The Consumer Finance Podcast: Navigating Mass Arbitration: New Rules and Strategies
Host: Chris Willis
Guests: Jeremy Rosenblum and Neil Currie
Date Aired: May 9, 2024

Chris Willis:

Welcome to *The Consumer Finance Podcast*. I'm Chris Willis, the co-leader of Troutman Pepper's Consumer Financial Services Regulatory Practice. Today, we're going to be talking all about mass arbitration and the American Arbitration Association's new mass arbitration rules. Before we jump into that very interesting topic, let me remind you to visit and subscribe to our blogs, TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. If you like this podcast, don't forget to check out our other podcasts. We have lots of them. We have the *FCRA Focus*, all about credit reporting, *The Crypto Exchange*, about all things crypto. We have *Unauthorized Access*, which is our privacy and data security podcast, and our newest podcast, *Payments Pros*, all about the payments industry. Those are available on all popular podcast platforms.

Speaking of those platforms, if you like this podcast, let us know. Leave us a review on your podcast platform of choice and let us know how we're doing. If you enjoy reading and listening to our thought leadership content, don't forget to check out our handy mobile app. It's available for both iOS and Android. Just look for Troutman Pepper in your app store. It's a one-stop shop where you can read all of our blogs, all of our alerts, listen to all of our podcasts, and even access a handy directory of all of our financial services lawyers. Just look for it in your app store and give it a try.

Now, as I said, today we're going to be talking about the phenomenon of mass arbitration and a recent revision to the American Arbitration Association's rules to deal with mass arbitrations. Joining me, I have two guests. First, I have my partner, Jeremy Rosenblum. Jeremy's been involved in arbitration-related issues for as long as I can remember, certainly the entirety of my career. It's something that he's very attuned to. Jeremy's here with us. But we also have a very special guest. We have Neil Currie. Neil is a vice president at the American Arbitration Association, and he's personally been involved with the mass arbitration process at the AAA for the last three or four years. He's the perfect person to talk to us about this. Jeremy, Neil, welcome to the podcast today.

Jeremy Rosenblum:

Thanks, Chris.

Neil Currie:

Thanks for having me.

Chris Willis:

Neil, let me start off with you. We know about this phenomenon of mass arbitration where you essentially have a large number of individual claimants coming into arbitration and making individual demands against the same respondent for essentially the same claim. At least that's what I think of when I think of mass arbitration. The AAA has responded to this by making some recent revisions to its rules. Do you mind talking the audience through what the new AAA rules do with regard to mass arbitrations?

Neil Currie:

Yeah, absolutely. I guess, I would start to reiterate what you talked about initially that, yeah, this seemed to have come, I don't know if it came out of nowhere, but it did really burst onto the scene in the last three to four years. I think you're probably right. There was a certain impact that the waivers of access to class action and the class arbitrations and any sort of collective remedy had on dispute resolution.

We started to see these filings of these large amounts of cases, and we needed to decide, hey, how are we going to administer these matters? Because ultimately, that's what the AAA's involvement, it's we're administering the actual disputes and we're trying to get the parties to a point where they can either resolve them on their own, or get to a decision maker to ultimately resolve that.

We did implement a set of rules initially and fees to try to address how we're going to administer these cases, how to make them efficient, how to get everyone through the process. I think, because mass arbitration is such a very dynamic field right now, there's so much going on. There's so many changes that are happening so quickly, we decided pretty – or I should say, not that long after these rules were implemented that, hey, I think we need to look at some other changes and adjustments here to really make the process better for all involved.

Earlier this year, mid-January, we released our revised set of rules and they do a few things and I'll give you the high level and then we can get into some of the details. I think what they first did was they really got the parties to get, or allowed to get to some decision maker much earlier in the process. What we were seeing is a lot of these cases were getting held up at the very beginning, because of a lot of disputes between the parties is about whether these matters need to proceed, how you're going to pay for them, get conditions, precedence get met, we're filing the requirements, met things of that nature. We realized that there was a real, real desire to get to somebody quickly to make these decisions, so we can figure out where the cases were ultimately going to end up.

We created a process to get the parties almost immediately after filing the cases to a process arbitrator. We also wanted to create more cost predictability for everyone, so they understood what it was going to cost more clearly throughout the entire process. The other thing we did was we created some attestation requirements and the rules for various pleadings and filing requirements, so that the parties would have some confidence in what was being alleged on both sides. We thought that was important, because that was another issue that we were seeking quite a bit. We tried to stage our fees a little bit better, going back to the fee issue to try,

again, to charge when the AAA was taking significant administrative steps and providing our services.

We also wanted to try to really encourage the use of virtual hearings, which has obviously exploded during the pandemic, but certainly something that we felt was a big improvement when you talk about mass arbitrations, especially with people all over the country sometimes. That was really going to be another key.

Then finally, related to the process arbitrator, based on some of the legal development surrounding mass arbitration we understood there would need to be a process to review the decisions of the process arbitrator. So room was added to allow a merits arbitrator to review a decision that a process arbitrator made. The rules now provide that authority, but we wanted to make sure that there was not going to be a relitigating of every single process arbitrator decision. We set up an abusive discretion standard for that merits arbitrator when reviewing a process arbitrator decision.

Chris Willis:

Thanks for that overview. Neil, you mentioned fees. I wanted to ask you a follow-up question about that, because it seems to me one of the biggest complaints that defendants have had about mass arbitration is the idea of like, “Hey, I'm being held up to settle these cases that I think don't have any value, just because I have to pay these very large in the aggregate filing fees with the arbitration administrator just to get my day in court. The leverage of the fees is what's causing me to settle, rather than the merits of the claim.” I know you made some changes. The AAA made some changes to the fee structure. Can you talk about those and how they're intended to address that potential criticism?

Neil Currie:

Yeah, definitely. What we wanted to do, and this goes hand in hand with the process arbitrator and getting to a decision maker very quickly, we wanted to provide a very flat fee, or something that was upfront so that everyone knew what it was. It was a reasonable, administrative fee to provide for the services. AAA was going to give the party to get them quickly to that process arbitrator. What we did is we set up this initial flat fee, regardless of if it’s 25 cases, which is the minimum number for mass arbitration, or 25,000 cases or anywhere in between.

The one fee would be charged to the individuals, which would be $3,125 and one fee charged to the businesses, which was $8,125 for them. What that got and what that gets the parties is conference with the AAA to start, a review of the filings to see what we received, what materials there are, if there's anything that we see that seems out of place and we need to maybe get before we can move forward. That it also gets us to a point of process arbitrator, so those initial early disputes that we talked about that really are what seem to be the primary concern for most involved are getting to that decision maker.

The other thing we added to this was also to get to a global mediator. The global mediator has been a pretty powerful experience for most parties when they actually get one. Because not only is it involving the possible resolution that's early, and we understand that resolving disputes, sometimes there's obviously PL party need to be ready and you need it to get to a

certain point to the process before it makes sense to really get to talking about resolving them. But the global mediator has also done things that we've noticed that are important, which is getting the parties engaged with each other directly, as opposed to just lobbying arguments back and forth against each other.

They're engaged, they're talking with one another. Maybe they're not ready to settle, or maybe they're not ready to consider resolution, but maybe they can start talking about the process, or maybe they can come to some agreement in how they think these matters should proceed. We found that to be a pretty powerful tool. That is, like I said, the big, I would say, change. From there, again, going back to predictability, once we know which cases are going to proceed, we're going to then charge individual filing fees for those matters that are going to proceed to the next stages.

Again, those filing fees are similar to how they were before. They didn't really change, but they are going to be tiered based on the number of cases that are proceeding. After that, rather than have a single case management fee where we currently have in our core cases, we created a different set of fees, so one that we're going to charge when we appoint an arbitrator, because obviously, that's a pretty major step in the process. What we did there that's a little different previously is that there is a part of that fee that is going to be due from the consumer parties as well. We split it between whether we're direct appointing, which is an easier process and less administrative work for the AAA, or whether we're providing a list of possible arbitrators to pick from, which is slightly more intense, labor-intensive job for us. In that sense, it's either $50 or $75 per case for the individuals. Then if we're doing a direct appointment, it's $450 for the business, or it's $600 if we're using a list of business.

Then finally, if we're actually going to go to a hearing, and we're going to schedule a hearing, and this matter is going to go that far through the process, the final fee that we're going to charge is what we call a final fee, and it's going to be $600 to the business, and it is when we schedule the hearing, and there's a document submission. The other change we made that I should note here, which is not administrative fees, is that we now have a $300 per hour set fee for the consumer uptake.

That's how generally, we've structured our fees now, and we think, again, it's a little bit more geared to when the AAA provides the service, and it's actually lowered the administrative fees in total to the parties as they move through the process.

Chris Willis:

Thanks for that overview. Jeremy, this is an issue you've been involved a lot in in terms of assisting clients in trying to avoid some of the negatives of mass arbitration. What's your reaction to how effective the new AAA fee structure in particular will be in trying to remove that complaint from defendants about being coerced by fees?

Jeremy Rosenblum:

Well, let me first address the process arbitrator, because I think that really was a material improvement in the mass arbitration rules. We've had experiences where arbitrations have a large number of arbitrations have been brought, without complying with all the requirements of

the arbitration agreement. We found that the arbitration administrators are reluctant to reject arbitrations, even if on the face of the arbitration agreement, it doesn't look appropriate. That's something that I would expect a process arbitrator to find much more easy to do.

Going to your direct question, the fees, I guess my theory is that one class action can ruin your day, but a thousand individual arbitrations can ruin your day also. The fee changes, the staging process is good, but it's not enough to eliminate the overwhelming leverage that the claimant group will have in a mass arbitration. We find in defending mass arbitration proceedings that settlement discussions frequently arrive at a point where the claimant's counsel is saying, put aside the merits of our claims, but do you really want to go through the process on a 1,000, 10,000 arbitrations? The cost of that, and it can be readily calculated, or you can estimate it when you talk about the filing fees and all the other fees, but especially the arbitrator compensation, which the mass arbitration rules continue to impose solely on the business, that just the cost of defending a large number of arbitrations can be prohibitive.

Bottom line, the AAA adoption of the mass arbitration rules is a very welcome and positive step, but it's not sufficient by itself. Businesses that are looking ahead and trying to protect themselves against mass arbitrations and especially the negotiating leverage that they can create for the claimant group need to think through ahead of time, how they're going to construct their arbitration agreements. Have to come up with mechanisms that will serve to make arbitration more efficient and less costly in this context.

Chris Willis:

Thanks, Jeremy. In a few minutes, I'm going to ask Neil about the weighing of the positions of both parties. Before we get to that, I don't want to ignore the fact that there are other arbitration administrators out there. I mean, I think of AAA is one of the preeminent ones, but there are others out there. I mean, Neil, do you think that the AAA has advantages for parties? I don't just mean one side or the other in terms of the way that it handles mass arbitration, as opposed to how some of the other arbitration administrators might do so?

Neil Currie:

Well, not surprisingly, yes, I do. We are best suited to provide the services in this field for parties for a variety of reasons. I think, one, certainly, we've been around for almost a hundred years. We have incredibly, or incredible amount of experience and resources to handle these cases. We have a dedicated rule set, fees, vast, diverse, and nationwide panel of experts and arbitrators who know these sorts of disputes and understand the concepts involved here. We also have the technology tools. I can speak to a few of those as well that I think have really improved the navigation through the process for the party.

Starting off, I would say, I think it’s important to remember that the AAA is a not for profit dedicated to promoting the use of dispute resolution. This also encompasses a core dedication to service and education. We're out here trying to find the best ways to resolve dispute fastest, early on in the process, if possible, and we're certainly committed to that. That is our part of our mission. We also have experience in handling these types of large disputes, whether it’s a natural disaster, or an environmental issue, a mortgage foreclosure property crisis, or even large corporate bankruptcies.

We've done these sorts of programs in the past. We've set up dedicated administrative teams to handle these, so they know what they're doing and they can provide that best service. One thing I think that's pretty unique about the AAA is we are providing what are called APIs, and APIs are application programming interfaces. What that means is that we can build and assist the firms representing both sides with building a bridge, so that your computer system, or platform can talk to our computer system, or platform. This can greatly improve mass arbitration process, because you can get materials such as case filings, document exchange, hearing dates and payments, other information easily transmitted directly between the AAA system and the law firm system. I think that's a real advantage that AAA have.

There's no fee or cost from the AAA to the parties or law firms for this service. We just set up a process, where the tech teams for either the firm, or the parties are interacting directly with our tech team. We have some myriad of types of options that we can provide firms and parties in terms of exchanging information between the two systems that really makes things easier. Other couple things, like I said, that we've already talked about, I think that are important, we do have our costs. They're right out there. Everyone knows what they are. They're not built into anything else, or dependent on some other set of circumstances. Our fees are fees. They're right there.

That's, I think, sets us apart in many ways. I think, ultimately, and I think most people understand is that the AAA has time tested rules and procedures, and people understand our commitment to due process. That parties could be confident in our process, that they're going to have a fair process, because they're working with a reputable organization and ultimately, whatever resolutions come out of these, it's going to be enforceable and people can have that confidence when they're using the AAA.

Chris Willis:

Thanks a lot. Jeremy, what's your perspective on this? How do you feel the AAA stacks up against the alternatives in the market?

Jeremy Rosenblum:

Well, I'll just make this observation regarding the principal competitor of the AAA. That is, JAMS has not gone forward with mass arbitration rules right now. It does not have a process arbitrator concept, and it's much more expensive. That's perhaps a simplistic comparison of two leading arbitration providers. We actually have enough of a preference for AAA right now is that we have modified a number of arbitration agreements that formerly provided for a choice between AAA and JAMS. Now, more recently, we're just providing for AAA to the arbitration administrator.

We're confident that no court is going to regard that choice as being unfair, or that selection as being unfair. There's enough of a preference that we have for AAA that we're just selecting them in the initial arbitration agreement. I think, Neil, you would agree that that comports with the AAA due process requirements?

Neil Currie:

Yeah, I would think so. Just remember, if we have a consumer clause registry to register your consumer clause, so that everyone's aware we're out there and we're going to administer the cases.

Jeremy Rosenblum:

Exactly.

Chris Willis:

Neil, you were mentioning the recent adoption to the modified mass arbitration rules that came out in January of 2024. I think in connection with the release of those, the AAA made a statement about how it had listened to and taken into consideration the needs of both individual claimants and business defendants in connection with mass arbitrations. Can you just explain to the audience how the new rules and fees that you've already described were intended to address the party's respective concerns?

Neil Currie:

Yeah. As you can imagine, as these cases began to be filed and we started to hear directly from the parties about what their expectations were, what they wanted out of the process, we started to try to put forth the least a set of rules and processes that would address some of the challenges that come with mass arbitrations, because there certainly are challenges when you have large amount of cases coming in at one time and you have to try to navigate how is this going to work. Especially, as you said, when we started this discussion when all these matters ultimately are individual cases.

They may have been filed at the same time by the same attorney, but there are different claimants involved in every case and ultimately, because as you said, most of the contracts as they're drafted, don't provide for any collective, or consolidated class type process. You got to figure out, how are we going to get all of these cases moved through and get to a decision maker and get a decision so the parties ultimately have a resolution to the matter. That's, as I said, what we were hearing from the parties over and over, we need that background. That's, again, what led us to not only establishing the process arbitrator initially when we put out the rules, but now when we revise them, we're going to expand the role of the process arbitrator and we're also going to get the party to that process arbitrator much faster and for, as I said, deal with a much larger scope of issues, because that's really, again, that's where these cases would initially have the biggest challenge.

Again, as I spoke about before as well, global mediator was something that we were hearing about. When parties were using that, they were really encouraging, “Oh, this was great. This was helpful. It cut down some of the disputes we're having. Maybe it narrowed the focus on some of the issues that were in place. It came up with some creative solutions to make the process more efficient for everyone and cost effective.” That was something that we thought about, how do we get that person, or that role engaged more quickly?

We also heard that, yeah, I mean, the process arbitrator has a lot of power when you think about it. They could make decisions that really impact these cases. What is the check on that? How can somebody who thinks that there was a mistake, either side, going to raise that issue? That's where we thought about the idea of having the merits arbitrator. But it couldn't just be, hey, we're going to relitigate the issue a second time, because that's not going to actually benefit anyone at the end of the day. We have to set a standard, and that's why we settled on the abuse of the special standard.

Then finally, I think that attestation issue that I spoke about was something that was very important to the party. They wanted some confidence that the information being provided was something that was being properly vetted and reviewed by the attorneys involved in the case. This is, as I said, across the board. It's not only with the filings, but with what is being provided for the answers, that there was something that was coming from, the attorneys in the matters saying, "Yes. I've done what I'm supposed to be doing in terms of vetting and looking at the issues before I'm making these arguments, or submitting these filings." They are actually, they have a dispute, or my allegations are true and correct to the best of my knowledge, or something along those lines, that they weren't just things being said without any thought, or any vetting that was going on. Those are the real, I think, what we were really hearing from the parties. That's where we felt was very vital to address when we were revising the rules.

Chris Willis:

Yeah, great. Thanks very much. Jeremy, you've spent a lot of time over the last few years trying to assist clients in drafting arbitration clauses to try to avoid the worst impacts of mass arbitrations. Now that we have the new AAA rules, where are we with respect to that?

Jeremy Rosenblum:

The AAA rules are not sufficient by themselves to address the problems that businesses have with mass arbitrations. We've had what I refer to as a version 1.0 arbitration agreement in place for years, well over a decade. That arbitration agreement, we modified on a regular basis to ensure its fundamental fairness. The main things were that the arbitration agreement would provide for individual, not class arbitration of disputes between the parties. We'd have all sorts of provisions about who bears fees, where the arbitration takes place, permission of small claims, matters as an exception to arbitration, etc., etc.

As we begin to worry more and more about mass arbitration, we have adopted what I term a version 2.0 arbitration agreement. The fundamental concept of that arbitration agreement is that where you have a mass arbitration, which, and the definition may vary from agreement to agreement, depending upon the preferences of the client. At least 25 individual arbitrations, maybe more in some cases. If there are common issues of law or fact that are raised in these arbitrations, that we will form groups to address those common issues of law in fact.

Hopefully, the issues can be resolved in a group arbitration, rather than multiple, individual arbitrations. Typical arbitration agreement we're drafting now may provide that we don't want to have a group that's too large. We don't want to turn an arbitration into a class action, even in an opt-in, rather than an opt-out class action. Discuss with the client what risk exposure it can tolerate for a single arbitration. Our new arbitration agreements provide that we will establish

groups ranging from 25 at the low end, to maybe 250 claimants at the high end. If there are more than 250 claimants, we'll whack it into multiple groups. We might have, if there are 500 claimants, we might have two groups of 250.

If the issues can be resolved in that group arbitration, there's going to be a radical reduction in cost. Let's say, you have a governing legal issue, is a particular charge, a finance charge under the Truth in Lending Act, or not. That's going to resolve all of the arbitrations. Under the new arbitration agreements, instead of running through 500 separate individual arbitrations and getting two different results, but 250 times the arbitrators decide one way, 250 times the other way, we're going to have two arbitrations involving little more work by the arbitrator and just a complete reduction in the arbitration cost.

Now, the claimant's attorney will no longer be able to come to the business and say, "I may win or I may lose. In fact, I think my claim is a little bit aggressive, but it's going to cost you millions and millions and millions of dollars to run through all these arbitrations." That's not a threat that's credible anymore in the context of our new arbitration agreement. AAA has come up with a fee schedule for individual arbitrations, individuals, arbitrations in the mass arbitration context. It has not come up with a fee schedule for the group arbitrations that we're now contemplating in our version 2.0 agreement.

My expectation is that in this context, the AAA early on, perhaps it's a process arbitrator decision, perhaps it's a AAA administrative decision, but there's going to have to be a fee schedule established for the group arbitrations. I'm not expecting that to be exactly the same fee as would be charged in a single individual arbitration, but I am expecting it to be not radically in excess of that fee. Certainly, the arbitrator compensation should be based on the same per hour rules that would apply in an individual arbitration.

Our agreements don't leave the business subject to getting bad news from the AAA. We have an escape hatch, and that is if the AAA charges too much for a group arbitration, we're going to dispense with the AAA. Sorry, Neil. And let a court appoint the arbitrator who will decide the procedures to apply in the group arbitration and presumably, a fee that will be more tolerable to the parties. The basic concept we have is group arbitration to resolve common issues when possible, and then there are all sorts of complexities that arise, the size of the groups, so how the groups get determined. How do you determine that you're in a mass arbitration context?

The answer there being we have a pre-dispute notice requirement that allows us to determine readily whether we're facing a mass arbitration situation. There are lots of complexities, lots of things that need to be thoughtfully considered, but the bottom line is with this concept, we are confident that we can resolve mass arbitrations more quickly, which is good for both sides. We can do it with less expense, with less negotiating, leverage, or undue negotiating leverage on behalf of the claimants. I'm pretty excited about this development. I think it addresses a problem that we're beginning to see will foreseeably be a problem for companies that really don't think ahead and get in place in arbitration agreement that's going to work in this context.

Chris Willis:

Neil, you've heard Jeremy talk about some other ideas in the party's agreement. Let me just turn to you and ask, are there any other approaches outside the AAA's rules that AAA recommends the parties should consider to improve the mass arbitration administrative process?

Neil Currie:

Yeah. There's certainly some things that we have seen that we, the parties have either utilized on cases, or talked to us about, or explored with a mediator that we think have really improved the mass arbitration process that aren't necessarily built directly in our rule. A few of these to consideration of the arbitrator is having what we would call limited service neutral to address common issues in the case, like discovery, or statute of limitations, or choice of law, things of that nature, things that aren't necessarily part of the process arbitrator component, but things that are actually involved when the matters are moving forward to hearing.

An agreed upon scheduling order can be really impactful. If the party's going to agree on a scheduling order, so to possibly minimize limit, or even negate the need to actually have preliminary hearings every time with all the different arbitrators, that can be a huge time saver, huge efficiency tool for them to utilize. Something we ask them to think specifically about agreeing to a process of appointing arbitrators without fighting about that. It can be really impactful as well. Obviously, our rules have a process, but there's other things people could consider. Could you do a rotating panel? A group of people that you both elect rotate through the cases. Larger numbers to a single arbitrator, getting to the point, I think that Jeremy talked about earlier about the cost of the arbitrator. I mean, when the arbitrator is doing work on cases, they are making $300 now. That is their fee. It's not a per case fee. It's when they're providing the services.

I think that's an impactful thing when an arbitrator is possibly having multiple cases and can do their own individual and they need to be decided individually, and how having those multiple cases with them, there's definitely some efficiencies that could be built into that process with one arbitrator. An agreed upon form of an award. Like, hey, this is what the award is going to look like We don't need an arbitrator, re-drafting, creating new awards every time, because this is the form.

Agreements about parties and witness testimony, I think that's probably something universal to any dispute resolution, whether it's litigation, and whether it's arbitration, anything like that, that can be. Then also, agreements on discovery and briefing similar to that, putting those limitations and making those agreements, again, can be pretty impactful and really improve things in the mass arbitration. Those are some of the ideas that parties have used and we've really seen them be really, really helpful when it comes to resolving their case and having a more supportive and efficient process at the end of the day.

Chris Willis:

This has been a fascinating discussion about a critically important topic for the consumer finance industry. I mean, probably for some other industries too, but what we care about here is consumer finance. Neil, I want to thank you very much for being on the podcast today and

Jeremy, thanks for sharing your insights as well. Of course, thanks to our audience for listening to this episode as well. Don't forget to visit and subscribe to our blogs, TroutmanPepperFinancialServices.com and ConsumerFinancialServicesLawMonitor.com.

While you're at it, why not go over to Troutman.com and add yourself to our Consumer Financial Services email list. That way we can send you copies of the alerts that we send out, as well as invitations to our industry-only webinars. As I said before, don't forget to check out our handy mobile app. It's available on both iOS and Android. Just look for Troutman Pepper in your app store. Of course, stay tuned for a great new episode of this podcast every Thursday afternoon. Thank you all for listening.

Copyright, Troutman Pepper Hamilton Sanders LLP. These recorded materials are designed for educational purposes only. This podcast is not legal advice and does not create an attorney-client relationship. The views and opinions expressed in this podcast are solely those of the individual participants. Troutman Pepper does not make any representations or warranties, express or implied, regarding the contents of this podcast. Information on previous case results does not guarantee a similar future result. Users of this podcast may save and use the podcast only for personal or other non-commercial, educational purposes. No other use, including, without limitation, reproduction, retransmission or editing of this podcast may be made without the prior written permission of Troutman Pepper. If you have any questions, please contact us at troutman.com.