

AAA Makes Changes in Attempt to Reign in Mass Arbitration

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Ever heard of "mass arbitration"? If you haven't heard of that term, you may be lucky. By rule of thumb, a "mass" of something isn't necessarily a good thing (unless it's a mass of tacos on my plate). If you have heard of mass arbitration or been subjected to a mass arbitration, help may be on the way from the American Arbitration Association.

By way of background, mass arbitration is a litigation approach used by some consumer plaintiffs' attorneys as a way to leverage the cost of the chosen arbitration forum against a defendant. It works like this: plaintiffs' attorneys will gather hundreds, or thousands, of consumer clients through a marketing campaign or social media push and then file an identical claim for arbitration on behalf of each of their consumer clients against the same defendant at the same time. Once filed, a defendant is then responsible for paying administrative fees for each of the filed arbitration claims. Previously, the AAA required a company to pay administrative fees of between \$100 and \$325 per case, plus a \$1,400 case management fee for each case. The fees for hundreds or thousands (a mass) of arbitration claims could easily climb into the hundreds of thousands, if not millions, of dollars depending on the number of arbitration claims that were filed.

In some cases, the plaintiffs' attorneys may send a letter to a company threatening to file the hundreds, or thousands, of consumer arbitrations with an ultimatum: either cut us a nice big check to settle these disputes or pay the hundreds of thousands or millions in arbitration fees. The company is faced with the possibility of having to pay the chosen arbitrator these enormous administrative fees, in addition to arbitrator compensation and other fees, or pay a lesser amount to the plaintiffs' attorneys, creating significant settlement leverage for the plaintiffs' attorneys.

The AAA recently announced new Mass Arbitration Supplementary Rules, effective April 1, that will hopefully provide some much-needed monetary relief for defendants and institute other changes in the handling of consumer mass arbitrations.

Under the new Supplementary Rules, the AAA requires a business to pay a flat \$8,125 initiation fee to cover an administrative review of the arbitration filings, an administrative call with the AAA, and an appointment of a global mediator and/or process arbitrator. The initiation fee is due and payable even if the cases are closed due to settlement or withdrawal or if a process arbitrator determines that the AAA cannot proceed with the mass arbitration. If the cases proceed beyond the initiation stage, the business would be

required to pay a per-case fee between \$100 and \$325, depending on the number of cases, and an arbitrator appointment fee of \$450-\$600 per case, but the initiation fee would be credited toward the per-case fees. This change in fee structure may represent a significant reduction in the amount of administrative fees a company would be required to pay the AAA for mass arbitrations.

The new mass arbitration fees will apply to all cases where the AAA determines, in its sole discretion, that the following conditions are met: (a) 25 or more similar demands for arbitration or a request for global mediation are filed against or on behalf of the same party or related parties; and (b) representation of all parties is consistent or coordinated across cases.

The new Supplementary Rules add an attestation requirement—mass arbitration filings must include an affirmation that the information provided for each individual case is true and correct to the best of the representative's knowledge—that will help ensure accurate and truthful filings. Additionally, virtual hearings are now the preferred method for mass arbitration cases as they can leverage technology for increased efficiency and accessibility. The new Supplementary Rules also include an expanded process arbitrator role to tackle potential hurdles early—such as determining whether the parties have met filing requirements, disputes over contractual conditions precedent, the process for selecting merits arbitrators, and the locale of merits hearings—allowing the parties to focus on substantive issues. Finally, the new Supplementary Rules provide a process for individually appointed merits arbitrators to review process arbitrator rulings using an abuse of discretion standard.

This would be a great time to review your arbitration agreement (you do have one, right?) to see which arbitrator(s) you have selected for arbitration and to talk to your friendly lawyer about whether it's time to make a change before you ever come face to face with a mass arbitration. ❏

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