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Seventh Circuit grants stay and expedited appeal of order requiring Samsung to pay initial arbitration fees for 36,000 claimants

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In the wake of a series of U.S. Supreme Court decisions upholding individual arbitration agreements with class action waivers, numerous companies have included such arbitration agreements as part of their terms and conditions. These agreements usually contain financial provisions highly favorable to the consumer, including requirements that the company pay most of the arbitration fees. Some class action plaintiffs' firms have turned these customer-friendly provisions against the companies by initiating "mass arbitrations" on behalf of thousands of claimants and triggering enormous up-front arbitration fees for the companies.

Companies have responded in various ways, including by refusing to pay the initial arbitration costs and modifying their arbitration agreements to address the possibility of mass arbitration filings. The Northern District of Illinois recently rejected Samsung's argument that it should not have to pay several million dollars of initial arbitration costs, but the Seventh Circuit granted a stay of that ruling and expedited proceedings in the appeal. *Wallrich v. Samsung Elecs. Am., Inc*., --- F. Supp. 3d ----, Case No. 22 C 5506, 2023 WL 5935024 (N.D. Ill. Sept. 12, 2023), *stay granted and appeal expedited*, No. 23-2842 (7th Cir. Nov. 8, 2023).

In *Wallrich*, nearly 50,000 claimants represented by the same counsel filed substantially similar individual arbitration demands alleging violations of Illinois's Biometric Information Privacy Act, 740 ILCS 14/1, *et seq.* ("BIPA"). 2023 WL 5935024, at *2. The AAA invoiced the claimants for their share of the initial administrative fees, which the claimants paid. *Id.* But Samsung refused to pay and identified discrepancies in the claimant list "such as deceased claimants and claimants who were not Illinois residents." *Id.* Samsung did agree to pay the fees for fourteen claimants now living in California, in light of a California statute imposing severe sanctions for nonpayment of arbitration fees. *Id.* (citing Cal. Code of Civ. Proc. § 1281).

The AAA requested a corrected claimant spreadsheet to address certain inaccuracies. *Id.* at *3. The revised spreadsheet identified 14,334 claimants who lived in the Central or Southern Districts of Illinois, as well as one New York resident, while the remainder listed a locale within the Northern District of Illinois. *Id.*

Finding that claimants had met their administrative filing requirements, the AAA ordered Samsung to pay initial administrative filing fees totaling $4,125,000. *Id.* But Samsung declined to pay, and the claimants declined to advance the fees owed by Samsung. *Id.* The AAA then administratively closed the individual arbitrations. *Id.* In addition to the *Wallrich* claimants' petition to compel arbitration, Samsung moved to dismiss for improper venue. *Id.* at *1.

Addressing Samsung's venue motion first, the *Wallrich* court agreed with Samsung that venue would not be proper under the FAA. *Id.* at *5–6. But it found venue proper under the general venue statute, 28 U.S.C. § 1391, as to the claimants who claimed to reside within the Northern District of Illinois, taking "judicial notice of today's norm that smartphone users use their smartphone where they live and travel and likely purchased it nearby." *Id.* at *6. Venue did not lie, however, for the 14,335 claimants who lived outside the District, and thus their claims were dismissed without prejudice. *Id.* at *7.

Turning to the arbitration issues, the district court rejected Samsung's threshold challenges to the court's power to compel arbitration. *Id.* at *7–8. On the merits of the motion to compel arbitration, the court found a valid agreement to arbitrate while acknowledging that it had to "accept the word of over 30,000 individuals, some of whom have been recruited to this action by obscure social media ads." *Id.* at *8. Because Samsung "had not identified a genuine issue of fact as to any individual" claimant, and because Samsung had not raised any further specific concerns after claimants submitted an amended claimant list to the AAA, Samsung had not raised sufficient grounds for refusing to find an agreement. *Id.* at *8–9.

The *Wallrich* court next found the parties' disputes within the scope of the arbitration agreement. While Samsung argued that the mass arbitration filings violated the arbitration agreement's collective action waiver, the district court held that question must be decided by the arbitrator. *Id.* at *9. Samsung's contention that the claimants asserted frivolous claims likewise did not allow it to "evade arbitration" because the FAA contains no "'wholly groundless' exception." *Id.* (citing *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019)). The district court found Samsung had failed to arbitrate in accordance with the arbitration agreement by refusing to pay the required fees, rejecting Samsung's argument predicated on the AAA's process for addressing non-payment because a "rule's mere anticipation of violations thereof does not render violations permissible." *Id.* at *10. Nor had the claimants waived their right to arbitrate. *Id.* at *10–11.

Finally, the *Wallrich* court held it could compel Samsung to pay the arbitration fees. *Id.* at *11–13. Noting that Samsung had "argued neither inability to pay nor unconscionability," the court observed that it "can also recoup its fees if [claimants'] claims are as harassing and frivolous as it contends." *Id.* at *11 (cleaned up). And the court found the issue of payment of the filing fees "substantive" rather than "procedural," because it affected "whether the parties can exercise their right to arbitrate at all." *Id.* at *13.

Samsung "may not have expected so many would seek arbitration against it, but neither should it be allowed to blanch at the cost of the filing fees it agreed to pay in the arbitration clause." *Id.* (citation and internal quotation marks omitted). Echoing other courts that have reached similar conclusions, the *Wallrich* court stated that "Samsung was hoist with its own petard." *Id.* Having made the "business decision" to preclude class claims in its arbitration agreement, "the time calls for Samsung to pay for it." *Id.*

Samsung promptly appealed the district court's ruling and sought a stay pending appeal. On November 8, 2023, the Seventh Circuit granted a stay and expedited the appeal. *See Wallrich v. Samsung Elecs. Am., Inc. and Samsung Elecs. Co., Ltd.*, Order, No. 23-2842 (7th Cir. Nov. 8, 2023). Oral argument in the appeal has been rescheduled for February 15, 2024.

Takeaways: Mass arbitrations threaten to undermine one of the central benefits of individual arbitration agreements with class action waivers, by subjecting companies to such significant initial arbitration costs that they have no choice but to capitulate to early settlements of what may be frivolous claims.

The issue may not be permanent, however, because many companies and alternative dispute resolution service providers already have enacted special procedures applicable to mass arbitrations. One solution involves the use of “bellwether” arbitrations, in which a small group of “exemplar” individual arbitrations would be adjudicated, after which a larger mediation would be attempted, followed by additional “batches” of individual arbitrations. While some district courts have upheld similar procedures, other courts have found them unconscionable, including one decision prompting a closely watched appeal that appears to be on the verge of voluntary dismissal. *See MacClelland v. Cellco P'ship* , 609 F. Supp. 3d 1024 (N.D. Cal. 2022), *appeal filed*, No. 22-16020 (9th Cir. July 13, 2022). Assuming a workable “bellwether” approach receives judicial endorsement, the mass arbitration problem may disappear as quickly as it arose.