What's Notable In JAMS' New Mass Arbitration Rules

By **Jonathan Waisnor and Brandon Heitmann** (May 9, 2024)

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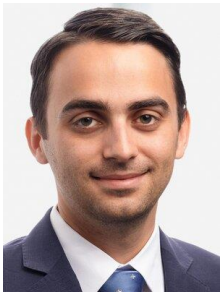

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On May 1, the Judicial Arbitration and Mediation Services issued new Mass Arbitration Procedures and Guidelines.[1]

With the American Arbitration Association also issuing its updates to the Mass Arbitration Supplementary Rules on Jan. 15, both of the nation's leading consumer arbitration administrators have now developed processes for administering a mass arbitration.

Consumers can benefit from predictability in the processes for determining procedural issues, and courts will now have a benchmark by which to evaluate other alternative mass arbitration administrators. The new rules are likely to continue the uptick in mass arbitration filings.

Background

Following several notable decisions by the U.S. Supreme Court that permitted companies to compel some consumer and employee claims into individual arbitration — including AT&T Mobility LLC v. Concepcion, decided in 2011, and Epic Systems Corp. v. Lewis, decided in 2018[2] — law firms representing large numbers of employees or consumers filed thousands or even tens of thousands of individual arbitration claims before administrators like AAA or JAMS.

Companies often objected to the mass filing of individual arbitration claims. They responded by trying to extensively litigate procedural issues or refusing to pay arbitration fees. Companies objected on the basis that the filing of mass arbitration claims violated the parties' arbitration clause or class waiver.

Examples can be found in Abernathy v. Doordash Inc. and Adams v. Postmates Inc., both decided by the U.S. District Court for the Northern District of California in 2020 and 2019, respectively.[3] In other cases — as in Uber Technologies Inc. v. AAA, before the Supreme Court of the State of New York, Appellate Division, in 2022 — companies objected on the grounds that the arbitration administrator had refused to amend its existing arbitrating rules to reduce the fees or streamline the process.[4]

For years, courts were unsympathetic to these arguments and compelled the companies to arbitrate.

AAA first issued mass filing rules in 2021, and amended them most recently on Jan. 15. The revised AAA Mass Arbitration Supplementary Rules expanded the authority of the process arbitrator to resolve an enumerated list of disputes that were often presented to AAA administrators at the outset of a filing. [5]

JAMS' Mass Arbitration Procedure and Guidelines

JAMS did not issue mass filing rules until this year. Instead, JAMS has relied on a policy statement, explaining that, due to the legal framework established in Epic Systems and

other cases, it would not override the parties' existing arbitration agreement for mass filings.

According to the JAMS statement: "If the parties' agreement prohibits class actions and consolidations, we must treat each case individually. ... 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."[6] This was true regardless if one party insisted on classwide or collective administration.

The JAMS mass arbitration procedures are effective as of May 1. They are substantially similar to AAA's mass arbitration rules, but differ in a few key ways. A summary of the changes is discussed below.

Effectiveness and Application

The JAMS mass arbitration procedures are applicable when 75 or more similar demands are filed by the same or coordinated firms against the same party or related parties, and when the parties have agreed to the application of JAMS mass arbitration procedures in the applicable arbitration agreement.

Critically, while AAA applies its mass arbitration rules for any mass arbitration filed after the effective date, JAMS will only do so if the relevant arbitration agreement specifically calls for its application or where the agreement arises post-dispute.

Therefore, for mass arbitrations under arbitration clauses that existed prior to these rule changes, even if the claims are in the process of being filed or the parties are engaged in prelitigation settlement negotiations, JAMS will not apply to mass arbitration rules unless the parties agree.

Appointment of a Process Administrator to Resolve Procedural Disputes

Like AAA, JAMS has also codified and clarified the authority of a process administrator to resolve certain disputes over the claims. Similar to AAA, JAMS process administrators — who AAA refers to as process arbitrators — can review whether filing requirements have been met, the sufficiency of conditions precedent, which JAMS rules apply, threshold jurisdictional and arbitrability disputes, the selection process for merits arbitrators, and any other issues the parties agree to submit.

Further, process administrators may decide, "consistent with the terms of the controlling agreements, procedural fairness and the integrity of the Arbitration process," whether to batch, consolidate or otherwise group the demands for the purposes of discovery, arbitrator appointments or merits hearings.

Fee Schedule

The modified rules provide that the initial filing fee for a mass arbitration is $7,500, regardless of the number of claims filed. Further, JAMS specifies that the highest fee consumers would be required to pay, in the aggregate, is $2,500, regardless of the number of claimants.

The company will bear all administrative, arbitration and case management fees. Case management and arbitrator appointment fees will be billed after the case progresses through the process administration stage.

From the consumer's perspective, JAMS' mass arbitration fee schedule is much simpler than AAA's, which has four different stages where the parties may be assessed fees, and the fees may change for each claim based on the number of claims in the mass arbitration.

As with AAA's mass arbitration rules, these changes dramatically reduce the amount of initial filing fees assessed to both consumers and companies. As a result, it may make it less likely that companies will refuse to pay arbitration fees and strategically default before a process administrator is appointed. Indeed, any attempt to do so may prompt a quick rebuke from courts.

Representative Declaration

JAMS now requires that each demand also be accompanied by a sworn declaration from counsel averring that the information in the demand is true and correct to the best of the representative's knowledge.

This mirrors the requirement included in AAA's mass arbitration rules that reflects the existing requirements in the Federal Rules of Civil Procedure.

Arbitrators will need to assess the meaning of this requirement and how it will be applied to individual arbitrations.

Batching and Individual Merits Arbitrations

The JAMS mass arbitration rules continue to provide that each consumer is entitled to a merits arbitration hearing and can obtain an adjudication of their claim by a neutral merits arbitrator. However, the JAMS mass arbitration rules do permit the process administrator to batch or consolidate demands.

It is unclear if the batching or consolidation contemplated by the rules is strictly for procedural or prehearing issues, like arbitrator appointments or discovery, or for factual determinations that would be binding across the entire batch or group of claims.

Since any ruling by the process administrator must be "consistent with the terms of the controlling agreements," it will be interesting to see how process administrators will determine requests from defendants for consolidated arbitration where those requests are inconsistent with the agreement's class action or consolidated action waiver.

Moving Forward

JAMS and AAA are the two most well-known consumer arbitration administrators in the country. With JAMS adopting a similar structure to AAA for the administration of mass arbitration filings, it seems that mass arbitrations will remain an efficient means for consumers to vindicate their rights against companies.

Counsel who practice mass arbitration must carefully review the relevant rules and familiarize themselves with the filing requirements for AAA and JAMS, and the bodies of procedural decisions issued — none of which are public or precedential — as both administrators will likely continue to be designated by the majority of companies.

Further, given that both AAA and JAMS administer mass arbitration claims under similar processes, the structure of limiting the role of the process arbitrator to resolve procedural

issues will likely become the standard for mass arbitration claims.

It is unclear whether there is much appetite, or whether courts would enforce, alternative structures, such as multidistrict litigation-type processes or forced bellwethers.[7]

By altering the requirement of an individual merits determination, these structures are potentially less faithful to the Supreme Court's vision of arbitration as a bilateral, individual form of dispute resolution, as laid out in its AT&T Mobility LLC v. Concepcion decision.[8] This may be why AAA and JAMS have not adopted these structures.

Further, both the Federal Arbitration Act and many state arbitration codes have provisions permitting a court to appoint a new arbitrator if the parties' selected arbitrator is unable or unwilling to arbitrate the claim.

For mass arbitrations where the selected forum has no mass arbitration procedures, insufficient arbitrators to hear the claims, or application of the provider's existing procedures would be impossible or impractical across thousands of cases, parties may seek to have the court appoint the AAA or JAMS to administer the mass arbitration under the reasoning that the agreed-upon arbitration method has failed.[9]

Finally, now that both major arbitration administrators have dramatically altered the fee structure associated with mass arbitration filings, companies thinking about strategically defaulting on their fee obligations must strongly consider how that will be perceived.

Courts have never been sympathetic to companies looking to evade their arbitration obligations, but may be even less likely to tolerate this when a company refuses to pay a relatively low flat initiation fee and forces consumers to move to compel arbitration en masse.

Once a process arbitrator or procedural administrator is appointed, if companies do not like the rulings, they will be hard-pressed to take their ball and go home in the middle of a game they already started playing.

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[1] https://www.jamsadr.com/mass-arbitration-procedures.

[2] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) and Epic Systems Corp. v. Lewis, 823 F.3d 1147.

[3] See e.g., Abernathy v. Doordash Inc., 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020); Adams v. Postmates Inc., 414 F. Supp. 3d 1246, 1254 (N.D. Cal. 2019), aff'd, 823 F. App'x 535 (9th Cir. 2020).

[4] Uber Tech. Inc. v. American Arb. Assn. Inc., 204 A.D.3d 506, 510 (N.Y. App. Div. 2022).

[5] For our firm's previous comment on these rules, please see: https://www.law360.com/articles/1789938/changes-to-note-in-new-aaa-mass-arbitration-rules.

[6] https://www.jamsadr.com/blog/2024/mass-arbitrations-the-new-landscape-of-dispute-resolution-and-its-challenges.

[7] See Heckman v. Live Nation Entertainment Inc., 2023 WL 5505999, at *10-18 (C.D. Cal. 2023) (finding that mass arbitration protocol in terms of use as well as bellwether procedures in arbitration provider's rules to be procedurally and substantively unconscionable); MacClelland v. Cellco Partnership, 609 F.Supp.3d 1024, (N.D. Cal. 2022) (finding mass arbitration protocol in terms of use that required serial bellwethers of individual claims to be substantively unconscionable).

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

[9] See Cal. Civ Pro Code § 1281.6; N.Y. CPLR 7504.