

Toward a Proposed Estimation Framework for the Resolution of Mass Arbitrations

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In this article, the authors discuss methods to organize, administer, and resolve mass arbitrations under an estimation methodology.

Introduction and Roadmap

Mass arbitration emerged because of how companies paired standard consumer and employee arbitration clauses with class and collective action waivers that required all claims to be prosecuted on an individual basis in arbitration. The bilateral, informal nature of arbitration meant that traditional consolidation and case management techniques, such as class actions or multidistrict litigation (MDL) procedures, are not available to manage a large mass arbitration docket.² Mass arbitrations are becoming increasingly large and complex, with mass arbitrations involving 50,000, 75,000, or even 127,000 individuals

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² *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (noting that “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”).

(known as “claimants”).³ Even if each individual claim shares common elements of law or fact, the individualized nature of the claims requires large investments of administrative and arbitral resources to adjudicate the claims.⁴

Indeed, companies faced with a mass arbitration have defaulted on their arbitration agreements and forced claimants to move to compel arbitration. These parallel court proceedings significantly delay the resolution of what are often straightforward consumer or employment disputes. As a result, arbitration’s promise of efficient and speedy dispute resolution is often not achievable for participants in a mass arbitration.

Bankruptcy courts are faced with large corporate bankruptcies involving or even driven by mass litigation. The sheer volume of claims threatens to overwhelm the proceedings and direct limited estate resources to litigation costs at the expense of a debtor’s creditors, including the claimants themselves. As courts of equity, bankruptcy courts have developed a process called estimation to resolve mass claims efficiently and effectively.⁵

This article discusses methods to organize, administer, and resolve mass arbitrations under an estimation methodology. The next section discusses existing approaches, including process

³ See *Arena v. Intuit Inc.*, No. 19-CV-02546-CRB, 2021 WL 834253, *4 (N.D. Cal. Mar. 5, 2021) (127,000 claims); Amazon removes arbitration provision from its terms of service, <https://natlawreview.com/article/retail-industry-2021-year-review-retail-giant-drops-arbitration-clause-right-move> (75,000 claims); Samsung ordered to pay fees in biometric privacy arbitration, <https://www.chicagotribune.com/2023/09/28/samsung-was-hoist-with-its-own-petard-in-court-ruling-that-could-cost-it-millions-for-alleged-violations-of-illinois-biometric-privacy-law/> (50,000 claims).

⁴ JAMS Policy Regarding Mass Arbitration Filings, <https://www.jamsadr.com/blog/2023/jams-policy-regarding-mass-arbitration-filings> (“Each matter is commenced and managed separately because that is what the pre-dispute contract requires. Every arbitration receives its own process and its own arbitrator, and the resources needed to manage these individual arbitrations are similar to or greater than any individual arbitration.”).

⁵ *Pepper v. Litton*, 308 U.S. 295, 304, 60 S. Ct. 238, 244, 84 L. Ed. 281 (1939) (“Consequently this Court has held that for many purposes ‘courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.’”).

arbitrations, batching and bellwethers. Process arbitrations are not a substitute for individualized merits arbitration, and batching and bellwether processes are subject to challenge as inviting delay and fundamental unfairness to claimants. It concludes that proposed approaches are not sufficient or adequate to resolve mass arbitrations within the arbitration system because they are not tailored for the unique goals of the arbitration system, including speed, efficiency, flexibility, and a lack of procedural complexity.

The third section discusses how bankruptcy courts have experience with efficiently administering and resolving large numbers of individual cases that share common issues of law and fact through the estimation process. Estimation proceedings involve procedural mechanisms that help judges efficiently resolve large numbers of claims so that a bankruptcy process is not derailed by litigation and distributions to creditors can begin promptly.

Finally, the fourth section discusses considerations for incorporating an estimation framework into mass arbitration rules and procedures as an alternative to the existing system of a process arbitration followed by merits arbitration. While parties would need to agree to use an estimation framework, arbitration administrators could introduce an optional framework that would provide more procedural alternatives for parties engaged in mass arbitration.

Attempted Approaches to Adjudicating Mass Arbitrations

In considering alternative approaches to mass arbitration, it is helpful to consider what has been tried so far. Two methods for adjudicating merits arbitrations are frequently proposed: “bellwethers” and “batching.”⁶ In a survey of 106 arbitration clauses used by large consumer-facing companies, Richard Frankel found

⁶ “Proposed” is a loose term in the context of consumer or employee arbitrations, where companies instead update their arbitration agreements to include a mass arbitration protocol, which may then be subject to challenge by claimants after a dispute arises.

that more than 40 percent of the clauses studied now call for some type of bellwether/batching procedure for mass claims.⁷ While the terms are sometimes used together when applied to mass arbitrations, they are conceptually distinguishable. However, neither batch nor bellwether proceedings have been successfully adapted to mass arbitrations, failing to provide the parties with the efficiencies purportedly gained by applying these aggregate claim adjudication techniques to the arbitration forum and raising due process and fairness concerns. Further, process arbitrators, which have been introduced by the American Arbitration Association® (AAA®) and Judicial Arbitration and Mediation Services (JAMS), are limited to procedural and administrative issues and are not a substitute for individual merits arbitrations.

Bellwether Proceedings

In bellwether proceedings, a limited number of representative cases are selected (either by the parties or randomly) and tried to conclusion. The information obtained from those trials can then be used by both sides to assess whether and how to structure a settlement to resolve the remaining cases.⁸

Courts have highlighted fairness concerns in recent attempts to apply batch/bellwether proceeding methods to mass arbitration. In a mass arbitration with Verizon, plaintiffs challenged an arbitration provision that allowed arbitrations to proceed in batches of only ten claims at a time, with the remainder of the claims prevented from being filed until the previous batch was resolved, but did not toll the statute of limitations.⁹ Using AAA statistics that the average disposition time for an arbitration was a little under seven months, the plaintiffs calculated that it would

⁷ Richard Frankel, *Fighting Mass Arbitration: An Empirical Study of the Corporate Response to Mass Arbitration and its Implications for the Federal Arbitration Act*, *Vand. L. Rev.* (forthcoming) (manuscript at 4).

⁸ Bennett Rogers, *Elastic Batch and Bellwether Proceedings in Mass Arbitration*, 99 *Notre Dame L. Rev.* 1655, 1678 (2024).

⁹ See *MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024 (N.D. Cal. 2022).

take approximately 156 years to resolve all of the remaining 2,712 claims involved in the mass arbitration.¹⁰ In striking down the provision, courts noted that in addition to the unconscionable delay, the batching provision created a risk that the majority of claims would be effectively barred, as the agreement contained no tolling provision, and expressly reserved Verizon's right to raise a statute of limitations defense in arbitration.¹¹ The U.S. District Court for the Northern District of California recently invalidated a similar sequential bellwether provision on the same basis in *Pandolfi et al. v. AviaGames*.¹² There, the court again noted that with "the bellwether provision which allows only twenty cases at a time to be arbitrated, claimants—numbering in the thousands—will have to wait months, more likely years before they can even submit a demand for arbitration, let alone have the issue of arbitrability decided."¹³

One case endorsed a bellwether provision that permits one round of 10 "test" cases to be resolved within 120 days of the initial pre-hearing conference, followed by a global mediation, and then a provision permitting each claimant to proceed to court or continue with arbitration.¹⁴ The practical issue with this type of process, however, is that there is no guarantee that either party will respect the outcome of the bellwether process in mediation, especially because there would still be significant procedural questions about whether either party could litigate such a large number of claims. If the parties choose to abandon arbitration and return to court, they start essentially at zero, losing the inherent efficiency and procedural flexibility of arbitration and with decisions that may not have collateral estoppel effect.

¹⁰ *Id.* at 1040.

¹¹ *MacClelland v. Cellco P'ship*, 609 F. Supp. 3d 1024, 1042 (N.D. Cal. 2022).

¹² *Pandolfi v. AviaGames, Inc.*, No. 23-CV-05971-EMC, 2024 WL 3558853, at *4 (N.D. Cal. July 26, 2024).

¹³ *Id.* at *6 (internal quotation marks omitted).

¹⁴ See *McGrath v. DoorDash, Inc.*, No. 19-cv-05279-EMC, 2020 WL 6526129 (N.D. Cal. Nov. 5, 2020).

Batching

Batching occurs when “a certain number of legally and factually related demands are filed, [and] those demands are ‘batched’ into a group for resolution in one proceeding. The ‘batch’ then gets assigned to an arbitrator or panel of arbitrators, and it triggers a single filing fee.”¹⁵ Batching provisions will often involve between 10 and up to 200 similar claims.¹⁶ Theoretically, batching reduces the total number of arbitrations required to resolve all the claims. For example, in the *Intuit* mass arbitration, which involved more than 127,000 claims,¹⁷ batching them into groups of 200 would have reduced the number of arbitrators needed from 127,000 to 635.

However, batched proceedings may not be consistent with the procedural flexibility of arbitration or compatible with consumer arbitration protections such as the AAA’s Consumer Due Process Protocol. Specifically, because batch proceedings are often triggered by the filing of a certain number of the same or similar claims, by the same or coordinated counsel, batch provisions seem to violate Principle 9, which provides that “[a]ll parties participating in processes in ADR Programs have the right . . . to be represented by a spokesperson of their own choosing,” as claimants are treated differently than others based in part on their choice of counsel.¹⁸

¹⁵ See J. Maria Glover, *Mass Arbitration*, 74 *Stan. L. Rev.* 1283, 1367 (2022).

¹⁶ See Frankel, *supra* note 7, at 29; see also “Airbnb—Terms of Service” requiring arbitration claims designated as part of a “Mass Action” be grouped and resolved sequentially in batches of 200 claims, <https://www.airbnb.com/help/article/2908> (last accessed October 7, 2024).

¹⁷ See *Arena v. Intuit Inc.*, No. 19-CV-02546-CRB, 2021 WL 834253 (N.D. Cal. Mar. 5, 2021).

¹⁸ This practice also may contradict state law regarding the right of arbitration parties to freely retain their own counsel. N.Y. C.P.L.R. 7506(d) (“A party has the right to be represented by an attorney . . . as to any part of the arbitration. . . . This right may not be waived.”); 710 Ill. Comp. Stat. Ann. 5-6 (“A party has the right to be represented by an attorney at any [arbitration] proceeding or hearing.”); *Outdoor Servs., Inc. v. Pabagold, Inc.*, 185

While batching provisions are not sequential, they are silent on the rules each arbitrator is to apply to each consolidated arbitration. Principle 1 and Principle 11 of the Consumer Due Process Protocol require a “fundamentally fair ADR process” and “clear and adequate notice of the arbitration provision and its consequences,” respectively. Ordinarily, that principle is satisfied by incorporation of the arbitral provider’s rules within the arbitration clause, assuming those rules are publicly available or accessible via hyperlink.¹⁹ However, because batching provisions do not provide information about how the arbitrator will administer each consolidated arbitration, like whether any issues of law or fact will be addressed in common, whether each arbitration claimant will have the right to an individual hearing, or what rules or procedures might apply to such consolidated arbitration to the extent that, by their nature, may differ from the arbitration rules adopted by arbitration administrator. In a recent mass arbitration against Ticketmaster/Live Nation involving thousands of antitrust claims, the court determined that the ambiguous rules for the grouping of claims together and the application of decisions from earlier claims to later-filed claims was uniquely problematic when considering they could be applied to thousands of claims at once.²⁰

It is unclear how a batch provision might comply with Consumer Due Process Protocol 7, which calls for arbitrations to be held in a “reasonably convenient location.” Mass arbitrations commonly involve thousands of individual claimants residing across dozens of states, and it would be difficult for an arbitrator

Cal. App. 3d 676, 685 (1986) (“a party to an arbitration has the right to be represented by counsel at any arbitration proceeding.”).

¹⁹ “Under general California rules of contract interpretation, matters like the AAA rules can be incorporated into a contract by reference provided the incorporation is clear and the incorporated rules are readily available.” *Ulbrich v. Overstock.Com, Inc.*, 887 F. Supp. 2d 924, 932-33 (N.D. Cal. 2012); see also American Arbitration Association, Consumer Due Process Protocol, Practical Suggestions to Principle 11, suggesting that the consumer be given the opportunity to acquire additional information regarding the arbitration process, such as through mail, website address, or 800 number.

²⁰ See *Heckman v. Live Nation Ent., Inc.*, 686 F. Supp. 3d 939, 963 (C.D. Cal. 2023).

to provide for a hearing location that would be convenient for every one of hundreds of claimants. Even where a suitable location could be found, it is difficult to envision a batch provision that would comport with Principle 12, which guarantees every claimant “an opportunity to be heard and to present relevant evidence.” For instance, the *Heckman* court considered such procedural and evidentiary limitations as applied to mass arbitration including submission limitations (10-page submission limit), and record limitations (presentations of evidence limited to 10 total references) purportedly designed to expedite the resolution of mass arbitrations.²¹ These limitations, coupled with no formal process of discovery as a right, “further exacerbate the level of unfairness to claimants,”²² and contributed to the substantive unconscionability of the mass filing rules at issue. Moreover, individuals may encounter unreasonable delays in presenting evidence and having their claims fully heard as they wait their turn among dozens or hundreds of other claims consolidated before a single arbitrator.

Principle 8, which provides for “reasonable time limits,” is also a potential hurdle. Along with delays in presenting evidence and having claims fully heard, litigation about how the consolidated arbitrations should proceed before each arbitrator may result in undue delay.²³ The *Pandolfi* court reasoned that the delay triggered when 25 or more claims asserted against the company by the same or coordinated counsel would “likely ha[ve] a chilling effect on [claimants], deterring them from vindicating their rights.”²⁴

Ultimately, as the Supreme Court has observed, consolidating claims in arbitration “sacrifice[s] the principal advantage of arbitration—its informality—and make[s] the process slower, more costly, and more likely to generate procedural morass than final

²¹ *Id.* at 961.

²² *Id.* at 963.

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

²⁴ *Id.* at 6.

judgment.”²⁵ The larger each batch, the more the cases resemble mini class actions, necessitating each presiding arbitrator to decide complex procedural issues before reaching the merits.

Process Arbitrations

AAA and JAMS, the two largest consumer and employment arbitration administrators, introduced mass arbitration rules, including appointment of a “process arbitrator.” After the filing of a certain number of similar claims by individuals represented by the same or coordinated counsel, an arbitrator is appointed either by consent of the parties or application of the rules to determine a number of procedural issues.²⁶ While process arbitrations may help the parties resolve certain pre-merits issues that were previously being resolved either by arbitration administrators or by courts, they are not a substitute for merits arbitrations.

Further, the jurisdiction and authority of process arbitrators is expanding, such that process arbitrators may now decide a variety of issues. The more process involved, the less arbitration becomes an efficient alternative to the courts, especially where process arbitration decisions are non-public and so may raise concerns over whether consumers and employees have adequate notice of the rules of their arbitrations.

²⁵ *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 508 (2018); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011); *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 184 (2019); *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. 662, 685 (2010) (holding that individual, bilateral arbitration allows the parties to “forgo the procedural rigor” of the court system and have their claims heard with “lower costs, greater efficiency and speed”).

²⁶ AAA’s process arbitration operates automatically if more than 25 claims are filed involving the same or similar facts or legal issues by the same or coordinated counsel. Under JAMS rules, the mass arbitration protocol must be either expressly incorporated into the parties’ arbitration agreement or part of a post-dispute agreement.

Estimation of Claims in Bankruptcy Proceedings

The Bankruptcy Code provides that a bankruptcy court shall “allow” claims against the debtor but that “any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case” shall only be “estimated.”²⁷ Although the bankruptcy court must apply the substantive law that would govern the claim outside of bankruptcy,²⁸ “Congress has not precisely defined the mode or method of claim estimation nor required a bankruptcy court to employ a particular mode or method of unliquidated claim estimation.”²⁹ Accordingly, the court has wide discretion over procedure and “should use whatever method is best suited to the circumstances.”³⁰ These methods include “summary trials,” that is, bench trials in which each litigant may only call a single witness,³¹ and, frequently, hearings that rely heavily on expert witness to assign values to claims.³²

Estimation takes on particular importance in bankruptcies in which the debtor faces thousands of individual claims that would make administration and resolution of the bankruptcy impractical. For example, where an airline faced over \$3.5 billion in employment-related claims, filed by both unions on behalf of their members and over 13,000 individual employee-plaintiffs, a bankruptcy judge found estimation appropriate, emphasizing the complexity and number of the claims, as well as the variety of legal theories asserted.³³ Estimation is commonly employed in

²⁷ 11 U.S.C. § 502(c).

²⁸ 4 Collier on Bankruptcy, ¶ 502.04[2] (16th ed. 2024).

²⁹ 4 Collier on Bankruptcy, ¶ 502.04[4], n.16 (quoting *In re N. Am. Health Care, Inc.*, 544 B.R. 684, 689 (Bankr. C.D. Cal. 2016)).

³⁰ *In re Brints Cotton Marketing, Inc.*, 737 F.2d 1338, 1341 (5th Cir. 1984) (quoting 3 Collier on Bankruptcy, ¶ 502.03 at 502-77 (15th ed. 1983)).

³¹ 4 Collier on Bankruptcy, ¶ 502.04[2] (citing *In re Baldwin-United Corp.*, 55 B.R. 885 (Bankr. S.D. Ohio 1985)).

³² 4 Collier on Bankruptcy, ¶ 502.04[2] (citing *Menard-Sanford v. Mabey (In re A.H. Robins Co.)*, 880 F.2d 694, 699-700 (4th Cir. 1989)).

³³ *In re Continental Airlines, Inc.*, 57 B.R. 842, 844 (Bankr. S.D. Tex 1985).

asbestos³⁴ and pharmaceutical and medical-device product-liability cases.³⁵ Most notably, in the *A.H. Robins* case, arising out of product-liability claims related to its Dalkon Shield intrauterine device, the bankruptcy court estimated that 195,000 claims were worth \$2.475 billion after hearing extensive expert testimony.³⁶ In that case, the debtor had argued that those claims were worth \$800 million to \$1.3 billion, the debtor's insurer had argued they were worth \$2.2 to \$2.5 billion, and product-liability claimants had estimated that their claims were worth \$4.2 to \$7 billion.³⁷

Breach of contract claims may be estimated as well. In the *Lehman Brothers* bankruptcy, a court also used estimation to resolve claims by investors that 94,000 loans that were packaged by Lehman into hundreds of residential mortgage-backed securities trusts (RMBS) actually breached Lehman's representations and warranties or were the product of fraud. The bankruptcy court considered a combination of claim data, expert evidence, and comparable settlement values to estimate the claims at the \$2.38 billion requested by Lehman's plan administrator, significantly less than the \$11.4 billion requested by a group of trustees acting on behalf of the investors in the RMBS trusts issues by Lehman.³⁸

Several methods are employed to estimate claims. These include estimating the "market value" of the claim or the "forced settlement value" of the claim.³⁹ In another, the judge considers the average verdict in similar cases; for example, to estimate the value of a products-liability claim in which several of the plaintiff's fingers were severed, the court considered "national

³⁴ E.g., *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

³⁵ E.g., *In re A.H. Robins Co.*, 88 B.R. 742 (E.D. Va. 1988), *aff'd sub nom. Menard-Sanford v. Mabey* (In re A.H. Robins Co.), 880 F.2d 694, 698-700 (4th Cir. 1989).

³⁶ *In re A.H. Robins Co.*, 88 B.R. 742, 747 (E.D. Va. 1988), *aff'd sub nom. Menard-Sanford v. Mabey* (In re A.H. Robins Co.), 880 F.2d 694 (4th Cir. 1989).

³⁷ *In re A.H. Robins Co.*, 88 B.R. at 747.

³⁸ *In re Lehman Bros. Holdings, Inc.*, Case No. 08-13555 (Bankr. S.D.N.Y. Mar. 15, 2018).

³⁹ *Id.* at 1135.

average unreduced verdict award for the amputation of multiple fingers.”⁴⁰ Even values of publicly known settlements may be considered.⁴¹ A more nuanced approach considers both the likelihood that each claim will succeed and the verdict if it does, drawing from statistics on the category of the claim as well as the judge’s perception of how strong particular claims are compared to their category, with the judge assigning percentage discounts to each category of claim.⁴²

Another approach to the estimation of mass torts involves a trial on general causation, also known as generic causation, and then trials on a randomly selected, statistically significant number of individual claims.⁴³ In developing this approach, courts have rejected permitting plaintiffs’ counsel and defense counsel each to select particular individuals, given that such selections will not be representative.⁴⁴ In this model, questions of law and fact common to all claimants can be resolved once, rather than relitigated, and individualized issues can be extrapolated from the randomly selected sample.

Given estimation’s capacity to resolve large numbers of claims, even where individuals’ claims vary on crucial details (including on details that render some claims viable and other inviable),⁴⁵ claims that cannot be resolved through class actions may still be estimated. Most notably, the Supreme Court has rejected efforts to resolve asbestos litigation through class action

⁴⁰ David S. Salsburg & Jack F. Williams, A Statistical Approach to Claims Estimation in Bankruptcy, 32 Wake Forest L. Rev. 1119, 1136 (1997) (quoting *In re Federal Press Co.*, 116 B.R. 650 (Bankr. N.D. Ind. 1989)).

⁴¹ *In re Lehman Bros. Holdings, Inc.*, Case No. 08-13555 (Bankr. S.D.N.Y. Mar. 15, 2018).

⁴² Salsburg & Williams, *supra* note 40.

⁴³ *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1017-19 (5th Cir. 1997) (in this non-bankruptcy case, overturning district court’s decision for failure to select individuals randomly).

⁴⁴ *Id.*

⁴⁵ See *In re A.H. Robins Co.*, 88 B.R. at 747.

settlements,⁴⁶ while asbestos bankruptcies have become paradigmatic applications of estimation in the mass tort context.⁴⁷

Also notably, parties to estimation proceedings consider the strategic and tactical posture of the case when determining how aggressively to argue their proposed valuations. Indeed, in the cases discussed above, while the estimation proceeding was contested, the debtor's counsel did not argue that the claims were worth nothing, instead arguing for a lower claim amount than that demanded by the creditor. Further, estimation proceedings often become a "battle of the experts," and parties may believe it is more credible to have an expert who is willing to make concessions with respect to certain issues.

Additionally, despite the flexibility of estimation proceedings, they still have "the same effect as any other order of a court of competent jurisdiction" and may impose "*res judicata* and collateral estoppel."⁴⁸ Moreover, "numerous courts have approved the creation of mass tort claims trusts coupled with channeling injunctions,"⁴⁹ that is, injunctions that prevent claimants from seeking recoveries from third-parties, such as insurers, typically in exchange for those third-parties' contributions to the estates, which in turn fund the claims trusts. Because these combinations of claims trusts and channeling injunctions "effectively limit total tort claimant recoveries to assets allocated to that trust,"⁵⁰ and because estimation determines how much money the debtors and third parties must commit to the claims trusts, estimation provides the only available path for compensation in many cases. At the same time, because bankruptcy judges' decisions of how

⁴⁶ *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

⁴⁷ E.g., *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2d Cir. 1988).

⁴⁸ 4 *Collier on Bankruptcy*, ¶ 502.04[3]. However, in cases in which a bankruptcy court estimates a claim for a limited purpose only, such as determining whether the holder of the claim may vote on plan confirmation, the preclusive effect of the estimation decision is limited to that purpose. *Id.* Litigants may also agree that an estimation decision would not be preclusive for other purposes. *Id.*

⁴⁹ 4 *Collier on Bankruptcy*, ¶ 502.04[4].

⁵⁰ 4 *Collier on Bankruptcy*, ¶ 502.04[4].

to estimate claims are reviewed for an abuse of discretion,⁵¹ such decisions are rarely overturned.

Adapting Estimation to Mass Arbitration

Bankruptcy courts rely on estimation proceedings to estimate large volumes of claims for purposes of efficient and fair administration of a debtor's estate. It is worth considering whether a similar process could be used to efficiently resolve a mass arbitration. Like estimation proceedings, mass arbitrations often involve large numbers of individual claims that share common issues of law and fact, and common counsel. Indeed, in party-negotiated mass arbitration settlements, the parties will often "bucket" claims based on common characteristics and assign values to each bucket that are then used to create an overall settlement number. Further, while estimation is not employed in civil litigation outside of bankruptcy, arbitration prizes fair but flexible and efficient dispute resolution over the procedural rigor of the civil litigation system.

The major consumer and employment arbitration administrators, AAA and JAMS, have so far avoided rules that would consolidate individual arbitrations within a mass arbitration for merits purposes, preferring to limit consolidation to "process" issues. Therefore, parties would need to consent to adopt an estimation-based framework, ideally after a dispute has arisen to avoid any potential due process or notice issues.

What are some considerations in adopting such a framework? Arbitration administrators could provide for appointment of an "Estimation Tribunal," consisting of one or three neutrals, as an optional addendum to existing mass arbitration rules. One the parties elected an estimation proceeding to resolve their claim, they would need to agree to abide by the rulings of the Estimation Tribunal (including any appeal rights that the administrator's rules may provide).

First, claimants would likely not accept any estimation process that is not an alternative to both a process arbitration

⁵¹ *Bittner v. Borne Chemical Co.*, 691 F.2d 134, 136 (3d Cir. 1982).

and merits arbitration. In other words, the estimation process would substitute for both the process and merits arbitration. It is unlikely that claimants who have already prevailed before a process arbitrator would be inclined to agree to an estimation proceeding, especially if the respondent used the process arbitration as a “bite at the apple” toward obtaining dismissal of all of the claims. While the Estimation Tribunal could be authorized to consider issues that would ordinarily be subject to a process arbitrator’s determination, it would do so along with the underlying merits issues.

Similarly, it is likely that parties would want the fee structure for the Estimation Tribunal to reflect existing arbitration administrator fee structures for process arbitrations, where claimants and respondents pay a flat fee regardless of the number of claims filed with the business responsible for additional neutral compensation on an hourly basis at the neutral’s prevailing rates.⁵² In an Estimation Tribunal proceeding, aggregate fees would likely be significantly lower than existing fee structures.

Second, the Estimation Tribunal would have the authority to supervise an exchange of data between the parties, with the goal of determining the extent to which there are disputed issues of fact, such as whether a particular individual used a product, in what manner, or the amount or frequency of their transactions. The Estimation Tribunal could order that data produced categorically or on a per claimant basis. As part of this process, the Estimation Tribunal could establish a “submission date” similar to a bar date by which no more claimants may be added to the estimation proceeding, ensuring that any data exchange would reflect all potential claimants.

Third, the Estimation Tribunal would have the authority to resolve common issues or defenses through an estimation methodology rather than an “all or nothing” approach. In other words,

⁵² Under the AAA Mass Arbitration Fee Schedule, the consumers pay an aggregate Initiation Fee of \$3,125, while the business pays \$8,125 plus arbitrator compensate. Under JAMS, the parties pay a non-refundable filing fee of \$7,500, split \$2,500 by the consumers or employees and \$5,000 by the business. However, under both sets of rules, parties continue to be responsible for per claim administrative fees and arbitrator compensation for the merits arbitrations.

the purpose of the estimation hearing would be to determine the likelihood that claimants, or categories of claimants, would succeed on disputed factual or legal issues if the cases were remanded to individual merits arbitrators through hearings, without setting individual merits hearings for each individual claim.

Fourth, the Estimation Tribunal could retain or rely on the services of special masters, associate arbitrators, or experts. These individuals could supervise production of the data on individual claims, perform calculations of damages, suggest ways in which the claims could be “bucketed,” or provide expert testimony as to the legal or factual issues or the valuation of the claim. In certain circumstances, the Estimation Tribunal could also order a statistically significant sample of claims to be arbitrated. The procedures and circumstances for appointment of these experts or associate neutrals would need to be spelled out in the estimation rules themselves.

Finally, the Estimation Tribunal could issue a partial or estimated award reflecting how the individual merits arbitrations would resolve if they were heard individually, reflecting available damages or statutory attorneys’ fees or costs shifting. Arbitration proceedings often include non-zero sum awards, for example, in “high low” or “baseball” arbitration proceedings.⁵³ The award would include parameters for which claimants are eligible to participate in the award. Distributing the award could be coordinated by claimant counsel, or by a settlement administrator if the number of claims is very large.

Any of these proposals would need to be subject to study and further rulemaking by arbitration administrators. However, an estimation proceeding could prove an effective party-driven alternative to the existing mass arbitration system.

⁵³ Edna Sussman & Erin Gleason, *Everyone Can Be a Winner in Baseball Arbitration: History and Practical Guidance*, N.Y. Dispute Res. Lawyer (Spring 2019), <https://sussmanadr.com/wp-content/uploads/2019/04/Baseball-arbitration-NYSBA-Sussman-3-2019.pdf>.