Lowenstein Sandler's Insurance Recovery Podcast: Don't Take No For An Answer

Episode 82:
Mass Arbitrations: Who Pays? Part I

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Lynda Bennett: Welcome to Don't Take No for An Answer. I'm your host, Lynda Bennett, Chair of the Insurance Recovery Group here at Lowenstein Sandler and today I'm very pleased to be joined by a nice cross-section of team Lowenstein to discuss an emerging trend that touches upon several different practice areas within the firm, and that is the emergence of mass arbitrations and mediations blowing out of the class action space.

Today, I'm very fortunate to have with me Judge Freda Wolfson, former Chief Judge of the United States District Court for the District of New Jersey and Chair of Lowenstein's Alternative Dispute Resolution Group. I've also got Michael Kaplan, who's a partner in our white collar group, and also welcome to Ruth Zimmerman, who's an associate in our litigation department. So welcome team Lowenstein. So happy to have you here tonight.

Michael Kaplan: Thanks, Lynda.

Lynda Bennett: All right, well let's jump right in and let's have Ruth set the table for us in terms of what it is, mass arbitration, and how has it become such a hot topic in litigation?

Ruth Zimmerman: Thanks, Lynda. So mandatory arbitration clauses were intended to be a head fake by the defense bar in order to defeat class actions. But litigation funders appear to have out head faked the defense bar by using high arbitration bills to add pressure to defendants. Litigation funders have been able to use things like targeted advertising, automated claims filing systems, data aggregation, and even artificial intelligence to develop their client rosters, allowing them to file up to thousands of individual arbitration claims at once in what is considered a mass arbitration.

Now, typically claimants in the mass arbitrations are individual consumers, employees, or independent contractors; individuals whose claims alone wouldn't pose significant threats. But when there are hundreds or thousands

of those claims filed at once, defendant companies face crippling arbitration fees. For example, recently Uber faced over 31,000 individual arbitration demands by Uber Eats customers, which resulted in $92 million in case management and other administrative fees charged by American Arbitration Association. Uber was stuck with the bill.

Keep in mind that beyond just the initial filing fees, the case management fees and arbitrator compensation fees can both be in the thousands for each case. With that being said, there are a lot of issues to unpack when it comes to mass arbitrations.

Lynda Bennett: Thanks for setting the table so beautifully. It sounds like we've got big bills. We've got ChatGPT potentially putting all of us out of business because that's where they're sourcing all of their potential plaintiffs here. Let's start to dig into some of the issues with these mass arbitrations and mediations and the impact that it's having on companies.

Let me start with you, Mr. Kaplan. From the perspective of companies that are responding to these mass arbitration demands, is it an effective strategy?

Michael Kaplan: Absolutely. No question about it's an effective strategy. The mass arbitration, similar to the mass work context, is giving claimants the ability to group themselves in with other meritorious claimants. And not to suggest anyone does or doesn't have a meritorious claim, but the level of scrutiny that occurs when it's a one-on-one type basis. Doesn't occur when what we're dealing with is one on 1,000, one on 5,000.

So without question, the strategy works particularly as we'll get to the way that the fee structure is set up. You get the expeditious nature of arbitration, you get the relaxed and limited discovery obligations, and now you have limited scrutiny when you are in with a group of a 1,000 of your similarly situated co-plaintiffs.

Lynda Bennett: Yeah. So we're here on Don't Take No for An Answer, which is an insurance recovery podcast, so I am duty bound to mention that that's an awfully ginormous bill that gets presented right out the gate for having the mass arbitration. Something that stood out to me, Mike, when you talked about meritorious claims or not, is very interesting because insurers only like to have to pay claims that actually have merit associated with them and these very large fees have become a problem because they're due at owing right up front.

Michael Kaplan: Well, AAA, Lynda, as you know, certainly does not take no for an answer when it comes time to pay their fees, so we have no worries there.

Lynda Bennett: Who has to pay those fees?

Michael Kaplan: Well, right now, the way AAA rules are set up is it's the companies, because they fall under these revised ... particularly in the employment context, there's revised rules both JAMS and AAA have in so far as in certain classes of cases when you check the box at the beginning, the bill shifts to the other

side. In all but very limited circumstances can you get it to be 50/50. So in a lot of cases, the defending company is the one footing the entire bill.

Lynda Bennett: So Judge Wolfson, this sounds like your phone's ringing off the hook these days. Is this music to your ears? You loving that?

Judge Wolfson: Actually, I've been doing several now and I have a couple more scheduled of mass mediations actually in the consumer area, and what I think is an emerging area of the law, and you're going to find actually cases being filed, but most of them are ending up in arb because there's an arbitration [inaudible 00:05:44] and that's in the Video Protection Privacy Act. All that Meta stuff where you go on and you stream a movie and you don't realize that through Meta your personal streaming habits are perhaps being communicated.

So I've seen those being filed. I've had several of them already, and it's interesting because I will tell you one of the things that I have noticed recently is that companies are changing their agreements with the consumers and they're requiring batching that could go on for years actually till you ever get your arbitration heard. So you've got batching that's going on through some of the rules that are being amended recently in fact. National Arbitration and Mediation amended its rules I think this last summer. AAA has amended its rules to deal with mass arbs and that was just the last few months.

But companies themselves are doing it and then the question will become though, if you're dealing with consumers that were there a couple of years ago, can you impose this new agreement on them? But there's lots going on. I'm talking largely at the moment from the mediation aspect.

Lynda Bennett: But I wanted to ask you about that because I think you touched on it, which is ... and then I'm going to come back around to you too, Mike, but you touched on it that the mass arbitration came out of the contractual requirement. So my first question to you is how are these being framed now as mass mediations? Is it the parties are willingly agreeing to do that or are you starting to see a change in and tweaking of the contract?

Judge Wolfson: Well, what I've seen so far ... the ones that I have had because they're operating under really altered agreements, were just the parties agreeing to mediate in advance. So you've got the first arbitrations being filed, the threat of tens of thousands, hundreds of thousands more coming. And while that's happening, the parties talk and say, "Let's put a stop on this. So let's see if we can mediate these claims as a mass mediation." And that's how I've been getting them.

Now, I do know AAA has in their new rules a global mediation requirement. You could also have in your agreement require mediation before you can go to arbitration. So there are different ways of doing it, but the ones that I've been handling have been voluntarily entered into between the company's and the law firm that's representing these many, many, and that's what they do. They sign them up, you know. Go online and look for people to sign up and there you are.

Lynda Bennett: And Mike, isn't this interesting? And I think Ruth touched on it at the top. Didn't the companies think that they had come up with a brilliant way around class actions? Give me the companies' perspective on what they thought they were doing by including these arbitration clauses and how it's really backfired on them.

Michael Kaplan: Well, what they thought they were doing is that they were essentially controlling the forum and the confidentiality and in some senses what discovery was and was not permissible and creating a process which was meant to enable them to do as little as humanly possible in order to settle the claims. Judge Wolfson is exactly correct. All of these companies voluntarily put arbitration provisions into the respective contracts. They paid very, very talented lawyers from very, very, very talented law firms in order to draft these extensive contracts and stuck those arbitration provisions in.

And as we know, arbitration provisions are simply just that. They're just born out of contract. And you can contract for as much or as little as you humanly want. You can contract for where you want the arbitration. If you like AAA, you can make it AAA, you can make it JAMS. You can limit the discovery. You can do anything you want in an arbitration contract. And what the companies thought they were doing was, is that they were creating an alternative dispute resolution mechanism that avoided the public specter of a trial, which we all love, into a private setting in which it was going to be resolved in anywhere from six to 12 months as opposed to ... And again ... no aspersions, Judge, on any particular court here in New Jersey, but instead of 18 to 36 months-

Judge Wolfson: The good news is I'm retired, so I'm not a representative.

Michael Kaplan: That's right. But the reality is what they actually created is a Pandora's box that now the plaintiff's bar has to figure out a way to exploit. And we're coming back around now to try to re-level the playing field.

Lynda Bennett: I think what happened was the class action defense lawyers had what they thought was an aha moment and a way to close the gate. And as you said, there were many brilliant lawyers fine-tuning that contractual language, never in a million years thinking that lit funders, ChatGPT, and data aggregators were going to come and absolutely blow that up in their face. And Mike, I want to keep hitting on your point because it's really what resonates to me as an insurance lawyer, which is they were doing that, and the class action defense lawyers thought they were going to be saving a lot of money not having these years long litigation and all the rest and compacting this down. And instead, what you now have is that $91 million bill that Ruth was talking about with Uber that is due and owing 30 days after the arbitration notice is filed.

And I think that the insurance industry is quaking in its boots right now because guess what? Those are covered defense costs. When that arbitration bill comes due, it is a covered defense cost. And as I said before, carriers only like to pay for meritorious claims and when that bill comes due 30 days after the arbitration notice has been filed, carrier has to pay it.

And what I see coming down the pipe for policy holders as a result of that is you may start to see changes in the definition of loss, the definition of defense costs. You may start to see sub-limits being put on these policies for arbitration costs up to X dollars and no more. So this is a really interesting multifaceted problem that is presenting itself. Disruptors are here.

So let's talk just for a few minutes about whether each of you, Judge and Mike, from each of your perspectives, do you think that it is better to have that mandatory mediation requirement first or have the optionality to choose after you see what claims are going to be made?

Judge Wolfson: Well, I am a proponent of doing mediation early on in these cases, but with a caveat. Well, first of all, in the cases that I've been getting, some of these arbitration notices have been filed, but they haven't gone in and filed all of them where the answers yet do, which is when all the costs start being incurred for the companies. And they'll agree to a voluntary stay for the period that they're going to mediate with me so that the costs are not incurred.

The problem here is you have to have very well-educated both consumer counsel; and I'm going to talk from the consumer end more than an employment end. I think that's more prevalent in the consumer context than employment. But that you have to have educated consumer counsel as well as corporate counsel because what is often going to happen is who's really got a claim? And so for instance, in the Video Privacy Protection Act situation, you have to have actually had a streaming service where actually you were the one who paid for it and you had to have a Facebook account or whatever it might be within that, that could be shared.

So how did the council know for a fact that you had the streaming service that you paid for? And there's a lot of legwork to be done. And so to be prepared and have a meaningful mediation, because we've gone back and forth on this, where the company may know who are our customers. And a lot of those people on your list are not my customers. So you need some education before you can have effective mediation to know are we talking about a 100,000 claimants or are we talking 10,000 claimants?

Lynda Bennett: Yeah.

Judge Wolfson: But I do think to do that kind of prep, which you're going to have to do for the arbitration on every one of these anyway, I think doing mediation first makes sense is what I'm seeing is happening.

Lynda Bennett: Terrific. And Mike, what about you? You thought you had the head fake and it blew up. What's your preference? Would you rather have we're go on arb first and decide later you'll consent to something less than arb? Or are you thinking that your clients are now going to start to take a more careful look at their current arbitration clauses and maybe do some rewriting?

Michael Kaplan: Well, I think there's definitely a need for rewriting, but that's a separate question in order to try to minimize the exposure. I happen to think that from the defense perspective, forcing the plaintiff's bar to do work is always the best strategy. And so to the extent that Ms. Judge Wolfson was just identifying figuring out who the real clients or otherwise are in any context, what you have to do is get a little bit of work on the plaintiff's bar side. A little more than just check the petition box and type in the name and go from there.

So I certainly am a proponent of mediation in these contexts, but I do think from a company perspective, they're best served by forcing people to really come forward, do a little work, put a little information out there, then sit down and resolve it. Because otherwise, if you're mediating it first, the only real question is just how big of a check you're writing and who it goes to is not really all that important. But that's just my point of view.

Judge Wolfson: Well, I think the other thing obviously in a mediation is I require a pre-mediation memo that's pretty substantial. And in those, what I am finding is the company will come back and tell me how many they think are really in this group as opposed to what the plaintiff has said. And it gives us at least some talking points of where are we and what is the reality here.

Lynda Bennett: That's actually a great place for us to put a pin in it. I think we've done a really excellent job in session one here of this setting the table and giving some context of what mediation and mass arbitration is. And when you come on back next time, we're going to talk about what is that work that you need to do? What is the arbitrator or mediator going to require to have a successful alternative dispute resolution process in place?

So I want to thank Judge Wolfson, Mike Kaplan, Ruth Zimmerman for joining us today to talk about this very interesting topic, but there's a lot more to unpack, so come on back and see us next time and we'll give you some practical tips on how to do this well.

Thank you all for joining me today.

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