SMALL CLAIMS, BIG MASS: MASS ARBITRATION AND DATA PRIVACY PROTECTION

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I. MASS ARBITRATION: INTRODUCTION

A. *Introduction*

Alternative dispute resolution ("ADR") provides disputants the opportunity to utilize a dispute resolution process that fits their needs. Those needs could be related to the dispute itself, access to justice, and/or the relationship between the parties moving forward. Intriguingly, the move towards use and acceptance of ADR mechanisms has led to a collective backlash against certain ADR processes deemed unfair. Specifically, arbitration between consumers and companies has developed a bad reputation—corrupted by large corporations who have sought limited liability against individual claims by squashing the potential for class-action lawsuits. Mass arbitration has been a response to an obtrusive, unresponsive, and institutionalized version of arbitration adopted by the Supreme Court in lieu of class-action lawsuits and multi-district litigation ("MDL"). This article briefly describes the advent of mass arbitration and suggests that this novel dispute resolution mechanic could be implemented to further data privacy protections for individuals seeking a private right of action. Until more states have robust data privacy laws, mass arbitration may be the best option for individuals seeking remedies for data privacy infringements.

B. *Background on Mass Arbitration*

For purposes of this article, mass arbitration refers to the aggregation of arbitration claims *en masse* to put pressure on a defendant to settle with the individual claimants.[1] In 2018, a group of plaintiff's firms and attorneys[2] brought mass arbitration to the forefront of ADR when they filed thousands of arbitration demands against large corporations—corporations such as Uber, Lyft, Chipotle, CenturyLink, DoorDash, Family Dollar, Peloton, Intuit, Chegg, and Amazon.[3] Mass arbitration was a backlash against the perceived unfairness of arbitration and its utilization by corporate defendants who

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[1] *See generally* J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022).

[2] *Id.* at 1323. Keller Lenkner LLC (Now Keller Postman), Z Law Group (Maryland consumer firm), and Kent Williams (a Minnesota lawyer).

[3] *Id.* at 1323–24.

leveraged arbitration's relatively expensive filing fees and a claim's relatively small size to inhibit a potential claimants ability to recover damages or hire council willing to pursue their claims.[4]

1. *ORIGINS*

Originally, pre-dispute arbitration agreements were intended to allow businesses, of comparable bargaining power, to negotiate and agree upon a dispute resolution mechanism other than litigation, primarily for efficiency reasons, culminating in Congress's enactment of the Federal Arbitration Act ("FAA") in 1925.[5] Over time, the guiding principle of "parties with *comparable* bargaining power" dissipated and, with the support of the Supreme Court and lawmakers, led to the usage of unilateral arbitration agreements by businesses in contracts with consumers.[6] Consumer arbitration clauses have not only been enforced by the Supreme Court, but have also been used to thwart class-action filings by consumers with similar complaints and disputes. In *AT&T Mobility, LLC vs. Concepcion*[7], the Concepcions filed a claim against AT&T for fraudulently advertising a free phone whilst charging them sales tax on the phone; their claim was later compiled into a putative class-action suit.[8] The Court ruled that the class-action waiver in the contract was binding and enforceable citing the purpose of the FAA was to promote the enforcement of arbitration provisions and any use of class-wide arbitration would directly interfere with the purpose of arbitration.[9] Since *Concepcion*, the Court has enforced the use of class-action waivers in arbitration agreements and now "forced arbitration agreements" are the norm in many consumer contracts with large corporate businesses.

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[4] Keller Postman, *What is Arbitration? Potential Challenges of Arbitration for Plaintiff*, KELLER POSTMAN, https://www.kellerpostman.com/what-we-do/arbitration/.

[5] Chao Liu & Adam Schwartz, *Stop Forced Arbitration in Data Privacy Legislation*, EFF: DEEP LINKS (Apr. 19, 2022), https://www.eff.org/deeplinks/2022/04/stop-forced-arbitration-data-privacy-legislation.

[6] *Id.*

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

[8] 563 U.S. 333, 337 (2011).

[9] *Id.* at 344.

C. *Elements of Mass Arbitration*

Mass arbitration is a dispute resolution mechanism consisting of four interrelated elements: 1) leveraging arbitration fees and fee-shifting provisions in arbitration agreements; 2) arbitrating individual claims—or credibly threatening to do so—to impose asymmetric costs on the defendants; 3) selecting higher-threshold-value individual claims (relative to class-action claims) and; 4) generating aggregate settlements (within the arbitration process as opposed to other settlement processes defendants might prefer) from a mass of individual claims.[10] This section will briefly elaborate on each element to show whether these elements are sufficient for applying mass arbitration in the data privacy context.

1. *LEVERAGING ARBITRATION FEES AND FEE-SHIFTING PROVISIONS*

For mass arbitration to be a viable dispute resolution mechanism, it needs the ability to recoup its initial spending costs. Mass arbitration requires a firm to front an enormous amount of cash to cover relatively expensive arbitration filing fees. This is economically viable for certain enterprising firms due to the fee-shifting provisions operating in defendants' arbitration agreements which allow plaintiff firms to leverage the massive amounts of filing fees to generate settlement pressure to an even greater magnitude than that produced by class certification.[11] With arbitrator costs and filing fees amounting to as high as $1,500 a claim, some corporate defendants have had to foot the bill for arbitration fees totaling in the tens of millions.[12] Generating settlement pressure through mass arbitration can occur at an even smaller threshold, with Chipotle agreeing to settle with only 150 arbitration cases.[13]

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[10] Glover, *supra* note 1, at 1340. These elements combine to form a "distinct form of dispute resolution with unique operation features, strategic elements, benefits, and risks."

[11] Glover, *supra* note 1, at 1340–41.

[12] Glover, *supra* note 1, at 1345–46. ("As of January 2019, Uber faced over $18 million in arbitration fees alone [citation omitted]. In October 2019…DoorDash refused to pay the $12 million it owed to the AAA.").

[13] Glover, *supra* note 1, at 1347.

2. *Threat of Arbitrating Individual Claims Imposes Asymmetric Costs on the Defendants*

Mass arbitration creates a more cost-effective claim procedure for potential plaintiffs. Instead of utilizing MDL or class-action lawsuits, mass arbitration "proceeds on the premise that plaintiffs can aggregate individual proceedings in a way that makes the claims economically viable—perhaps even more viable than class or otherwise consolidated proceedings."[14] These hundreds to even thousands of arbitration-demands force defendant companies to pay, in the aggregate, exorbitant filing fees or negotiate a settlement with the claimants.[15]

3. *Selecting Higher-Threshold-Value Claims*

Mass arbitration claims are usually higher than the threshold required for MDL or class-action claims due to the significant upfront investment required for mass arbitration in comparison to the economies of scale utilized by MDL and class action.[16] As a result, mass arbitration claims must be a higher dollar value for the claim to be economically viable for a firm to pursue.

4. *Generating Aggregate Settlements from Individual Claims*

Mass arbitration's final element involves the creation of an aggregate settlement that can pay out the other individual arbitration claimants. Unfortunately, access to the details of settlement agreements can be difficult to find. Claims and their settlement provisions are either protected by nondisclosure agreements, filed in a forum lacking a public record of settlement, or are settled prior to an arbitration filing.[17] Despite the lack of

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[14] Glover, *supra* note 1, at 1350.

[15] *See* David R. Singh, *Mass Arbitration: A New Wrinkle in an Old Problem*, LEXOLOGY (Jan. 19, 2022), https://www.lexology.com/library/detail.aspx?g=4e391897-03dd-4d57-9290-40a02e2457a0.

[16] Glover, *supra* note 1, at 1352.

[17] Glover, *supra* note 1, at 1355.

information, global settlements for mass arbitration claims do occur[18] and are a key, final element to mass arbitration and its viability as a dispute resolution mechanism.

II. DATA PRIVACY

This section will provide background on data privacy, its legal issues, and how mass arbitration can provide a right of private legal action for individuals living in states without comprehensive data privacy legislation. Data privacy refers to "an area of data protection that concerns the proper handling of sensitive data including, notably *personal data* [footnote omitted] but also other confidential data, such as certain financial data and intellectual property data."[19] There is a growing public awareness and frustration surrounding the use of an individual's personal data by companies—including the selling of personal data to third parties for market research, targeted advertising, and other purposes.[20] The rising clamor for more protections for personal data has led to a growth in the introduction and enactment of state data privacy laws.[21] Data privacy laws are "designed to protect vulnerable populations, prevent crime, and assure consistent digital functionality"[22] in an effort to prevent individuals and companies from

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[18] *See* Erin Mulvaney, *DoorDash Got Its Arbitration Wish, Costing Millions Upfront*¸ BLOOMBERG L. (Feb. 12, 2020), https://news.bloomberglaw.com/daily-labor-report/doordash-got-its-arbitration-wish-costing-millions-upfront (noting CoreLogic, a case in the Southern District of California settled with 160 real estate appraisers and Uber settled "a large majority" of 60,000 arbitration claims for between $146 million and $170 million).

[19] SNIA, *What is Data Privacy?*, SNIA (2022), https://www.snia.org/education/what-is-data-privacy#_ftn1.

[20] *See generally* Brooke Auxier et al., *Americans and Privacy: Concerned, Confused, and Feeling Lack of Control Over Their Personal Information*, PEW RESEARCH CTR. (Nov. 15, 2019), file:///C:/Users/aalfo/Downloads/Pew-Research-Center_PI_2019.11.15_Privacy_FINAL.pdf (explaining a majority of Americans are concerned about how their personal data is used by companies and more than 80% are concerned about the amount of personal information social media sites and advertisers know about them. About one-in-five Americans say they always or often read privacy policies before agreeing to them).

[21] *See* IAPP, US STATE PRIVACY LEGISLATION TRACKER: COMPREHENSIVE CONSUMER PRIVACY BILLS (2023), https://iapp.org/media/pdf/resource_center/State_Comp_Privacy_Law_Chart.pdf.

[22] DataGrail, *Importance of Data Privacy Laws Explained*, DATAGRAIL (May 24, 2022), https://www.datagrail.io/blog/data-privacy/importance-of-data-privacy-laws-explained/.

revealing or providing access to sensitive data by explicitly prohibiting certain types of data collection. At the time of writing, only five states have enacted and signed data privacy laws while seventeen states have either introduced or have a data privacy bill in committee.[23] Of the five states with enacted data privacy laws, only California provides for a private right of action for data privacy violations.[24] Even with enacted data privacy laws, mass arbitration remains an important dispute resolution mechanism for claimants seeking a private right of action for a data privacy breach. In the absence of comprehensive data privacy legislation, consumers who suspect or know of breaches and impermissible uses of their private data are vulnerable to forced arbitration clauses in online contracts. Claimants would then be unable to aggregate their claims by using MDL or class-action lawsuits and instead would have to rely on arbitrating each claim individually.[25]

III. MASS ARBITRATION'S APPLICABILITY TO DATA PRIVACY RIGHTS

In the absence of comprehensive data privacy legislation, mass arbitration is a dispute resolution mechanism capable of vindicating the rights of thousands of consumers and potential claimants who either suspect or know that a company has sold their private data without consent but are forced to engage in arbitration. The barriers to entry for mass arbitration are financially steep, requiring an enterprising and savvy firm to front the claim-filing fees for potentially thousands of claimants whilst collecting the buy-in of the claimants and their individual claims for a potential settlement. Leveraging the fee-shifting provisions could put the necessary pressure on companies to settle with claimants. While not sustainable in the long term, mass arbitration can fulfill the dispute resolution chasm until comprehensive data privacy legislation with its own dispute resolution or rights enforcement mechanisms are available in every state. Without a private right of action for data privacy breaches, forced arbitration clauses could compel consumers to

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[23] IAPP, *supra* note 21.

[24] IAPP, *supra* note 21 (noting only California's California Consumer Privacy Act and California Privacy Rights Act allow for private rights of actions limited to certain violations).

[25] *See* Liu & Schwartz *supra* note 5 ("People forced into arbitration do not get the protections or advantages that come with civil litigation. Without the ability to join similarly wronged consumers in a class action, an individual's case and its possible damages awarded becomes too small for most lawyers to offer representation.").

engage in a business-friendly arbitration forum or risk disengaging with that business entirely.[26]

IV. CONCLUSION

Mass arbitration is a new and novel dispute resolution mechanism that has the potential to vindicate private rights of action against defendants who violate consumer private data privacy rights but who force arbitration as the dispute resolution forum. Although the contours and long-term efficacy of mass arbitration remain unknown, its effect on forced arbitration clauses has shifted the power balance between individual claimants and large corporations through the removal of class-action waivers.[27] This novel dispute resolution mechanism will continue to serve an important function for realizing private rights of action for claimants subject to forced arbitration clause until more comprehensive data privacy laws with private rights of action are enacted—or until companies and the Supreme Court look more favorably upon class-action litigation and MDL over arbitration.

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[26] *See* David Lazarus, *Column: AT&T's new arbitration clause isn't doing you any favors*, L.A. TIMES (March 19, 2021, 5 AM), https://www.latimes.com/business/story/2021-03-19/column-arbitration-clauses (describing that AT&T's arbitration clause in service provisions is offered on a "take-it-or-leave-it" basis, effectively making a consumer choose between accepting the arbitration provision or forgoing internet access, phone service, cable TV, etc.).

[27] *See* Cecilia Y. Oh & Perie Reiko Koyama, *Retail Industry 2021 Year in Review: Retail Giant Drops Arbitration Clause—Is This the Right Move for Your Agreement?*, NAT'L L. REV. (Feb. 4, 2022), https://www.natlawreview.com/article/retail-industry-2021-year-review-retail-giant-drops-arbitration-clause-right-move. (Facing over 75,000 individual arbitration demands, Amazon announced it would remove forced arbitration clauses and class-action waivers from its online terms of service.).