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# THE ADVOCATE

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2024 YEAR-END REPORT

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# EXECUTIVE SUMMARY

Labaton Keller Sucharow is pleased to present *The Advocate: 2024 Year-End 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:

- ✘ An exploration of the history of collective legal mechanisms in the United States and the United Kingdom and the potential for developing a mass arbitration model in the United Kingdom;
- ✘ The Ninth Circuit's rejection of a recent attempt to move customer claims out of court and into an untested mass arbitration program;
- ✘ Strategies being utilized by companies seeking to avoid mass arbitrations and how claimants are fighting back; and
- ✘ A case study on attempts to enforce "bellwether" provisions that limit the number of claims within a mass arbitration.

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

By: Jonathan Gardner, Adrian Ward

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# The Case for Mass Arbitration in the United Kingdom



## NOTEWORTHY DEVELOPMENTS

In recent years, mass arbitration has emerged as a transformative force in consumer dispute resolution in the United States. Unlike traditional collective litigation models, mass arbitration leverages streamlined, individualized proceedings to address systemic harms efficiently and effectively. The courts in the United Kingdom have seen a recent increase in collective litigation on behalf of and by consumers. This has highlighted the opportunity for alternative case and claim management procedures that can offer the parties additional efficiencies outside of the court system.

This article explores the history and development of collective legal mechanisms in the United States and the United Kingdom, examines the role of U.S. Supreme Court precedent in shaping the mass arbitration model, and makes the case for why such a model could be advantageous in the United Kingdom alongside its existing collective litigation mechanisms.

## **COLLECTIVE LEGAL MECHANISMS: A COMPARATIVE OVERVIEW**

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### **UNITED STATES: THE EVOLUTION OF CLASS ACTIONS, MASS ARBITRATION, AND MASS TORTS**

In the United States, collective litigation has its roots in Rule 23 of the Federal Rules of Civil Procedure, first established in 1938. Rule 23 created a framework for class actions, allowing a single plaintiff or small group of plaintiffs to represent a larger class with similar claims. Rule 23 was substantially revised in 1966, making the opt-out class action the standard option and giving rise to the modern class action.<sup>1</sup> Over time, class actions became a cornerstone of consumer protection, addressing issues ranging from defective products to civil rights violations.

Parallel to the rise of class actions, mass tort litigation has also played a critical role in the U.S. legal system. Mass torts emerged as a response to large-scale harm caused by defective products, environmental disasters, and pharmaceutical negligence. The rise of multidistrict litigation (“MDL”) in the 1960s further streamlined mass torts by consolidating pretrial proceedings for similar claims in federal courts.<sup>2</sup>

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<sup>1</sup> Yeazell, Stephen C, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION, New Haven: Yale University Press (1987).

<sup>2</sup> Peterson, Colvin A. Jr., McDermott, John T., *Multidistrict Litigation: New Forms of Judicial Administration*, ABA Journal. 56. Chicago: American Bar Association: 737-746 (August 1970).

Unlike class actions, where a single suit binds all class members, mass torts involve coordinated individual lawsuits that share common factual or legal issues. The flexibility of mass torts allows for individualized damages while benefiting from consolidated discovery and procedural efficiencies.

Notable mass tort cases include the asbestos litigation, that began in the mid-20th century and has persisted for decades due to the long latency period of asbestos-related illnesses. Similarly, the Dalkon Shield litigation in the 1970s and 1980s addressed injuries caused by a defective intrauterine device, resulting in significant settlements and trust funds to compensate victims. This approach has since been used in cases ranging from pharmaceutical injuries to environmental disasters like the Deepwater Horizon oil spill.

Arbitration has a long history in the United States, with its use codified in the Federal Arbitration Act (“FAA”) of 1925. The FAA was designed to provide an efficient, streamlined alternative to court litigation, particularly for commercial disputes.

In the 1980s, the defense bar, corporate entities, and related interest groups launched a decades-long campaign to expand the universe of permissible contexts for mandatory arbitration agreements to mitigate litigation, especially class action, exposure.<sup>3</sup> Companies began incorporating arbitration clauses with class action waivers in their consumer contracts.

The U.S. Supreme Court’s decisions in *AT&T Mobility LLC v. Concepcion*<sup>4</sup> and *American Express Co. v. Italian Colors Restaurant*<sup>5</sup> held that such arbitration clauses were entitled to be enforced by their terms under the FAA and that states could not enforce their own laws or rules prohibiting consumer arbitrations or even prohibiting opt-out class action waivers that would effectively abrogate an individual arbitration agreement. These clauses mandate individual arbitration for disputes, effectively limiting class action litigation.

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<sup>3</sup> J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1297 (2022).

<sup>4</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

<sup>5</sup> *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

This development paved the way for mass arbitration. This novel approach involves filing thousands of individual arbitration claims simultaneously whenever there is widespread, systematic corporate wrongdoing. Mass arbitration can be an effective way for consumers to arbitrate systemic violations of laws while providing for individualized resolutions.

## UNITED KINGDOM: REPRESENTATIVE ACTIONS, GROUP LITIGATION ORDERS, AND COMPETITION COLLECTIVE CLAIMS

Although “group litigation”—the antecedent of the class action—appeared to have been quite common in medieval England, over the subsequent centuries, group litigation gradually became less common.<sup>6</sup> By 1850, Great Britain had enacted several statutes on a case-by-case basis to deal with issues regularly faced by certain types of organizations. With the main reasons for group litigation removed, it quickly declined in importance in British law. Collective litigation in the United Kingdom remained relatively dormant until the 21st century, when Group Litigation Orders (“GLOs”) were formally added to the Civil Procedure Rules (“CPR”) in 2000.<sup>7</sup>

The United Kingdom’s approach to collective legal redress incorporates some case management mechanisms like class actions and mass actions: Representative Actions, GLOs, and collective claims under the Consumer Rights Act 2015 (“CRA 2015”). However, the United Kingdom takes a narrower approach to the potential for “opt-out” claiming, unlike U.S. class actions.

### Representative Actions

Representative actions allow one or more claimants to bring a claim on behalf of others who share the “same interest.”<sup>8</sup> However, the courts have interpreted “same interest” narrowly, requiring identical claims and remedies for all represented parties. This stringent standard has limited the use of representative actions. For example, in *Emerald Supplies Ltd v. British Airways plc*, the Court of Appeal refused to certify a representative action because the other persons Emerald purported to represent did not share identical legal interests at all stages of the litigation.<sup>9</sup>

<sup>6</sup> Yeazell, *supra* note 1 at 38; 124-125.

<sup>7</sup> Civil Procedure (Amendment) Rules 2000, The National Archives, 24 January 2000, SI 2000/221, <https://www.legislation.gov.uk/uksi/2000/221/made>.

<sup>8</sup> Civil Procedure Rules Part 19 – Parties and Group Litigation, 19.8, <https://www.legislation.gov.uk/uksi/2000/221/made>.

<sup>9</sup> *Emerald Supplies LTD & Anor v. British Airways plc* [2009] EWHC 741 (Ch).

Representative actions are also not permitted in instances where damages may be individualized. In *Lloyd v. Google*,<sup>10</sup> Richard Lloyd brought claims against Google alleging breach of its duties as a data controller under section 4 of the Data Protection Act 1998. Lloyd sought to bring the claim for damages by acting as a representative for all the individuals affected by Google’s alleged conduct under CPR 19.6 and attempting to plead a “baseline” level of “loss of control” damages that would be uniform among all members of the class. Ultimately, Google appealed to the UK Supreme Court (“UKSC”). The UKSC found in favor of Google, determining that the representative action was appropriate because the claim for damages would require an individualized assessment of what happened to each class member.

### Competition Collective Claims (CRA 2015)

The CRA 2015 introduced opt-out collective actions for breaches of competition law, enabling claims brought by a representative on behalf of an entire class under section 47B of the Competition Act 1998 before the Competition Appeal Tribunal (“CAT”). These cases are limited to competition law violations, such as price-fixing or abuse of market dominance. While the CAT’s opt-out mechanism represents a significant departure from traditional UK practices, it remains confined to a narrow set of claims. For instance, the landmark *Merricks v. Mastercard* case, a £14 billion claim over excessive interchange fees, was only certified after years of litigation, highlighting the procedural hurdles that persist in implementing opt-out mechanisms.<sup>11</sup>

### Group Litigation Orders (GLOs, CPR 19.21)

Introduced in 2000, GLOs provide a framework for managing multiple individual claims with common legal or factual issues.<sup>12</sup> Claimants must actively opt in by joining a group register, and the court oversees the collective management of these cases. While GLOs have been used in high-profile cases, such as the British Coal respiratory disease litigation,<sup>13</sup> their opt-in nature often leads to lower participation rates compared to opt-out mechanisms like U.S. class actions.

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<sup>10</sup> *Lloyd v. Google LLC* [2021] UKSC 50.

<sup>11</sup> See *Merricks v. Mastercard* [2020] UKSC 51. The CAT initially refused to grant a collective proceedings order, citing insufficient data for aggregate damages and difficulty in approximating individual losses. The UKSC held that the CAT erred in its assessment. It emphasized that the aim of collective proceedings is to provide access to justice and should not be halted due to challenges in calculating damages.

<sup>12</sup> GLO claims must give rise to “common or related issues of fact or law” (CPR 19.21).

<sup>13</sup> See GLO 108, *The British Coal Coke Oven Workers Litigation*.

This limits their effectiveness in addressing systemic consumer harms. There have been 124 GLOs entered since the mechanism was established, in cases ranging from securities, consumer, data privacy, and drug and device litigation to mass tort, and with groups ranging from a few dozen (in personal injury or tort cases) to tens of thousands (data breach cases).<sup>14</sup> Notable recent GLOs include British Airways,<sup>15</sup> which arose as a result of a 2018 data breach impacting 420,000 individuals. Over 16,000 claimants joined the GLO,<sup>16</sup> and British Airways settled in July 2021.<sup>17</sup> Several GLOs have been entered against car manufacturers concerning allegations of emissions cheating. The claimants allege that engines used by manufacturers, including BMW and Volvo, in some of their vehicles emitted harmful levels of toxic gases in breach of EU/UK law and regulatory standards.<sup>18</sup> As these GLO's show, UK residents are increasingly opting in to collective redress mechanisms, and law firms have significant experience representing large numbers of consumers.

## ARBITRATION CLAUSES ARE RARE IN UK CONSUMER CONTRACTS

Stringent consumer protection regulations in the United Kingdom have led to the infrequent inclusion of arbitration clauses in consumer contracts, reflecting a legal environment that prioritizes consumers' rights to access the court system over alternative dispute resolution mechanisms.<sup>19</sup> Unlike the United States, mandatory consumer arbitration terms are generally prohibited in the United Kingdom by the CRA 2015, which implements a provision from the EU Directive 93/13 on unfair terms in consumer contracts that deems any consumer contract term that hinders the consumer's right to take legal action by requiring the consumer to take disputes exclusively to arbitration as unfair. Sections 89-91 of the Arbitration Act 1996 ("AA 1996") and the Unfair Arbitration Agreements (Specified Amount) Order 1999 extend the application of the relevant provisions of the CRA 2015 to arbitration. Furthermore:

- ✘ Compulsory consumer arbitration agreements relating to claims of £5,000 or less are automatically unfair under section 91(1) of the AA 1996 and are therefore unenforceable against the consumer.<sup>20</sup>

<sup>14</sup> <https://www.gov.uk/guidance/group-litigation-orders#list-of-all-group-litigation-orders>.

<sup>15</sup> UK Government, *Group Litigation Orders*, GOV.UK, <https://www.gov.uk/government/publications/group-litigation-orders/list-of-group-litigation-orders#British-Airways-Data-Event-Group-Litigation>.

<sup>16</sup> The Irish Times, *British Airways Faces Large Class Action Lawsuit Over Customer Data Breach*, The Irish Times, <https://www.irishtimes.com/business/transport-and-tourism/british-airways-faces-large-class-action-lawsuit-over-customer-data-breach-14456586>.

<sup>17</sup> National Law Review, *British Airways Settles UK Breach Class Action*, National Law Review, <https://natlawreview.com/article/british-airways-settles-uk-breach-class-action> (last visited Jan. 2, 2025).

<sup>18</sup> See, e.g., No. 113 *Jaguar Land Rover NOx Emissions Group Litigation (2024)*; No. 114 *Nissan/Renault Diesel NOx Emissions Group Litigation (2024)*; No. 115 *BMW NOx Diesel Emissions Group Litigation (2024)*. <https://www.gov.uk/government/publications/group-litigation-orders/list-of-group-litigation-orders#the-vauxhall-nox-emissions-group-litigation>.

<sup>19</sup> G. Lazarev, J. Trevellick, *Consumer Class Arbitration in the UK: Where We Are and What Next?* <https://arbitrationblog.practicallaw.com/consumer-class-arbitration-in-the-uk-where-we-are-and-what-next/> (October 9, 2017).

- ✘ Arbitration clauses in consumer contracts relating to claims over £5,000 may also be found to be unfair under the CRA 2015.<sup>21</sup>
- ✘ An arbitration clause in a consumer contract is likely to be judged as unfair if its effect is to exclude or hinder the consumer’s right to take legal action before the courts, the arbitrator’s fees are relatively high compared with the amount of the claim, and the impact of the arbitration clause would not have been apparent to a layperson.<sup>22</sup>

## THE POTENTIAL FOR MASS ARBITRATION IN THE UNITED KINGDOM

There may be companies that prefer to handle large volumes of consumer claims outside of a large court proceeding like a GLO. Because mass arbitrations are handled outside of the court system, proceedings can be faster and more efficient, confidential, and offer greater flexibility in procedural rules for both consumers and companies. If companies wanted to adopt arbitration as a tool for dispute resolution, absent legislative change, they would likely make similar arguments as were made in the United States when the courts began to consider the use of arbitration clauses in consumer contracts.

### Enhanced Access to Justice

Elective mass arbitration provides a streamlined and accessible process for individuals to resolve small-value claims. By offering a simplified, user-friendly opt-in alternative, mass arbitration could offer an additional option alongside the GLO for UK consumers seeking redress.

### Efficient Resolution of Disputes

Mass arbitration can provide greater efficiency in resolving disputes for both companies and consumers. In *AT&T Mobility LLC v. Concepcion*, Justice Scalia emphasized several benefits of arbitration, such as streamlined procedures tailored to the specific dispute, decision-makers with expertise in the relevant field, confidential proceedings that safeguard trade secrets, and informal processes that lower costs

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<sup>20</sup> See *id.*

<sup>21</sup> *Supra* note 19.

<sup>22</sup> See *Mylcrist Builders Limited v Mrs. G Buck* [2008] EWHC 2172 TCC.

and accelerate resolution.<sup>23</sup> Although a U.S.-based mandatory arbitration system would typically place most of the financial burden on companies, they might still favor arbitration if it leads to significant savings in litigation expenses or attorneys' fees.

### Incentivizing Fair Practices

The prospect of facing thousands of individual arbitration claims creates a strong incentive for companies to address systemic issues proactively. Much like U.S. mass tort actions and UK GLOs, mass arbitration holds corporations accountable, but it does so in a way that prioritizes individualized outcomes.

## OVERCOMING CHALLENGES TO IMPLEMENTING MASS ARBITRATION IN THE UNITED KINGDOM

Because consumer arbitration clauses are presumptively unenforceable in the United Kingdom, companies would need to structure their contracts and their interactions with consumers to promote a voluntary mass arbitration model.

### Legislative and Regulatory Changes

The Consumer Arbitration Agreements Act 1988 broadly prohibits mandatory consumer arbitration unless the consumer expressly consents to bring the claim in arbitration after the dispute has arisen or a court makes an order that it will not be detrimental to the interests to the consumer for the claim to be heard in arbitration.<sup>24</sup> Furthermore, the AA 1996 is primarily designed for commercial disputes and does not provide features for class or collective arbitration.<sup>25</sup>

Expanding mass arbitration to consumer contexts would necessitate legislative reform and careful regulation to ensure cohesion with the CRA 2015, AA 1996, and other settled principles in UK law including the “loser-pays” fee shifting rule.

### Cultural Shift in Legal Practice

Mass arbitration represents a significant departure from traditional UK legal practices. Educating stakeholders, including consumers, lawyers, and companies, about its advantages and procedures would be critical to its adoption.

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<sup>23</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344–45 (2011).

<sup>24</sup> See Consumer Arbitration Agreements Act 1988, <https://www.legislation.gov.uk/ukpga/1988/21/crossheading/england-wales-and-northern-ireland/enacted>.

<sup>25</sup> See Arbitration Act 1996, <https://www.legislation.gov.uk/ukpga/1996/23/contents>.

Arbitration administrators located in the United Kingdom and capable of handling large volumes of claims would need to be established, as well as a roster of arbitrators.

### **Consumer and Mass Arbitration Frameworks**

Both the American Arbitration Association (“AAA”) and JAMS have established frameworks and procedural safeguards that serve as models for ensuring fairness. The AAA’s Consumer Due Process Protocol and JAMS’ equivalent protocols emphasize transparency, neutrality, and accessibility in consumer arbitration. These protocols also ensure that the costs of arbitration are not prohibitive to the consumer. Recently, both organizations have introduced specific rules to address mass arbitration, including streamlined processes for filing and managing large numbers of claims efficiently. When properly implemented, mass arbitration directly addresses concerns about judicial economy by offering an effective alternative to litigation. These ethical frameworks and tailored rules could help align a new mass arbitration model with the strong existing protections for consumers in the United Kingdom, and one which would additionally protect consumers from shouldering the burden of arbitration costs in a loser-pays jurisdiction.

### **Opt-In, Post-Dispute**

Unlike in the United States, consumer arbitration agreements in the United Kingdom are not presumptively enforceable under the Consumer Arbitration Agreements Act 1988, AA 1996, or the CRA 2015. Therefore, consumers would need to provide written consent to submit the claim to arbitration after a dispute has arisen. While commentators in the United States may think it’s unlikely that consumers would elect arbitration after the claim has arisen, it might be possible for a consumer to consent to be included in the arbitration on the basis of an existing arbitration agreement after the dispute has arisen by joining an existing arbitration campaign bookbuild that is being administered by solicitors acting on behalf of consumer claimants.

## CONCLUSION

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Mass arbitration in the United States has grown into a collective litigation structure that can offer parties an alternative to the court system that balances efficiency in an individualized framework. There is a growing trend in UK courts for parties seeking redress to do so in increasingly larger groups, and the development of an elective mass arbitration model in the United Kingdom could provide an alternative adjudication system with similar advantages.

By: Jonathan D. Waisnor, Alexander F. Schlow

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# Ninth Circuit Court of Appeals Confirms Consumers' Rights to Fair, Individualized Arbitration in Ticketmaster Case



NOTEWORTHY  
DEVELOPMENTS

In its recent decision in *Heckman v. Live Nation Entertainment, Inc.*,<sup>1</sup> the Ninth Circuit blocked Ticketmaster’s attempt to shunt customer claims out of court and into an untested mass arbitration program overseen by New Era ADR (“New Era”), a newly-formed arbitration organization that advertised itself as a “critical prophylactic measure” for companies’ “mass arbitration risk.” The court rejected New Era’s “Expedited/Mass Arbitration” protocol both because the process itself was so byzantine and one-sided as to be unconscionable and because, according to the court, the “method of dispute resolution contemplated by New Era’s [r]ules is unworthy even of the name of arbitration.”<sup>2</sup> The case has important implications for both companies and arbitration organizations dealing with mass arbitrations going forward.<sup>3</sup>

## BACKGROUND

Prior to the *Heckman* litigation, Ticketmaster’s parent company, Live Nation Entertainment (“Live Nation”), successfully compelled an antitrust class action to traditional arbitration before JAMS under a standard individual arbitration clause. Then, once it was on notice that many of its customers actually wanted to arbitrate, it changed its clause to direct “mass arbitrations”—defined as arbitrations where more than 25 customers represented by the same or “coordinated” lawyers brought similar claims—to New Era instead of JAMS. Live Nation’s amendment was enacted without notice to any of its customers, and Live Nation wanted to apply it retroactively, even to disputes that were already proceeding at the time of the change.

New Era itself was founded in 2020, only about a year before Ticketmaster changed its arbitration clause. Its Expedited/Mass Arbitration rules were drafted with a “remarkable degree of coordination” from Latham & Watkins LLP, the law firm defending Ticketmaster in *Heckman* and other cases.<sup>4</sup> In order to access these mass arbitration rules, companies like Live Nation would pay New Era an annual subscription fee, and Live Nation was New Era’s first ever subscriber.

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<sup>1</sup> *Heckman v. Live Nation Entertainment, Inc.*, 120 F.4th 670 (9th Cir. 2024).

<sup>2</sup> *Id.* at 690.

<sup>3</sup> The Ninth Circuit recently rejected Ticketmaster’s request for *en banc* review.

<sup>4</sup> 120 F.4th at 677.

In *Heckman*, Live Nation again sought to compel an antitrust class action out of the courts and into arbitration, this time before New Era under its amended arbitration clause. The plaintiffs opposed Live Nation’s motion, arguing both that Live Nation’s unilateral changes to its arbitration clause were unconscionable and that New Era itself was an inherently unfair, unconscionable forum. The trial court agreed with the plaintiffs, and Live Nation appealed to the Ninth Circuit.

## THE NINTH CIRCUIT’S DECISION

The Ninth Circuit affirmed the trial court ruling and rejected both Live Nation’s amendment process and New Era’s mass arbitration rules. It held that Live Nation’s attempt to amend the rules governing arbitration with it in the midst of ongoing litigation, with no notice to customers, purporting to retroactively bind them to the new terms if they, for example, logged back into the Ticketmaster website to view tickets they had previously purchased, was “procedurally unconscionable to an extreme degree.”<sup>5</sup> It then turned to the substance of New Era’s rules.

After noting that New Era’s mass arbitration rules were “internally inconsistent, poorly drafted, and riddled with typos,” the court held that New Era’s “Expedited/Mass Arbitration” process was so one-sided it would make it “impossible for plaintiffs to present their claims on equal footing to Live Nation.”<sup>6</sup> Specifically, the Ninth Circuit focused on four aspects of New Era’s rules, each of which it held were sufficiently “oppressive” to be unconscionable and therefore unenforceable.

- ✘ First, the New Era rules called for “bellwether” cases in which a panel of arbitrators decide a set of three individual claimants’ claims, and the rulings they made in those arbitrations would become final, binding “Precedent” across the entire mass arbitration. The court noted that later-filed cases could be consolidated into the same mass arbitration as prior cases that had already advanced past this bellwether phase,

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<sup>5</sup> *Id.* at 687.

<sup>6</sup> *Id.* at 677, 688.

meaning that new claimants might file only to find that their claims had already been invalidated by “the rulings of cases in which they have no right to participate” and, worse, “of which they have no knowledge” before filing.<sup>7</sup> The court concluded that “[i]t is black-letter law” that such a system “violates basic principles of due process.”<sup>8</sup> It also noted that this disadvantage would only apply to potential plaintiffs—the defendant would always know the results of all claims brought against it.

✘ Next, the court addressed New Era’s drastic limitations on discovery and the right to be heard—by default, mass arbitration claimants were entitled to no formal discovery whatsoever and limited to presenting no more than 10 documents in total as evidence, regardless of the specifics of their claims, and limits were placed on the length of briefing, which the court held “border on the absurd.”<sup>9</sup> The Ninth Circuit pointed out that Live Nation’s own briefing in the trial court only on the limited issue of seeking to compel arbitration “far exceeds the limits that would apply in a New Era arbitration.”<sup>10</sup> These rules were likewise held unenforceable because they made it impossible for customers to fully and fairly present their cases.

✘ Third, the court criticized New Era’s rules for providing a defendant, but not a plaintiff, with a right to appeal a grant of injunctive relief. It noted that such asymmetric rights were inherently unfair and unenforceable.

✘ Finally, the court held that New Era’s process for selecting arbitrators violated potential claimants’ rights. In essence, New Era was permitted to unilaterally appoint any arbitrator and override a claimant’s decision to disqualify an arbitrator. New Era also did not allow claimants who were part of a mass arbitration an individual right to disqualify arbitrators and allowed a single arbitrator to preside over multiple cases at the same time. The Ninth Circuit noted that each of these provisions violated

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<sup>7</sup> *Id.* at 684.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 685.

<sup>10</sup> *Id.* at 686.

<sup>11</sup> *Id.* at 687.

California arbitration law and held that these aspects of California law were not preempted by the Federal Arbitration Act (“FAA”).<sup>11</sup>

Of particular note, the Ninth Circuit also announced an alternative, independent ground under which New Era’s Expedited/Mass Arbitration process must be invalidated: It is so different from the “bilateral arbitration of the individualized and informal form” contemplated by the FAA that it is not really traditional arbitration at all.<sup>12</sup> Essentially, the court held that New Era’s mass arbitration process more closely resembled the “class arbitration [that] was not envisioned by Congress when it passed the FAA in 1925,” a type of arbitration the Supreme Court has already held is fundamentally different from, and not protected by, the FAA.<sup>13</sup> The Ninth Circuit ruled that this “switch from bilateral to aggregative arbitration” took New Era’s rules out of the FAA’s umbrella and required Ticketmaster’s clause to be invalidated under California’s Discover Bank rule, which prohibits class action waivers in “consumer contracts of adhesion” like Ticketmaster’s terms.<sup>14</sup>

The Ninth Circuit’s decision is an important development in the mass arbitration space, with lessons for consumers, companies, and arbitration providers alike. All three groups should be aware of the specific issues highlighted by the Ninth Circuit in invalidating New Era’s rules and Ticketmaster’s arbitration clause, and companies and arbitration organizations in particular should take care to ensure that any “mass arbitration” rules or provisions they adopt avoid the pitfalls of New Era’s rules. Further, it is clear that arbitration rules and clauses must preserve consumers’ rights to individualized, bilateral arbitration even in the mass arbitration process, or they risk falling outside of the FAA and being invalidated under preexisting state law.

.....  
<sup>12</sup> *Id.* at 690.

<sup>13</sup> *Id.* at 689.

<sup>14</sup> *Id.* at 690.

By: Melissa H. Nafash, Woodworth B. Winmill

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# The Misuse of Class Action Settlements to “Settle Out” Arbitration Claims and How Arbitration Claimants Are Fighting Back



NOTEWORTHY  
DEVELOPMENTS

In recent years, mass arbitrations have become more prevalent, even as class actions persist. As a result, companies now sometimes find themselves simultaneously facing thousands of arbitrations and one or more class actions based on the same or similar legal theories.<sup>1</sup>

## WHY COMPANIES NOW WAIVE ARBITRABILITY IN CLASS ACTIONS AND SETTLE

In this scenario, a company may no longer find it advantageous to enforce its arbitration clause, because doing so would strengthen the arbitration claimants' theory that the company's arbitration clause is both enforceable and applicable to the dispute. In response to concurrent mass arbitrations and class actions, a company may waive arbitration in a class action to reach a settlement with the class representatives. Occasionally, these settlements have happened after the company has already successfully moved to compel the class action to arbitration.<sup>2</sup> In other cases, these settlements have occurred even before the filing of a substantive motion to dismiss or motion to compel arbitration.<sup>3</sup>

Controversially, proposed class settlements in this scenario sometimes include individuals who have retained counsel to pursue individual arbitration, individuals who have provided notice of their intent to file arbitrations, or even individuals who have filed demands for arbitration with the applicable arbitral forum. Moreover, these settlements may include individualized and burdensome opt-out procedures, making it difficult for claimants to continue to pursue their claims in arbitration if the class settlement is approved. Indeed, in some cases, defendants have even tried to release claims of arbitration claimants in a class action settlement of an unrelated claim with a broad release that includes mass arbitrations that are being prosecuted separately and are not based on the same or similar facts or legal theories as the class action.<sup>4</sup>

From the company's perspective, these class definitions can enable it to achieve global peace, while only having to strike a bargain with the lead class counsel

<sup>1</sup>See, e.g., *In re 23andMe, Inc. Customer Data Sec. Breach Litig.*, Case No. 24-md-03098-EMC, 2024 WL 4982986, at \*1 (N.D. Cal. Dec. 4, 2024) (noting that three law firms were pursuing arbitrations against 23andMe, while "approximately forty federal" class actions had also been filed against 23andMe and had been consolidated in a multi-district litigation); *In re T-Mobile Customer Data Sec. Breach Litig.*, No. 4:21-MD-03019-BCW, 2023 U.S. Dist. LEXIS 240268, at \*35-36 (W.D. Mo. June 29, 2023), *rev'd in part on other grounds*, 111 F.4th 849 (8th Cir. 2024) (excluding individuals who had provided the defendant with notice of their intent to arbitrate or had filed demands for arbitration from the class definition); *Vianu v. AT&T Mobility LLC*, 3:19-cv-03602-LB (N.D. Cal. May 10, 2022), ECF No. 145-1 at 25 ("Excluded from the Settlement Class... any otherwise covered consumers... who assert claims and seek relief in connection with the Administrative Fee and who have provided AT&T with an unresolved written Notice of Dispute (pursuant to AT&T's contractual dispute resolution procedures) before the Execution Date.>").

<sup>2</sup>See *Arena v. Intuit Inc.*, Case No. 19-cv-02546-CRB, 2021 WL 834253, \*1 (N.D. Cal. Mar. 5, 2021); see also *K.F.C. v. Snap Inc.*, 29 F.4th 835 (affirming order compelling arbitration of BIPA claims) (7th Cir. 2022); *Boone v. Snap Inc.*, 2022-LA-000708 (Cir. Ct. for the 18th Jud. Cir., Dupage Cnty.) (reaching class action settlement of the same claims).

<sup>3</sup>See, e.g., *In re 23andMe*, 2024 WL 4982986, at \*2-4 (recounting procedural history that does not include a motion to dismiss or motion to compel arbitration).

<sup>4</sup>Compare *Gregory v. Tubi, Inc.*, 2024-LA-0000209 (Cir. Ct. for the 17th Jud. Cir., Winnebago Cnty.) (purporting to release claims under the Unruh Act in a settlement of a class action based on alleged violations of the Video Privacy Protection Act); with *Tubi, Inc. v. Keller Postman LLC*, 1:24-cv-01616 (D.D.C.), ECF No. 1 (alleging that claimants were bringing Unruh Act claims against Tubi in arbitration).

and cutting out the arbitration claimants. From the lead class counsel's perspective, this arrangement can be helpful to getting a settlement done, while expanding the class definition and possibly increasing the class's recovery. From the perspective of arbitration claimants and their counsel, however, this arrangement is an infringement on arbitration claimants' right to arbitrate, and a drastic reduction of their recoveries, compared to what may be available in arbitration. There may also be other considerations—judges, for example, may not appreciate defendants who compelled arbitration and then, when faced with large numbers of arbitrations, seek to have the court approve a settlement that appears to have been motivated by the company's desire to avoid arbitration, or they may not like if parties did not make the court aware of the existence of large numbers of pending arbitrations at the preliminary approval stage.

## HOW ARBITRATION CLAIMANTS RESPOND

Accordingly, arbitration claimants may object to a proposed class action settlement and request that the judge presiding over the class action modify the proposed class action settlement to exclude arbitration claimants or at least make it easier for them to opt out of the settlement.

In federal court, an arbitration claimant may argue that the proposed class does not satisfy Fed. R. Civ. P. 23(a)(3), which requires that the class representatives' claims be "typical" of the class. Specifically, the arbitration claimants may argue that the putative class representatives' choice to waive arbitrability renders the claims in the class action atypical of the arbitration claimants. This argument finds support in case law which recognizes that a class should not be certified to include members who agreed to an arbitration clause, even if they have not asserted their rights to arbitrate.<sup>5</sup>

Further, arbitration claimants may invoke Fed. R. Civ. P. 23(a)(3), which requires that class representatives "fairly and adequately protect the interests of the class." The claimants may argue that class representatives who have chosen

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<sup>5</sup>See, e.g., *Eaton v. Ascent Res.-Utica, LLC*, No. 2:19-CV-03412, 2024 U.S. Dist. LEXIS 62182, at \*15 (S.D. Ohio Apr. 4, 2024) ("the Court finds that good cause exists to modify the class definition to exclude members of the class whose leases included arbitration agreements"); *Morangelli v. Chemed Corp.*, 2010 U.S. Dist. LEXIS 146149, at \*13 (E.D.N.Y. June 15, 2010) ("It would be a disservice to judicial efficiency to certify all technicians, when those with arbitration agreements are subject to additional, prolonging [sic] motion practice which will likely disqualify them from the class."); *Campanelli v. Image First Healthcare Laundry Specialists, Inc.*, No. 15-cv-04456-PJH, 2018 U.S. Dist. LEXIS 215287, at \*9 (N.D. Cal. Dec. 21, 2018) ("it [makes] no sense to certify a class/collective action that included hundreds of plaintiffs who are contractually prohibited from participating in [the] action.").

to waive arbitrability are not representing the claimants “fairly or adequately.” Further, arbitration claimants’ counsel may argue, depending on the facts, that the class action settlement is an improper “reverse auction,” where defendants have found a plaintiff’s firm that is willing to override the right of a subset of class members to arbitrate their claims rather than settle directly with those individuals. Because Federal Rule of Civil Procedure 23(e)(2) permits a court to approve a class action settlement only if the court finds the settlement “fair, reasonable, and adequate after considering whether . . . the proposal was negotiated at arm’s length,” a court should not approve such a “reverse auction” settlement.

Additionally, the arbitration claimants may argue that opt-out procedures which provide that the settlement administrator will contact arbitration claimants directly, rather than through their counsel, violates ethical principles that communications directed by an attorney to a represented party, concerning the representation, should be through counsel.<sup>6</sup> Similarly, arbitration claimants may argue that a class action court should reject burdensome opt-out requirements that impose arbitrary hoops for claimants to jump through, such as individual, wet-ink signatures, invoking *Arena v. Intuit, Inc.*, which rejected similar procedures.<sup>7</sup>

In *In re 23andMe, Inc. Customer Data Security Breach Litigation*, the Northern District of California agreed with arbitration claimants and conditioned his preliminary approval of a proposed settlement on a modification of the class definition to exclude arbitration claimants.<sup>8</sup> Though the court alluded to the typicality and adequacy arguments described above, the court rested its decision in slightly different reasoning: “[T]here is a basic problem with including those who have opted to arbitrate in the class. If an individual has chosen to arbitrate, they have chosen not to litigate; including the individual in the class amounts would force them into litigation in derogation of their right to arbitrate.”<sup>9</sup> Similarly, in *In re Piper Funds*, the Eighth Circuit reversed a decision that rejected an absent class member’s attempt to opt-out of a class action in favor of arbitration, reasoning

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<sup>6</sup> *Cf. In re Piper Funds*, 71 F.3d 298, 304 (8th Cir. 1995) (permitting a claimant in arbitration to opt out of class action, outside of ordinary opt out process, where the claimant was represented by separate counsel and its counsel communicated its intent to opt out to the court and parties).

<sup>7</sup> *Arena*, 2021 WL 834253, \*3, \*10.

<sup>8</sup> *In re 23andMe, Inc.*, 2024 WL 4982986, at \*11 (“The Court agrees with the Arbitrating Objectors that the settlement class definition should be modified so as to exclude those who have *demand*ed or *initiated* arbitration.”) (emphasis added).

<sup>9</sup> *Id.*

that, “[a]lthough the court supervising a class action has wide discretion to control a class action, including the opt-out process, that discretion must be exercised consistent with the policies and principles of the FAA when a class member with an immediate right to arbitrate its claim seeks to opt out.”<sup>10</sup> The Eighth Circuit further emphasized that a claimant’s “contractual and statutory right to arbitrate may not be sacrificed on the altar of efficient class action management.”<sup>11</sup>

## LOOKING AHEAD AND BEST PRACTICES

Companies looking for strategies to avoid mass arbitrations cannot rely on a class wide settlement with alternative counsel that releases the arbitration claims or burdens individuals seeking arbitration with opt-out requirements. *Piper Funds, Intuit, and 23andMe* provide strong precedent that class action settlements are not a means to force consumers to abandon their rights to arbitrate, even where a defendant’s weak financial position raises the prospect of a limited fund to be divided among all class members and claimants. In cases where the defendant has received a pre-arbitration demand or is facing arbitrations, best practices would counsel in favor of excluding those individuals from the settlement at the outset. This can be accomplished by defining the class to exclude “any otherwise covered consumers . . . who assert claims and seek relief in connection with the [topic of arbitration] and who have provided [the respondent/defendant] with an unresolved written Notice of Dispute (pursuant to [the respondent/defendant’s] contractual dispute resolution procedures) before the Execution Date.”

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<sup>10</sup> 71 F.3d 298, 304 (8th Cir. 1995) (71 F.3d 298, 304 (8th Cir. 1995).

<sup>11</sup> *Id.* at 303.

# CASE WATCH

By: Jonathan D. Waisnor, Stephen Kenny

## Pandolfi

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**CITATION:** *Pandolfi v. AviaGames, Inc.*, C.A. No 23-cv-05971-EMC (N.D. Cal. Sep. 4, 2024)

**COURT:** U.S. District Court for the Northern District of California

**DEFENDANT:** AviaGames, Inc.

**INDUSTRY:** Entertainment Technology

On November 17, 2023, a class action complaint was filed against AviaGames (“Avia”) asserting that the company’s online gaming platform amounts to an illegal gambling enterprise in violation of state and federal laws. More than a year later, the parties continue to dispute whether the claims belong in court or arbitration. Ultimately, this case is another instance where companies have attempted to enforce “bellwether” provisions that limit the number of claims within a mass arbitration that can proceed.

Filed in the Northern District of California, the complaint alleges that while Avia claims to match players with other real live users, the games are actually populated with computer “bots.” This allegation serves as the bedrock of the lawsuit in two major ways. First, Avia could be liable for the deception itself, and second, bots controlled by Avia may help transform the games from those of skill to those of chance—a critical prong in distinguishing gambling from ordinary gaming.

## THE PARTIES

Lead plaintiffs in the case are Andrew Pandolfi of Texas and Mandi Shawcroft of Idaho who each claim to have lost hundreds of thousands of dollars through games operated by Avia. The two seek to lead a class of individuals defined as “[a]ll persons who have lost money playing any Avia game until [Avia’s] unlawful conduct and its harmful effects stop.” Avia was founded in 2017 and is best known for its mobile platform “Pocket7Games,” which is home to popular titles such as “Solitaire Clash” and “Bingo Tour” where users can wager real money.

In addition to Avia, named defendants in the lawsuit include co-founders Vickie Yanjuan Chen and Ping Wang as well as investors Acme LLC and Galaxy Digital Capital Management, L.P. Notably, these four parties are collectively referred to in the complaint as the “RICO Defendants.” RICO refers to the federal Racketeer Influence Corrupt Organizations Act and is an additional claim brought against persons or companies who commit crimes while acting as an association-in-fact enterprise with another person or company.

## THE ALLEGATIONS

Referencing both the Illegal Gambling Business Act of 1955 and California Penal Code, Section 330, Plaintiffs contend that, “[a]t all relevant times, Avia and the RICO Defendants operated as an association-in-fact enterprise formed for the purpose of providing games of chance without the necessary statutory authorization, thereby engaging in illegal gambling, and which defrauded the public as regards the true nature of those games.” “The assignment of bots,” Plaintiffs insist, “at best, renders the result of the game random. By having its own bots play in the matches, Avia is financially interested in those matches and is able to determine their results at its whim.” As such, Plaintiffs assert claims that Defendants violated the California Business & Professions Code § 17200, the California Consumer Legal Remedies Act (“CLRA”), and the federal RICO Act.

## THE ARBITRATION AGREEMENT – DELEGATION CLAUSE AND BELLWETHER PROVISION

Avia requires that users agree to its Terms of Service in order to play its games. The lawsuit spans two iterations of those terms, released in December 2022 and July 2023, respectively. Each version contained a provision that “[a]ll disputes, claims or controversies arising out of or relating to these Terms, any Services, or the relationship between [users] and [Avia] . . .” be resolved by binding arbitration.

The arbitration agreement within Avia’s terms contained two features that would prove consequential to the case at hand. First, the agreement contained a delegation clause, *i.e.*, an instruction that an arbitrator—rather than a court—decide gateway issues related to arbitration, such as the validity or enforceability of the agreement. Second, the agreement contained a “bellwether provision,” *i.e.*, a mechanism by which claims may be grouped and arbitrated together. Avia’s bellwether provision read as follows:

The AAA Supplementary Rules for Multiple Case Filings and the AAA Multiple Consumer Case Filing Fee Schedule will apply if twenty-five (25) or more similar claims are asserted against AviaGames or against you by the same or coordinated counsel or are otherwise coordinated. In addition . . . you and AviaGames understand and agree that when twenty-five (25) or more similar claims are asserted against AviaGames or you by the same or coordinated counsel or are otherwise coordinated resolution of your or AviaGames’ Claim might be delayed. For such coordinated actions, you and Avia games also agree to the following coordinated bellwether process.

Counsel for claimants and counsel for AviaGames shall each select ten (10) cases (per side) to proceed first in individual arbitration proceedings. The remaining cases shall be deemed filed for purposes of the statute of limitations but not for the purpose of assessing AAA fees. No AAA fees shall be assessed in connection with those cases until they are selected to proceed to individual

arbitration proceedings as part of the bellwether process. If the parties are unable to resolve the remaining cases after the conclusion of the initial twenty (20) proceedings, each side shall select another ten (10) cases (per side) to proceed to individual arbitration proceedings as part of a second bellwether process. A single arbitrator shall preside over each case. Only one case may be assigned to each arbitrator as part of a bellwether process unless the parties agree otherwise. The bellwether process shall continue, consistent with the parameters identified above, until all the claims included in these coordinated filings, including your case, are adjudicated or otherwise resolved.

In early 2024, Avia moved to compel arbitration and insisted on compliance with the bellwether provision.

## UNCONSCIONABILITY

While a delegation clause generally gives an arbitrator the power to decide gateway issues, a court may still determine whether the clause, itself, is unconscionable, which may in turn render an entire provision unenforceable. Indeed, the *Pandolfi* court identified some procedural unconscionability concerning Avia’s delegation clause, noting that it retained “an element of unfair surprise” as it was written in a small font, light grey in color, and intertwined with delineated contractual provisions.<sup>1</sup>

The court then considered substantive unconscionability. Plaintiffs argued that a bellwether provision in the arbitration agreement made delegating questions of arbitrability substantively unconscionable. A primary contention of Plaintiffs was that the bellwether process would lead to untenable delays in the resolution of disputes. While bellwether provisions are increasingly common in arbitration agreements, they have been subject to challenge where they result in delays.

Indeed, in *MacClelland v. Cellco P’ship*—which came before the Northern District of California just two years prior—the court was tasked with adjudging

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<sup>1</sup>*Pandolfi v. AviaGames, Inc.*, No. 23-CV-05971-EMC, 2024 WL 4051754, at \*10 (N.D. Cal. Sept. 4, 2024).

whether a similar bellwether provision was substantively unconscionable because it effectively delayed adjudication of claims brought by consumers, condemning some to waiting as long as 150 years in order to have their claims heard.<sup>2</sup> *Pandolfi* differs somewhat in that the initial question was whether a delegation clause in an arbitration agreement (as opposed to the arbitration agreement, itself)—that is also governed by a bellwether provision—is substantively unconscionable. Furthermore, the issue in *MacClelland* was never decided since the parties settled on appeal.

The court’s analysis began with determining when unconscionability should be assessed, *i.e.*, at the time of contract formation or at the time a party seeks enforcement. This evaluation was critical because it informed how to view the relationship between the delegation clause and bellwether provision. Adopting the position that the assessment need begin at the time of contract formation, the court found that the delegation clause and bellwether provision should be examined together. Indeed, the court found that the relationship between the delegation clause and the bellwether provision fostered a chilling effect, as claimants may note the delays or costs involved in pursuing arbitration and decide to abandon their claims altogether.

Additionally, the court took issue with the broad scope of the bellwether provision. The court foresaw a scenario where even claimants with individualized issues, like a user seeking a refund, for example, might yet get lumped into a batch of arbitrations. Since the terms allow for coordination “of all related claims,” it’s easy to see how disputes over blanket policy might swallow up other arbitrations. What’s more, “[t]he sweep of the bellwether provision is broad, applying not only to an attorney who represents a large number of consumers asserting similar claims, but also to independent counsel who represent other unrelated consumers whose claims are similar and are not fact specific and not made on an individual basis; all are subject to coordination within the ambit of the bellwether provision.”<sup>3</sup>

The court described this broad mandate as “built-in asymmetry . . . with no apparent

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<sup>2</sup>*Pandolfi v. AviaGames, Inc.*, No. 23-CV-05971-EMC, 2024 WL 4051754, at \*10 (N.D. Cal. Sept. 4, 2024).

<sup>3</sup>*Pandolfi* at \*6.

justification.”<sup>4</sup> “It is hard to imagine that there would not be an interest—on the part of an arbitrator at least—to coordinate if similar consumer-type claims are being brought simply because counsel for the plaintiffs are different or not coordinated.”<sup>5</sup>

Indeed, this highlights yet another troubling aspect of Avia’s bellwether provision. According to the terms, the bellwether provision is triggered when 25 or more claims are asserted by the *same or coordinated counsel*. “As Plaintiffs argue, to avoid the bellwether provision, players would have to find different counsel, which affects the right to counsel of their choice or indeed, the ability to find any counsel at all: where the individual claims are small (as consumer claims often are), it may be difficult to find an attorney who represents only a single or small number of similarly situated clients.”<sup>6</sup>

Defendants argued that a chilling effect on consumers wishing to file arbitrations was speculative at best and could not provide the requisite support for a finding of unconscionability. Defendants also argued that AAA—the arbitral forum wherein the claims were filed—had in place rules that would mitigate delays. Specifically, they pointed to the role of the “Process Arbitrator,” an individual who is assigned to decide threshold issues ahead of merits arbitration, akin to a special master or magistrate judge. The court disagreed, holding that the defendants had misunderstood the role of a Process Arbitrator. “Nothing in the AAA Supplementary Rules suggests that the Process Arbitrator has a role in deciding matters beyond those that are administrative or ministerial in nature, and gateway issues of arbitrability are clearly more consequential in nature.”

The court found that Avia’s bellwether provision was unconscionable, thus rendering the delegation clause unenforceable. On July 26, 2024, the court issued an order denying the motion to compel arbitration. Defendants have since filed an appeal of the decision to the Ninth Circuit, which will have a chance to finally rule on the bellwether provision since, as mentioned earlier, *Cellco P’ship* settled while on appeal.

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<sup>4</sup> *Id.* at \*7.

<sup>5</sup> *Supra* note 2.

<sup>6</sup> *Id.* at \*11.

## TAKEAWAYS

The *Pandolfi* decision has made several major contributions to the mass arbitration practice area. First, the court's determination that Avia's bellwether provision was unconscionable is the third time a court has invalidated a "serial" bellwether provision. The decision is also notable for its weighing of competing statutes and jurisprudence as it pertains to when potential unconscionability in a contractual provision should be assessed. *Pandolfi* also offered guidance on how courts view the role of a Process Arbitrator. As this matter is on appeal, we may yet see further guidance from the Ninth Circuit.

# CONTACT US

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