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A Return to First Principles: Individual Mediation as an Alternative to Mass Arbitration

Robert A. Harris[1]

In this article, the author observes that the challenges posed by mass arbitration have created expense and uncertainty for companies but that individual mediation, when included as a mandatory step before arbitration, can provide a cost-effective, efficient, and flexible means of resolving disputes.

Isaac Newton's third law of motion—that every action has an equal and opposite reaction—pertains to the physical world, not arbitration. But one might think otherwise by looking at the punch-counterpunch that has occurred regarding individual arbitrations, class arbitrations, and, most recently, mass arbitrations.

Setting the Stage

Historically, arbitration was not a happy place for attorneys representing consumers. Eager to pursue class actions in front of juries, plaintiffs' counsel often were dismayed to discover that a prospective consumer client had contractually agreed to arbitration, thereby rendering unlikely the prospect of substantial economic recoveries. Plaintiffs' counsel viewed individual consumer arbitration as a gross deprivation of a consumer's right and ability to seek recourse for corporate malfeasance. On the other hand, the corporate bar viewed arbitration as a prudent and

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appropriate way for a company to avoid nefarious overreaching by plaintiffs and their lawyers.

Hoping to change this perceived inequity, enterprising plaintiffs' counsel began filing class claims in arbitration. They did so in the face of contractual arbitration provisions that, most often, spoke only to the claims between the consumer and the company; the contracts were silent as to whether "class arbitrations" could be filed on behalf of other similarly situated consumers.

As expected, the corporate bar challenged these attempts to pursue class arbitrations, receiving divergent rulings from the courts.

By 2003, the U.S. Supreme Court was poised to provide clarity. The South Carolina Supreme Court had issued rulings holding that, from the consumer's perspective, silence was golden: consumers could bring arbitration claims on behalf of a class of similarly situated consumers unless the agreement specifically stated otherwise.

Instead of delivering the expected substantive guidance, a divided Supreme Court in *Green Tree Financial Corp. v. Bazzle*[2] opted to punt. Four justices invoked procedure rather than substance, noting that the appropriate question was not whether class claims could be brought in arbitration, but who should decide the question. The four-justice plurality concluded that it was up to the arbitrator, not the judge, to determine whether an arbitration provision permitted the assertion of claims on behalf of a class. These four justices managed to corral the vote of a fifth, Justice John Paul Stevens. Although personally of the view that the Court should definitively rule that class claims indeed were permitted in arbitration, Stevens joined with his four colleagues, in order to ensure a "controlling judgment of the Court."

Having avoided the substantive question on procedural grounds, the Court's decision nonetheless opened the floodgates to class arbitrations. The decision granted arbitrators with largely unfettered discretion, and predictions (often accurate) were that arbitrators would permit class claims to proceed. Compare this Wild West scenario to the limited, controlled

[2] Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003).

single-party proceeding that corporate counsel envisioned when they included an arbitration provision in the company's contracts with consumers.

The Supreme Court's (non)decision in *Bazzle* spawned immediate reaction on multiple fronts.

- For its part, the American Arbitration Association® (AAA®), tasked with the mission of providing administrative support for arbitrations of all stripes, promptly propounded and released "Supplementary Rules for Class Arbitrations." AAA would be ready to administer an expected influx of class claims.
- The plaintiffs' bar seized on the opening granted by the Supreme Court, and meaningfully increased the number of class action arbitration filings.
- Corporate America, greatly concerned at the prospect of the plaintiffs' bar turning every de minimis consumer claim into a class action arbitration, put their counsel to work drafting contractual arbitration provisions that expressly and specifically precluded this from happening.

In 2010, the Supreme Court—with the composition of its members having changed—decided the question it procedurally ducked in *Bazzle*, holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[3] that contractual arbitration provisions silent on the issue *do not* create a right to bring class claims under the Federal Arbitration Act (FAA).

However, although class claims under the FAA were foreclosed, courts still permitted class arbitrations to be brought under state arbitration provisions. This ended in 2012, when the Supreme Court put the final nail in the arbitration class action movement by holding that state statutes purporting to provide rights to assert class claims in arbitration are preempted by the

[3] Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010).

FAA. This decision, *AT&T Mobility LLC v. Conception*,[4] effectively barred class arbitrations.

Never fear, the plaintiffs' bar remained undaunted. They expanded their toolkit. Mass arbitration was born. Whereas in a class arbitration, one claimant asserted the claim on behalf of himself and those similarly situated, mass arbitration was, indeed, mass. Dozens, hundreds, thousands of claims—each on behalf of a separate consumer or employee—were filed with AAA and other arbitration tribunals. Since contractual arbitration provisions often specified that the company was responsible for funding the arbitration's administrative costs, the respondent companies were required to advance the fees of the arbitration, with aggregate sums running into the millions, often dwarfing the sums in dispute.

Faced with this mass arbitration onslaught, the corporate bar argued that it was unfair that their company clients be forced to defend claims en masse, while having to pay millions for the privilege. Largely, the courts were not sympathetic. Companies had insisted that contracts required consumers and employees to forsake litigation in favor of arbitration. Thus, courts were quick to remind companies that they, too, were bound by the contracts they signed, even if it meant ponying up the filing fees for every case.

Once again, AAA, as it did years before with class arbitration, addressed administrative needs by issuing rules that went into effect in April 2024. Notably, the rules—separately propounded for consumer, employment, and other types of mass arbitrations—prescribe more cost-effective filing fees and set forth case management protocols commensurate with high-volume filings.

The Current Landscape

So, where do things stand? Let's compare the beginning and endpoints of this arbitration evolution.

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[4] AT&T Mobility LLC v. Conception, 563 U.S. 333 (2011).

- *Starting Point*. Companies began writing arbitration provisions into their contracts to manage risk. As conceived, designating arbitration as the required forum for addressing a single claim enabled a corporate defendant to address claims on a "one off" basis in a private forum.
- *Now*. The arbitration world is different. Mass arbitration provides a functional equivalent to the class action proceedings corporations sought to avoid with their arbitration provisions. Exposure must be evaluated in the context of hundreds or thousands of cases, and the publicity attendant to mass arbitrations makes meaningless the aspiration of tribunal privacy.

Turning back the clock seems unrealistic. Perhaps there is an alternative.

A Return to First Principles: The Mediation Alternative

Mediation and arbitration obviously are different processes. Arbitration brings with it finality, as an arbitrator will pick a winner and a loser. Mediation aspires to finality, but is achieved only if the parties reach an agreement, something that often occurs when both sides approach the dispute with a sincere desire to reach a resolution.

From a company's perspective, mediation offers features not unlike those historically sought in single-claim arbitration:

- *Control Over the Process*. Individual arbitration allows companies to retain more control over the dispute resolution process than judicial litigation, as each case is handled separately. Mediation, where the parties agree to a resolution, provides even greater control.
- *Minimization of Risk*. By avoiding the vagaries of jury trial, individual arbitration minimizes the risk of unfettered damages. Mediation offers the ultimate

safeguard to a company in that it affirmatively determines whether an outcome is acceptable.
- *Avoidance of Precedent*. Individual arbitration avoids creating a formal judicial precedent. Mediation, too, avoids the issue of precedent as it entails a negotiated settlement that is specific to the individual case.
- *Preservation of Arbitration's Advantages*. Individual arbitration provides privacy, speed, and finality. Mediation provides similar advantages.

Given these process similarities, a question emerges: Can mediation of individual claims offer an alternative—to both consumers and companies—that is preferable to mass arbitration?[5]

As to the Company

The Cost-Benefit Analysis

From a prudent company's perspective, it needs to project the costs of operating a mediation program, and then compare the costs with those required to defend mass arbitrations.

The company should consider the staffing costs, whether legal advice will be provided by outside or inside counsel, and the components of the settlement package that will be needed in order to make settlement of claims more attractive to plaintiffs than what they can expect to receive as one of many claimants in a mass arbitration.

The company should also consider the expected savings the company will incur by avoiding the defense of these claims in arbitration. In addition, the company should assess the less quantifiable, but no less tangible, benefits that come from resolving

[5] The AAA's recently adopted rules for mass arbitration provide for mediation, unless the parties opt out. Resolving a mass arbitration through mediation may provide an outcome for the parties that is preferable to an arbitrator's determination of the mass claims. That process, however, is different than the proposal discussed here, which is to tackle through mediation the individual claims of a consumer or employee.

claims without the publicity and distractions of adjudicative proceedings.

And, of course, the company needs to consider that not all claimants will reach settlement in mediation, leaving open the distinct possibility it still will need to defend a mass arbitration, although one smaller in scale.

If there are no meaningful projected savings from pursuing the mediation program, the company may choose to abandon the initiative.

Program Design

If a company determines that a program of individual mediation is worthwhile, it will need to design the program. Goals should be a program that is efficient and cost effective, and will sufficiently capture the interest of consumers and employees so they will elect to participate rather than sign on as claimants in a mass arbitration. Program elements will also need to withstand potential challenges that they impose unlawful impediments to the pursuit of claims.

Companies lacking in house program design capabilities can enlist guidance from knowledgeable and experienced consultants.

The Mediation Agreement

The company will need to spell out mediation requirements in its contracts with consumers and/or its policies with employees. Following are a few suggested touchstones.

Clarity of Language

The mediation provision should clearly state that mediation is a mandatory step before arbitration. The provision should specify the timeline for initiating mediation, the process for selecting a mediator, and the rules governing the mediation process.

Integration with Informal Dispute Resolution

The company may wish to consider language requiring informal efforts at negotiating a resolution prior to mediation. The contract can designate authorized company representative(s)

with whom the consumer/employee will engage for a short period of time prior to proceeding with mediation.

Integration with Arbitration Provisions

The mediation provision should be integrated with the arbitration clause to ensure that the two processes are complementary. The contract should outline the consequences of failing to mediate before initiating arbitration, such as a stay of arbitration proceedings until mediation is completed.

Designation of Mediation Rules

The company either should set forth the rules that will govern the mediation process (if the program is to be self-administered) or reference the rules of a reputable mediation service provider such as AAA. This ensures that the mediation process is structured and adheres to established standards.

Mediator Selection Protocol

If the referenced rules governing the mediation process do not do so, the company should indicate the process for identifying and selecting the mediator. The company will need to ensure that the selection process can survive challenges to its neutrality.

Confidentiality

To protect the parties' interests, the mediation provision should include a confidentiality clause that prevents the disclosure of information shared during mediation. This encourages open communication and facilitates settlement discussions.

Good Faith Requirement

The mediation provision should include a requirement that the parties participate in mediation in good faith. This ensures that both parties engage in the process with a genuine intent to resolve the dispute.

Consideration of Cost-Sharing

The contract should address the allocation of costs associated with mediation, such as the mediator's fees. Imposing upon

counterparties significant financial costs may cause a court to view mediation as conceivably violative of due process rights. However, specifying modest cost contribution by counterparties can incentivize both parties to participate in mediation and contribute to its success. Before implementation, a company should have its counsel review any proposed cost-sharing requirements.

As to the Consumer/Employee

The inclination of a consumer or employee to bring a claim against the company will arise in one of two ways. In some instances, the motivation is organic—that is, company action or inaction will lead a claimant to conclude that they have been victimized by the company. In other instances, the claim may be more opportunistic; for example, consumers and/or employees may learn of attorney-driven efforts to marshal claimants for a mass arbitration.

In either scenario—perhaps more so in the second—the company's ability to avoid addressing the claim in arbitration will depend on its success in negotiating a resolution, either informally or through mediation. To this end, the consumer contract and/or employee guidelines are the company's friend. By prescribing a mediation process, the company will have the opportunity to resolve the claim short of arbitration. The company's likelihood of success obviously will depend on the claimant's assessment of the settlement terms compared with what she perceives she will receive from arbitration.

Thus, mediation as an off ramp to arbitration is only viable if a company is prepared to commit the resources to a mediation process that will provide fair and appropriate outcomes. If so, the company will have a decent shot at obtaining mediation buy-in from consumers who otherwise will participate in mass arbitration.

Conclusion

The challenges posed by mass arbitration have created expense and uncertainty for companies. Individual mediation—which offers a number of features similar to what companies

previously sought through individual arbitration—may provide an attractive off ramp for companies seeking to avoid mass arbitration. When included as a mandatory step before arbitration, individual mediation can provide a cost-effective, efficient, and flexible means of resolving disputes.