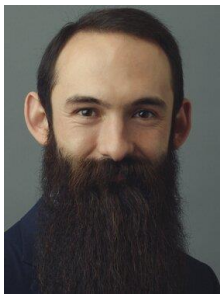
Mass Arbitration Procedures After Faulty Live Nation Ruling

By **Collin Vierra** (January 17, 2025)



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On Oct. 28, a U.S. Court of Appeals for the Ninth Circuit panel handed down a decision in Heckman v. Live Nation Entertainment Inc., which considered the conscionability of Ticketmaster's terms of service that required the use of a new arbitration provider, New Era ADR, for consumer mass arbitrations.[1]

Although Heckman's effect on companies has been widely discussed, the decision's impact on major consumer arbitration providers — including not only the likes of JAMS and the American Arbitration Association, but also Federal Arbitration, National Arbitration and Mediation, alternative dispute resolution services, and others — has not yet been explored.

While Heckman undoubtedly will invite conflicting interpretations, the exceptional allegations that gave rise to the decision mean that it should not restrict arbitration providers that have adopted good faith procedures to ensure that consumer mass arbitrations can be efficiently resolved on the merits.

Background

Heckman involved an action against Ticketmaster for alleged antitrust violations.[2] While the dispute was pending, Ticketmaster revised its terms of service to designate a new arbitration provider, New Era ADR, to resolve disputes between Ticketmaster and its customers.[3]

New Era allegedly reached out to Ticketmaster's defense counsel to pitch its services in 2021, at which time New Era "had not yet conducted any arbitrations and had not finalized its Rules governing mass arbitration procedures."[4] The parties disputed "the extent to which [Ticketmaster] and [its defense counsel] had input on, or helped shape, New Era's Rules" while their dispute with the Heckman plaintiffs was pending.[5]

Ticketmaster shortly thereafter became New Era's first subscriber and allegedly "only source of revenue."[6] Later that day, New Era published its ADR Rules, which plaintiffs alleged were specifically designed to unjustly limit consumer rights.[7] Ticketmaster then sought to compel the plaintiffs to arbitrate their pending claims with New Era.[8]

The Ninth Circuit panel first held that Ticketmaster's delegation clause and arbitration agreement were unconscionable and unenforceable under California law.[9]

The panel found that the manner in which Ticketmaster obtained consumers' purported consent to the arbitration agreement "evince[d] an extreme amount of procedural unconscionability far above and beyond a run-of-the-mill contract-of-adhesion case," including because Ticketmaster allegedly sought to require customers to arbitrate already-pending claims if they merely used Ticketmaster's website, which "customers may be required to visit the website again to access and use previously purchased tickets."[10]

The panel also found the arbitration agreement substantively unconscionable because of the combination of four features of New Era's rules: (1) decisions in early, bellwether

arbitrations would become binding precedent in subsequent arbitrations even though the claimants in the later arbitrations would not have the right to participate in the bellwether arbitrations; (2) claimants would be severely limited in their discovery rights; (3) the appeal process favored the respondent company; and (4) New Era could replace neutrals in its sole discretion.

U.S. Circuit Court Judges William Fletcher and Morgan Christen joined in this holding.[11]

The panel next reasoned, "as an alternate and independent ground, that the Federal Arbitration Act does not preempt California's prohibition ... of class action waivers contained in contracts of adhesion in large-scale small-stakes consumer cases," because the Federal Arbitration Act protects only "individual, bilateral" arbitration.[12]

Accordingly, the panel held that California's Discover Bank rule barring class action waivers — which the U.S. Supreme Court held was preempted by the Federal Arbitration Act in the 2011 case, AT&T Mobility LLC v. Concepcion — applied, rendering the entire agreement unenforceable.[13]

Heckman's Faulty Reasoning

At the outset, it should be noted that Heckman was almost certainly wrongly decided, and the alternate and independent ground is particularly poorly reasoned.

Although Heckman frequently cites the Supreme Court's seminal precedents in Concepcion and Viking River Cruises v. Moriana, the latter decided in 2022, it significantly misconstrues those cases.[14]

Both Concepcion and Viking River extolled parties' contractual freedom to enter into all manner of arbitral arrangements.[15] And although Concepcion held that California law could not require class arbitration, it did not hold that parties cannot agree to class arbitration — let alone batched, consolidated or bellwethered arbitrations of the sort, frequently administered by JAMS, the American Arbitration Association and others.[16]

Indeed, even before arbitration providers and companies began adopting these mechanisms to ensure that mass arbitrations could be resolved on the merits, traditional arbitration providers like JAMS and the American Arbitration Association offered class arbitration procedures that companies could opt into.[17] While most companies chose not to opt into class arbitration procedures, nothing in Concepcion supports the conclusion in Heckman that the Federal Arbitration Act only protects bilateral arbitration.

Even if the Ninth Circuit was right that Concepcion only protects bilateral arbitration, Heckman would be wrong, because batched, consolidated and bellwethered arbitrations can still be bilateral vis-à-vis the rights of the parties and the relief afforded to them. Indeed, Viking River rejected the argument that "a proceeding is 'bilateral' in the relevant sense if — but only if — it involves two and only two parties and the arbitration 'is conducted by and on behalf of the individual named parties only.'"[18]

In Concepcion and Viking River, the Supreme Court was concerned about California's imposition of mandatory class procedures on companies and consumers that did not agree to them, which also "sacrifice[d] the principle advantage of arbitration — its informality — and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."[19]

But nothing in those decisions can reasonably be read to preclude batching, consolidation and bellwether-style procedures that are designed specifically to ensure that consumer mass arbitrations can be efficiently resolved on the merits consistent with the parties' contractual arrangements, rather than doomed to potentially decades-long proceedings that prevent companies and consumers alike from vindicating their rights.

Despite Heckman's faulty reasoning, it is unlikely to be overturned in the near term. In December, the Ninth Circuit denied Ticketmaster's petition for reconsideration and/or rehearing en banc, and petitions for certiorari are rarely granted. However, courts will likely limit Heckman to its facts because of the exceptional allegations, and because the alternate and independent ground is effectively dicta.

Little Effect on "Traditional" Arbitration Providers

Assuming arguendo that Heckman was rightly decided, the ruling raises the question of what long-established arbitration providers like JAMS, the American Arbitration Association and others should take from the decision.

Each of these arbitration providers has adopted specific procedures in recent years to administer mass arbitrations and/or enforced bespoke mass arbitration procedures in companies' consumer arbitration agreements — and for good reason: Without specific procedures for mass arbitrations, many, if not most, arbitration providers are institutionally incapable of resolving consumer arbitrations in a timely manner.

JAMS, for example, has only 450 neutrals worldwide, only a fraction of which hear consumer arbitrations.[20] Without batching, consolidation or bellwether-style procedures, JAMS is simply incapable of resolving mass arbitrations involving, in some cases, tens of thousands of claims.[21]

Plaintiffs attorneys will almost certainly urge a broad reading of Heckman to foreclose arbitration providers from offering and enforcing mass arbitration procedures. Specifically, they will likely argue that batching, consolidation and bellwether-style procedures are inherently unconscionable, and that the Federal Arbitration Act does not preempt state class action waivers when companies invoke these procedures — leaving otherwise preempted state law rules, like California's Discover Bank rule, in effect, and rendering agreements that contain class action waivers unconscionable.

Plaintiffs attorneys who favor class actions will therefore bring their claims in court. Plaintiffs attorneys who hope to gain settlement leverage over companies through hefty arbitration fees, by contrast, will continue to assert thousands — if not tens of thousands — of individual arbitrations, and argue that arbitration providers are precluded from applying batching, consolidation and bellwether-style procedures.

Such arguments, however, are not only unsupported by Heckman, but implicitly — if not explicitly — suggest that the batching, consolidation, and bellwether-style procedures adopted and enforced by the likes of JAMS, the American Arbitration Association and FedArb suffer from the same legal defects as those used by New Era, even though they do not. In fact, none of these or other major arbitration providers' rules has the unique quartet of features — or in most cases, any of the features — that led the Ninth Circuit panel to conclude that New Era's procedures were substantively unconscionable.

Nor can any of these providers plausibly be accused of having colluded with a corporate defendant or its counsel to adopt procedures specifically designed to stymie pending

consumer claims. Rather, these procedures were thoughtfully adopted to enable arbitration providers to efficiently resolve consumer mass arbitrations on the merits.

Without batching, consolidation and bellwether-style procedures, an arbitration provider risks: (1) rendering consumer arbitration agreements illusory because the provider is unable to timely resolve the claims of tens of thousands of consumers; (2) facing legal liability by invoicing parties for arbitration services that the provider lacks the capacity to provide; and/or (3) causing companies to abandon the provider in favor of a competitor that takes a less aggressive reading of Heckman, and/or to abandon arbitration altogether.

None of these outcomes is in the long-term interest of reputable arbitration providers.

Further, neither batching, consolidation nor bellwether-style procedures is contrary to the supposed norm of bilateral arbitration extolled by Heckman. While these procedures help arbitrators efficiently resolve common issues, none prohibits participation by individual claimants or impairs the ability of an arbitrator to award individualized relief as each claimant's circumstances may warrant.

Indeed, such procedures are frequently used in both state and federal court. Section 1048(a) of the California Code of Civil Procedure, for example, provides that:

> [w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Similarly, Section 404.1 provides that:

> [c]oordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and manpower; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and, the likelihood of settlement of the actions without further litigation should coordination be denied.

Like batched, consolidated and/or bellwethered arbitrations, these procedures help ensure the efficient resolution of disputes while protecting all parties' due process rights and preserving the adjudicator's ability to award individualized relief where appropriate. It would be contrary to the interests of arbitration providers — and consumer arbitration altogether — for arbitration providers to read Heckman to void mass arbitration procedures similarly designed to facilitate efficient and fair resolution on the merits.

To be sure, arbitration providers may sometimes be asked to enforce bespoke mass arbitration procedures that are inconsistent with Heckman or other cases addressing procedural and substantive unconscionability. For example, whereas courts have held that unilateral arbitration clauses and prearbitration dispute resolution processes are valid and enforceable,[22] they have held that clauses that preclude consumers from timely resolving their claims on the merits without tolling statutes of limitations are not.[23]

But until Heckman is limited, reversed or affirmed, either by the Ninth Circuit and/or the

Supreme Court, respectable arbitration providers have an important choice to make: Do they take an unduly broad reading of Heckman that calls into question the legitimacy of their procedures, subjects them to potential liability and effectively precludes arbitration on the merits, thereby causing companies to forego use of these providers' services?

Or do they stand by procedures that were adopted to efficiently resolve consumer arbitrations without violating parties' contractual commitments?

Given the exceptional allegations of collusive conduct between New Era and Ticketmaster,[24] Ticketmaster's alleged attempt to force consumers retroactively into procedures to which they had not agreed when they initially asserted their claims, and the unprecedented rules New Era adopted that were "internally consistent, poorly drafted, and riddled with typos,"[25] Heckman should not be read to restrict reputable arbitration providers from applying mass arbitration procedures to efficiently resolve consumer mass arbitrations on the merits.

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[1] Heckman v. Live Nation Ent. Inc., 120 F.4th 670 (9th Cir. 2024).

[2] Id. at 676.

[3] Id. at 677.

[4] Heckman v. Live Nation Ent. Inc., 686 F. Supp. 3d 939, 947 (C.D. Cal. 2023), aff'd, 120 F.4th 670 (9th Cir. 2024).

[5] Id. at 947–48.

[6] Id. at 947, 957.

[7] Id. at 947–48.

[8] Id. at 946.

[9] Heckman, 120 F.4th at 676.

[10] Id. at 683.

[11] Id. at 684-87.

[12] Id. at 676, 692.

[13] Id. at 690.

[14] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); Viking River Cruises Inc. v.

Moriana, 596 U.S. 639, reh'g denied, 143 S. Ct. 60 (2022).

[15] See, e.g., Concepcion, 563 U.S. at 339; Viking River, 596 U.S. at 641.

[16] Concepcion, 563 U.S. at 352.

[17] See, e.g., JAMS, Class Action Procedures (effective May 1, 2009), https://www.jamsadr.com/rules-class-action-procedures/; American Arbitration Association, Supplementary Rules for Class Arbitrations (effective October 8, 2003), https://www.adr.org/sites/default/files/document_repository/Supplementary%20Rules%20for%20Class%20Arbitrations.pdf.

[18] Viking River Cruises Inc., 596 U.S. at 656.

[19] Concepcion, 563 U.S. at 348.

[20] JAMS Releases 2023 Global Caseload Statistics Reflecting Growing Demand for ADR Services Worldwide (July 15, 2024), https://www.jamsadr.com/news/2024/jams-releases-2023-global-caseload-statistics#:~:text=About%20JAMS%20%E2%80%93%20Local%20Solutions.&text=With%20a%20roster%20of%20over,world's%20important%20cases%20every%20year.

[21] Clifford D. Bloomfield, Mass Arbitrations: The New Landscape of Dispute Resolution and Its Challenges (May 2, 2024), https://www.jamsadr.com/blog/2024/mass-arbitrations-the-new-landscape-of-dispute-resolution-and-its-challenges.

[22] Bielski v. Coinbase, Inc., 87 F.4th 1003, 1014-15 (9th Cir. 2023).

[23] MacClelland v. Cellco P'Ship, 609 F. Supp. 3d 1024 (N.D. Cal. 2022); Achey v. Cellco P'ship, 475 N.J. Super. 446 (App. Div. 2023).

[24] Heckman, 686 F. Supp. 3d at 957-58.

[25] Heckman, 120 F.4th at 677-78.