Consumer Finance Monitor (Season 3, Episode 34): Consumer Arbitration in the Crosshairs (Again): Individual Public Injunctive Relief Claims, Other Threats, and Possible Responses

Speakers: Alan Kaplinsky, Mark Levin, and Marcos Sasso

Alan Kaplinsky:

Welcome to the Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer finance and what they mean for your business, your customers, and the industry. I'm your host today, Alan Kaplinsky, and I'll be moderating today's program. I'm the chair of the Consumer Financial Services Group at Ballard Spahr.

Alan Kaplinsky:

For those of you who want more information about the subject we're going to be talking about today, or for that matter any other subject in the world of consumer finance, particularly in the legal part of that world, you ought to make sure that you consult other resources that we make available to our clients and friends, including our award winning blog, which also goes by the name of Consumer Finance Monitor, just like our podcast, or also our webinars. Indeed, today's podcast is based to a significant extent on a webinar that we conducted not too long ago, called Consumer Arbitration in the Crosshairs Yet Again. In just a moment, I will introduce our presenters today and we'll dive into the program.

Alan Kaplinsky:

Getting back to our blog, we've been doing our blog since 2011. There is, literally, a ton of content there about arbitration and about a full range of other subjects pertaining to consumer finance. We also regularly host webinars on subjects of interest to those of you in the industry. To subscribe to our blog, you just have to go on the blog and self-subscribe. Or, if you're not on the list for our webinars, just go on our website, find your way to the Consumer Financial Services Group, and there will be a way for you to sign up for our webinars. Our podcasts are available once a week. We release a new podcast generally, with the exception of a couple of holidays, on Thursday of each week.

Alan Kaplinsky:

Let me introduce our speakers today. First is Mark Levin. Mark is the litigation partner at our Consumer Financial Services Group. Mark was, literally, one of the pioneers who counseled our banking and our other consumer financial services clients about using arbitration provisions with class action waivers in their consumer contracts. Mark and I started drafting consumer arbitration provisions at least 15 years ago. It seems like we've been doing it forever. And Mark and I have been very much involved in enforcing consumer arbitration provisions in courts throughout the country. We have been involved in some of the most significant consumer arbitration decisions in the past decade, including several cases that ended up before the U.S. Supreme Court.

Alan Kaplinsky:

Let me introduce to you Marcos Sasso. Marcos is the litigator in our Consumer Financial Services Group in our California office and our Los Angeles office. Marcos advises large national banks, credit card issuers, and other lenders in class actions, regulatory enforcement proceedings, and other complex litigation and arbitration matters. He does it in California and throughout the rest of the country. He has extensive litigation experience and has served as lead trial counsel for financial services companies in defeating class and individual claims. He's successfully argued for the enforceability of consumer arbitration agreements in trial and appellate courts throughout the country. In fact, one of the very first topics we're going to

talk about today, Marcos is knee-deep in that topic. That's why we decided that Marcos would address that subject. First of all, welcome Mark and welcome Marcos.

Marcos Sasso:

Thank you, Alan.

Mark Levin:

Thanks, Alan.

Alan Kaplinsky:

Yeah, a pleasure to have you both on our program. Let me provide a little bit of a foundation for the questions I'm going to ask you today so that, even for those of you that are listening to the podcast that may have limited information about consumer arbitration and how it's been used, hopefully in my quick overview you will gain enough information to fully understand what Mark and Marcos have to say.

Alan Kaplinsky:

Consumer arbitration, as I said, was developed at least 15 years ago. One of the, I guess you could say an outgrowth of consumer arbitration, that we got very instead in early on was what impact would it have on class action litigation? Could it be used as the way of defeating a class action by arguing that the named plaintiff is subject by contract to an arbitration agreement and therefore cannot sue in court either through an individual lawsuit for through a class action because he or she agreed to take his or her dispute to an arbitrator? That was the issue.

Alan Kaplinsky:

Highly controversial. Highly contentious. As you can imagine, consumer advocates hated the idea, particularly plaintiffs' class action lawyers hate the idea, because it was going to have, if it was successful, a very significant impact on the gravy train that a lot of these attorneys had at that point by maintaining class action lawsuits in court. Very often, because of the potential concern that a lot of companies had about having the cost of litigating these complex class actions and ending up in front of a bad judge or a runaway jury, they would settle it for a lot of money. It was hoped that this use of a consumer arbitration provision, specifically with class action waiver language saying that, "I agree not to prosecute a class action either in court or in arbitration," that the courts would enforce it.

Alan Kaplinsky:

Well, some of them did at the beginning and some of them did not. It really took until several years later, actually in 2011, when the Supreme Court came down with its opinion in AT&T Mobility v. Concepcion, where the court held that the Federal Arbitration Act would preempt any California law that would make a class action waiver in an arbitration agreement unlawful, either as being unconscionable under California law or a violation of the public policy of California.

Alan Kaplinsky:

So, we finally, in 2011, got the opinion we had been waiting for and had litigated throughout the country in other circuit courts and many other state courts. We finally won. We did, I must admit, pull out the champagne and pop the cork and we celebrated. We thought that the class action beast finally was done with.

Alan Kaplinsky:

Then, an unfortunate thing happened and that is as part of the Dodd-Frank Act, which was enacted on July 21 of 2010 in reaction to the recession of 2008-2009, part of that Dodd-Frank Act created the Consumer Financial Protection Bureau, which we refer to as the CFPB. There was a section in there that required the CFPB to conduct a study of consumer

arbitration and to make a determination as to whether or not consumer arbitration was working in the best interests of consumers and if not what should the CFPB do about it?

Alan Kaplinsky:

So, the CFPB was given this very broad authority to study consumer arbitration. And then, if they found out they didn't think it was fair to consumers, then they could propose a regulation dealing with this subject, either banning it altogether or regulating it in some fashion. We were worried about that. From the day that the CFPB got stood up on July 21, 2011, we knew they were going to do the consumer arbitration study. Fortunately, they got diverted for a few years because they had a lot of other things they had to deal with, such as promulgating a whole host of regulations dealing with mortgage loan origination and mortgage loan servicing and a variety of other optics.

Alan Kaplinsky:

So, finally they get around to doing this study. Surprise surprise, they found that consumer arbitration was unfair to consumers. Not consumer arbitration, in general, but the use of class action waivers in consumer arbitration. That was essentially on their agenda right from the beginning. The only thing that may have been a little surprising is that they didn't try to claim that all consumer arbitration they'd like to ban by regulation.

Alan Kaplinsky:

Then, they went through another protracted procedure where they proposed a regulation that would not ban arbitration but ban the use of class action waivers. And they did one other thing which really isn't germane to the topic we're talking about today. And then there were three hearings that were conducted. I testified at all three hearings on behalf of the bank trade associations. I told them ahead of time no matter what I was going to say I knew the Bureau was hellbent to promulgate a regulation and they were just paying lip service to the industry. In any event, I went ahead and testified.

Alan Kaplinsky:

They did finalize a regulation, not surprised. But it happened right near the end of Richard Cordray's tenure as director of the CFPB. He right around that time or shortly after he promulgated that regulation, he resigned from the CFPB to go back to Ohio to run for governor of Ohio.

Alan Kaplinsky:

And then, the next thing to happen was Congress, under a little-known statute called the Congressional Review Act, by the skin of its teeth, it overturned the CFPB regulation. The House did it without any problem at all, because the House, at that point, was clearly controlled by Republicans. We're talking about 2017. Then, it went over to the Senate and very very late at night, it was a tie vote and Vice President Pence was summoned to Congress and he cast the deciding vote overturning the CFPB regulation. And once again, we all pulled out our champagne and we popped the corks on the champagne and we said, "The class action beast is now dead."

Alan Kaplinsky:

Well, that was premature, unfortunately, because it turned out that the plaintiffs' class action lawyers had other things up their sleeve. That was a long-winded way of setting the stage for you, Marcos, to tell us about what the creative lawyers ended up doing in California to try to get around AT&T Mobility v. Concepcion and the fact that the CFPB's anti-arbitration regulation was thrown out.

Marcos Sasso:

Well, thank you, Alan. I'm happy to be here and happy to do this with you today. You are talking about McGill v. Citibank. That is a 2017 California Supreme Court case that basically creates an acception under California law to the enforceability of class action waivers in consumer arbitration agreements. McGill, the plaintiff there alleged that the defendant had engaged in a

nation-wide marketing and sales advertising campaign in which the defendant made various alleged misrepresentations. Plaintiff brought claims under California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act. The case was brought on her own behalf and on behalf of a punitive class action of customers of the defendant.

Marcos Sasso:

The plaintiff also brought claims for public injunctive relief under each of those statutes. Now, those statutes allow a plaintiff to pursue injunctive relief on behalf of the general public and, importantly, do so without having to certify a class. What this means, in essence, is that in seeking an injunction preventing the defendant from doing something in the future or requiring a change to a business practice as it relates to the plaintiff, the plaintiff also can seek to have that injunction apply to others who may deal or interact with the defendant in the future, and again, can do so without certifying the case as a class action.

Marcos Sasso:

So, the defendant in McGill moved to compel arbitration. The case worked its way up to the California Supreme Court. There, the California Supreme Court held that under California law, a plaintiff must be able to pursue a claim for public injunctive relief in some form, meaning either in court or in arbitration. And the arbitration agreements that completely bar the claim in either forum are unenforceable because they violate California public policy. In McGill, the arbitration agreement required both that all claims be arbitrated and precluded the arbitrator from awarding relief on behalf of anyone but the named parties. As a result, the agreement was unenforceable under California law.

Marcos Sasso:

The California Supreme Court also made a second ruling in that case and that was that the Federal Arbitration Act did not preempt its holding, not withstanding the U.S. Supreme Court's landmark decision in Concepcion. On that part of the decision, the court found that under California Civil Code Statute 3513, that civil code statute provided that a law established for a public reason cannot be contravened by private agreement. The court concluded that the ability to pursue public injunctive relief under the specific consumer statutes are such laws established for a public reason and an arbitration agreement that precludes a plaintiff from pursuing that relief is invalid and unenforceable.

Marcos Sasso:

Relying upon the saving clause of the FAA, the California Supreme Court held that FAA preemption did not apply because the saving clause permits arbitrations agreements to be declared unenforceable upon such grounds as exist at law or in equity for the revocation of any contract. Long way of saying that because of the civil code statute was a general rule of applicability, it did not discriminate against arbitration agreements and therefore the McGill decision fit within the saving clause and was not preempted.

Marcos Sasso:

Now, what does that mean for us? Well, since McGill, plaintiffs have routinely included or even expressly sought public injunctive relief in order avoid a class action waiver and to argue that an entire arbitration agreement is unenforceable or that the request for public injunctive relief must proceed in court.

Marcos Sasso:

For the most part, I would say that state courts and Federal courts in California have mostly followed McGill and either denied motions to compel arbitration or held that public injunctive relief claims are not subject to arbitration. Some defendants have argued with some success that McGill is factually distinguishable and does not preclude enforcement of a particular agreement where the relief sought is not the type of public injunctive relief at issue in McGill but instead is more private relief that will either primarily benefit the plaintiff or persons similarly situated to the plaintiff. And if it has an incidental effect on the public, that's really it. It's not really the primarily purpose of it.

Alan Kaplinsky:

Okay. Well, Marcos, in addition to the McGill case, which was in state court, a lot of these cases were filed in Federal court. There were three cases, in particular, one involving Rent-A-Center, another involving Comcast, and another one involving AT&T, that eventually made their way up to the Ninth Circuit Court of Appeals. Everybody... Well, I guess I shouldn't say "everybody." There were some people that were hopeful that the Ninth Circuit would straighten out the California Supreme Court on this issue, but that's not what happened, right? What happened, Marcos?

Marcos Sasso:

That is not what happened. You're exactly right. Following McGill, a big open question was what would the Federal courts do? Would they follow the California Supreme Court's ruling? Or, would they independently determine the preemptive effect at the FAA on claims for public injunctive relief?

Marcos Sasso:

In 2019, there were three decisions that made their way up to the Ninth Circuit. The Blair v. Rent-A-Center was the lead case, and there were two companion cases. And while the facts of the cases differed a bit, in all three the district courts declined to enforce the arbitration agreements, found that they were unenforceable under California law, and also that the FAA did not preempt the McGill rule.

Marcos Sasso:

In June of last year, the Ninth Circuit issued its decision in Blair and affirmed the lower court's application of McGill, including that the rule in McGill is not preempted by the FAA. The Ninth Circuit applied its analysis and its reasoning in Blair to the additional companion cases. And that is where we were at. I think it's worth noting that in Blair, the Ninth Circuit did not really consider in a meaningful way the question of what factually constitutes public versus private relief. It really adopted the lower court's analysis on that question and simply focused primarily on the FAA preemption question.

Marcos Sasso:

Now, like you said, I think we all thought, "Well, this is kind of working its way to the Supreme Court." Following Blair, the parties in that case did reach a settlement, but the parties in the two companion cases, Tillage and McArdle, they did not. The defendants filed petitions for review in the U.S. Supreme Court really seeking a ruling that McGill was preempted by the FAA, essentially because the McGill rule conditioned the enforceability of arbitration agreements on allowing for public injunctive relief claims and those types of claims are just fundamentally inconsistent with arbitration.

Marcos Sasso:

So, while there was, I think, great hope that the U.S. Supreme Court would grant review given its history of upholding arbitration agreements. Even in 2018 and 2019 they've consistently, since Concepcion, had enforced agreements. They did not. That was June of this year, this summer. So, for now, McGill is controlling law in California and in the Ninth Circuit.

Alan Kaplinsky:

Thank you, Marcos. Let me turn to you, Mark. I know you've had a lot of dealings in your career with the Supreme Court. I know you were heavily involved in drafting an amicus brief on behalf of the American Bankers Association, Consumer Bankers Association, urging the court to grant cert and trying to convince the Supreme Court that this was a very important issue and if they didn't grant cert, this was going to drive a huge hole in their Concepcion opinion. Go ahead, tell our listeners what happened and why do you think it happened as it did?

Mark Levin:

Well, thanks, Alan. Let me just say by way of introduction that we've actually been in this arbitration field for more than 20 years and I think got our first rulings, which were good ones, in 1998. So, it's been several decades of experience.

Mark Levin:

But yes, it was disappointing that the court denied certiorari. It's speculation on my part, of course, but I see two reasons why the court decided not to grant review. First was a very practical reason, that the court was working remotely due to the pandemic crisis. They did make it through the term, but the term ran longer than usual by a week or 10 days. By all accounts, it looks like they were having a harder time functioning remotely and became very conservative as to the number of cases it agreed to review for the next term. At one point in late May, the court had granted only about half the number of cases it had granted at that time the year before.

Mark Levin:

Second, the court was inundated with an unusual number of what I'll call political petitions and appeals which were of immediate national importance. Things like immigration, congressional and U.S. attorney subpoenas, emoluments clause cases, the president's tax returns, and with the 2020 elections looming in November, I think the court was expecting and probably rightly so that there would be issues coming up to it on voting by mail, the use of the post office, which we see every day in the papers.

Mark Levin:

So, my educated guess is that it was a question of timing, not substance. In a normal year, I like to think that the court would have granted review, given its interest in these issues in Concepcion and lots of other cases over the years. The bottom line is that FAA preemption over the McGill rule is still ultimately an unsettled question. So, hopefully other cases in the pipeline will come up at a more opportune time.

Alan Kaplinsky:

Mark, I'm sure you've been asked this question by dozens of clients. I'm going to ask you the same question again today. That is, what should companies do in their consumer arbitration contracts to revise the language in order to mitigate the impact of this McGill opinion from the California Supreme Court? First of all, maybe before you say what they should do, I guess you have to lay a foundation for that and say if they don't do anything, what's the risk that they're running?

Mark Levin:

Well-

Alan Kaplinsky:

And then get from there to what should they do.

Mark Levin:

Sure. Great questions, Alan. If you don't do anything, you run the risk of having the entire arbitration clause invalidated. What courts have been doing is construing the blow up provisions in arbitration clauses. A blow up provision, they were adopted many many years ago, before Concepcion. They provided that if a court invalidated the class action waiver, then after an appeal of that issue, the entire arbitration clause would blow up and basically disappear, leaving class actions to be pursued in court.

Mark Levin:

The theory was most clients would prefer to have a class action litigated in court, rather than have an arbitrator conduct class arbitration because in court at least you have a right to appeal to a court of appeals, whereas arbitrators' awards are very very difficult to overturn, especially after the U.S. Supreme Court ruled in the Oxford Health case in 2014 that as long as an arbitrator is purporting to construe a party's contract, the award pretty much has to stand even if the arbitrator was wrong as a matter of law.

Mark Levin:

What happened is... Of course, nobody knew McGill was going to be decided. Courts got ahold of the blow up provision. They would make a decision that the class action waiver is invalid because it does not allow consumers to pursue public injunctive relief. Most class action waivers also say not only can you not pursue a class action, but you can't bring a private attorney general action or other representative action.

Mark Levin:

So, the courts say, "Well, I see the arbitration clause says, in that instance, the entire arbitration agreement is invalid." They ignore the fact that you're supposed to have a right of appeal before that happens, and they basically say, "The entire arbitration agreement is invalid." Which is particularly unfortunate if there are not only public injunctive relief claims but also claims for monetary relief, even individual claims for monetary relief, or class action claims for monetary relief all brought in the same lawsuit, because then you lose the ability to apply the class action waiver to the non-public injunctive relief claims.

Mark Levin:

So, we've addressed that basically by having a two-prong severability provision which says that if any part of the arbitration clause is deemed invalid, the rest of the clause with continue to apply, with two exceptions. The first exception is the standard class action waiver blow up clause, but it makes it clear that it's addressing claims that are not public injunctive relief claims. And then the second prong specifically addresses public injunctive relief claims and describes what happens if a court concludes that the arbitration clause contravenes the McGill rule because it doesn't allow public injunctive relief claims to proceed.

Mark Levin:

In a nutshell, our draft of sort of a model clause says that if a claim is brought seeking public injunctive relief and the court determines that the arbitration clause is unenforceable under McGill, then there has to be permitted an immediate appeal by the defendant, a final appeal, of the ruling that the arbitration clause violates the McGill rule. And only then does the arbitration clause get invalidated, with respect only to the public injunctive relief claim. And any claims for monetary relief are still subject to arbitration. In that event, the parties agree that the public injunctive relief claim gets stayed in court while the monetary claims get arbitrated.

Mark Levin:

And so, we're always happy to talk to companies about the specific language that's best suited to their clause, but that's what we've devised to help blunt the impact of McGill until such time, hopefully, as the U.S. Supreme Court decides to take up the issue and decides that McGill is preempted by the FAA.

Alan Kaplinsky:

Yeah. Let me pick up on something, Marcos, that you mentioned a little bit earlier. You suggested that even if the FAA doesn't preempt California's public policy that individuals should be able to seek public injunctive relief, that contrary to maybe to the conventional wisdom that is out there, that that doesn't mean necessarily that you're not going to be able to enforce your arbitration clause fully. Because you made some distinction between public injunctive relief and class action relief. They're not synonymous. I'm wondering if you could explain how that distinction can end up helping you in litigating these cases?

Marcos Sasso:

Yeah, absolutely. That has really been where the area of the fight has been probably in the last year. It really comes down to what McGill tells us is a claim for public injunctive relief is relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public, whereas private injunctive relief has the primary purpose of

redressing or preventing injury to the individual plaintiff or to a group of individuals similarly situated to the plaintiff, which sounds a lot like a class action. That's the type of relief that you would seek as part of a class action.

Marcos Sasso:

So, where the courts now have sort of been struggling with is how do you draw the line between public versus private? That's important because if it is a private injunction that has an incidental effect on the public, then it's not within the scope of McGill and your arbitration agreement is fully enforceable.

Marcos Sasso:

There has been some California Court of Appeal decisions in the last year, I will say in the employment context so far, that have endorsed this analysis of public versus private and found where the injunction the plaintiff seeks has an incidental impact on the general public, then it's not public and it doesn't fall within McGill. And that is true even where the argument is that the injunction is needed to protect future employees from the same conduct. In those cases, really what they're looking for an injunction enforcing the employer to comply with wage and hour laws. And their argument was, "Well, that has to be a public injunction because you're trying to prevent the same type of conduct in the future towards future employees."

Marcos Sasso:

And what the courts have said is, "Well, you're taking it a little bit far because that type of an injunction is really a private injunction looking at the current employees who is there now. If you take it so far, then really any injunction can be arguably to be made to be a public injunction because there's always going to be potentially some incidental impact on somebody in the future if you change your conduct."

Marcos Sasso:

So, the Federal district courts have also struggled with this and they've reached conflicting results on this question of drawing the line between public versus private. I will note, though, that in June of this summer, the Ninth Circuit heard oral argument in case called Hodges v. Comcast and the question in that case really was specifically this idea of what is public versus private injunctive relief? Like I said, one of the justices in that case specifically wrestled with a question of whether, in application, McGill makes every injunction a public injunction because you could always argue that a change in practice is going to have some impact.

Marcos Sasso:

So, that is where we are in terms of the next steps, what the appeals are going to look like. But there is an important distinction because it has to be remembered that McGill deals with injunctions, not monetary claims for relief. That is important because if you seek a monetary claim under the Unfair Competition Law, for example, you do have to certify a class, but if you're seeking purely injunctive relief, you do not have to certify a class. Meaning if you're in Federal court, Federal Rule of Civil Procedure 23, or California law, you don't have to establish predominance, commonality, typicality, and all those usual elements that you would have to establish in order to bring your claim.

Marcos Sasso:

Instead, if it's a pure injunctive relief claim in California, the question becomes does your plaintiff have standing? Have they suffered an injury in fact? Have they lost money or property as a result of the conduct? If so, then that single person can argue that they're entitled to obtain an injunction against the defendant that applies to all future conduct. So, that's where we're at and that's really kind of the next phase in this evolution.

Alan Kaplinsky:

Marcos-

Mark Levin:

Yeah, so-

Alan Kaplinsky:

Marcos-

Mark Levin:

Yeah, go ahead.

Alan Kaplinsky:

... before we leave public injunctive relief, just a couple of points. First of all, this really is not a hypothetical exercise in parsing all these things. There have been hundreds of public injunctive relief claims filed in California. The cert petitions that were filed in the Tillage and McArdle cases had appendices that actually listed them in trying to urge the court to accept review. But they are really really predominate. One of the reasons for that, and Marcos, you can probably explain it better than anybody, is the ability of successful plaintiffs to recover their attorneys' fees.

Marcos Sasso:

Yeah, no. You're right. Now, to be clear, under the UCL, the Unfair Competition Law, there is no attorney fee provision. However, there is a separate statute in California, Civil Procedure Code 1021.5, where essentially, I'm paraphrasing, but if you obtain a substantial benefit to the public, then you can make a motion to recover attorneys' fees. That is where you're absolutely right. Many people who, in the past, would have brought a class action have simply gone with a straight public injunctive relief action because they can obtain the same attorney fee result and simply proceed on basically an individual case without having to deal with all the other elements of class action. It makes it a more streamlined approach for them and they get around the class action waiver that's in the arbitration agreement.

Alan Kaplinsky:

So, let me ask you, Mark, is this a problem limited to just California? I hesitate to call it a contagion, but is this a problem that exists throughout the country so that plaintiffs' attorneys in other states can seek to do an end run around Concepcion by including in their complaint a claim for public injunctive relief?

Mark Levin:

Yeah, there are analogs in other states not really as well-defined as California law, but we've seen instances of plaintiffs kind of latching onto state private attorney general statutes to try to claim that courts have a right to award pubic injunctive relief. There are consumer advocacy groups that are urging state legislatures to basically use the California McGill experience as a model to adopt public injunctive relief claims. So, it is definitely a risk.

Mark Levin:

The other point, Alan, is that I won't say all, but probably virtually all, national companies do a lot of business in California. And so, you end up getting sued in California no matter where you're located elsewhere in the United States. And while there might be choice of law issues, it's probably more likely than not that a court's going to say, "California law applies, so McGill applies."

Alan Kaplinsky:

Okay. Let's turn to an entirely different subject right now. But again, it falls into the category of consumer arbitration in the crosshairs. That is this phenomenon of a cottage industry developing among the plaintiffs' bar to bring mass arbitrations. What in the world are they, Mark, and what's the concern about them?

Mark Levin:

Well, the mass arbitrations is the simultaneous filing of hundreds or even thousands of individual arbitration demands against the same company by the same law firm or affiliated law firms. The problem is that once you file an individual arbitration demand, usually it's with the American Arbitration Association, the AAA, or JAMS, which are by far the most widely used consumer arbitration administrators. Under their rules, the company pays the vast majority of the filing, administrative, and arbitrator fees. Under the AAA rules, the consumer's only responsible for $200 and under JAMS, it's $250. The company has to pay of the order of, like, $3,000 or $4,000 in fees and they have to be paid upfront or the administrator won't administer the arbitration.

Mark Levin:

So, when you have hundreds or thousands of these being filed simultaneously, companies can be exposed to having to pay millions of dollars in administrative, filing, and arbitrator fees right at the inception. So, it's really quite a hammer that the plaintiffs' lawyers are trying to use against companies.

Mark Levin:

This started, basically, in the context of employment arbitration claims, but they're now also spreading to consumer businesses. Typically, as a practical matter, what happens is the plaintiffs' lawyer will send a letter to the defendant company, attaching a lengthy list of 100 or several hundred or several thousand customers who the plaintiffs' lawyer says they're all clients of the lawyer and that in 30 days, if the company doesn't agree to settle all these, the plaintiffs' lawyer is going to file all these individual arbitrations and require that the company pay hundreds of thousands or millions of dollars in filing, administrative, and arbitrator fees. Of course, what the plaintiffs' lawyers are looking for is a hefty group settlement, almost akin to a class action settlement, in order to avoid the arbitration fees.

Mark Levin:

Now, in employment arbitrations, plaintiffs' lawyers often compile their lists of clients by asking one or two employees, "Who do you work with?" I mean, it's not all that hard to figure out. And if you ask each one, "Who are your coworkers?" you can assemble a list of employees pretty easily. In consumer cases, I think they do it mostly by advertising, especially through social media and the internet. Things like, "Have you recently obtained a loan from X company? If so, you may be entitled to damages. Call us right away," that type of thing.

Alan Kaplinsky:

I take it there have been a few companies, I think in the labor area, that when faced with these kinds of extortionate, they seem extortionate to me, anyway, settlement demands, have said, "Hell no. This is abusive. We're not going to kowtow to it. We're not going to pay anything. We're not going to let you file thousands of arbitrations, either." There have been a few courts that, unfortunately, have not been very sympathetic to the industry argument. Am I right, Mark?

Mark Levin:

Yeah, that's right. They have been very sympathetic to the employee side, which would also be the consumer side. In particular, a case called Abernathy v. DoorDash, which was February of this year, Northern District of California. The DoorDash couriers brought more than 6,000 individual AAA arbitrations alleging employment law violations. Under the arbitration agreement, the total of all this obligated the company to pay the AAA nearly $12 million in filing and administrative fees. The company refused to pay the fees, basically alleging this is an abuse of the arbitration process. So, the couriers moved to compel arbitration and the court granted the motion. This was Judge Alsup in the Northern District of California.

Mark Levin:

He basically said, "For decades, the employers have enforced class action waivers in their arbitration agreements to require employees to bring individual arbitrations, rather than class actions or collective actions, and the U.S. Supreme Court has

upheld that. And now, the workers are trying to enforce the very provisions that the employers forced on them. We have a situation where the company is faced with actually having to honor its side of the bargain but it doesn't want to do it because of the cost." And so, the court said, "In irony upon irony, DoorDash now wishes to resort to a class-wide lawsuit, the very device it denied to the workers to avoid its duty to arbitrate." The court said, "This hypocrisy will not be blessed, at least by this order."

Mark Levin:

Similar types of results have ensued in other similar cases. So far, the courts have not been sympathetic and they view the mass arbitrations as sort of a just payback for the companies having gone all the way to the Supreme Court to enforce the enforceability of class action waivers.

Alan Kaplinsky:

Well, Mark, what does a company do? Let's assume you're representing a company in a consumer arbitration and your client receives a letter from some attorney saying, "Your client violated some law and the rights of the following clients of mine on exhibit A were violated. I'm going to initiate arbitrations in 1,500 cases. It's going to cost your client about $3,000 a case in arbitration fees." What do you do?

Mark Levin:

Well, there are some long-term strategies and some short-term strategies. The longer-term strategies involve trying to convince companies like AAA and JAMS to adopt procedures for group arbitrations that reduce the upfront filing fees. The AAA actually did that for employment arbitrations, but it has not so far done that for consumer arbitrations. JAMS, as far as I know, has not done it and a couple of years ago stated that it was going to require payments in each individual arbitration.

Mark Levin:

There's a third administrator that doesn't have a huge footprint in the consumer area called CPR International Institute for Conflict Prevention and Resolution. It created a whole mass arbitration procedure which basically allows the parties to designate certain cases as test cases or bellwether cases, which are used sometimes in mass tort cases, to use some of those as a way of basically letting the parties see, "How are these cases going to come out?" With the end result, hopefully, that the parties, once they see this, will be able to mediate their differences one way or the other.

Mark Levin:

But in terms of short-term strategies, well, you can defend these things. If a company wins a few of them, that might take some of the steam out of the plaintiffs' engine. But a couple of practical things, although it requires a lot of homework by the company, first of all to probe the legitimacy of this list of supposed clients. There might be a lot of errors in that list. The company should really review each claimant's file to see if there's anything in there that would embarrass the plaintiffs' lawyers or eliminate the claim or maybe even constitute an ethical violation. For example, is the claimant still living? Is there a bankruptcy? Anything that starts to reduce the number of claims or give the plaintiffs some doubt that their list has really been well-compiled.

Mark Levin:

A second idea is to provide each of the claimants with a settlement offer that would be less than the arbitration administrator's fees but enough to make the client actually sweat a little bit and say, "Well, maybe I ought to take this. Why am I bothering with an arbitration?" What that requires to do, especially if each settlement offer is just a little bit different, the plaintiffs' lawyer, ethically, has to go back to each client and say, "The company has made an offer. Do you want to accept it?" That's a lot of work for the plaintiffs' counsel.

Mark Levin:

Some cases may settle. A lot of them may settle. You could include, also, not just some monetary relief but maybe some individual injunctive relief. For example, going to correct things at the credit bureaus. Other than that, there's no magic bullet at this point, although we're still trying to create one.

Alan Kaplinsky:

Yeah. Well, Mark, what about just getting rid of the arbitration administrator in the arbitration agreement? Just eliminate AAA or JAMS and provide for... As I understand, it's perfectly legal under the Federal Arbitration Act, to have an arbitration without an administrator, where if the parties can't agree on the arbitrator, you let the court decide who the arbitrator would be.

Mark Levin:

Right. Well, that's an interesting concept in theory and certainly deserves a much closer look, but a couple of drawbacks there. First of all, it's extremely doubtful that a company and the claimants' lawyers are going to be able to agree on arbitrators to handle all these claims. And if they can't, a court almost certainly is not going to spend its time looking for hundreds of arbitrators or thousands or arbitrators. It's hard enough just to find one or two arbitrators, sometimes.

Mark Levin:

Even more importantly, the reason that companies tend to use administrators like the AAA and JAMS is that both administrators have very well-defined due process protocols that are... The AAA, as early as the late 90's, developed such a protocol. They make sure that consumers are treated fairly in the arbitration. Over time, courts have pretty much become convinced that if you use AAA or JAMS rules, you've got the good makings of a fair arbitration. There are also all sorts of rules that guide the arbitrators' conduct for neutrality and disclosures and that sort of thing.

Mark Levin:

So, I have not seen one of those in operation yet, but I could see that if you went before a court to enforce an arbitration agreement that didn't have an administrator listed, even if you tried to build in a lot of these due process protections just by wordsmithing them into the agreement, the plaintiffs' lawyer is going to say, "There's something amiss here. We don't have an arbitrator. That's the whole central feature of arbitration. And so, you don't know enough to be able to enforce the clause. There's a trick going on. It's a ruse by the company."

Alan Kaplinsky:

Okay, well, you've heard Mark and Marcos talk today about two very significant problems involving consumer arbitration. As if that weren't enough, we also have an election looming. In November, there will be an election for president and if the present polls are correct, Joe Biden will win that election. There is a possibility that the House and the Senate will both be controlled by the Democratic Party.

Alan Kaplinsky:

Also, it's very clear that, by virtue of the Seila Law v. CFPB case in the U.S. Supreme Court, that the new president, if it is Joe Biden, will be able to elect a new director of the CFPB. You can be pretty assured that that new director is going to philosophically be very much aligned with the thinking of Richard Cordray, the original director of the CFPB, and Elizabeth Warren, whose brainchild the CFPB was. You can be sure they're going to be thinking about what they can do to consumer arbitration. They can't do exactly what they did when Cordray was there, which the Congress overruled, but they could do a lot of other things. They might be able, in fact, to ban arbitration altogether. It's very unclear whether they could do that.

Alan Kaplinsky:

And then, something could happen legislatively. Literally, every year, bills are introduced in Congress and hearings are held. And indeed, the House of Representatives passed a bill this year by a significant margin banning the use of consumer

arbitration and labor arbitration. It would never get through the Senate, I don't think, although it would be a closer vote than you'd think because there are Republicans that like or don't dislike litigation in courts, including class actions. I'm referring to Lindsey Graham and John Kennedy, the senators right now from South Carolina and Louisiana, respectively. So, there's a lot of political uncertainty on the horizon right now. I guess I can say stay tuned for what might ensure next year if indeed Joe Biden does win the election.

Alan Kaplinsky:

Now, want to thank Mark and Marcos for being our guests today. I particularly want to thank all of our listeners who downloaded our podcast today. We welcome any comments or suggestions you have. If you liked our show today, let us know about it. You can email us at podcast@ballardspahr.com or you can write a review on whatever platform you use to get your podcasts. Our podcast show is available, essentially, on every platform for podcasts, Apple, Google Play, Spotify, et cetera, et cetera. And again, don't forget to check our blog for other important and current developments. With that, I wish you a good day. Thank you, again.