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Costs of Defense in Mass Individual Wage-and-Hour Arbitrations: A Case Study

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In the wake of several pro-arbitration decisions issued by the U.S. Supreme Court, many employers view arbitration agreements with class action waivers as the surest defense against wage-and-hour class litigation. However, employers instituting these arbitration programs must consider the costs of defending a large-scale, coordinated filing of individual arbitrations.

This article recounts recent litigation involving over 150 individual overtime exemption misclassification arbitrations, with a focus on the costs of defending each arbitration case to resolution. The litigation can serve as an instructive case study in the costs of defending mass arbitrations in the wage-and-hour context.

Litigation Timeline

Early Litigation Activity

The litigation began as a class and collective action, filed by a single named plaintiff in federal court. The plaintiff alleged that the defendant had misclassified a group of its employees as exempt from overtime under state and federal law. One additional plaintiff filed an FLSA consent form with the initial complaint.

Soon after the plaintiff filed the case, the defendant advised plaintiffs' counsel that plaintiffs had signed arbitration agreements. The arbitration agreements contained class and collective action waivers and, according to defendant, were signed by the vast majority of putative class members. The arbitration agreements mandated arbitration with JAMS in the employer's headquarters city.[1] The defendant asked the original plaintiffs to voluntarily move the case to arbitration.

However, it was soon clear that the litigation would not be limited to two plaintiffs. Employee response was enthusiastic from the outset; eleven additional plaintiffs joined the case in the first three weeks. Because some worked in a second job position, the plaintiffs were prepared to amend their case to expand the classes. Armed with this early, enthusiastic participation and expanded case, plaintiffs' counsel asked the defendant reconsider its decision to enforce its arbitration agreements. Plaintiffs' counsel warned that participation would be high and that individual arbitration would be prohibitively expensive and disruptive for the company.

The defendant elected to stand by its arbitration agreements and their class and collective action waivers. Rather than challenging the arbitration agreement, most plaintiffs[2] willingly filed their claims in arbitration in exchange for defendant's waiver of certain (arguably unenforceable) provisions in the arbitration agreements. Importantly, the defendant also agreed to pay the plaintiffs' half of the arbitration filing fees, based on the plaintiffs' argument that federal opt-in plaintiffs (who could file a consent in federal court for free) could not be forced to pay a filing fee in arbitration.[3]

Litigation Proceeds in Arbitration

New plaintiffs[4] continued to join the case after the litigation moved to arbitration. JAMS began sending arbitrator strike lists, and it quickly became apparent

that the list of potential arbitrators was very short. And because JAMS rules allow each side to strike two arbitrators (and rank the rest), the vast majority of plaintiffs' cases were assigned to three arbitrators.

Nine months into the case, the list of participating plaintiffs grew from thirteen to over seventy-five. Litigation began in earnest. The defendant steadfastly adhered to the individualized nature of the arbitrations—and the plaintiffs complied with the company's desires. The plaintiffs scheduled arbitration hearings on a first-come-first-served basis, taking the first available dates for each arbitrator. The plaintiffs filled the arbitrator's schedules as fully and completely as the arbitrators would allow.

Discovery was also individualized. Although the defendant provided Rule 30(b)(6) depositions[5] that could be used in all cases, written discovery and individual depositions focused on a handful of cases at a time. Thus, even though a supervisor may have supervised twenty plaintiffs in the group, the defendant limited that supervisor's deposition testimony to the plaintiffs who were next up for hearing. As a result, almost every individual case involved at least one supervisor deposition.

As the first hearing dates approached, the defendant provided settlement offers to those plaintiffs with imminent hearing dates. Some plaintiffs accepted the settlements and others did not. This strategy had immediate benefits for the defendant, as the company saved a great deal in JAMS filing fees and legal fees. However, the settlements also provided an escape hatch for plaintiffs with credibility issues, extenuating circumstances, or little desire to pursue their claims through full discovery and a hearing. Those plaintiffs who wanted to fight for full payment pushed forward.

The First Plaintiff Loses, the Next Four Plaintiffs Win

The first arbitration hearing took place in December 2013. The arbitrator for the hearing ("Arbitrator 1") was very low on the plaintiffs' ranking list and thus was only assigned to one case.[6] After a three-day hearing and submission of post-hearing briefs, Arbitrator 1 found in the defendant's favor on its exemption affirmative defense and awarded zero damages. Plaintiffs' counsel paid approximately $10,000 in costs to the defendant on its client's behalf.

If the defendant had permitted class arbitration and drawn Arbitrator 1, the litigation would have been over. Instead, the right to strike arbitrators ensured plaintiffs they would never see Arbitrator 1 again. The adverse ruling had no issue-preclusive effect. The plaintiffs moved forward, trusting that later arbitrators would find the decision poorly reasoned and unpersuasive.

The second and third hearings took place in February 2014 in front of Arbitrator 2. Those hearings were quickly followed in March 2014 by the fourth and fifth hearings, in front of Arbitrator 3. Because of the timing of post-hearing briefings and the loaded schedule, the defendant was forced to pay nonrefundable arbitration fees on the fourth and fifth cases before receiving a ruling on the second and third cases. Plaintiffs declined the defendant's request to continue the fourth and fifth hearings.

The day before the fourth hearing (in front of Arbitrator 3), Arbitrator 2 issued final awards in plaintiffs' favor in the second and third hearings. Arbitrator 2 rejected the defendant's exemption defense and awarded wage loss damages of $20,000 and $30,000. He later awarded $186,888 in attorney fees and costs.

Arbitrator 3 followed suit in the fourth and fifth hearings, also rejecting the defendant's affirmative defense and awarding damages of $15,067 and $43,631. Arbitrator 3 later awarded $104,793 in fees and costs.

Resolution

With four plaintiff victories in the books, the parties agreed to pull a number of hearings off calendar for a global mediation. Unfortunately, that mediation was unsuccessful. Thus, the hearings continued once again, with three September hearings scheduled in front of Arbitrator 3 (who had already rejected the defendant's exemption defense) and one hearing scheduled in front of a new arbitrator ("Arbitrator 4").

The parties took depositions, exchanged documents, drafted witness and exhibit lists, and filed opening briefs for the four September cases. On the morning of the first September hearing, however, the four cases settled. Settling the four September cases gave the parties time to hold a second global mediation, which resulted in a global settlement for 156 plaintiffs.

Payments Prior to Second Global Mediation

Defendant Owed Almost $650,000 in Settlements and Awards

The second global mediation did not include the thirteen plaintiffs who had already won or settled their cases. At the time of the mediation, the defendant owed or had paid $642,441.92 in settlements and awards to thirteen plaintiffs. Those settlements and awards were enlightening for several reasons.

First, the cost of each case increased dramatically the closer it got to hearing. The defendant owed over $400,000 in damages, fees, and costs—or $100,000 a head—on the four cases it lost. That number does not include the substantial JAMS fees and defense fees the defense incurred in each case. When it settled on the eve of trial, on the other hand, the defendant paid less. Even factoring in the plaintiffs who took a quick payout instead of litigating, the defendant owed (or had paid) an average of over $49,000 per head on the thirteen plaintiffs whose cases resolved.

Second, any savings to the defendant in identifying and cheaply resolving weaker plaintiffs was far outweighed by the cost of going to hearing against strong plaintiffs. The plaintiffs who settled their cases early all faced extenuating circumstances unrelated to the facts of their case. Those plaintiffs still received valuable settlements. While there may have been other plaintiffs with similar weaknesses, the defendant would have had to proceed through individualized discovery to find them. And for every such plaintiff that the defendant found, it would have to pay hundreds of thousands of dollars in settlements, awards, defense costs, and JAMS fees to successful plaintiffs.

Third, as outlined in more detail below, the defendant's costs of defense were far greater than the cost to settle cases, even on the eve of trial. The defendant would certainly spend more than $49,000 in JAMS fees and defense fees on each individual hearing. Thus, even a win on the merits was a financial loss for the defendant. Settling cases on the eve of trial—when the cases cost the most, JAMS fees had become non-refundable, and the defendant had paid tens of thousands of dollars in defense counsel fees—was the worst financial decision for the defendant.

JAMS Fees and Costs of Defense for Initial Hearings

Plaintiffs estimate that the defendant paid JAMS between $17,000 and $34,000 for the hearing in front of Arbitrator 1, between $19,000 and $24,000 each for the two hearings in front of Arbitrator 2, and between $22,000 and $28,000 each for the two hearings in front of Arbitrator 3. Thus, the JAMS fees for these five arbitrations alone were between $99,000 and $138,000.

Of course, the defendant paid its own lawyers as well. Assuming a very conservative $250,000 in defense fees and costs to litigate through the first five cases (an average of $50,000 per case), and subtracting the $10,000 plaintiffs' counsel reimbursed the defendant for the first loss, the defendant spent at least $240,000 in its own attorney fees to defend the first five cases.

By the plaintiffs' very conservative estimate, therefore, the first five arbitration hearings cost the defendant approximately $775,000. Extrapolated across 156 hearings, the potential cost of continued litigation to the defendant was a whopping $24,180,000. Knowing the defendant would argue that it could litigate subsequent arbitrations more efficiently and cost-effectively, the plaintiffs created a detailed cost of defense analysis.

Costs of Defense Going Forward

The second global mediation covered 156 plaintiffs, each of whom returned a consent form to plaintiffs' counsel. Many had filed arbitration demands, but others had not yet done so. (Various tolling agreements throughout the litigation obviated the need for the plaintiffs to file their arbitration demands immediately.) The chart on the opposite page outlines the number of plaintiffs per arbitrator.

The defendant's exposure included not only damages or settlement payments to the plaintiffs, but also JAMS fees and costs of defense. The defendant's exposure was significant.

JAMS Fees

JAMS fees for each individual case were substantial. The defendant was first responsible for an $800 filing fee and a $5,000 retainer for each case. The plaintiffs had filed 106 arbitration demands at the time of mediation, meaning the

Arbitrator	Cases Assigned	Cases Resolved	Cases Outstanding
Arbitrator 1 (Ruled for Defendant)	1	1	0
Arbitrator 2 (Ruled for Plaintiffs)	13	6	7
Arbitrator 3 (Ruled for Plaintiffs)	37	6	31
Arbitrator 4	22	1	21
Arbitrator 5	1	0	1
Arbitrator 6	1	0	1
Arbitrator 7	1	0	1
Unfiled/Unassigned			94
TOTAL		**14**	**156**

defendant had paid (or owed) over $626,000 to JAMS just in initial filing costs. If mediation had failed and the remaining plaintiffs had all filed their claims, the defendant would have owed JAMS another $226,200 in initial filing fees.

The initial JAMS filing fees were substantial. But the JAMS fees increase significantly thirty days before each hearing, when they become nonrefundable. For a two-day hearing, the defendant must pay two daily arbitrator fees (ranging from $5,000 to $6,500 per day) and two daily case management fees ($800 per day), on top of the initial $800 filing fee and $5,000 deposit. JAMS credits the $5,000 deposit to the arbitrator's research and writing time.

Assuming the arbitrator devotes two days for preparation, research, reviewing the record, and writing an award, the cost for a single two-day arbitration ranges from $22,000 to $28,000. This does not include any time spent on a motion for fees and costs. Thus, total JAMS fees for arbitrating all 156 remaining cases would have been $3,820,800.

JAMS fees might have gone down the longer the cases were litigated. For example, the parties might have limited later hearings in front of repeat arbitrators to one day. Likewise, arbitrators might spend less time researching and writing in subsequent hearings. However, JAMS costs would be substantial even with these costs savings. Assuming only five additional two-day hearings, with the rest of the hearings taking one day of hearing time and one day of arbitrator prep, the JAMS fees would be a minimum of $1,999,000.

Defense Counsel Fees and Costs

While the defendant might have been able to defend subsequent arbitration hearings cheaply, it could not do so for free. Each hearing involved a claimant deposition, a defense witness deposition, witness preparation, document production, document review, briefing and/or argument preparation, and general hearing preparation. The defendant must also pay for transcripts and other costs.

Using conservative hours and rate estimates,[7] the plaintiffs estimated that the defendant might be able to defend the remaining cases for approximately $43,400 apiece. Over an additional 156 cases, that amounts to $6,770,400 in defense fees and costs. For the sake of argument, and to put the most conservative spin possible on these numbers, one might assume that the defendant could cut defense costs in half through efficiency measures. Even if it spent only $21,700 to defend each arbitration, however, the defendant would still pay over $3,385,200 in defense fees and costs to arbitrate the remaining cases.

Payments to Claimants and Claimants' Counsel

The first four awards averaged approximately $100,000: $27,000 in damages and almost $73,000 in fees and costs. For various reasons too detailed to include here, the plaintiffs believed that $27,000 in damages per plaintiff was a *very* conservative projection for future hearings. By improving presentation of documentary evidence and witness testimony, future plaintiffs were likely to be significantly more successful than the first four.

Importantly, the $27,000 average award was *free and clear* of attorney fees and costs. Even assuming plaintiffs' counsel continued to streamline its prosecution, thus incurring only the $43,400 of fees and costs estimated for defense counsel, each loss would still cost the defendant over $70,000 in payments to plaintiffs and plaintiffs' counsel.

Defendant's Exposure

When one tallies the JAMS fees, defense counsel fees and costs, and payments to plaintiffs and plaintiffs' counsel, the defendant's exposure was staggering. The chart below uses the following variables:

- Single-day hearing and one day of arbitrator prep, research, review, and writing (with only five more two-day hearings)
- $21,700 in defense fees and costs in each case
- $27,000 per plaintiff for each plaintiff victory
- $43,400 in plaintiffs' fees and costs for each plaintiff victory
- $5,000 in costs reimbursed to defendant for each defendant victory

COSTS OF DEFENSE 1-Day Hearing, 1 Additional Day	
Defendant's Cost to Lose All Remaining Cases	$16,366,600
Defendant's Cost to Win 50% of Remaining Cases	$10,485,400
Defendant's Cost to Win 75% of Remaining Cases	$7,544,800
Defendant's Cost to Win 90% of Remaining Cases	$5,780,440

Of course, these numbers did not reflect reality—they ignore that Arbitrator 2 and Arbitrator 3 already ruled on the exemption defense based on the defendant's corporate testimony and that there were multiple cases pending before each of these arbitrators. Therefore, the defendant's best-case scenario was to win *every single case* not assigned to Arbitrator 2 or Arbitrator 3, *as well as every single case* not yet assigned to an arbitrator. That highly unlikely turn of events would still cost the defendant mightily:

DEFENDANT'S COST to Win Every Case Not Assigned to Arbitrator 1 or Arbitrator 2	**$7,589,400**

Importantly, these calculations do not include a dollar value for the unproductive supervisor time required for each hearing. To bring a case to hearing, the defendant had to produce, at the very least, a supervisor for the hearing and witnesses regarding job duties. If the defendant actually litigated 156 future arbitrations, it would essentially employ a manager for a year to do nothing but attend hearings.

Conclusion

The litigation recounted above settled after five arbitration hearings and the expenditure of significant resources by the plaintiffs and the defendant. Although the parties were able to settle the litigation at a second global mediation, there is no guarantee of resolution at any point in the case. The defendant was contractually bound to litigate each individual arbitration hearing to resolution. The costs of defense exposure were real, and they were significant.

At the end of the day, most plaintiffs' counsel will prefer class or collective litigation over individual arbitrations. However, the right to arbitrate—and the right to arbitrate individually—arises from contract. Accordingly, employees who are subject to arbitration agreements with class action waivers may choose to arbitrate individually, in order to impose greater litigation costs on the defendant in hopes of higher individual awards. Employers considering an arbitration program must consider the worst-case scenario: mass individual arbitrations leading to stifling costs of defense.

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NOTES

1. The employees at issue all worked in the headquarter city.
2. A small number of plaintiffs terminated employment before the defendant launched its arbitration agreements. These plaintiffs remained in federal court.
3. *See* Armandariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 765 (Cal. 2000) (concluding that in employer-mandated arbitration, employees cannot be forced to bear "any *type* of expense that the employee would not be required to bear" if they filed in court).
4. Plaintiffs in arbitration are commonly called "claimants." This article uses the term "plaintiff" throughout for consistency and clarity.
5. *See* FED. R. CIV. P. 30(b)(6).
6. Coincidentally (or not), Arbitrator 1 had the most immediate availability for hearing dates, which led to his case coming up for hearing first.
7. Plaintiffs estimated a rate $600/hour, although in 2011, defense counsel's cheapest partner billed at $540/hour, and the average partner rate was $646/hour. The vast majority of the work in the litigation, including every deposition and every hearing, was performed by partners.