Kluwer Arbitration Blog

Can Batches and Bellwethers Work in Mass Arbitration?

Bennett Rogers · Thursday, October 3rd, 2024

Mass arbitration has become extraordinarily expensive and highly volatile. The practice originated during a low tide for conventional class action certification and a high tide for judicial enforcement of individual arbitration agreements and class action waivers. Over the past decade, plaintiffs' firms embraced this legislative and jurisprudential landscape and coordinated mass filings of individual arbitration claims, particularly in the consumer and employment context. These filings can be effective at generating substantial settlements because of, in part, the fee structure in arbitration agreements that require defendants to pay individual arbitration fees. The defense bar has responded to the mass arbitration revolution by resorting to techniques familiar to complex litigation but novel to arbitration: batch and bellwether proceedings. When a substantial number of cases are aggregated, parties can agree to litigate a smaller "batch" before returning to settlement discussions. Similarly, bellwether trials happen after the parties agree to try a representative case to anchor potential settlements. Batch and bellwether proceedings can work in the arbitration context, but institutions must embrace and agreements must reflect what I call the *elastic bellwether model*. In this model, the parties are adequately incentivized to resolve disputes arising during a mass arbitration because failure to do so will eventually increase or decrease following batch sizes, making the process more timely and costly, or eventually bring all claims back into court.

When the enforceability of consumer and employment arbitration agreements remained unsettled in the early 2000s, defendants added certain pro-claimant provisions to avoid issues of fairness and unconscionability. Notably, to ensure avoiding costly class action litigation, defendants agreed to pay arbitration fees. Recognizing the value of individual arbitration fees, plaintiffs' firms began systematically filing individual claims for would-be class members and generating exponential costs for defendants. In one of the earliest mass arbitrations against Uber, plaintiffs filed over 12,000 arbitration demands, which produced over $18 million in arbitration fees before even considering damages, attorneys' fees, and other costs. In less than six months, Uber announced in an SEC disclosure that it had settled the claims for between $146 and $170 million. The tides had quickly turned and plaintiffs were again able to recover large sums for aggregate claims.

As I discuss in my recent article in the Notre Dame Law Review, every action has an equal opposite reaction. Corporate defendants responded to the mass arbitration revolution with four noteworthy strategies. First, defendants refused to pay arbitration fees altogether. This option was not well received by courts, and judges routinely enforced the fee provision contained in an arbitration agreement while also ordering attorneys' fees and costs. Because arbitration has always embraced the "pay-to-play" model, courts have held defendants accountable to both pay and play.

The second defense strategy was returning to court to seek class treatment and avoid arbitration, and judges have lambasted defendants for this tactic. Because defendants zealously and successfully moved claims out of court and into arbitration, only to seek to return to court as a class action after amassing large individual arbitration fees, judges noted the irony of resorting to the instrument that defendants previously moved to prohibit plaintiffs from using themselves. Other judges have remarked that defendants have been "hoisted by their own petard".

Third, defendants have eliminated arbitration agreements altogether. While this litigation strategy may be prudent for some companies, it is unsustainable for others. For example, brick-and-mortar institutions largely do not rely on disruptive practices like independent contractor labor to succeed, which makes them less averse to litigation than startups or other modern business models. For the latter, the exposure to mass arbitration costs may still be lower than litigation costs. Thus, none of these responses were able to stop the bleeding and mass arbitration continued at a rapid pace.

The fourth defense strategy was ineffectively implemented yet strong potential to remedy "bottleneck" defense strategies and "shakedown" plaintiff tactics: adding batch and bellwether provisions to arbitration agreements. Traditionally, batching occurs when numerous cases are aggregated and the parties agree to try a small number of cases before returning to the settlement table. This technique was recently tested in a mass arbitration with Verizon. There, plaintiffs challenged an arbitration agreement as unconscionable because it permitted only ten claims at a time and no more than twenty per year. Because the mass arbitration contained 2,721 individual claims, the plaintiffs averaged the tribunal's resolution time of seven months and calculated that the current system would force the last third of claimants to wait 156 years to be heard.

Similarly, a bellwether trial happens when the parties with joined cases agree to try a representative case to anchor settlement talks. The bellwether provision became the focal point of a recent mass arbitration with Ticketmaster. There, plaintiffs were ordered to severely limit complaint allegations, were prohibited from discovery, and were required to submit briefs fewer than 15,000 total characters (or approximately five pages). The parties then proceeded with three bellwether claims, and the results of which would then apply to "all similar cases" waiting to be adjudicated. If claims were not deemed similar, each subsequent claim was heard on an individual, case-by-case basis. When challenged, the reviewing court recognized that these practices have "stacked the deck" with unconscionable provisions.

Batch and bellwether proceedings can succeed in arbitration but must stay true to the goals established in the litigation context. These methods can succeed by embracing what I call the *elastic batch and bellwether model*. As a foundation, arbitration will remain a critical forum for dispute resolution that parties should have the right to enter. But if the initial stages of mass arbitration are either conducted in bad faith or are not progressing towards resolution, judicial intervention is warranted to break the stalemate. The elastic model begins by incentivizing parties to bring legitimate claims and try those claims to the best of their abilities because the outcome of early claims will dictate future proceedings. This model is 'elastic' because it rejects a set number of claims or rigid procedural framework in favor of a system that adjusts based on the outcome of each round of proceedings. Batch and bellwether proceedings can start the mass arbitration, and as the claims are decided, the next batch either grows or shrinks depending on the outcome. If batches begin to reveal a systematic injury, later batches grow until the information is both significant enough to predict the outcome of global resolution and costly enough to incentivize the parties to bargain. This would alleviate the "bottleneck" problems associated with substantial delay.

But if the batches reveal that claims were simply filed to increase the arbitration entry fee, the size of the batches should similarly be reduced to allow the defense to benefit from cost-effective measures. This would alleviate the “shakedown” problems associated with bringing empty claims for the sake of making arbitration prohibitively expensive. Decreasing each batch size would also promote settlement because the parties could use prior results as a barometer for the number of future successful claims and refine the settlement value based on the tribunal’s rulings on key features or characteristics of similarly situated claimants.

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This entry was posted on Thursday, October 3rd, 2024 at 8:38 am and is filed under Mass claims, Mass litigation
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