Lowenstein Sandler's Insurance Recovery Podcast: Don't Take No For An Answer

Episode 83:
Mass Arbitrations: Who Pays? Part II

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Lynda Bennett: Welcome to Don't Take No for An Answer. I'm your host Lynda Bennett, chair of the insurance recovery practice here at Lowenstein Sandler. And I am pleased today to welcome back team Lowenstein, or a nice cross-section of team Lowenstein, to continue our discussion on mass arbitration and mediation. In one of our prior episodes, we set the table on what is involved in those types of alternative dispute resolution processes.

And today, we're going to take a much deeper dive into now you have found yourself receiving a mass arbitration demand, or you've been asked to head off to a mass mediation discussion. What are the things that you need to do in these respective roles to have a successful process?

Today I'm welcoming back Judge Freda Wolfson, who is the former Chief Judge of the United States District Court for the District of New Jersey, as well as the chair of Lowenstein Sandler's Alternative Dispute Resolution Group. I am also pleased to have Michael Kaplan, who is a partner in our white-collar group, and also Ruth Zimmerman, who's an associate in our litigation department. Thank you all for coming back to continue our discussion of this very interesting topic. Good to see you again.

Michael Kaplan: Hi, Lynda.

Judge Wolfson: Hi, Lynda. Thank you for having us.

Lynda Bennett: Happy to have you. Last time, as you know, we talked just about what mass arbitrations and mediations are, how they work, how they came to be. Today, I really want to have you take a deep dive into, what are the things that my companies need to do to prepare for a mass arbitration or mediation?

And then, Judge Wolfson, I want you to give the perspective as the head of the ADR process there. What are the things that you see that work well and

not so well when companies show up and try to get these cases resolved? Or I should say lit funders show up to do that.

Let's start off with Mike. What should a company do when it finds itself getting that now maybe not so unexpected mass arbitration demand? What are some of the first things they need to do, think about?

Michael Kaplan: They should call their favorite corporate counsel and have their agreements revised for the next time. When you get the mass arbitration, I think the first thing that companies really need to do is to dig into their records to quickly identify the scope of valid and viable claims.

And that's going to be the most helpful, because the one thing that the plaintiffs' bar dislikes most is being told that the claims they found on 1(800) call me for a claim, irrespective if you ever used the service or not, is not valid, is to be presented with that proof. And so the first thing companies should do is that, is to really identify the scope or otherwise.

Obviously, given that this is an insurance recovery podcast, I'd be remiss if I did not say with a quick shout out to our host, call your favorite insurance recovery lawyer-

Lynda Bennett: Day one.

Michael Kaplan: ... Lynda Bennett day one and start the process of getting coverage. And then within that scope, I think really have a critical assessment of what your liability is. If your liability is going to be in orders of magnitude that is only going to be compounded by the cost of the arbitration, then it's going to make sense right from the outset to try to mitigate that loss and try to create a pool, give it to the plaintiffs' bar, and let them fight over how to hack it up.

But those are really the three initial things I think that companies need to do as they prepare. Outside of that, they're going to be in a process where they need to work with the arbitrator to create the most favorable conditions for that mass arbitration, but I'm sure we'll get there.

Lynda Bennett: Judge, on that front, Mike is describing an awful lot of work that needs to be done pretty quickly, and the timetables associated with arbitration demands can be pretty tight. When you've been contacted potentially to serve as an arbitrator, are you seeing a lot of requests for release from the timetables that ordinarily apply?

Is that something that you're recommending to the parties coming to you, that maybe we should slide this on over into a mediation posture first? Or is that something that they're coming to you proactively and asking for right out of the gate?

Judge Wolfson: Well, I'll be very candid that in my short time since I left the bench, I have not acted as an arbitrator in this case but only as a mediator. I have now done several, and I have several in the pipeline, and I think that's really the direction.

I think in these, what we call the mass arbitration, that's the direction. If you've got a company on the other side, they appreciate let's try to mediate this, if they think there's some validity to some claims. They'd rather do that and limit, because we know the cost of each of these arbitrations is astronomical.

And by the way, it's one of the arguments that the plaintiff, when I say the plaintiffs, they're not the plaintiffs, I'm sorry, consumer counsel or whoever it might be, employment counsel coming in, makes, which is saying, "It's going to cost you X to pay for the arbitration fees."

And that's an important point, too, if you happen to have mass claims that are statutory claims. The statute says, "For each violation, you can collect 1,500 or you can collect up to 2,500," or whatever it might be. You don't have to show the actual damage. You can get a statutory damage.

Their point is, "Even if you pay me and all I'm going to get is my statutory damages, guess what. What you're going to pay for the arbitration process is well beyond that for each of those, so it makes sense to settle." They hold that up as a reason why these claims should be paid and should be paid at a higher number.

What I'm seeing from the companies is, oh, you're not scaring me. We're not going to pay for something we don't think has value, that we don't think you can show, and if you have a limited number, we're going to talk about those now.

Lynda Bennett: I want to ask a preliminary question there, though.

Judge Wolfson: Sure.

Lynda Bennett: Parties reach out for the mediation. Are you pretty quickly, though, putting your robes back on, in a way, to start to set the parameters of what information will be gathered before you're actually going to sit down?

Mike, during the last episode, talked a lot about work that needs to be done. Are the parties coming to you, Judge, with those guideposts already in place? Are they immediately looking to you to start to talk about, what is the baseline amount of information that needs to be exchanged before we're going to sit down to actually mediate this case?

Judge Wolfson: Well, I require a pre-mediation memo which includes or can include exhibits. And I can tell you that my experience in this area is that I get pretty darn good submissions. One, they want to give me the long. Fine. I've got that now.

But then they want to tell me about the various claims, and they're definitely grouping sometimes what these claims are. Some will be a stronger one. We can show X. Others may fall into a different category.

Oftentimes, I think the companies coming in have more information and have done more, because also, it's oftentimes in their possession who actually dealt with us, records do we have? And if they can't find something on you, they're going to say, "We don't know where you're coming from. You're going to tell us you're one of our customers? Well, guess what. We don't see it. We don't have a charge. You show us."

But I've gotten tables of the different claimants, where they fall, so by the time they've decided that they're coming to me, they've talked already with each other, which is why they've decided they want to now try and mediate this. They're somewhat educated, and now they're educating me.

And we do substantively talk about, this isn't just about, what do you want to pay? What are you willing to take? We really sit down and talk about where this might go and what could be successful or not. And for the most part, I feel that people are coming in ready to do that.

Lynda Bennett: And Mike, from the companies' perspective to the, Judge Wilson is talking about slicing and dicing an awful lot of data, how does a company strike the right balance of doing the work and how much is going to be shared with the other side versus perhaps mediators' only eyes type submissions? How do you strike that right balance?

Michael Kaplan: Well, I think in the sort of outset, if this is a global mediation prior to litigation, you need to be a lot more careful in what you share at that outside stage, because again, you doing the work enables someone else not to. And so if you're sitting down at that initial sort of let's try to resolve this before things really get going here, I think the advice of the company is share only what the mediator requires to share, and the rest of it is for the mediator's eyes only.

It's really a balance here, because not every mediator is like Judge Wilson by any stretch of the imagination, in many, many ways. Not everyone requires the level of detail she requires, and certainly not everyone takes the time to read, understand, and utilize the way Judge Wilson does. That's what differentiates her from the rest.

Some are simply just, come in. Tell me how many claims. Tell me what your insurance policy is and tell me how much you're going to put on top of it so that we can all get this done. And oh, by the way, here's my $650,000 bill for pretending to read everything and settling your claim.

It's really a balance, because coming in at the beginning with that level of detail is a double-edged sword, because it really in one way could enable the mediator to help you in terms of defeating not-valid claims. On the other hand, it could simply turn around and be used against you, which is to say, as Judge Wolfson was just talking about, you're facing 40,000 claims where you have to pay $1,500 apiece statutorily. Let's just talk about how much above the 40,000 times 1,500 we're talking about here.

Judge Wolfson: Usually, what's coming in, they're going to say is, "We're not giving you the statutory amount. It's going to be something less than that." They're never talking about what above that we can do. It's something less. And I can tell

you, there's never been a time in any ones I've had where they're agreeing to pay a statutory amount. That's a given.

But I do want to point out, you're right about the sharing of the information. I've had companies come in and say, "Well, we're not giving them our list of who we know are the customers that we've had. It's up to them." Now, sometimes what they've done is give me both lists. I can cross-check.

But the other thing is then, how do you do your settlement? And what we've done is, we can have an idea of these are the number of claims, but for purposes of settlement, we're going to require declarations of X or X proof for us to pay for people that fall within this group and people that fall within that group, which means that the plaintiffs still, or consumer counsel, or whoever it might be, employment counsel has to go back and provide that information to actually get paid on the claim.

It's also how you structure a settlement, and we may have an overall number that'll fit, and then it may be, but who gets paid what in that? Because if it's more people, going to be less per claim. Anyway, there's so many permutations here, and you need savvy counsel.

Lynda Bennett: And you need insurance, and I'm going to jump in and say that, because part of the slicing and dicing of the information, and Judge, to your point of needing the proof of who was actually harmed or creating that spectrum of level of harm and who's getting paid what, a lot of that is being driven behind the curtain by what the insurance company is requiring to put their money up on the table.

And Mike, as defense counsel, gets to walk that fine line with me saying, "Yeah. We've got to slice and dice and really know this information inside and out." But we have to be really careful not to step on the trip wire with the insurance companies and point out all the flaws and all the problems and how these are all junky claims and shouldn't be paid a dollar, because when you're saying that, that is music to the ears of the claims adjuster sitting in that room who's going to tell you why they're not giving Judge Wolfson any money to go back into the other room.

This does get very complicated and needing the whole team of people put together from the very beginning, because I've had defense counsel who come in there, and they've been beating their chest about what junky claims these are. And then we show up at the mediation or get ready for the arbitration and want to have some courthouse steps money for the other side, and the carriers say, "What are you talking about? You told us you have all these great defenses. You told us that they don't have any good claims." It's a very careful balance of who and how you share all of that information with.

And then Judge, to your point, it can get very sticky when the carriers want to dig in and require more evidence or more information than the plaintiffs are willing to provide. It can get very, very difficult to keep that all harmonious and working together well.

Michael Kaplan: You also can't walk in and sell your favorite insurance adjuster up the river for what he's worth in weight, because you can't just say, "Hey, you're in. We're guilty. We're going," because you've got to cooperate. You have to associate-
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Lynda Bennett: What are you trying to be an insurance lawyer?

Michael Kaplan: No. No. I'm trying to-

Lynda Bennett: Are you telling me to cooperate, Mike?

Michael Kaplan: Yes. I'm just noting that the balance becomes even finer when you're trying to juggle who your friends are and aren't at any given moment.

Lynda Bennett: Absolutely.

Judge Wolfson: Lynda, I will add this, though. It's fascinating, because insurance is often an issue in litigation, and it's basically never mentioned in my mass mediations.

Lynda Bennett: You know about.

Judge Wolfson: Well, in the mediation, and I can tell you, because when I do settle in conferences and mediations, I will have representatives of the insurance company also present. I have never had one come on a mass mediation in this area. I have in-house counsel very high upcoming, corporate representatives, and outside counsel. And I've never heard the word insurance mentioned once until my last mediation when I specifically inquire. But it's very interesting to me that in this area, it is not coming up. They're not discussing it.

Lynda Bennett: Well, it's not surfaced at the underlying mediation. I can assure you; we have a whole separate Zoom going on most of the time, but then these are-

Judge Wolfson: Yes.

Lynda Bennett: ... these are tales. All right. Well, we're just about to wrap up here, and I really appreciate your insights. I've got a final question, and we're going to, Ruth's been sitting here quietly listening. This is her future, so I'm going to get the crystal ball out, and I'm going to let Ruth gaze in first and ask, "Mass arbitrations and mediations, is this a passing fad or here to stay? What do you think?"

Ruth Zimmerman: I think they're here to stay. I think pending all the revisions to the contracts that have been discussed, if the older contracts are still in play, it's a valid tactic, and they're able to leverage these arbitration clauses.

Lynda Bennett: And we're going to be looking forward to you being the fine tuners while we're on the golf course. Judge Wolfson, what do you think?

Judge Wolfson: I think it's just another way of having class actions in some fashion, that people think are a different way, a faster way of doing them. I think we're

going to get savvier lawyers drafting these agreements, and the question is going to be, though, however it's done and you're dealing with people who check off, as we know, the clickwrap agreements and everything else that they do, are they going to be unconscionable, or are they going to be upheld?

Lynda Bennett: So says the judge. Mike Kaplan, bring it home.

Michael Kaplan: Gone. Gone like the wind.

Lynda Bennett: Thank God. The contrarian to the bitter end. I like it.

Michael Kaplan: They are going. Just like the trend for arbitration is sailing away as people get tired of the limitations and the costs and otherwise, we are going to find ourselves back where the framers believed we should be, in a courtroom with a set of our peers judging us in the open space so the world can see us. And eventually, there will be cameras, so I will have to change my bio picture. But that's where we're going.

Lynda Bennett: I like it. I like it a lot. All right. And I'm going to answer the question, wrapping it back around to insurance, by saying I think that they are going to be here to stay, and for that reason, I really want to encourage our listeners to have careful eyes on your insurance policies at every renewal.

We are going to see changes to the definitions. We are going to potentially see sublimits coming on for these types of claims. And don't get that unhappy surprise after you've had a claim. Be intentional and be thinking about this while you're negotiating the terms and conditions of the policy.

Well, thanks again, team Lowenstein. You hit it out of the park. So appreciate you joining today to talk about this very interesting issue. And I'm going to find another one to get this band back together, because you did such a great job, so thanks for joining us today.

Michael Kaplan: Thanks, Lynda.

Judge Wolfson: Thanks, Lynda. It was great.

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