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‘Samsung’ Highlights the Costs of Arbitrating Mass Claims

By Shira A. Scheindlin

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The arbitration of mass claims is now available through all of the major ADR providers. The American Arbitration Association (AAA), JAMS, FedArb and CPR have developed special rules to govern the resolution of such claims.

A bit of history is warranted. Most consumer contracts require that all disputes be resolved by arbitration. These contracts generally cover relationships with many financial institutions, the sale of consumer goods, and employment agreements. Many of these contracts agree that the employer, seller, or institution will pay the costs of the arbitration.

Plaintiffs’ lawyers were not happy that their consumer and employment cases could no longer be brought as class actions in state and federal court. Their efforts to challenge these agreements as unconscionable or contracts of adhesion or both were unsuccessful. The U.S. Supreme Court has repeatedly ruled in favor of enforcing such agreements. *See, e.g., AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

Having been compelled to arbitrate, and unable to proceed on behalf of a class due to contractual waivers of class actions, plaintiffs began bringing arbitration claims on behalf of hundreds or thousands of claimants each alleging a similar injury. Each individual claim required the respondent to pay the entire cost of the arbitration, beginning with the initial filing fee.

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Respondents quickly realized they had created a significant financial problem of their own making. The filing fees alone, in claims brought on behalf of a thousand or more claimants, often exceed several million dollars.

A recent case, *Wallrich v. Samsung*, is illustrative. The case began in the district court for the Northern District of Illinois. Petitioners were 49,986 users of Samsung electronic device users claiming violations of Illinois’ Biometric Information Privacy Act. The user contracts specified that all disputes must be resolved in arbitration and contained class action waivers.

Petitioners brought 50,000 individual claims to the AAA. Pursuant to the AAA Supplementary Rules for Multiple Case Filings, governing cases where the same counsel files 25 or more claims against the

same Respondent, Claimants paid their portion of the filing fees.

But Samsung refused to pay the initial administrative filing fees totaling $4,125,000. When Samsung continued to refuse, the AAA administratively closed all the cases. At that point, claimants (now petitioners) asked the court to compel arbitration by requiring Samsung to arbitrate and to pay its share of the arbitration fees.

Although the AAA had administratively closed the case the court found that the user agreement required dispute resolution "exclusively through final and binding arbitration..." and that this had not yet occurred. 691 F. Supp. 2d 867, 879 (N.D. Ill. 2023).

The court then found that petitioners had entered into a valid agreement to arbitrate disputes arising under its purchase agreements with Samsung. The court next found that any dispute regarding the scope of the arbitration clause was clearly and unmistakably delegated to the arbitrator through the plain language of the agreement and through the reference to and incorporation of the AAA rules.

The final issue for the court was whether Samsung's refusal to pay the AAA's fees for each individual claimant constituted a breach of its own arbitration agreement. Samsung argued that petitioners had a choice: They could either advance Samsung's share of the filing fee (subject to recoupment at the close of the arbitration) or they could forgo arbitration and proceed in court. The court rejected these suggestions. It found that a dispute over fees was substantive and involved the exercise of the right to arbitrate.

Noting that courts have reached different decisions on this issue, it nonetheless decided that it could and should compel Samsung to pay the administrative fee noting that Samsung was "hoist with its own petard." *Id.* at 884. It relied, in particular, on a New York state court decision in *Uber Tech., Inc. v. American Arbitration Assn., Inc.*, 204 A.D.3d 506, 510 (1st Dept 2022), which noted that the fees that Uber was required to pay were a direct result of its "business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers . . . ."

The 7th U.S. Circuit Court of Appeals reversed the decision of the district court. *See Wallrich v. Samsung,* (7th Cir. July 1, 2024). The court found that the consumers could not compel Samsung to pay the AAA's administrative fees. The reasoning of the appellate court was straightforward. It found that the parties had agreed to abide by the rules and procedures of the AAA.

As noted, the AAA terminated the proceedings, based on the failure of both parties to pay the full administrative fee, noting that petitioners could have advanced Samsung's fees, and invited the parties to resolve their dispute in the district court. The court found that at that point the arbitration was, and the dispute would now have to be resolved in the district court.

This battle is not over. This issue may well result in a Circuit split that reaches the Supreme Court. It will be interesting to see if the Supreme Court's general predilection to favor arbitration will still apply in the unusual circumstance where a company refuses to pay its share of the fees in a consumer mass action.

For now, this decision is not good news for the plaintiffs' bar which had thought that large companies had been hoisted on their own petard by requiring consumers to proceed in arbitration rather than by a class action in court. It is hard to imagine a more circular outcome. Plaintiffs are back in court where they have always preferred to be. Truth is stranger than fiction!

Shira A. Scheindlin *served for a total of 27 years on the federal bench as a Magistrate Judge in the U.S. District Court for the Eastern District of New York and later as a U.S. District Court Judge for the Southern District of New York. She now serves as an arbitrator and mediator with AAA, FedArb, and CPR and is a Fellow of the College of Commercial Arbitrators.*

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