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How Companies Can Hedge Risk of Mass Arbitration

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Mass arbitration is a recent trend where companies are hit with thousands of identical consumer or employment arbitration claims. Led by a resourceful plaintiffs' bar that uses targeted online ads to locate potential claimants, coordinated groups of consumers and employees are weaponizing arbitration agreements to create massive leverage against technology companies.

The consequences for companies and employers are stark: Under the applicable arbitration rules or the company's arbitration agreement, the company pays most of the filing and arbitrator fees in consumer or employment arbitrations. With millions of dollars in initial filing fees alone in a mass arbitration, companies must consider of how to mitigate the risk of this emerging form of claim.

Background

For years, companies have included a combination of arbitration clauses and class action waivers in their terms of service, terms of use, and user agreements. For consumers and employees who accepted the arbitration agreement, they were bound to arbitrate on an individualized basis. In practical terms, this strategy limited the exposure these companies faced from large class action litigation, and allowed consumers and employees to bring claims in a more efficient forum.

However, in a calculated move to overwhelm companies with the prospect of astonishingly high institutional arbitration fees, plaintiffs' firms turned to social media and online claim aggregators to enlist thousands of consumers and employees, often without sufficient prior vetting of the claims. Recent changes in the fee schedules for arbitration institutions, which require the company to pay for the majority of fees – as well as commitments many companies have made in their arbitration clauses to pay most or all of the fees – have allowed these plaintiffs' firms to create significant pressure without having to invest in the case.

For companies facing mass arbitration, the financial consequences are significant. Under most arbitration rules, the company is on the hook for filing and administrative fees – regardless of whether the claims have any merit. As a result, the initial filing costs borne by companies can quickly escalate into the millions of dollars. To make matters worse, California adopted legislation requiring companies to pay arbitration fees within 30 days of the due date, and added sanctions for failure to pay, including plaintiffs' attorney fees or the case being removed to court.

While the mass arbitration phenomenon began several years ago, it appears to be gaining momentum, with new plaintiffs' firms entering the market. Recent cases involving Amazon, Uber, DoorDash, Postmates and Intuit demonstrate that companies targeted with mass filings face the undesirable choice of having to pay millions of dollars in arbitration fees upfront or liquidating the plaintiffs' firms with substantial settlement amounts under the threat of many more cases being filed after the initial wave.

How to mitigate the risk of mass arbitration

While the law regarding mass arbitrations is continuing to develop, some strategies to mitigate the risk do exist. To be successful, a company must implement these strategies before it receives notice of a mass arbitration. Not all of these strategies have been tested before courts, and companies need to ensure their clause remains free of unconscionable provisions that could put the

arbitration agreement as a whole at risk. Some strategies that companies should consider when revising their existing arbitration agreements are listed below.

Include small claims court options

Dispute resolution clauses should preserve both parties' right to opt for small claims courts, where available, due to their much lower (and usually nominal) fees.

Reconsider delegation clauses

Not all threshold issues need to be sent to an arbitrator for resolution via a delegation clause (i.e., a provision where the parties agree that the arbitrator will decide "gateway" issues around arbitrability). Companies also should take care in drafting carve outs to delegation clauses for certain threshold issues to avoid incurring unnecessary arbitration fees (e.g., whether the parties have complied with any pre-arbitration steps or whether the plaintiffs have violated the class action waiver in the agreement).

Use an alternative arbitration provider

Companies should compare and carefully select the most cost-effective arbitration provider for their needs. Not all arbitral institutions have adopted specific rules and protocols to address mass arbitrations.

Opt for ad hoc arbitration

Another approach to drastically diminish the arbitration costs is to opt for ad hoc arbitration (i.e., arbitration not administered by an institution). However, there are drawbacks to this approach, including forgoing the advantages of established rules and an administering institution, particularly when thousands of individual claims are filed.

Mandate a pre-dispute resolution process

An option to decrease costs and ensure that only serious claimants participate in the dispute resolution process would be to provide a tiered clause that includes mandatory individualized conferences prior to initiating arbitration.

Require individual requests for arbitration

To further deter unmeritorious claims, companies should add provisions requiring claimants to file individual requests for arbitration, setting out the identity of the plaintiff and the plaintiff's counsel, a detailed description of the legal claims being asserted and the requested relief, including a good-faith calculation of the specific amount in dispute.

Revise cost-splitting provisions

To the extent permitted under applicable law and arbitration rules, companies should remove unconditional promises to pay arbitration filing fees from their terms of use. Similarly, discretion should be given to allow for fee shifting against claimants who brought frivolous or vexatious claims.

Consider batch arbitration

Companies should strongly consider a clause that requires mass arbitrations to be consolidated into "batches" to allow for more streamlined dispute resolution. Such a clause also can benefit consumers, as it will allow for a more efficient adjudication of their claims. For example, the arbitration clause could provide that when 100 or more requests of a similar nature are filed at the same time, the arbitrations will be administered in batches of 100 cases each, with one arbitrator and one set of administrative fees per batch.

Utilize online dispute resolution (ODR)

In recent years, ODR has started to gain traction as an alternative to more conventional forms of dispute resolution. Ecommerce companies, for example, have successfully utilized ODR platforms to resolve a high number of consumer disputes every year. Although this approach is yet to be widely tested outside of ecommerce, it offers the benefit of significantly decreasing the costs that often are incurred in traditional arbitration.

Remove mandatory arbitration provisions

Finally, companies may want to reconsider whether individual mandatory arbitration still represents the best dispute resolution system for their needs. Some companies already have opted to revert to court litigation and class actions, although the majority – even after having to face a mass arbitration – continue to use arbitration, albeit with several of the risk mitigation strategies described above.

Insight and next steps

The risk of mass arbitrations continues to grow, and companies should no longer ignore the threat posed by this litigation strategy. Arbitration clauses in terms of service, terms of use, and user agreements should be drafted (or amended) carefully with a forward-thinking approach, giving due consideration to the unique challenges mass arbitrations pose.

To that end, companies should not reflexively keep the same arbitration agreement on which they have relied for so long. They should instead explore alternative and more tailored solutions that meet the needs of their customer base or employees, while also ensuring a fair and reasonable dispute resolution process for themselves.

Cooley has considerable experience in advising clients facing mass arbitration claims and is uniquely situated to assist companies to fashion the most appropriate dispute resolution clause for their individual needs. Please reach out to any of the Cooley contacts below if you have questions about mass arbitration.

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