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BLOG

Courts Considering New Defense to Mass Arbitrations

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In recent years, large companies have faced an onslaught of "mass arbitrations," a tactic used by the plaintiffs' bar to leverage against valid class-action waivers and arbitration provisions in consumer agreements. Specifically, the plaintiffs' bar tries to regain the posture of large-scale litigation by filing tens of thousands of cookie-cutter, individual arbitration demands against a single corporate defendant, forcing the defendant to front millions of dollars in arbitral fees and thus creating pressure for a windfall settlement.

Defendants have found little recourse in the courts or legislatures—in fact, California recently passed laws that set strict penalties for nonpayment of arbitration fees. *See* Cal. Code Civ. P. §§ 1281.97–1281.99. But defendants have started hitting back, and several courts are currently weighing the validity of new defense strategies.

One promising strategy is to challenge the sufficiency of plaintiffs' evidence that a valid arbitration agreement exists —essentially flipping the usual script of arbitration disputes. This defense is playing out in two similar cases that are working through the Seventh Circuit Court of Appeals: *Wallrich v. Samsung*, Case No. 22-cv-5506 (N.D. Ill.), and *Hoeg v. Samsung*, Case No. 23-cv-01951 (N.D. Ill.).

In *Wallrich*, nearly 50,000 consumers filed arbitration demands against Samsung with the American Arbitration Association, resulting in an assessment of over $4 million in arbitration fees, which Samsung refused to pay. The consumers filed a petition in federal court to compel arbitration, which the court granted, ordering Samsung to pay the arbitration fees. Samsung's appeal is currently pending in the Seventh Circuit. During the recent oral argument, the panel suggested that plaintiffs' only evidence of valid arbitration agreements is a "raw spreadsheet" containing a list of the consumers who were solicited by counsel to participate in the mass arbitration. Critically, the spreadsheet was unsworn and was not backed up by individual sworn declarations—which is unsurprising, given the large number of plaintiffs. The panel signaled its view that the existence of valid arbitration agreements should be substantiated "in a form that would be admissible in federal court as evidence."

In contrast with *Wallrich*, the plaintiffs in *Hoeg* submitted sworn declarations for 672 of the 806 consumers in that case. The district court expressly found such evidence was sufficient, and that appeal is also pending. Even if the Seventh Circuit concludes that the *Hoeg* declarations are sufficient, the viability of mass arbitrations may be curtailed if courts impose a requirement to obtain sworn declarations from each consumer. And while the plaintiffs' bar has urged courts to defer to arbitral bodies on these evidentiary issues, the Supreme Court of the United States' recent

ruling in *Coinbase, Inc., v. Suski*, 144 S. Ct. 1186, 1191 (2024), affirmed that courts—not arbitrators—must decide whether the parties agreed to arbitrate.

KEY TAKEAWAY:

- Companies facing mass arbitrations should insist that claimants provide admissible evidence of valid arbitration agreements for each consumer.

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Authors

Kevin Simpson

Linda Greene

Mia Uhunmwuangho

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