companies to publish their total fees for a particular arbitration as well as the percentage of fees allocated to each party. Further, §1281.9(a) requires a neutral arbitrator to disclose all matters that could cause a person to "reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial."

[26] 2023 WL 5505999, at *1, No. 22-CV-00047 (C.D. Cal. Aug. 10, 2023).

[27] *Id.*

[28] *Id.* at *9.

[29] *Id.* at *10.

[30] *Id.*

[31] *Id.* at *17.

[32] *Id.*

whether "precedential" decisions are inconsistent with individual arbitration is still not fully answered by the rules. It is unclear if New Era's amendments will be enough to overcome these significant hurdles.

## THE HOBSON'S CHOICE

Though these new arbitration providers have sought ways to address corporate complaints regarding mass arbitrations by lowering filing fees and attempting to litigate common legal and factual issues, it is far from certain they will pass muster in court or survive states' attempts to regulate them. The Supreme Court in *Concepcion* created a clear precedent favoring individual, bilateral arbitration as opposed to class-wide treatment.[33] What these novel arbitration providers have instituted crosses the line into the type of procedural complexity that the Supreme Court has found inconsistent with arbitration.[34]

Further underscoring this is the fact that none of these providers have gained widespread adoption by corporations. If their rules and procedures were truly a panacea for corporations facing mass arbitrations, one would think corporations would be lining up to place them in their arbitration agreements. That is not the case. A recent report by Greenberg Traurig, LLP found that 87% of Fortune 500 companies that use arbitration still designate AAA or JAMS in their Terms of Use.[35] Companies, therefore, appear to recognize the significant risk inherent in the use of novel MDL arbitration procedures.[36]

Last, AAA and JAMS have also responded to the growth of mass arbitration by issuing new rules aimed at the processing and administration of mass arbitrations,[37] as discussed in the preceding article. These rules differ greatly from the rules of arbitration providers like FedArb and New Era. AAA and JAMS call for the appointment of a process arbitrator to assist the parties in deciding procedural issues, but the claims still proceed individually to a merits arbitration.[38] There are no bellwether, batching, nor MDL procedures

[33] 563 U.S. at 347.

[34] Some commentators have argued that the added procedural complexity wrought by new mass arbitration protocols have transformed traditional arbitration to "such a degree that it is no longer the type of arbitration covered by the [FAA]." Thus, states should feel empowered to regulate these types of rules without fear of FAA preemption. See Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act,* Drexel University Thomas R. Kline School of Law (Jan. 24, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4705062

[35] https://www.gtlaw-dataprivacydish.com/2024/04/fortune-500-terms-of-use-utilize-varying-arbitration-providers/

[36] A study recently found that nearly 80% of arbitration clauses require consumers to engage in complicated pre-arbitration dispute resolution processes before they can initiate arbitration. Whereas 40% require the claims to be addressed in batches. *See* Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act,* Drexel University Thomas R. Kline School of Law (Jan. 24, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4705062

[37] Mass-Arbitration-Supplementary-Rules.pdf (adr.org); https://www.jamsadr.com/mass-arbitration-procedures

[38] National Arbitration and Mediation ("NAM"), predated AAA and JAMS in issuing mass arbitration rules. NAM's mass arbitration rules are similar to JAMS and AAA and call for the appointment of a procedural arbitrator to decide procedural issues, staggered case fees, and individual merits arbitration. https://www.namadr.com/content/uploads/2024/03/Mass-Filing-Supplemental-Rules-updated-as-of-8.24.23.pdf

of any kind unless the parties agree to it and establish procedures that do not offend their due process protocols. In addition, these new rules significantly lower the filing fees for companies. The fact that JAMS and AAA, the two largest and most established arbitration providers, have adopted similar provisions for the administration of mass arbitration highlights the possibility that many of the rules issued by new arbitration providers may not be enforceable as currently written. Further, the JAMS and AAA procedure will likely become the standard for mass arbitration administration in the future.

# CASE WATCH

By: Melissa H. Nafash, Morris Dweck

## Verizon

**CITATION:** *MacClelland, et al. v. Cellco P'ship, et al.,* 609 F. Supp. 3d 1024 (N.D. Cal. 2022); *Esposito, et al. v. Cellco P'ship, et al.,* MID-L-006360-23 (N.J. Super. Ct.); *Allen, et al. v. Cellco P'ship, et al.*, 23-cv-01138 (D.N.J. Feb. 27, 2023); *Achey v. Cellco P'ship, 475 N.J. Super.* 446 (Super. Ct. App. Div. 2023)

**COURT:** U.S. District Court for the Northern District of California, New Jersey Superior Court, U.S. District Court for the District of New Jersey, New Jersey Superior Court

**DEFENDANT:** Cellco Partnership DBA Verizon Wireless and Verizon Communications Inc.

**INDUSTRY:** Telecommunications

Companies are attempting several tactics to manage the risk of mass arbitrations, including introducing new arbitration provisions with different procedural structures for litigating arbitrations. Many of these attempts have resulted in significant delays because the new provisions are being challenged along with the alleged wrongful conduct. Across the country, new laws seek to eliminate "junk fees" (*i.e.*, charging additional fees not disclosed in the advertised price). For instance, beginning in July 2024, California businesses can no longer charge fees or surcharges not already disclosed in the advertised price for goods or services. But even before jurisdictions began outlawing these practices explicitly, consumers utilized state consumer protection laws to combat junk fees. Here, we briefly

discuss this claim in litigations against Verizon regarding similar practices, but mainly examine Verizon's efforts to manage the risk of mass arbitration. Verizon customers in *MacClelland v. Cellco Partnership* and *Esposito v. Cellco Partnership* took legal action, claiming that Verizon's "Administrative Charges" violated state consumer protection laws. These cases targeted a bait-and-switch tactic employed by Verizon against its wireless service subscribers: despite advertising flat monthly rates for its post-paid wireless service plans, Verizon allegedly implemented higher monthly rates by including an undisclosed monthly Administrative Charge. The consumers alleged the "Administrative Charge" served as a means for Verizon to increase monthly costs without openly advertising higher prices. While the Administrative Charge was only $1.95 per month, consumers alleged that Verizon collectively earned billions of dollars per year in Administrative Charges.

In *MacClelland*, Verizon had modified its arbitration provision while a class action was ongoing, citing that over 2,000 consumers represented by class counsel had filed arbitration claims.[1] The modification introduced a "batched" arbitration clause, requiring that customers whose attorneys had filed more than 25 similar claims must arbitrate their cases in groups of 10.[2]

However, the court in *MacClelland* ruled against Verizon's revised arbitration clause, deeming the entire agreement unconscionable and unenforceable.[3] The court's decision stemmed from its determination that the arbitration clause, along with its associated limitations, represented a systematic attempt to impose arbitration on customers as an "inferior forum."[4] Indeed, the court noted that under Verizon's serial bellwether provision, it would take over 156 years for a consumer to have their claim heard in arbitration.[5] Further, the provision did not toll the statute of limitations while the bellwethers were litigated.[6]

In total, four separate actions were filed against Verizon for its Administrative Charge practices. Despite none of the cases reaching a determination on the

[1] *MacClelland,* 609 F. Supp. 3d at 1029.

[2] *Id*. at 1040.

[3] *Id*. at 1044.

[4] *Id*. at 1045.

[5] *Id*. at 1040.

[6] *Id*. at 1043.

merits or class certification, Verizon consistently sought to compel arbitration in each case, leading to extensive legal proceedings and appeals:

1. In *MacClelland*, the court denied Verizon's motion to compel arbitration, which Verizon then appealed.
2. In *Corsi*, the court similarly denied Verizon's motion to compel arbitration and ordered limited discovery on the issue of arbitrability.[7]
3. In *Allen*, the parties submitted stipulated facts to allow the court to address Verizon's motion to compel arbitration.[8]
4. In *Achey*, the New Jersey Appellate Division found Verizon's arbitration agreement to be unenforceable even where Verizon added a tolling provision to the clause. Verizon appealed, and the case was accepted by the New Jersey Supreme Court.[9]

Verizon consistently argued that its implementation of batching or bellwether arbitration procedures was a reasonable approach to assess the validity of consumers' claims. When it was pointed out that the procedures would lead to potentially decades of delays in claims, Verizon essentially—and unsuccessfully—asked the court to trust that it would engage in settlement efforts after the initial set of bellwethers.[10]

Despite having the opportunity to defend its changes to the arbitration agreement before the Ninth Circuit and the New Jersey Supreme Court at the end of 2023, Verizon chose instead to reach a nationwide settlement of $100 million to resolve the class claims.[11]

Verizon's decision to settle for $100 million has been characterized as a setback for critics of mass arbitration.[12] Indeed, the U.S. Chamber of Commerce submitted a Ninth Circuit amicus brief, claiming that Verizon's bellwether rules offer substantial advantages and ensure a fair and equitable outcome for both the company and the claimants involved.

[7] *Corsi v. Cellco P'ship,* No. 22-4621 RLS, 2023 WL 3775320, at *1 (D.N.J. June 2, 2023).

[8] *Allen v. Cellco P'ship, et al.,* No. 23-CV-01138, (D.N.J. Feb. 27, 2023).

[9] *Achey v. Cellco P'ship,* 475 N.J. Super. 446, 450 (Super. Ct. App. Div. 2023).

[10] Verizon's Reply in Support of Motion to Compel Arbitration at 12-14, *Corsi, et al. v. Cellco P'ship, et al.* No. 3:21-cv-08592-EMC, Docket No. 34, April 22, 2022.

[11] *See generally*, Class Action Settlement Agreement, MID-L-006360-23, Nov. 15, 2023. Esposito resolved four separate litigations regarding the Administrative Charge: (1) *MacClelland, et al. v. Cellco P'ship, et al.*, 21-cv-08592 (N.D. Cal. Nov. 3, 2021); (2) *Corsi,* 2023 WL 3775320 (D.N.J. June 2, 2023); (3) *Allen, et al. v. Cellco P'ship*, et al., 23-cv-01138 (D.N.J. Feb. 27, 2023); and (4) *Achey*, 475 N.J. Super. 446 (Super. Ct. App. Div. 2023). Each class action asserted claims on behalf of customers who held Verizon post-paid wireless service plans and paid an Administrative Charge.

[12] Alison Frankel, *Verizon's $100 million fee settlement is setback for mass arbitration critics,* Reuters (Jan. 16, 2024), https://www.reuters.com/legal/litigation/column-verizons-100-million-fee-settlement-is-setback-mass-arbitration-critics-2024-01-16/.

The *Esposito* class settlement was finally approved in April 2024. On the one hand, the Verizon administrative fee litigation is a prime example of the type of consumer protection litigation that consumer advocates warned that arbitration would eliminate: claims involving deceptive consumer practices that individually involve small amounts of money but in the aggregate impose billions in harm on consumers.[13] The multimillion-dollar settlements reached by Verizon serve as compelling evidence that such claims still exist and are now much more viable.

On the other hand, the *Verizon* case is consistent with a number of decisions by courts that strike down arbitration clauses that operate purely as claim suppression vehicles. Indeed, the case shows the value of having a strategy to challenge mass arbitration procedures at the outset of a case. Importantly, this settlement reflects the judiciary's close examination of arbitration clauses that seek to impose arbitration as a forum inferior to traditional litigation.

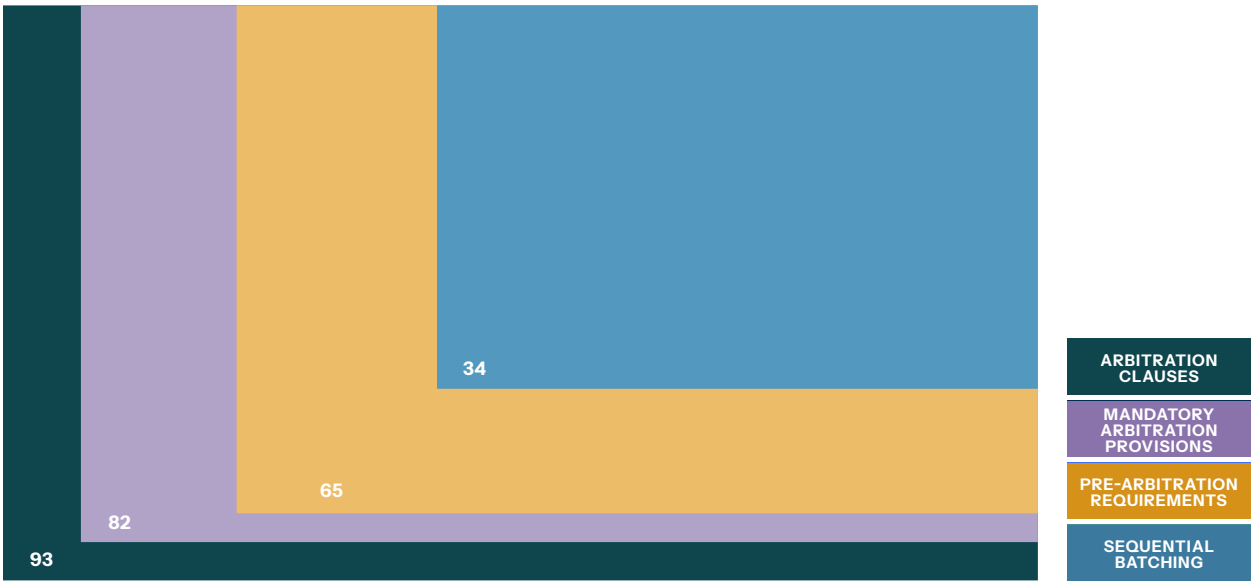
The rulings in cases such as *MacClelland* and *Achey*, where Verizon's arbitration clause was deemed unconscionable and unenforceable, further highlight the courts' receptiveness to challenges against such clauses. These decisions signal a growing recognition of the importance of fairness and transparency

[13] *Consumer advocates come out against forced arbitration clauses,* ConsumerAction, (March 2015) https://www.consumer-action.org/coalition/articles/consumer_advocates_come_out_against_forced_arbitration_clauses.

# MASS ARBITRATION BY THE NUMBERS

**The following is drawn from Richard Frankel's article "Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act," which contains a review of 93 different arbitration clauses.[1]**

## PREVALENCE OF ARBITRATION PROVISIONS

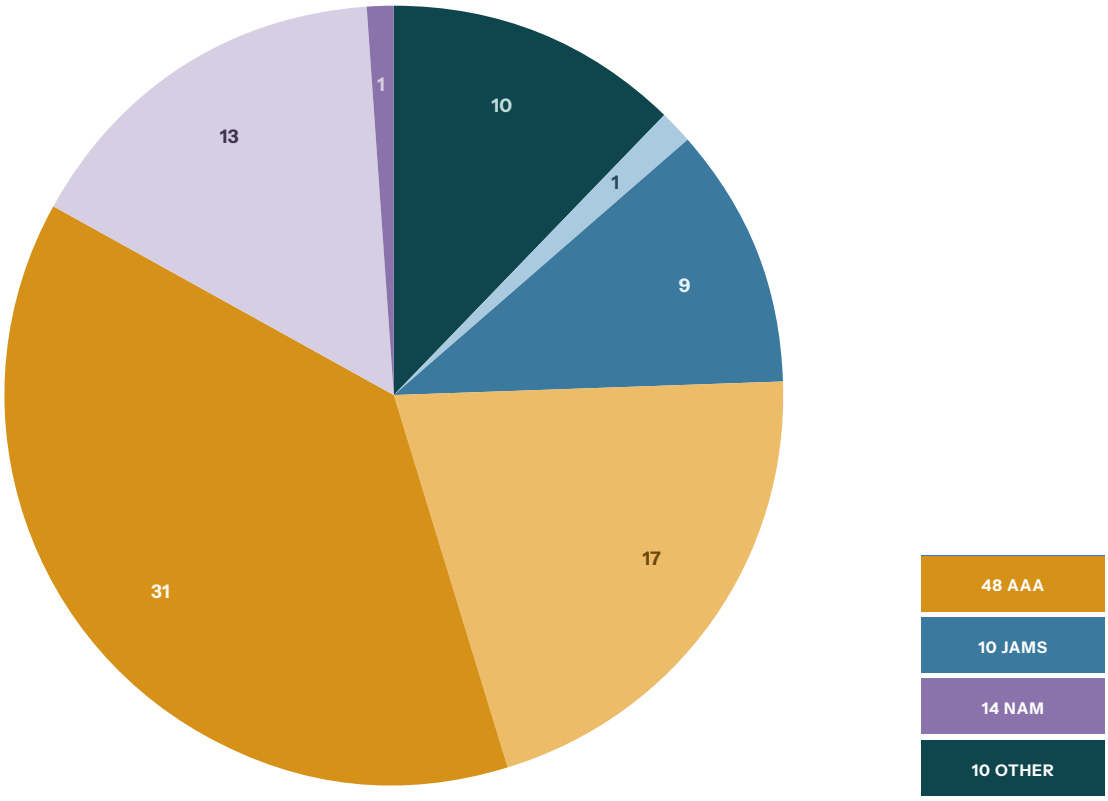



- Of 93 companies analyzed, 82 have mandatory arbitration provisions as part of their terms of service.
- Nearly 80% of companies with an arbitration clause require claimants to complete pre-arbitration requirements.
- Just over 40% of companies with an arbitration clause employ some process for addressing claims in sequential batches.

[1]Frankel, Richard. "Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and Its Implications for the Federal Arbitration Act." *SSRN Electronic Journal* (2024): https://ssrn.com/abstract=4705062.

# MASS ARBITRATION BY THE NUMBERS

## ARBITRATION PROVIDERS AND FREQUENCY OF REQUIRED BATCHING




- 14 of the 82 companies with a mandatory arbitration provision use National Mediation and Arbitration ("NAM") as their arbitration provider, with 13 of those 14 companies have a required batching procedure.
- By contrast, companies that continue to use more longstanding arbitration providers like the American Arbitration Association ("AAA") and JAMS are less likely to use batching procedures:
  - 17 of 48 companies using AAA require batching
  - 1 in 10 companies using JAMS require batching

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Jonathan Gardner
Managing Partner
Email: JGardner@Labaton.com
Tel: +1 212.907.0839



Melissa H. Nafash
Partner
Email: MNafash@Labaton.com
Tel: +1 212.907.0861



Jonathan D. Waisnor
Partner
Email: JWaisnor@Labaton.com
Tel: +1 212.907.0623

**NEW YORK**
140 BROADWAY
NEW YORK, NY 10005
TEL: +1 212.907.0700

**DELWARE**
222 DELAWARE AVENUE, SUITE 1510
WILMINGTON, DE 19801
TEL: +1 302.573.2540

**LONDON**
1 KING WILLIAM STREET
LONDON, EC4N 7AF UNITED KINGDOM
TEL: +44 20.3582.0981

**WASHINGTON, D.C.**
1050 CONNECTICUT AVENUE NW, SUITE 500
WASHINGTON, D.C. 20036
TEL: +1 202.772.1881