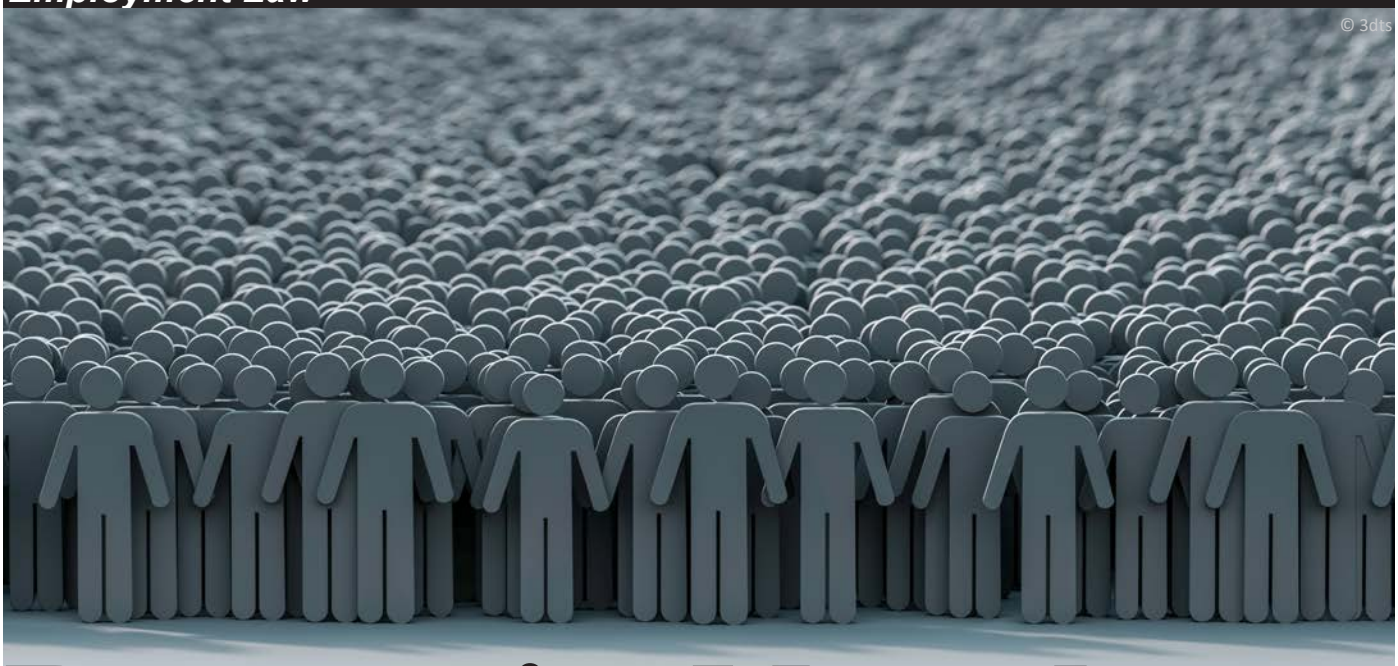

Power in Numbers

Corporations increasingly force ordinary consumers and employees to arbitrate their disputes individually, eliminating claims that once were pursued as class actions. But costly mass arbitration actions could help restore the balance of power – and push defendants to settle. The successful test case of Hose v. WIS provides some hope.

By Nathan Piller, Joshua Konecky and Leslie Joyner

As we approach the election, leading Democratic Party presidential candidates have made reining in corporate excess a focal point of their campaigns, pledging to fight for the "little guy" in a struggle against what they see as a rigged system.

The ensuing public debate on corporate power has focused on hot-button issues like taxing the "1%," CEO pay, offshore tax havens, and the like. But one of the more pernicious exercises of corporate power against the "little guy" rarely sees the bright lights of the debate stage. In fact, it happens outside of public view and behind closed doors by its very design. This is the problem of forced arbitration.

In our previous article on Mass Actions in the March/April 2018 *Forum*, we examined the pattern of Supreme Court decisions upholding contracts of adhesion that require ordinary consumers and employees to arbitrate their disputes individually, rather than in class or collective actions before juries. This trend continued after publication of that article with the recent decision of *Epic Sys. Corp. v. Lewis* (2018) 138 S.Ct. 1612. Buoyed by this and other rulings, corporations are increasingly using forced arbitration as a way of cutting class claims off at the pass, betting that the practicalities of having to litigate numerous individual arbitrations – as opposed to a single class or collective action – will discourage the individuals from pursuing their claims at all.

But what if consumers and employees call the corporations' bluff? As we explained in our previous article, filing hundreds or even thousands of individual arbitration demands may carry important strategic advantages. For one thing, the contract law of unconscionability in many states prevents enforcement of arbitration clauses that require individuals to pay costs as part of an arbitration that they would not have to pay in court. As a result, corporations may find themselves needing to pay millions of dollars in arbitral and other fees, spread across potentially thousands of individual proceedings, to resolve what used to be brought as a single action in court.

We previously presented the test case of *Hose v. WIS*, in which thousands of low wage workers were poised to bring nearly 14,000 of their own test cases as individual arbitrations. At the time that article went to press, the parties had agreed to stay the case and filing of the arbitrations to allow the parties to mediate the dispute. In this article, we report on the outcome, and what it augurs for future "mass actions" in this brave new world of forced arbitration.

An update on the legal landscape for forced arbitration – more of the same

As discussed in the previous article, one of the most well-known markers for the recent trend of court cases approving

mandatory arbitration agreements with class action waivers is *AT&T Mobility, LLC, v. Concepcion* (2011) 563 U.S. 333, 131 S.Ct. 1740. In *AT&T Mobility*, a 5-4 majority held that a state law conditioning enforcement of arbitration on the availability of class procedures "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the [Federal Arbitration Act]." (*Id.* at 344, 131 S.Ct. at 1748.) Two years later, the Supreme Court built upon *Concepcion*, holding that mandatory class action waivers are enforceable even where the costs of arbitration would exceed the potential recovery. (*American Exp. Co. v. Italian Colors Restaurant* (2013) 570 U.S. 228, 231, 133 S.Ct. 2304, 2307.)

Predictably, corporations have taken full advantage. In 2015, a *New York Times* investigation described the increasingly widespread practice of forced arbitration as "a far-reaching power play orchestrated by American corporations" to "circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices." (https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html) As shown by the *Times*' investigation, ordinary consumer behavior like using a mobile phone, getting a credit card, or shopping online is becoming nearly impossible without agreeing to private, individual arbitration. And now, "[t]he same applies to getting a job[.]" (*Id*.)

When our previous article was published, the Supreme Court was poised to address the most recent challenge to forced arbitration. At that time, we predicted another 5-4 decision in favor of arbitration. Needless to say, this prediction came to fruition.

In *Epic Sys. Corp.*, the Supreme Court took up the issue of whether forced arbitration and class action waivers could deny the ability to enforce statutory rights under the nearly hundred-year old National Labor Relations Act (NLRA). Section 7 of the NLRA gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (29 U.S.C. § 157.)

The Respondent employees contended that the class action waivers in their arbitration agreements were illegal because they interfered with the employees' rights under the NLRA to engage in concerted activities, including the right to participate in collective lawsuits. (*Epic Sys. Corp.*, 138 S. Ct. at 1622.) The Respondents relied on a "savings clause" in the Federal Arbitration Act (FAA), which provides that arbitration agreements must be enforced "save upon such grounds as exist at law or in equity for the revocation of any contract." (9 U.S.C. § 2.)

The 5-4 majority disagreed, holding that under *Concepcion*, "courts may not allow a contract defense to reshape traditional individualized arbitration … without the parties' consent." (*Id*. at 1623.) The Supreme Court viewed the potential deprivation of statutory rights under the NLRA as just another contract defense that must be rejected under the *Concepcion* rule because it would transform an individual arbitral proceeding into a class or collective one, contrary to the terms of the arbitration agreement. (*Id*.)

The Supreme Court also rejected the Respondents' argument that the NLRA's protection of "concerted activity" overrides the FAA, reasoning that participating in a class or collective action is not protected "concerted activity" under the NLRA. (*Id*. at 1626-27.)

So, if class action waivers are airtight, and participating in a class action is not a protected right, how can the "little guys" of the world work together to seek justice for the group?

The answer may lie in mass actions like *Hose v. WIS*.

Hoisting corporations on their own petard – case study

In our previous article we introduced the case of *Richard Hose, et. al. v. Washington Inventory Service, Inc., et. al*., Case No. 3:14-cv-02869- WQH-RBB (S.D. Cal.) ("*Hose v. WIS*"). In *Hose v. WIS,* the plaintiff-employees were low wage workers who alleged that the defendant-employer denied them minimum wage and overtime by having them work "off-the-clock."

After more than 14,000 individuals opted-in to the collective action, the District Court compelled the vast majority of them to arbitration, specifically ordering that "the parties are directed to proceed to arbitration in accordance with the terms of the [arbitration agreement.]" (Dkt. No. 189, at p. 17.) That's when things got interesting.

As discussed above, California law on the unconscionability of contracts forbids corporations from requiring individuals to bear fees and costs as part of arbitration

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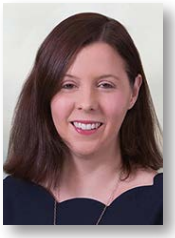

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that they would not have to pay in court. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113.) Well aware of this requirement, defendant WIS promised in its arbitration agreements to "pay all costs and expenses unique to arbitration, including without limitation the arbitrator's fees." (*Hose v. WIS*, *supra*, Dkt. No. 215-6, at 2.)

> In *Hose v. WIS*, the employer's filing fees alone would add up to more than $36,500,000.

These fees and costs are substantial even on an individual level, but staggering when multiplied by 14,000. The American Arbitration Association (AAA), the arbitral outfit designated under the arbitration agreement, charges the Claimant an administrative "non-refundable filing fee capped at $300" and charges the employer a "non-refundable filing fee of $1,900."(https://www.adr.org/sites/default/files/Employment_Arbitration_Fee_Schedule.pdf.) Employers must also pay a $750 "case management fee" per individual arbitration. In *Hose v. WIS*, the employer's filing fees alone would add up to more than $36,500,000. Of course, this does not include the additional fees and the costs of the arbitrators, which are expenses unique to arbitration and must therefore be borne solely by the employer as well. (*Armendariz, supra,* 24 Cal.4th at 113.) Nor does it include the attorneys' fees and costs that the defendants would have to pay their own lawyers to defend each arbitration, or the attorneys' fees and costs they may need to pay to the individual employees who prevail in their arbitrations, under the fee shifting provisions of the FLSA. (29 U.S.C. § 216(b).)

In April of 2018, the plaintiffs began filing arbitration demands with the AAA, and tendered a single filing fee of $300 (the maximum fee chargeable to an employee under the AAA rules) (*Hose v. WIS, supra*, Dkt. No. 217, at p. 7.) The AAA *returned* the $300 filing fee to the plaintiffs, notifying the parties that "fees are not due from the employees pursuant to the arbitration agreement." In doing so, the AAA found that the defendant had to pay for all filing fees, including those normally charged to the claimant, under the terms of the arbitration agreements and the applicable rules. This amounted to $2,200 per case, which totaled more than $30 million in filing fees to force approximately 14,000 people to individually arbitrate their claims. (See *id*.)

Rather than paying the fees assessed and arbitrating on the merits, the defendants refused to participate, taking the position that they owed nothing unless and until each individual claimant tendered her or his own $300 filing fee. (*Id*. at p. 8.) In essence, the defendants thumbed their noses at the very tribunal they previously insisted would need to be the decision-maker to resolve the plaintiffs' claims.

The dispute came to a head when the plaintiffs petitioned the District Court for an order requiring the defendants to participate in the arbitrations in accordance with the terms of their own arbitration agreements. Citing the "federal policy in favor of arbitration," the District Court granted the plaintiffs' motion and ordered the employer to participate in the arbitrations and pay the filing fees as assessed by AAA. (*Hose v. WIS, supra*, Dkt. No. 251, at p. 10.) The employer had no choice but to pay the costs of arbitration – which well exceeded the amount sought by the employees in the collective action – or come to the negotiating table.

(To complicate matters further, the original defendant had declared for bankruptcy, but not until after it sold its business to a successor company. In purchasing the WIS business, the successor had gambled that the case was not a significant liability due to the forced arbitration agreement. The gamble backfired, as the successor was now on the hook for the filing fees assessed by AAA.)

After a series of multi-layered negotiations (involving multiple stakeholders from the bankruptcy proceedings and successor company), the parties agreed to a multi-million dollar settlement. (See *Hose v. WIS, supra*, Dkt. No. 290-1). While the settlement reflected compromises by all sides, it likely was higher than what could have been achieved without the forced arbitrations. Indeed, the company essentially had no choice but to settle for a reasonable price on the plaintiffs' low wage overtime claims, because paying the arbitration filing fees (which themselves exceeded the value of these claims) would have put it out of business.

Losing a motion to compel arbitration is ordinarily a fatal blow to a class or collective action. But in *Hose v. WIS*, the leverage created by the defendants' original insistence on individual arbitration was actually the driving force behind the substantial settlement.

In fact, the result achieved may be superior to what could have been obtained in court, had there been no arbitration agreements to begin with. In court, the defendant could have brought a motion for decertification and potentially forced the plaintiffs to litigate individually in court, without being required to pay the filing fees. But here, the forced arbitration campaign by the employer allowed the plaintiffs to leap frog over the procedural complexities of maintaining a collective action, and skip right to the individual claims.

Hose v. WIS is just one case, but it is an early indication that at least some defendants faced with mass arbitrations will sooner agree to a substantial settlement than spend the great deal of money necessary to arbitrate hundreds or even thousands of individual disputes, which itself carries the risk of successive losses and the resulting need to find a reasonable "mass" settlement later on.

The perils of the filing fee

One of the keys to the plaintiffs' success in *Hose v. WIS* was the AAA's determination that the defendants were responsible for paying all of the filing fees of the arbitrations. This added to the financial pressure inherent in the fee structure the defendants wrote into their form arbitration agreement. But more important, it relieved the plaintiffs of having to pay a $300 filing fee with each arbitration – a substantial sum when multiplied by several thousand arbitration demands.

Of note, the AAA's determination on the filing fee issue relied on the broad language of the defendant WIS's arbitration agreement. If mass actions become more common, we may see corporations attempt to draft arbitration agreements that increasingly reside on the margins of unconscionability law – that is, just fair enough to pass muster under state contract law, but not so fair as to excuse each claimant of her or his individual filing fee.

Under California state law, arbitration agreements are unconscionable to the extent they require employees to pay "costs that are unique to arbitration." (*Armendariz, supra*, 24 Cal.4th at 113.) In the seminal *Armendariz* case, the Court observed that an individual plaintiff appearing in federal court will have to pay a filing fee, so it would not be "problematic" to require the same individual plaintiff to pay a similar filing fee if she or he were compelled to arbitration. (*Id*. at 108.) Some defendants have interpreted this to argue that it is not unconscionable to require each plaintiff in a mass action to pay an individual filing fee. But is this a fair reading of *Armendariz* in a mass arbitration, where hundreds or even thousands of filings fees are at issue? Are these potentially massive aggregate filing fees a reasonable substitute for what would have to be paid in court anyhow, or are they "unique to arbitration"?

Named plaintiffs in a class action case need not pay a separate filing fee in court for each class member. But a mass arbitration is not a class action, where a single plaintiff represents absent class members. Corporations will likely take the position that "mass arbitration" is just a fancy word for many individual cases, each of which should be judged separately as to its reasonableness as a substitute for an individual court case.

One potential retort is that mass arbitration is akin to mass joinder, where individual plaintiffs are made part of the same complaint without having to each pay a separate filing fee. Permissive joinder "is designed to promote judicial economy, and reduce inconvenience, delay, and added expense." (*Coughlin v. Rogers* (9th Cir.1997) 130 F.3d 1348, 1351.) California courts have joined hundreds of individual plaintiffs into a single case based on these principles. (See, e.g., *Petersen v. Bank of America* (2014) 232 Cal.App.4th 238 [approving joinder of 965 plaintiffs, and reasoning that "mass joinder here holds the promise of actually decreasing trial court case management time. Unless we adopt the cynical view that requiring each plaintiff to proceed against the corporate defendants will make their cases go away, we have to consider this aspect of the case."])

Still, it is an open question whether mass arbitration filing fees are unconscionable because they are "unique to arbitration," or if they are merely a proxy for what might happen in court if hundreds or thousands of individual claims were filed.

This novel issue may be tested in the case of *Orson Judd, et al. v. KeyPoint Government Solutions, Inc.*, Case No. 1:18-cv-00327-RM-STV ("*Judd v. KeyPoint*"). Like *Hose v. WIS*, *Judd v. KeyPoint* is another FLSA collective action in which hundreds of individual opt-in plaintiffs are poised to file individual arbitration demands. The early returns are less secure for the plaintiffs. Whereas the defendant in *Hose v. WIS* agreed to pay "all costs and expenses unique to arbitration," the defendant in *Judd v. Keypoint* agreed to "pay all of the Arbitrator's fees and costs." (*Judd v. Keypoint, supra*, Dkt. No. 51-2, at p. 4.). The AAA determined that each individual claimant is responsible for her or his own $300 filing fee, based on its interpretation that the "Arbitrator's fees and costs" do not cover filing fees.

The plaintiffs have sought review of this determination on both contractual and due process grounds. As this article goes to press, the parties are awaiting a decision from the District Court. Perhaps there will be more to report by the next publication of *Forum*.

Reform on the horizon?

Change on the forced arbitration front may not come from the Supreme Court any time soon, but recent legislative efforts signal progress. Just last October, California Governor Gavin Newsom signed into law AB 51, which prohibits employers from forcing employees to waive any right or forum for vindicating statutory employment rights as a condition of employment. (https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51.) While the Supreme Court may still enforce arbitration clauses so long as employees sign them, the bill makes it illegal for an employer to revoke a job offer or retaliate against those who refuse to sign.

On the national level, lawmakers in the House of Representatives recently passed the "Forced Arbitration Injustice Repeal (FAIR) Act," a far-reaching bill that bans corporations from forcing consumers and employees to arbitrate disputes, and prohibits class action waivers. (https://www.congress.gov/bill/116th-congress/house-bill/1423/text). The bill likely will face resistance from Senate Republicans, but its passage in the House is a promising development.

Leading California businesses also are increasingly abandoning forced arbitration. For example, Google announced in February of 2019 that it would no longer force employees to resolve disputes in private arbitration. (https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html). Months earlier, Facebook abandoned its controversial practice of mandatory arbitration of sexual harassment claims, following public outcry. (https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html.)

Conclusion

Cases like *Hose v. WIS* may require courts and legislatures alike to recalibrate their policy judgments when it comes to the merits of forced arbitration and class action waivers. For instance, the majority in *Epic Systems* observed that class actions can unfairly "plac[e] pressure on the defendant to settle[,]" and cited what it regards as cost advantages inherent to arbitration. (See, e.g., *Epic Sys. Corp.*, 138 S.Ct. at 1632.) *Hose v. WIS* turns these policy concerns on their head. As more mass actions come down the pike, judges and policymakers alike may come back to the original view that "[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit; the class action is often the only effective way to halt and redress such exploitation." (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 446 [quoting Justice Tobriner's concurring opinion in *Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 387].)

In the meantime, *Hose v. WIS* brings hope that a mass arbitration strategy can help restore the leverage that is critical for seeking legal redress on behalf of the most vulnerable among us, but that has been stripped away by the Supreme Court's string of pro-arbitration decisions. Perhaps then corporations will think twice before relying on arbitration as their central legal defense – or before inserting class action waivers in their mandatory arbitration agreements to begin with. ■