# Consumer Finance Monitor (Season 4, Episode 13): A Deep Dive on Mass Consumer Arbitration

Speakers: Alan Kaplinsky, Mark Levin

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 or essentially interviewing our guest today. My guest today is my colleague and good friend Mark Levin, who is also with Ballard Spahr. Before we get to today's program, however, I want to alert all of you to the fact that, if you're aware of it, we have a blog that also goes by the name of Consumer Finance Monitor.

Alan Kaplinsky:

The issues that we'll be talking about today, like practically every issue we cover during our podcast, are dealt with in our blog. I urge all of you, if you're not subscribers to our blog, you should be. If you log onto consumerfinancemonitor.com, you can self-subscribe. What we're going to talk about today is consumer arbitration. We're going to talk about one aspect of it that has in some circles become a scourge, a major problem, a major headache for certain companies and certain industries. The topic is mass arbitration.

Alan Kaplinsky:

But before we get to that topic, I want to give our listeners a little of the history here, because I think it will put everything in context. About 25 years ago, Mark and I were litigating cases in Alabama and in some other locations in the country that were considered judicial hellholes. Not my name. That was the name ascribed to them by certain industry groups. They were considered to be judicial hellholes because if you got sued in one of those jurisdictions, particularly in state court, you were in a world full of trouble.

Alan Kaplinsky:

It was very hard to get rid of cases quickly and easily, and the judgements at that time were enormous and way out of proportion to the amount of harm. Our clients came to us and they said, "Is there a way to level the level field? We're not looking for an advantage here. We just want to get a fair shake." It was at that point Mark and I started exploring the area of consumer arbitration, did a lot of research into the Federal Arbitration Act. And ultimately, we went back to many of our clients and we urged them to start experimenting with the use of consumer arbitration.

Alan Kaplinsky:

That is to put language into consumer finance contracts, be they credit card agreements or auto finance contracts, their deposit account contracts, that would say that if a dispute arose, the parties upon the election of either party would have to arbitrate their dispute and not litigate it. It was around that time that we started wondering about what would the impact be of consumer arbitration on class action litigation. Unfortunately, there weren't many guide posts for us.

Alan Kaplinsky:

There was practically no law dealing with the issue of whether language in an arbitration provision barring a consumer from participating in a class action in court or arbitration, whether that would hold up in court. And Mark and I then along with

many other industry lawyers began to litigate that issue in federal and state courts throughout the country. Ultimately, the issue didn't get resolved, until the U.S. Supreme Court decided a pair of cases in 2011-2012, one of them called AT&T v. Concepcion, and the other one called the Italian Colors case.

Alan Kaplinsky:

It was those two decisions that held that the Federal Arbitration Act would preempt any state law holding that a class action waiver was unconscionable or against public policy, and that the Federal Arbitration Act would trump any federal statute where a plaintiff was trying to argue that they had a right to litigate a class action that was provided for by law. The Supreme Court basically said, "Oh no. That doesn't work unless it's very clear that the language of that statute makes it clear that a consumer has got a right pursue a class action."

Alan Kaplinsky:

Mark and I started celebrating. We had wild parties that went on for several weeks, and then we finally realized the plaintiff's attorneys weren't giving up because the battleground shifted to the CFPB. In July of 2010, the Dodd-Frank Act was enacted and required the CFPB to conduct a study of consumer arbitration, which they did, and it took many years to conduct that study. I testified in three hearings that were held. Ultimately, the CFPB came out with a regulation not banning arbitration, but banning the use of class action waivers in consumer arbitration agreements.

Alan Kaplinsky:

That to many of our clients was paramount to banning arbitration altogether, because a lot of the motivation behind the use of arbitration was to not have to deal with class action lawsuits that very often were filed just to extort large individual settlements. The CFPB has got this regulation. It's not looking bad for us. Fortunately, Congress came to the rescue with an 11th hour passage of a joint resolution that purported to override that CFPB regulation. It wasn't until a vote in the Senate that was a tie vote broken by the vice president that once again we could celebrate.

Alan Kaplinsky:

We thought we had vanquished this class action problem and that arbitration was king once again. Well, we were mistaken. It was not, because the plaintiff's attorneys didn't give up. And year and year, they've been introducing legislation in Congress to enact something called the FAIR Act, which would bar the use of arbitration in all consumer contracts, all employment agreements, et cetera, et cetera. Never have they been able to get that passed, but again, this year, who knows?

Alan Kaplinsky:

We now have the Democrats in control of the House, the Senate, and the presidency, and I'm sure there will be a real effort made within the next couple of years to try to enact legislation. They have been saying that they're also going to continue the battle with the CFPB. That maybe another battle we're going to have to fight. And then on top of that, in California, you have a Gilman v. Citibank case, where the California Supreme Court held that a claim for individual injunctive relief has to be able to be litigated in court.

Alan Kaplinsky:

That issue is unresolved. And now we're getting to what we're really going to dig into today, Mark, and that is this thing of mass arbitration. Basically this is the plaintiff's way of saying to the industry, "You want arbitration? We'll give you plenty of it." Mark, what the heck is mass arbitration? Tell us what it is. How long has it been going out? Talk about this cottage industry, I know you've referred to it that way, that the strategy they're now deploying to try to extract very large settlements from the industry.

Alan Kaplinsky:

Sorry for that lengthy monologue, Mark, but I really felt we needed to put this thing in an overall historical context.

Mark Levin:

I agree, Alan, and thanks for the introduction. Well, in a nutshell, a mass arbitration is the simultaneous filing of hundreds or even thousands of individual arbitration demands against the same company by the same law firm. What that does is require the company to pay upfront the substantial administrative fees charged by the most widely used arbitration administrators, which are the American Arbitration Association, the AAA, and JAMS. This can amount to millions of dollars in fees that have to be paid almost immediately.

Mark Levin:

It was first used in the context of employment arbitration claims starting about two or three years ago, but is now being pursued against consumer businesses as well. Typically, what happens is that the plaintiff's lawyer sends a letter to the defendant, attaching a list of maybe 100 or 500 or 1,000 customers who supposedly are clients of the lawyer, and it states that in 30 days, each of the customers is going to file an individual arbitration.

Mark Levin:

Now, when an arbitration starts, the company has to pay the filing administrative and arbitrator fees under the AAA or JAMS rules, and that can amount to several thousand dollars in each arbitration. Of course, the letter goes on to say, "If you prefer not to have to deal with the arbitrations, we will, of course, agree to a reasonable settlement," reasonable meaning something close to extortion.

Mark Levin:

In California, where a lot of these mass arbitrations occur and where they really began, the pressure on companies to pay is particularly intense, because there's a California statute, SB 707, that says that if fees are not paid within 30 days of the arbitration starting, the company is deemed to be in breach of the arbitration agreement and waives the right to arbitrate. It can be subject penalties and even sanctions. Companies have been arguing that that statute is preempted by the FAA.

Mark Levin:

But just this past January, Judge Gutierrez of the Central District of California held that the statute is not preempted because, ironically enough, it actually promotes arbitrations by requiring the company to act expeditiously and get the arbitrations going, even if that means paying millions of dollars in fees within 30 days.

Alan Kaplinsky:

Is that case now on appeal, Mark?

Mark Levin:

I believe it's rumored that they're going to file an appeal. I have not seen one yet, but it's only been several weeks since that decision. It certainly is appealable. That's not atypical of the way courts have reacted to attempts by companies to try to attack mass arbitrations. But so far, none of the court attacks have really amounted to anything for the industry. Probably the most famous one is the case called Abernathy v. DoorDash in the Northern District of California. In that case, I think it was before Judge Alsup. February 2020, an opinion was issued.

Mark Levin:

That was a case where more than 6,000 DoorDash couriers initiated individual arbitrations, and it required DoorDash to pay $12 million in fees, which, of course, DoorDash resisted. The couriers filed a motion to compel arbitration alleging that DoorDash had breached the agreement by not paying the fees and the court granted the motion basically saying, for many decades, the industry side of this issue has pressed for class action waivers and all sorts of procedures that will require individual arbitration, taking it all the way to the U.S. Supreme Court.

Mark Levin:

You mentioned the Concepcion and Italian Colors cases. The judge went on to say, "The irony is that the workers wished to enforce the very provisions forced on them by the company." The employer actually now has to honor its side of the bargain, but it blanches at the cost of the filing fees they'd agree to pay. No doubt DoorDash never expected that so many would actually seek arbitration, and no doubt DoorDash never expected that it would have to resort to basically a class wide lawsuit, which is the very device it tried to prevent.

Mark Levin:

Nevertheless, this hypocrisy will not be blessed at least by this court. That pretty much summarizes where the courts had been on this issue. Similar cases involved Uber and Lyft and Chipotle and Buffalo Wild Wings and Postmates, and they've all pretty much turned out the same.

Alan Kaplinsky:

Hmm, boy! It seems pretty clear the industry isn't going to get any sympathy from most courts anyway. What do you do, Mark? You're counsel to a company and you're faced with this demand that you described to cough up a lot of money to settle a case. Or if you don't do that, you got to pay AAA some very high fees that's sort of between a rock and a hard place. What is a company to do?

Mark Levin:

Well, good question, Alan. There are some long-term strategies and also some short-term strategies. Long-term...

Alan Kaplinsky:

Let's talk about, if you don't mind, the short-term strategies.

Mark Levin:

Sure.

Alan Kaplinsky:

Yeah, go ahead.

Mark Levin:

The short-term strategies are very simple. First of all, if you're presented with a list of potential claimants who are threatening to bring individual arbitrations, don't take for granted that the list is legitimate. If you look closely and compare the list to your customer records, you're probably going to find that a large number, and maybe even as many as 50%, of the names there are not even customers of the client. Some of them have deceased. Others were never customers. Some are in bankruptcy.

Mark Levin:

This kind of information can really embarrass the plaintiff's lawyer whose coming huffing and puffing with a list of a thousand clients and it turns out that half of them aren't even clients or are in a position to pursue claims, and it raises all sorts of ethical concerns as well. Another thing that you can consider doing is to give the plaintiff's lawyer a settlement offer for each claimant that's substantial enough to actually settle the case, but less than what the AAA or JAMS arbitration fees would be. This requires ethically the plaintiff's lawyer to go to each client and discuss the settlement offer.

Mark Levin:

If each offer is a little bit different, the lawyer just can't send out a border plate letter to all the clients. A lot of clients are probably going to accept the amount. They have probably no idea what's really going on, and it'll be a windfall for them. It

also requires the plaintiff's lawyers to do some actual work. That's another strategy. A third thing to consider if you receive one of these demand letters is to see if the plaintiff's lawyers will agree to arbitrate a limited number of tests or bellwether cases that might ultimately lead to a resolution one way or the other of all the claims.

Mark Levin:

In reality, the plaintiff's lawyers are no more interested in prosecuting thousands of individual arbitrations than the company is in defending them. That might resonate with some of the firms, although some firms are very well heeled and they don't mind staying in the game for a while and seeing what happens and putting pressure on the company.

Alan Kaplinsky:

Not only that, the problem that I see with that strategy is you're feeding the monster. It sort of reminds me of a musical I saw not many years ago, Little Shop of Horrors. It was made into a movie, where the shopkeeper had a little plant. And all of a sudden, the little plant bit the shopkeeper. He started bleeding. That's what the plant needed to grow, and it grew and it grew and eventually took over the shop and started devouring people. If you keep settling with plaintiff's attorneys, you're just feeding the monster, aren't you?

Mark Levin:

Well, that is true, but it's all relative. Everything is painful and it's just a question of, what's less painful for the company? The irony is, is that some of these strategies can actually lead back to almost having a class action again. Because when you're faced with thousands of individual arbitrations, you really do want to have a procedure that will resolve them all quickly and not go on for years and so forth. It's a tough situation, but there's a lot you can also do. If I can segue to a different issue...

Alan Kaplinsky:

We're talking about longer term strategies now?

Mark Levin:

Well, no. The long-term strategies are actually trying to convince the AAA and JAMS to do something with their rules to address the reality of what's happening to the industry here. JAMS so far has not changed its fee scheduled or its rules, but AAA, I'm happy to report, did in November 2020, just a few months ago, adopt a new fee schedule for what it calls multiple consumer cases. It applies when the AAA determines in its sole discretion that 25 or more similar arbitration claims have been filed against the same party by the same council or coordinated council.

Mark Levin:

If it determines that multiple consumer cases exist, it has a sliding scale of filing fees. It's usually the filing fees that are the big chunk of what has to be paid upfront. Under their new schedule, for the first 500 cases, the company pays $300 per case. For cases numbering 500 to 1,500, the filing fee goes down to $225 a case. For cases between 1,500 and 3,000, it's $150 a case. And over 3,000, it's $75 a case. It's not chopped liver, but it's still a lot better than paying thousands of dollars for each case.

Mark Levin:

Unfortunately, the AAA does not seem to have change its rules to have a procedure that would account for how you're supposed to arbitrate multiple consumer cases. It doesn't clarify whether the arbitrator has discretion to join cases. Most arbitration clauses say cases can't be joined. And it's also unclear how other AAA administrative fees apply. For example, the AAA also has a $1,400 what they call a case management fee that's supposed to be paid in each case. It's not clear whether that has to be paid in addition to say the $300 filing fee for each case.

Mark Levin:

If it does, you're almost back to the original fee schedule that has been causing so much pain. I reached out to the AAA to try to get clarification on these points, but have not heard back from them yet. Hopefully we'll get some guidance. I will note that there's a third administrator active more in the employment area than the consumer area called the International Institute for Conflict Prevention and Resolution. It goes by the nickname CPR. In 2019, they launched a mass claims protocol and procedure, at least in the employment area.

Mark Levin:

The crux of that is that the parties will identify test cases or bellwether cases that will be arbitrated first, and then there are various procedures to see if the resolution in those cases will help settle the entire bunch of cases. We'll have to see what happens. But long-term, it's more than just what happens in an individual arbitration or an individual mass arbitration. It's sort of requires the cooperation of the arbitration administrators to work through these issues.

Alan Kaplinsky:

Mark, what other things can be done? For example, I know AAA has a consumer due process protocol that says that the parties should be able to avoid arbitration if a case fits within the jurisdiction of a small claims court. I assume that a lot of these consumer cases would be cases that on an individual basis would fit within the jurisdiction of a small claims court. However, I remember when you and I were drafting clauses in our effort to bend over backwards to make these clauses extremely consumer-friendly, we would only allow the consumer to elect to go to small claims court.

Alan Kaplinsky:

We wouldn't permit the company to do that, because we felt that was actually treating the consumer better than the company. Now in light of what's going on in mass arbitrations, we've changed our mind. Am I right? We want it to be...

Mark Levin:

That is correct. You want to make sure that that small claims court is reciprocal and that either party can go to small claims court. In fact, the AAA says if there's an arbitration started, a party can send a written notice to the AAA that it wants the case decided by a small claims court, and the AAA after it gets that notice is supposed to administratively close the case. Now, it's not a perfect solution though, because plaintiff's lawyers are aware of this as well.

Mark Levin:

They simply ratchet up the allegations of the arbitration demand to try to get to some number that's above the small claims court jurisdiction, which doesn't take too much because... And that varies from jurisdiction to jurisdiction, but it can be as little as $5,000 or even up to $15,000. But as you can imagine, it doesn't take much for a plaintiff's lawyer to even in the smallest case to have some emotional distress and get above $15,000 in damages. But in terms of drafting, absolutely no harm in making it reciprocal. There are some other things to consider too.

Alan Kaplinsky:

Yeah. Well, what about... In order to take advantage of that new fee schedule at AAA that I know you're still trying to drill down on and figure out the full implications, assuming that they had dealt with these other financial issues, would that be something where you would also need to revise the arbitration agreement to take advantage of that, or is that just something that would operate automatically?

Mark Levin:

Well, it all depends how the arbitration agreement is drafted. I mean, for a long time, we were taking the position that it would be ultra consumer-friendly to have the company offer to pay all of the arbitration fees and costs. Of course, nobody realized what that was going to lead to. These days, I think if you say that filing fees will be paid in accordance with the administrator's

rules, that'll make the plaintiffs put some skin in the game. Because under these rules, the company or the consumer does have to pay a maximum of $200 fee to arbitration, which doesn't sound like a lot.

Mark Levin:

But when you multiply that by thousands of arbitrations, that's a substantial amount of money. Of course, the thing that the plaintiff's lawyers say is that the consumers are impoverished. And especially in California, there's the statute that says that if you're impoverished, the company has to pay all the fees. That's sort of of limited help. There's been some thinking that maybe we should do away with the AAA and JAMS altogether.

Alan Kaplinsky:

I was about to ask you about that. Am I right, that under the FAA, it doesn't require that you name an arbitrator, right? That can be totally blank. You don't have to name an arbitrator or an administrator. Am I right?

Mark Levin:

That's right. I mean, under section five of the FAA, it says the parties can agree to an arbitrator. But if they can't, the court will select an arbitrator for them. There's no requirement. I mean, the reason the industry uses companies like AAA and JAMS is because they are very well-known to court. They've both developed extensive consumer due process protocols and rules that pretty much guarantee a neutral and fair arbitration for consumers.

Mark Levin:

When you tell a court, "I want to enforce this arbitration agreement into a AAA arbitration," that brings a lot with it, because the courts are more or less reassured that there's a set of protocols in place that will treat the consumer fairly. While you don't have to use AAA or JAMS, there is some danger, perhaps a great risk in not naming anybody. Because it used to be 25 or 30 years ago when people drafted arbitration clauses, they didn't have any company listed as the administrator.

Mark Levin:

The consumers went nuts about that saying, "I don't have enough knowledge about how I'm going to be treated in arbitration." So then the companies started using AAA and JAMS. Because if you say the AAA rules, that brings with it all the consumer-friendly due process rules. You don't even have to really even spell them out in the arbitration clause. There was a benefit to naming them. But that's something to keep in mind.

Mark Levin:

There is a recent New Jersey case, Flanzman v. Jenny Craig from September of 2020, where the New Jersey Supreme Court of all courts upheld an arbitration agreement in an employment contract that did not name an administrator or arbitrator, and they usually issue very pro-consumer opinions. That's something to keep in mind. There's another variation, which is to use something called AAA Arbitrator Select, which lets you pick and choose how much you want the AAA to be involved in the arbitration. You can engage them just to pick a list of their arbitrators.

Mark Levin:

And then once an arbitrator is chosen, they disappear from the scene, and you don't have to pay the administrative fees or the case management fees or the filing fees. The problem is you have to pay the Arbitrator Select fees, which are not all that much less than having to pay the filing fees, but it's something to keep in mind. Another thing that you can consider in terms of drafting and it's consistent with the AAA rules is to put in a provision that the arbitrator can shift fees and costs if a determination is made that a claim is frivolous.

Mark Levin:

It's basically like a Rule 11 provision. The AAA consumer rules have a similar provision, but putting it in is a little bit of a reminder to the plaintiff's lawyers that there is a limit on how far they can go with this. If they're presenting thousands of claims purportedly from their clients and it turns out that a lot of those are really not substantial claims or the clients don't exist, that's certainly frivolous and harassing and they could get stuck for all the costs and fees.

Alan Kaplinsky:

Mark, I'm just going to ask you a policy question. This mass arbitration phenomenon that we're witnessing, is it fair? I mean, I'm wondering why... To get back to where we began where you mentioned the courts haven't been very sympathetic to the industry, This sounds like a hold up to me. An old fashioned robbery. Isn't that unfair? Why haven't the courts seen that?

Mark Levin:

Well, I think the courts have been looking for a pretext to get revenge for the Concepcion decision which upheld class action waivers. Also, the Supreme Court in 2018 in the Epic Systems case upheld class action waives and employment agreements. The courts have really bridled against that. They're not supposed to under the FAA, but this has created a context for them to basically say, "Well, look, you wanted individual arbitration, you've got it." And as you said at the beginning here, you've got plenty of it.

Mark Levin:

But it's also unfair to the plaintiff's lawyer's clients because consumers who have legitimate claims get tangled up in a mass arbitration proceedings with a lot of so called claimants who really don't have legitimate claims, who were thrown in just to raise the volume of the filings. As we learned when we did battle with the CFPB on a rule that would have prohibited class action waivers, consumers do fair very well in individual arbitration and much better than they fair if they're putative class members.

Mark Levin:

Not giving them the chance to have a normal individual bilateral arbitration without thousands of other claimants being thrown into the mix actually deprives them of the legitimate rights that they have and of their chance to actually benefit from arbitration. It also hurts consumers because just as when a company is faced with the class action, the whole cost of litigation defense is increased exponentially. And ultimately, that gets passed down through the cost of goods and services to the consumer level.

Mark Levin:

Just like with the class action, the only group of people who really seems to benefit are the plaintiff's lawyers if they can actually achieve a settlement.

Alan Kaplinsky:

Yeah. One other thing that occurred to me as you were describing the various defenses that are available, could a legitimate argument be made seeking to engage in mass arbitration that that is a breach of the language in the arbitration agreement that prohibits consolidation of arbitration or class actions? I recognize mass arbitration is different than a class action, but it's not really much different than consolidating, is it? And usually class action waivers prohibit consolidation as well as a class action. I'm wondering what your reaction is to that.

Mark Levin:

Yeah. Well, it certainly contravenes the spirit, if not the letter of what class action waivers were intended to accomplish, which is a quick, inexpensive, and efficient way to resolve individual consumer disputes. There has been an attempt in the courts basically to argue that these mass arbitrations amount to a de facto class wide arbitration, which is what the arbitration agreement is supposed to prohibit. The Ninth Circuit recently had that argument.

Mark Levin:

But in September of last year, 2020, in another case involving Postmates, the Ninth Circuit kind of duct the issue and said that under the delegation clause in the arbitration contract, it was for the arbitrator to decide whether this was valid or not. We're not going to know the answer from the Ninth Circuit.

Alan Kaplinsky:

Yeah. The answer probably wouldn't have been good anyway, Mark.

Mark Levin:

It probably would not have been.

Alan Kaplinsky:

Yeah. Knowing the Ninth Circuit as we do, well, that's where most of the anti-arbitration opinions have been rendered over the years. We're drawing to the end of our podcast show today. I'm trying to from what you've described in the last 30-40 minutes the takeaways. I guess, one takeaway is you got to take a look at your arbitration agreement, because there are some changes that ought to be considered. That even if you haven't yet been targeted for one of these mass arbitrations, it will put you in a better position than if you don't do anything. Am I right?

Mark Levin:

You're better off being proactive and taking the bull by the horns. It's really more or less tweaking it here and there, but together, it gives you at least some chance of fighting the beast.

Alan Kaplinsky:

Yeah, I got it. Okay. Mark, is there anything else you'd like to add to what you've already talked about today that our listeners ought to be aware of?

Mark Levin:

As Alan noted at the beginning of this podcast, attacks on consumer arbitration clauses have gone in cycles. But we got class action waivers upheld and we defeated the CFPB rule, and we'll do our best to get you over this speed bump as well. Don't hesitate to contact us if you're concerned about a mass arbitration or have any other arbitration issues you want to discuss.

Alan Kaplinsky:

Right. Right. Well, Mark, thank you very much for sharing your wisdom with us today. I think it's been very, very helpful. Also, we want to thank all of our listeners today and remind everybody that we release a new podcast show practically every week. 50 times a year. We skip a couple of weeks in December over the holidays. But other than that, we present shows that we think are timely, informative, and are going to be helpful to the consumer finance industry. With that, we're going to sign off on our show today. Thank you, everybody.