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Mass Arbitration: Processing Claims; Managing and Securing Information; Resolving Underlying Disputes

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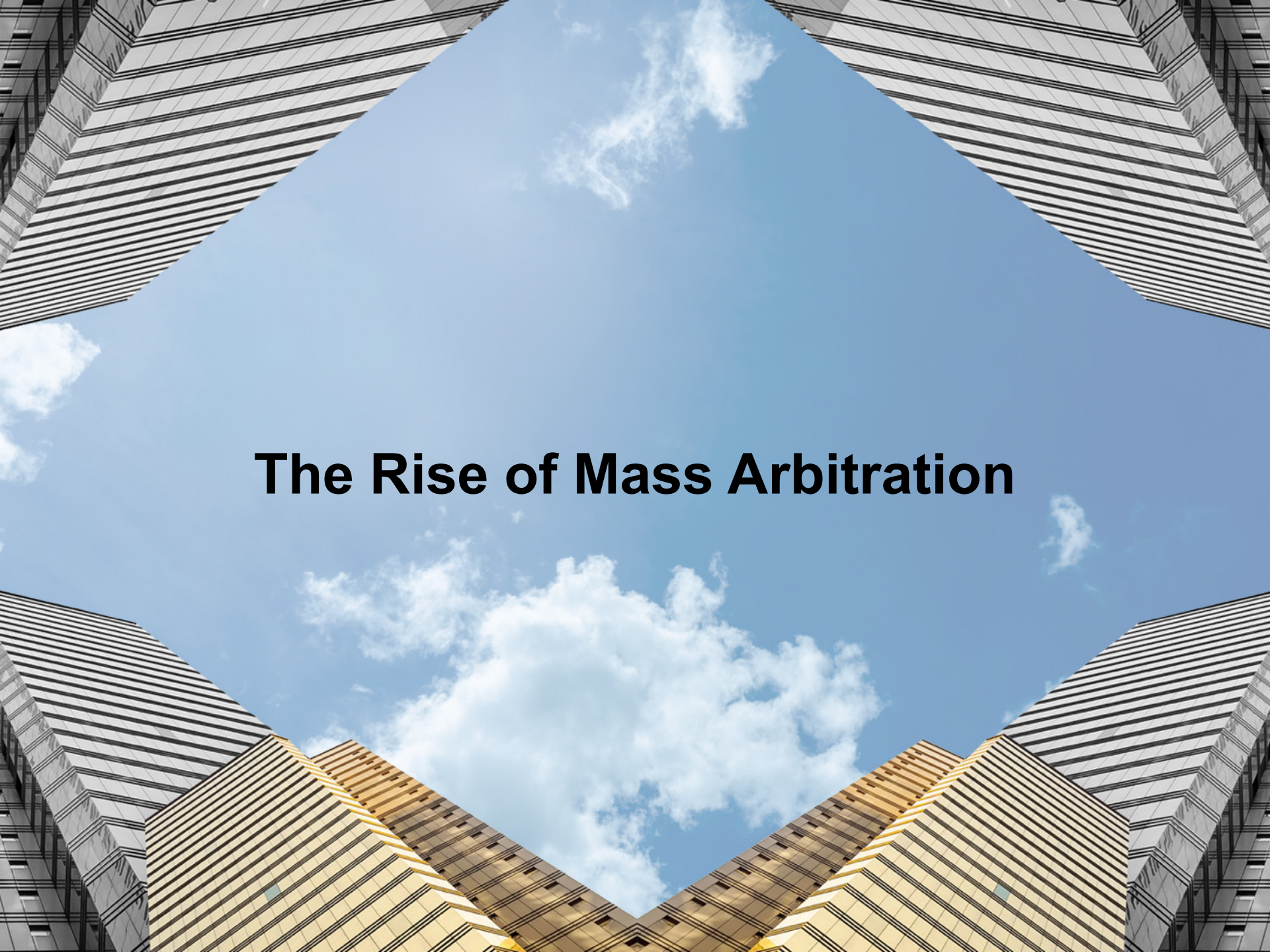
Mass Arbitration: Managing Claims

Mass Arbitration Origins; Processing Information; Managing Claims; Resolving Disputes


The Rise of Mass Arbitration

The Rise of Mass Arbitration

- Mid-1990's: Supreme Court holds FAA applies to consumer disputes. Companies begin to use arbitration agreements to level the playing field.
- Class action waivers are added to consumer arbitration agreements. Consolidation on steroids.
- *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011): class action waivers are enforceable under FAA, which preempts inconsistent state law. Impacts consumers who have contracts with banks, credit card companies, and other lenders and consumer-oriented companies.
- CFPB issues 728-page empirical Study on consumer arbitration on March 10, 2015. CFPB promulgates final Arbitration Rule with a March 19, 2018 mandatory compliance date. The Rule banned the use of class action waivers in arbitration provisions in consumer financial services contracts and effectively overruled *Concepcion*.

The Rise of Mass Arbitration

- On November 1, 2017, President Trump signs H.J. Res. 111, the Joint Congressional Review Act resolution passed by the House and Senate repealing the CFPB's Arbitration Rule.
- *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018): upheld validity of class action waivers in employment agreements. FAA trumps NLRA.
- *Concepcion* and *Epic Systems* broadly affect hundreds of millions of consumers and employees.
- Consumer and employee advocates strike back with "mass arbitrations" -- the simultaneous filing of hundreds or thousands of individual arbitration demands against the same company by the same law firm, requiring the company to pay, up front, millions of dollars in filing, administrative and arbitrator fees charged by the widely used American Arbitration Association ("AAA") and JAMS. Initially used in the context of employment arbitration, now also being pursued against consumer businesses.

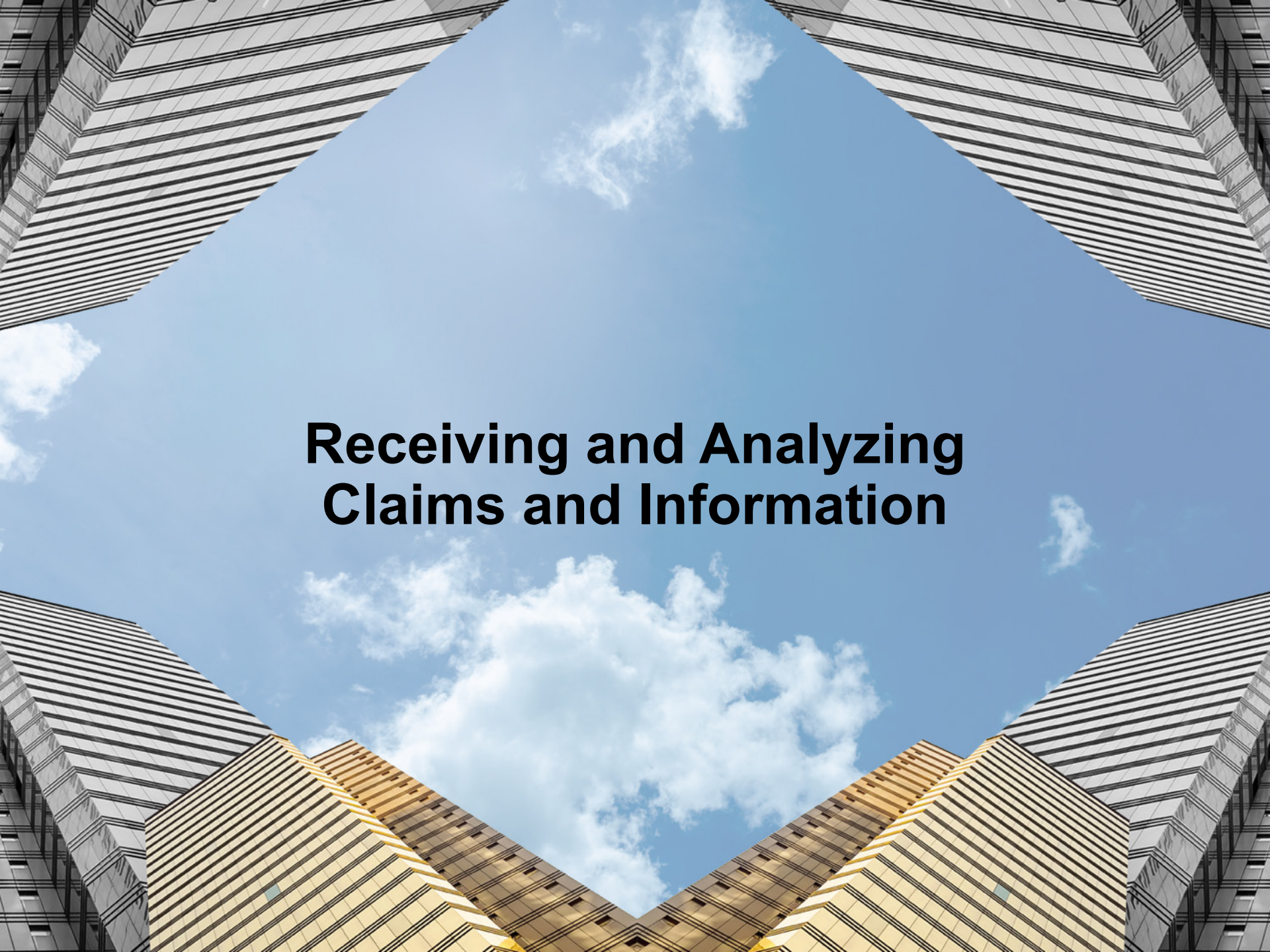
The Rise of Mass Arbitration

- Court actions by companies to stop these mass filings have thus far been unsuccessful. *E.g.*, in *Abernathy v. DoorDash, Inc.* (N.D. Cal.) (Alsup, J.), delivery couriers initiated 6,250 individual AAA employment arbitrations which obligated the company to pay AAA almost $12 million in filing and administrative fees. When the company declined to do so, the couriers filed a motion to compel arbitration which was granted by the federal district court (Judge Alsup):
  - "For decades, the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too, thus taking away their ability to join collectively to vindicate common rights. The employer-side bar has succeeded in the United States Supreme Court to sustain such provisions. The irony, in this case, is that the workers wish to enforce the very provisions forced on them by seeking, even if by the thousands, individual arbitrations, the remnant of procedural rights left to them. The employer here, DoorDash, faced with having to actually honor its side of the bargain, now blanches at the cost of the filing fees it agreed to pay in the arbitration clause. No doubt, DoorDash never expected that so many would actually seek arbitration. Instead, in irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate. This hypocrisy will not be blessed, at least by this order."

The Rise of Mass Arbitration

- J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. (forthcoming 2022) (117 pages) (first major academic study)

  Available at SSRN: https://ssrn.com/abstract=3575765

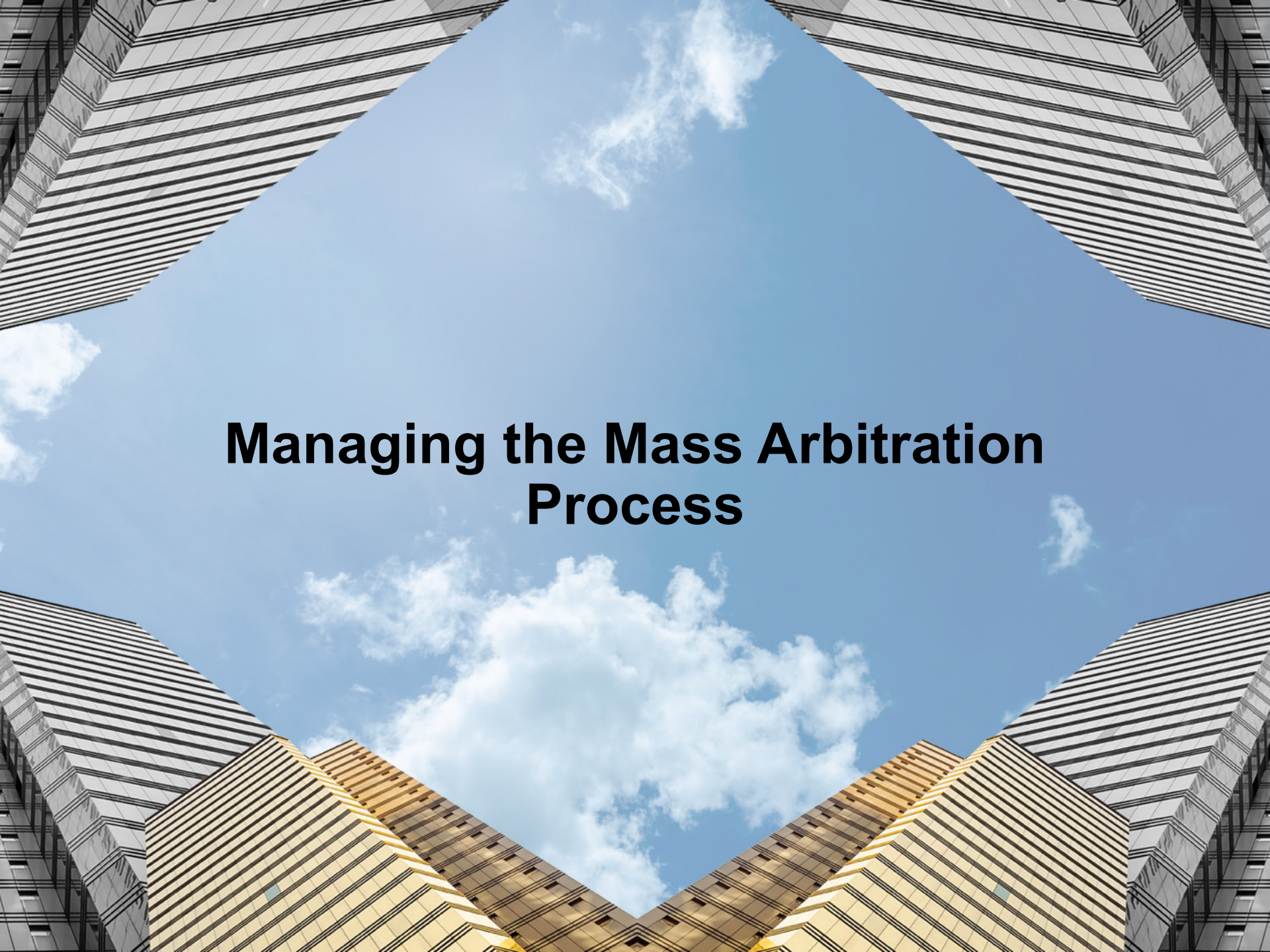

Receiving and Analyzing
Claims and Information

Strategies for Receipt and Analysis of Mass Claims

- Do not ignore the claim notice letter.
  - Many laws, such as certain state consumer protection statutes, require claimants to provide pre-suit notice before initiating a claim.
  - Companies can evaluate the allegations and circumstances to determine whether offering relief voluntarily might be a viable cost-saving measure, to gain more information and negotiate stays, and vet claims.
  - More often, an information exchange process will reveal that a large percentage of the claims are invalid, thus limiting the number of claims and potential exposure considerably.
  - Pre-filing notice provisions.
    - Do these provisions have teeth?
    - *See, e.g.*, *In re CenturyLink Sales Practices & Sec. Litig.*, 2020 U.S. Dist. LEXIS 227550, at *23-25 (D. Minn. Dec. 4, 2020) (finding that claimants' filing of mass arbitration demands and any associated breach of the agreement's pre-dispute resolution provision was not a material breach because it did not deprive the parties of the ability to arbitrate).
  - Once claims are filed and the business is assessed arbitration fees, much of the negotiating leverage for the claimants' attorneys is gone, and thus there may be motivation for the claimants to provide information and agree to postpone filing.

Strategies for Receipt and Analysis of Mass Claims

- The importance of organization and information management in mass claims.
  - Lessons from mass tort litigation.
  - Designing the claim tracking information system suitable for your case.
    - E.g., applicable law, product, accrual/filing dates, liability allegations
  - Identify case patterns to develop proposals for administration and arbitration strategy.
  - Depending on the number of claims and amounts of information, consider retaining a third-party administrator.
  - Early work put into detailed organization systems will pay off later.



Managing the Mass Arbitration Process

Assessing the Arbitral Rules

- The arbitration administrators have reacted to mass arbitration filings by adopting new rules and fee schedules.
  - **AAA**. Sliding scale for filing fees in "multiple consumer cases" which apply when AAA determines, in its sole discretion, that 25 or more similar arbitration claims have been filed by or against the same party by the same counsel or coordinated counsel.
    - Businesses pay: (a) $300 per case for the first 500 cases; (b) $225 per case for cases 500 to 1,500; (c) $150 per case for cases 1,501 to 3,000 and (d) $75 per case for cases 3,001 and beyond. Consumers pay $100 per case for the first 500 cases, and $50 per case for cases 501 and beyond
    - Businesses still pay, for <u>each</u> arbitration, (a) $1,400 case management fee prior to appointment of arbitrator, (b) a minimum $2,500 arbitrator fee, and (c) $500 hearing fee.
  - Supplementary Rules for Multiple Case Filings: intake data spreadsheet; process arbitrator; merits arbitrator; mediation.
    - Applies to both consumer and employment mass actions.

Assessing the Arbitral Rules

- **JAMS.** Has not modified its rules, stating that "[w]hile it is not our preference to force the parties to litigate these issues seriatim, our policies and procedures, absent party agreement otherwise, require that we collect a filing fee in each case to be pursued."

Assessing the Arbitral Rules

- **International Institute for Conflict Prevention and Resolution ("CPR")**. Mass Claims Protocol and Procedure "any time greater than 30 individual employment-related arbitration claims of a nearly identical nature are, or have been, filed with CPR against the same Respondent(s) in close proximity to one another."
  - 10 randomly selected "Test Cases" are arbitrated and decided, followed by non-binding mediation. If mediation unsuccessful, either party can opt out of arbitration as to remaining claims or have remaining claims arbitrated.
  - Initiation fee (negotiated by each company); appointment fee ($1,800/case); mediation administrative fee ($20,000); arbitrator fees.
  - May only apply to employment cases, not consumer cases.

Assessing the Arbitral Rules

- **FedArb.** Applies when 20 or more individual claims are brought by same law firm(s) with a common set of factual and legal issues.
  - MDL-type panel decides common factual/legal issues and damages formulae. Composed of 3-judge panel of former federal judges (1 judge if <50 claims/250k damages).
  - Individual issues resolved by claim forms or individual arbitrations (FastTrack expedited rules/video conferencing with exceptions).
  - Each claimant pays $50 filing fee; company pays $150 filing fee ($100 after 1,000 claims) plus all setup (MDL panel/$1,000), administrative (6%), and arbitrator (hourly rates) fees.

Assessing the Arbitral Rules

- **New Era**. Applies when more than 5 claims arise out of Common Issues of Law and Fact.
- Completely virtual
- Subscription fee paid upfront annually
  - Sample of Subscription Fees = 100 Mass Arbitration cases on $250,000 annual subscription fee + $300 per case filing fee = $280,000
  - Non-Subscription Pricing = 100 Mass Arbitration cases at $10,000 per case fee = $1M
- 3 bellwether cases selected by parties are arbitrated and a "Lead Decision" is produced in each case, followed by a non-binding settlement conference. If no settlement, Lead Decisions are precedential on remaining cases as to common issues. Arbitrator develops process for handling individual issues.

Selecting the Arbitrators

- Arbitrator selection processes may vary depending on provider.
  - AAA vs. NewEra
- Arbitrator selection can be party driven where parties agree.
  - One arbitrator per case for all purposes.
  - Rotating arbitrator panels.
  - Process vs. merits arbitrators.
  - MDL-type procedures with arbitrators deciding common issues.

Selecting the Arbitrators

- Strike and rank, and the importance of arbitrator analysis.
  - Scrutinize the biographies and resumes. But do your own due diligence too.
  - Is information about the arbitrator's past rulings available?
    - The AAA maintains an online Consumer and Employment Arbitration Statistics report based on AAA consumer cases closed within the last five years. This report is made available pursuant to state statutes such as the California Code of Civil Procedure §1281.96, Maryland Commercial Law §§ 14-3901 to 3905 and New Jersey Statutes § 2A:23B-1 et seq. and updated quarterly, as required by law.
      - https://www.adr.org/consumer
- Consider associating local counsel depending on the jurisdiction.

Hearings, Summary Resolutions, and Other Procedures

- Bellwether proceedings and negotiating stays
  - Where the parties reach agreement, efficiencies can be achieved. To this end, while claimants' counsel is unlikely to agree to any alternative fee arrangements that would reduce the amount of arbitration fees the business is required to pay, companies often can negotiate the efficient administration of cases and delayed timing of fee assessments.
  - For example, if the parties agree, providers will typically stay the assessment of case management and arbitrator fees pending settlement discussions or while an initial "bellwether" set of arbitrations is litigated.
  - Although claimants' counsel may be reticent to make the process more efficient initially, claimants who actually seek to adjudicate claims often have little choice but to agree, since counsel may not have the resources to arbitrate hundreds or thousands of cases at once. Agreeing to stay the bulk of the cases for adjudication of a small, initial set may also be appetizing to claimants' counsel, who will want to test their theories before committing to prosecuting hundreds or thousands of claims. If the company believes in the merits of its defenses, winning an initial set of cases may provide strong leverage in resolving the remainder.

Hearings, Summary Resolutions, and Other Procedures

- **Discovery procedures.**
  - Informal rules provide room for party agreement and arbitrator discretion.
    - JAMS Streamlined Rule 13: The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and information (including electronically stored information ("ESI")) relevant to the dispute or claim, including copies of all documents in their possession or control on which they rely in support of their positions or that they intend to introduce as exhibits at the Arbitration Hearing, the names of all individuals with knowledge about the dispute or claim and the names of all experts who may be called upon to testify or whose reports may be introduced at the Arbitration Hearing. The Parties and the Arbitrator will make every effort to conclude the document and information exchange process within fourteen (14) calendar days after all pleadings or notices of claims have been received. The necessity of additional information exchange shall be determined by the Arbitrator based upon the reasonable need for the requested information, the availability of other discovery options and the burdensomeness of the request on the opposing Parties and the witness.
    - AAA Rule R-22:
      - (a) If any party asks or if the arbitrator decides on his or her own, keeping in mind that arbitration must remain a fast and economical process, the arbitrator may direct 1) specific documents and other information to be shared between the consumer and business, and 2) that the consumer and business identify the witnesses, if any, they plan to have testify at the hearing.
      - (b) Any exhibits the parties plan to submit at the hearing need to be shared between the parties at least five business days before the hearing, unless the arbitrator sets a different exchange date.
      - c) No other exchange of information beyond what is provided for in section (a) above is contemplated under these Rules, unless an arbitrator determines further information exchange is needed to provide for a fundamentally fair process.
      - (d) The arbitrator has authority to resolve any disputes between the parties about exchanging information.

Hearings, Summary Resolutions, and Other Procedures

- Discovery procedures.
  - Document Requests.
    - Agreements that documents in one case can be used in all.
    - Proportionality disputes -- arbitration is supposed to be fast and economical.
      - AAA Rule R-23: The arbitrator may issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient, and economical resolution of the case, including, but not limited to: . . .
        - (b) to the extent the exchange of information takes place pursuant to R-22, imposing reasonable search limitations for electronic and other documents if the parties are unable to agree;
        - (c) allocating costs of producing documentation, including electronically-stored documentation; . . .
  - Interrogatories.
    - Form templates can be useful for basic information gathering from claimants.
  - Depositions.
    - Typically not provided for in rules. But parties may agree to them, and arbitrators may order them.
    - Burden of repeat depositions on corporate representatives.
    - Depositions may be necessary to prepare for hearing effectively when faced with boilerplate demands and little information exchanged.
  - Does your case need experts?

Hearings, Summary Resolutions, and Other Procedures

- Dispositive motions.
  - Sometimes available, sometimes not. If allowed, usually need arbitrator permission.
    - AAA Consumer Rule R-33: "The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case."
- Pre-hearing submissions
  - Identifying witnesses
    - Securing testimony of third-party witnesses
  - Hearing exhibits
    - Processes for streamlining objections and admitting
  - Pre-hearing briefs
    - On the defense side, this can be more burdensome, with key defenses depending on individual claimant facts.
- Estimating the timing of presentation (1 day presumption)
- Evidentiary standards in arbitration

Hearings, Summary Resolutions, and Other Procedures

- Scheduling several hearings together – don't underestimate the time commitments.
- Desk/document only arbitrations.
  - Can provide cost efficiencies
  - Can lessen burden on corporate representatives from repeat testimony
  - What is the best strategy for your case?
- Virtual arbitration vs. in-person hearings
  - Zoom arbitrations are likely here to stay.
  - Negotiating procedures for virtual arbitrations.
- Record of the hearing

Hearings, Summary Resolutions, and Other Procedures

- Fee shifting—when to request and standards for recovery
  - State laws may prohibit fee shifting in arbitration proceedings unless explicitly provided for in the agreement to arbitrate/arbitral body's procedural rules. Even then, fee-shifting may require a higher standard than "prevailing party."
    - Cal. Code Civ. Proc. 1284.3.
    - *Rizzio v. Surpass Senior Living LLC*, 2020 WL 479342, (AZ 2020): the court severed a cost-shifting provision that it found to be unconscionable and otherwise enforced the parties' arbitration agreement.
- Note some arbitration providers may not enforce fee-shifting.
  - *See* JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses
  - Minimum Standards of Procedural Fairness.

Substantive Law

- FAA vs. state arbitration acts
- Does the arbitration agreement have a choice of law provision? Is it enforceable?
- Analyzing differences in state law for claims brought across various jurisdictions.
  - Elements of the same causes of action may change materially.
  - Statutes of limitation may change.
  - Research the differences early.
- Stipulations about applicable law at the outset may be beneficial for both sides.

Precedential Value/Binding Effect of Arbitration Awards

- Are arbitration awards confidential?
  - Look at the arbitration agreement and arbitral rules.
  - AAA Statement of Ethics
    - "An arbitration proceeding is a private process. In addition, AAA staff and AAA neutrals have an ethical obligation to keep information confidential. However, the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. Where public agencies are involved in disputes, these public agencies routinely make the award public."
  - Court enforcement of awards is presumptively public.

Precedential Value/Binding Effect of Arbitration Awards

- Can arbitration awards in one claim be cited as precedent in another of the mass claims?
  - Do the provider's rules call for resolution of common issues? This may up the stakes early.
  - Have the parties made any agreements on the effect of awards?
  - Most arbitration provisions address this squarely—saying "no."
  - Look also at applicable law.
    - In *Vandenberg v. Superior Court*, 21 Cal.4th 815, 834 (1999), the California Supreme Court has held "a private arbitration award, even if judicially confirmed, can have no collateral estoppel effect in favor of third persons unless the arbitral parties agreed, in the particular case, that such a consequence should apply."
    - *Chiron Corp. v. Ortho Diagnostic Systems, Inc.*, 207 F.3d 1126, 1132-34 (9th Cir. 2000) (arbitrator decides whether prior arbitral award or judgment should have preclusive effect).
  - Typically, the results of one arbitration are *not* binding on the others.
    - Even if the arbitrator will not consider prior awards, there may still be a "ring the bell" effect.

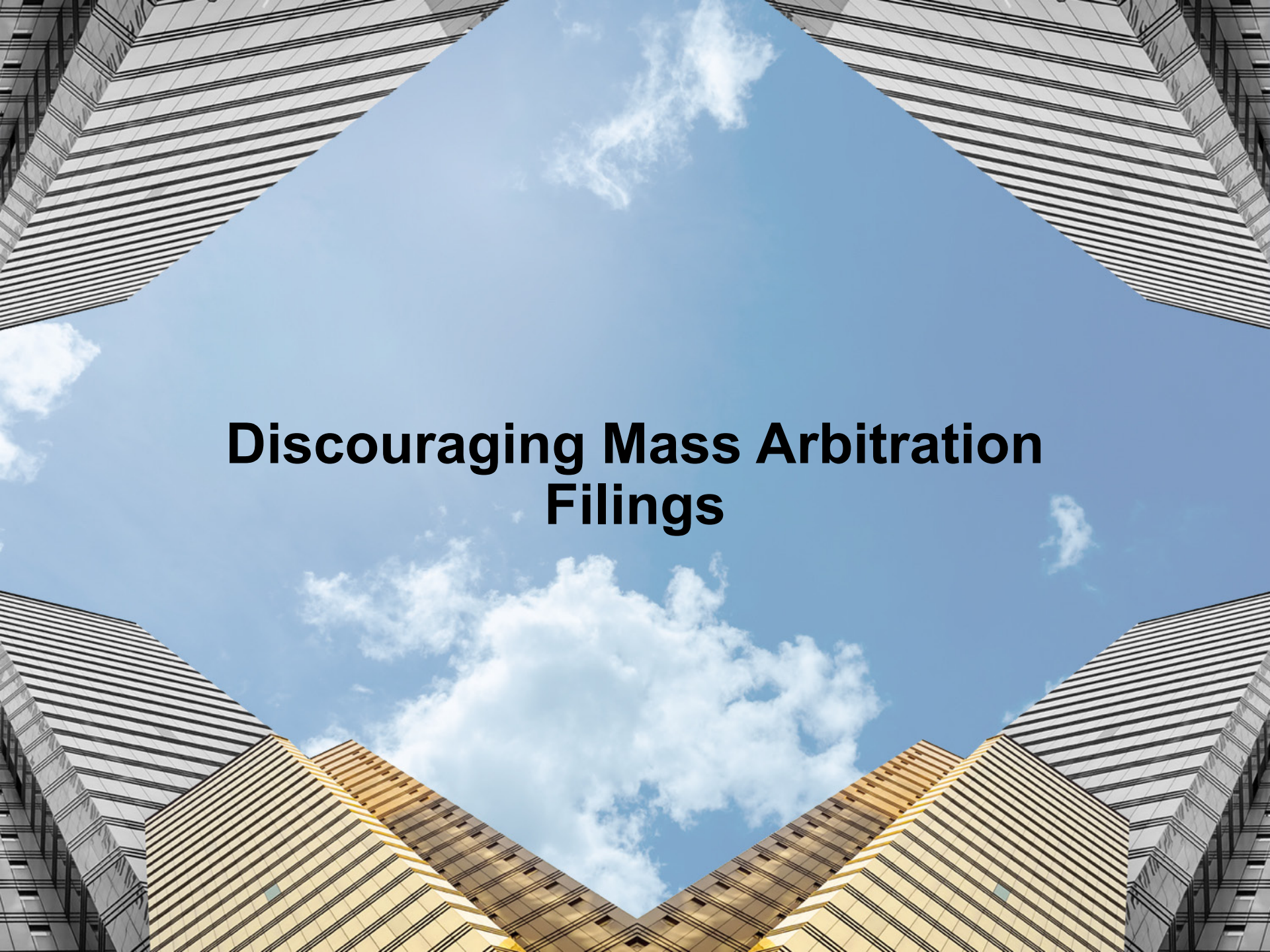

Settlement Considerations

Practical Considerations for Settling Mass Arbitration Claims

- Settling mass arbitration through parallel class actions?
  - Some courts have denied preliminary approval of class action settlements proposed to resolve mass arbitration.
    - *Rimler et al. v. Postmates, Inc.*, No. CGC-18-567868 (Cal. Super. June 17, 2020), denying motion for approval of proposed a $11.5m settlement for a class of 411,671 couriers.
    - *Arena v. Intuit Inc.*, No. 3:19-cv-02546-CRB (N.D. Cal. 2020), denying motion for approval of $400m settlement, the company was being "hoisted by (its) own petard."

Practical Considerations for Settling Mass Arbitration Claims

- Negotiating a large number of individual settlements poses challenges that companies will need to navigate, assuming settlement is something the company is willing to consider.
  - Companies may require that claimants provide certain supporting information to trigger a payment obligation under the settlement.
  - Parties also will need to coordinate how releases will be obtained and payments will be made, and companies may prefer to hire a settlement administrator to process the exchanges on a mass scale.
  - Still, companies must understand that they are not buying finality of all claims, but only releases from individuals who participate in the settlement. Strategies can be employed, though, to help ensure that claims do not continue.


Discouraging Mass Arbitration
Filings

Strategies for Discouraging Mass Arbitration Campaigns

- Request AAA/JAMS/CPR to adopt rules for mass arbitrations applicable to consumer claims or choose different administrator.
- Instead of naming an administrator, arbitration clause requires parties or court to select arbitrator, bypassing payment of certain administrative fees.
- Scrutinize the plaintiff's list of claimants for irregularities.
- Provide individualized settlement offer to each claimant.
- Drafting Tips:
  - Make small claims exception bilateral
  - Revise arbitration costs language
  - Allow parties to agree to consolidate
  - Shift costs/fees for bad faith or frivolous claims

Thank You

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