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# Mass Arbitration Has Changed the Calculus for Terms of Use

Caren Decter and Peter Augustin Devlin

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Mandatory arbitration agreements and class action waivers are ubiquitous in consumer-facing online terms of service. Since the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), the pairing of a mandatory arbitration clause with a class action waiver has been considered the single most valuable term a consumer-facing company could have in its online terms. It converts potentially existential class exposure into separate, individual proceedings that plaintiffs' firms have (until recently) little economic incentive to bring. It offers speed, confidentiality, and control over forum. Until recently, it was, by every measure, widely considered a win for the company.

But that calculus has changed. The rise of mass arbitration—coupled with a wave of judicial and legislative pushback against overbroad arbitration provisions—has forced companies to reassess a question most had stopped asking: Should we include a mandatory arbitration provision at all? The coordinated filing of thousands of individual arbitrations generates tremendous exposure to filing and administrative fees charged by the arbitral forum. For a meaningful share of consumer-facing companies, the answer in 2026 is no longer an obvious yes.

## The Mass Arbitration Tactic and the Exposure

Mass arbitration is a coordinated response to the class action waiver architecture that *Concepcion* legitimized. By advertising for clients on social media, a plaintiffs' firm can engage thousands of potential claimants to file identical arbitration demands simultaneously against a common defendant—alleging violations of various consumer protection statutes.

The American Arbitration Association's ("AAA") most recent public data confirms the scale of this mass arbitration trend. In the reporting period ending in 2025, the AAA received 82 consumer mass arbitrations covering more than 247,000 individual filings. *Mass Arbitration in Transition: What 2025 Data Reveals About a Shifting Landscape*, Am. Arb. Ass'n (2025). Only a fraction, roughly 10 percent, of those individual claims advanced past the initial stage. The pattern is consistent with a tactic driven by fee leverage rather than the merits.

What creates leverage is simply the number of claimants, not the underlying merits of the claims asserted. Under the fee schedules of the major consumer arbitration providers, each individual demand triggers an initial administrative fee borne primarily by the company. Without mass arbitration protocols in place, companies can face millions of dollars in filing and administrative fees—regardless of the underlying merits of the claims asserted. Moreover, in California, a company can face a litany of sanctions, including evidentiary or terminating sanctions, if it does not pay the required arbitration fees within 30 days of the invoice due date. Cal. Civ. Proc. Code §§ 1281.97–.98. The leverage that this provides plaintiffs cannot be overstated, and it creates significant pressure for companies to settle untested or frivolous claims.

Plaintiffs' firms have largely focused their mass arbitration efforts on companies with predictable characteristics:

- a large U.S. consumer base,
- a recurring or subscription relationship with consumers that generates uniform claims,
- a high-visibility brand that supports claimant recruitment, and
- a business model that intersects with consumer protection statutory regimes.

The claims are typically based on the use of website-tracking technologies, the collection of biometric information, subscription auto-renewal practices, telecommunications marketing, and drip pricing and reference pricing—as there are typically large numbers of similarly situated consumers subject to these practices.

## Mixed Judicial Reaction to Mass Arbitration

When the first wave of coordinated mass arbitration filings hit, defendants faced with multimillion-dollar fee invoices looked for ways to escape their own mandatory arbitration agreements. The first response from courts was that companies had drafted the arbitration agreements, benefited from them for years, and could not now complain when plaintiffs' counsel flipped those same agreements against them.

*Abernathy v. DoorDash* is the paradigmatic example of this early judicial response. 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020). There, approximately 6,250 DoorDash couriers, represented by the same plaintiffs' firm, simultaneously filed individual arbitration demands with the AAA alleging misclassification under the Fair Labor Standards Act and California labor laws—

triggering $12 million in AAA filing fees that DoorDash was obligated to pay. When DoorDash refused to pay, citing purported deficiencies in the filings, the AAA closed the files, and the couriers moved to compel arbitration. Judge Alsup enforced DoorDash's arbitration agreement against DoorDash, observing that he would not "bless[]" what he viewed as DoorDash's "hypocrisy" in trying to avoid those fees by resisting arbitration.

More recently, however, courts have been faced with situations where plaintiffs' firms clearly overreached by filing arbitration demands with little or no evidence the claimants had valid claims or entered an arbitration agreement. In such situations, courts have refused to force companies to pay millions of dollars in initial filing fees for potentially "phantom plaintiffs"—that is, supposed claimants that either do not exist or never visited the site. Three appellate decisions bear particular attention.

In *Wallrich v. Samsung Electronics America, Inc.*, the U.S. Court of Appeals for the Seventh Circuit reversed a district court order compelling Samsung to pay approximately $4 million in initial filing fees in a Biometric Information Privacy Act mass arbitration and held that plaintiffs' counsel must, as an evidentiary matter, establish that each individual claimant actually assented to the underlying arbitration agreement. 106 F.4th 609, 620 (7th Cir. 2024). A spreadsheet of names and a declaration that they were customers were not sufficient. The court's holding thus shifted a critical burden onto the plaintiffs' bar, helping combat the phantom plaintiff problem.

In *Frazier v. X Corp.*, the U.S. Court of Appeals for the Second Circuit joined the U.S. Courts of Appeal for the Third, Fifth, Ninth, and Eleventh Circuits in holding that a district court cannot intervene mid-arbitration to compel a party to pay disputed fees under section 4 of the Federal Arbitration Act. 155 F.4th 87, 101 (2d Cir. 2025). The holding helps prevent the plaintiffs' bar from seeking to use judicial coercion in a provider-level fee dispute.

Most recently and consequentially, the Seventh Circuit in *Bernal v. Kohl's Corp.* affirmed the denial of a petition to compel arbitration where Kohl's had refused to register its arbitration agreement with the AAA, and the AAA had, pursuant to its own rules, terminated the proceedings before imposing fees. 174 F.4th 573, 581 (7th Cir. 2026). The court held that Kohl's non-registration was not a "refusal to arbitrate" within the meaning of the Federal Arbitration Act ("FAA") because the arbitration had started and ended in a manner the arbitration agreement contemplated. For a company willing to take an aggressive stance, *Bernal* offers an off-ramp from mass arbitration exposure, at least in the Seventh Circuit.

While these decisions have materially improved the situation since 2022, their limits deserve equal emphasis. *Bernal* was a 2–1 decision from a single circuit, and courts elsewhere may not

follow the majority's reasoning. A spirited dissent in *Bernal* argued that the majority had created a "get-out-of-arbitration-free" card. 174 F.4th at 586 (Kolar, J., dissenting). *Wallrich* likewise represents the Seventh Circuit's approach, and it is most powerful where plaintiffs are trying to compel a company to pay arbitration fees in a judicial proceeding; it does less to blunt the initial fee exposure that arises at the provider level.
Finally, *Frazier* addresses only the question of mid-arbitration fee compulsion and does not resolve underlying fee-allocation disputes.

## Mass Arbitration Provisions: Only a Partial Solution for the Problem

The defense bar's contractual response to the mass arbitration tactic has been the "mass arbitration provision," which is a suite of clauses providing for batching; staggered fee schedules; coordinated procedural calendars; and, in some no-longer-favored iterations, bellwether adjudications with preclusive effect.

In parallel, the major arbitration providers have restructured their rules and fee schedules. The AAA introduced its Mass Arbitration Supplementary Rules in January 2024, replacing per-case filing fees in mass arbitrations with a single initiation fee and creating a Process Arbitrator to resolve threshold administrative disputes. Am. Arb. Ass'n, Mass Arbitration Supplementary Rules (Apr. 1, 2024). JAMS followed in May 2024 with its own mass arbitration procedures, appointing a Process Administrator and, notably, applying only where the parties have expressly opted in. JAMS, Mass Arbitration Procedures and Guidelines (May 1, 2024). And National Arbitration and Mediation ("NAM") has developed a batching-based mass-filing procedure that is widely used. Nat'l Arb. & Mediation, Mass Filing Supplemental Dispute Resolution Rules and Procedures (Oct. 1, 2024).

These reforms have blunted the fee-leverage tactic but have not eliminated it. Two key problems remain.

First, mass arbitration provisions are enforceable only to the extent courts permit. In *Heckman v. Live Nation Entertainment, Inc.*, the Ninth Circuit affirmed the invalidation of Ticketmaster's arbitration agreement as unconscionable and unenforceable under California law. 120 F.4th 670, 689 (9th Cir. 2024). The court's critique focused on four features of the New Era ADR rules incorporated into the Ticketmaster terms: a bellwether protocol with preclusive effect for nonparticipating claimants, procedural limitations including the absence of discovery, an asymmetric right of appeal, and arbitrator-selection provisions. The court held that, with this set of terms—particularly the preclusive bellwether protocol—California unconscionability law was not preempted by the FAA, and the agreement was unconscionable.

Post-*Heckman* district court decisions have distinguished agreements that use batching rather than bellwether adjudication. *See, e.g.*, *Kohler v. Whaleco, Inc.*, 757 F. Supp. 3d 1112, 1128 (S.D. Cal. 2024) (distinguishing *Heckman* because "[b]y contrast, the Batch Arbitration Provision at issue here does not mention bellwether proceedings, and Plaintiff has not raised any concern about a lack of notice or opportunity to be heard in the batch arbitration proceedings"); *see also* *Jones v. Starz Ent., LLC*, 129 F.4th 1176, 1182 (9th Cir. 2025) (observing that a mass arbitration provision "implicat[ed] none of the concerns" present in the mass arbitration provision in *Heckman*). The batching-based templates now in circulation are meaningfully more defensible than the Live Nation / New Era model. But *Heckman* establishes a doctrinal ceiling on how aggressively a mass arbitration provision may be drafted.

Second, even where mass arbitration provisions are enforceable, the arbitral fora still charge substantial administrative fees. A company facing a mass arbitration will pay per-case or per-batch fees for cases surviving the provider's threshold review, plus the fully allocated cost of merits arbitration for any claims that reach that stage. If, for instance, a plaintiffs' firm files 10,000 claims, and the arbitral provider batches them into 100 batches, or 100 claims, at $1,400 per batch, initial administration fees alone reach $140,000—before panel-preparation and final-administration fees, which apply on the same per-batch basis, and before any hourly arbitrator time. So, while mass arbitration provisions do blunt exposure, they are no panacea.

## A Second Front: The "Infinite Clause" Problem

Mass arbitration is not the only tactic that the plaintiffs' bar is using to flip the playbook on mandatory arbitration provisions. A parallel movement seeks to limit how far arbitration clauses may reach in the first place.

The catalyst for this movement was the widely publicized attempt by Walt Disney Parks and Resorts to compel arbitration of a wrongful-death claim on the ground that the decedent's spouse had, years earlier, accepted an arbitration provision when signing up for a Disney+ streaming trial. *See* *Disney Drops Disney+ Arbitration Agreement After Public Backlash*, ABA (Aug. 29, 2024). Disney ultimately withdrew its motion in the face of public backlash, but the episode crystallized a concern that many observers had already been noting: the incorporation of an arbitration clause into a consumer contract governing a specific transaction later being invoked to compel arbitration of claims wholly unrelated to that transaction.

California responded with Senate Bill 82, codified at California Civil Code § 1670.15 and effective January 1, 2026. Cal. Civ. Code § 1670.15. The statute limits "dispute resolution terms and conditions" in consumer contracts to disputes concerning "the use, payment, or provision" of the specific good or service covered by the contract; declares "infinite" clauses reaching beyond that scope void as against public policy; and instructs courts to construe the provision broadly in favor of consumer protection. Its drafters framed the provision as a neutral, contract-scope rule of general applicability in an attempt to avoid FAA preemption. The statute's central and unresolved legal vulnerability is precisely that preemption question. The Ninth Circuit's decision in *Chamber of Commerce of the United States v. Bonta*, 62 F.4th 473, 490 (9th Cir. 2023) striking Assembly Bill 51, which prohibited mandatory arbitration in employment contracts, together with the preemption doctrine from *Concepcion* and its progeny furnish substantial arguments that section 1670.15 targets arbitration for disfavored treatment. No court has yet resolved the question, so companies cannot assume the statute will be preempted.

Other jurisdictions are watching. Whether or not section 1670.15 survives, the legislative impulse likely will not disappear. Companies drafting terms of service today must plan for a world in which their arbitration provisions may not reach as broadly as the plain text suggests.

## Mandatory Arbitration Agreements: Are Companies Really Better Off?

This brings us back to where we began: Is the pairing of a mandatory arbitration agreement and class action waiver still worth having in consumer terms? That question no longer admits to an easy answer. While for most companies the benefits still outweigh the costs, that is not true for all.

A handful of high-profile companies have gone the other way. Amazon is the leading example. In 2021, after being served with roughly 75,000 individual arbitration demands from Alexa users, Amazon removed the mandatory arbitration provision and class action waiver from its consumer terms and consented to litigation in the state and federal courts of King County, Washington. That reversal was striking. It reflected a judgment that, in Amazon's particular fee posture at least, the mass arbitration exposure had surpassed the benefits.

But the Amazon path remains the exception. The general trend is to keep the arbitration provision and class action waiver in place, and to pair them with mass arbitration protocols designed to withstand the kind of scrutiny reflected in *Heckman*. Those protocols now have predictable characteristics: bellwether procedures, in which a small number of representative cases are resolved first; evidentiary preconditions, requiring claimants to come forward with some threshold showing before arbitration proceeds; affirmation requirements, under which the claimant or counsel must certify the authenticity of the demand; and batching protocols, which group substantially similar cases rather than administering each demand individually. These tools are not mutually exclusive, and companies increasingly combine them.

Mandatory arbitration provisions and class action waivers are still valuable, but only when paired with a thoughtfully drafted mass arbitration protocol that reflects the current doctrinal landscape. Companies that have not revisited their arbitration language since the pre-mass-arbitration era are operating in an outdated paradigm. They should reassess now.