Consumer Finance Monitor (Season 5, Episode 8): A Deep Dive into Mass Arbitration: Part II, with special guest Maria Glover, Professor of Law at Georgetown University Law Center

Speakers: Alan Kaplinsky and Maria Glover

Alan Kaplinsky:

Welcome to Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean to you or your clients. I'm Alan Kaplinsky, senior council of the consumer financial services group at Ballard Spahr, formerly chair of our consumer financial services group. And I'm very pleased today to once again, welcome back to our program, Professor Maria Glover at Georgetown University Law Center. The topic that we are exploring today is the remainder of the topic we began a week ago, and that is mass arbitration and what it's all about, what it means, and what's the impact of it. And how can defendants go about countering mass arbitration if they are faced with that problem? So without further ado, let's now go to part two. Getting back to the economics of mass arbitration, is there a certain dollar amount of claim that works better? I take it the smaller the dollar amount the claim, the less efficient mass arbitration is for resolving that dispute? Is that what you think and tell us, share thoughts on that.

Maria Glover:

So the dollar amount. So that was one of the more interesting findings of the study, which was that given the enormous startup costs, as well as the maintenance costs, even if you get your tech apparatus and your client services apparatus in place, you still have to run a claims model that is somewhat individualized, individualized communications on outflow, individualized communications on intake. And some of that can be automated, some of it can't. So it's expensive to do, it's expensive to maintain. So what's the economic calculus? Well, it's the same for any law firm when it's running a, how much can we get versus how much do we have to spend? And the way the economics have played out in mass arbitration is even with the availability of fee leveraging, unless, and until the contracts change, even with that leverage, it's still going to be costlier to pursue mass arbitration than it would be say a class action.

Maria Glover:

So it is very rare in any study that you get anything approaching an apples to apples comparison, but what's so interesting about the early stages of mass arbitration and the procedural posture that led to the first mover cases, not necessarily the later ones, but the first mover cases whereby they started as a class action and then were moved to arbitration by way of a motion to compel, is you actually can view a few things apples to apple. So take Fitbit, for example. Fitbit was a class action in California with regard to alleged deceptive representation about the accuracy of the heart rate monitoring. Turns out it wasn't so accurate. A class action was filed, Fitbit moved to compel, went to arbitration and fundamentally it just died there. The name plaintiff McLaughlin recovered in arbitration, but none of the other plaintiffs followed. Why is that? Well, I talked to the attorneys and they were candid about it. They said that it just wasn't high dollar enough claim per claim to pursue an arbitration.

Maria Glover:

It was sufficient for a class action, which has a lot more efficiencies and fewer startup costs, but it was too expensive in arbitration. And this is brought to bear in a hearing that occurred in McLaughlin against Fitbit when they were debating the class action in the arbitration, and the attorney for Fitbit said, this is ridiculous. We shouldn't have to arbitrate. Who would pay $700 in filing and initiation fees, which was their share, for a $162 device? At which point the judge threatened to hold the

attorney in contempt. That was precisely the argument that the plaintiffs made to the Supreme Court, the plaintiffs at the district court, in American Express, they said, you shouldn't enforce this class action prohibition, because if you do no rational individual is going to pursue this claim, because the value of the claim is less than the cost to pursue it. That's the identical argument that Fitbit raised.

Maria Glover:

So we know that a $162 device that gave rise to claims it ranged from $20 to a hundred dollars a piece, not sufficient. What the attorneys I spoke with told me is we're talking high hundreds, low thousands. That's what we're talking as a minimum threshold for economic viability in arbitration as a mass arbitration.

Alan Kaplinsky:

I take it, there's not enough data yet, and there hasn't been enough experience with actual mass arbitrations that have gone all the way from beginning to end, to figure out an average recovery in these mass arbitrations. I asked that question because, although we haven't mentioned it yet, one part of the story that you told the beginning, laying the foundation, was that after all that litigation had happened regarding the validity of class action waivers, then Congress enacted a provision in the Dodd-Frank Act, the Consumer Financial Protection Bureau to do a study of consumer arbitration and if appropriate promulgate a rule. And, of course, the CFPB did promulgate a rule banning the use of class action waivers. And that fortunately from the standpoint of my clients, Congress overrode that under the Congressional Review Act. So it never became effective, but the CFEB did this massive study of the interaction between class actions and arbitration.

Alan Kaplinsky:

And, in fact, concluded, they reached the conclusion that there was nothing wrong with consumer arbitration in and of itself. Class action waivers, they didn't like, but they didn't ban the use of individual consumer arbitration. And in this study that they did, comparing how much consumers recovered in class action litigation over a certain period of time and comparing that to how much people consumers recovered in individual arbitrations. The contrast was alarming. It was $32 and 35 cents in a class action as being the average amount recovered in a whole range of class actions. Those that had small dollar amount claims and those that were larger, that were in the thousands. And they compared that to the average recovery in an individual arbitration, which was $5,389. We don't yet know, and tell me if you disagree with me, Maria, what the actual outcome is going to be in a mass arbitration that doesn't get settled. How much are the consumers actually going to recover?

Maria Glover:

So two things, one, there are tons of layers to what's going on in the CFPB study, which I'll get to, and then two, what do we know, what don't we know, what may we never know, and what would we like to know? On that second point, we will never know all of the settlements that are reached in arbitration the same way we will never know the settlements of any individual case in court, and often what any individual recovers by way of say a class settlement. Those are almost always confidential. The information we have is either by way of the battles that were going on in court, by way of claimants who were willing to disclose. So on your first question, do we have an average? No. Will we ever have an average? Not unless there are anonymous, or a anonymized disclosures of settlements over the course of years.

Maria Glover:

Here's what we do know so far. In the early mass arbitrations, Uber, DoorDash, Lyft in the gig economy cases, numerous claimants reported receiving damages that approach their actual damages. Now are these the reports of every single claimant? No, these are plaintiffs who were willing to talk. In TurboTax we know that Keller Lenkner moved to intervene in a parallel class action that purported to resolve the claims, not just of those who were not subject to arbitration by way of their contracts with TurboTax, but those who were, and who were represented by Keller Lenkner, they moved to intervene in that class action. And one of the arguments they made was that the plaintiffs in arbitration were doing much better as a matter of recovery than they would do under the proposed settlement in TurboTax as a matter of a class action. So some plaintiffs were willing to speak there and they were getting something close to actual damages.

Maria Glover:

Then you get to family dollar, and it's a little more of a mixed picture in terms of what the plaintiffs revealed. Some said, look, I don't think I got enough. And what they meant by that was specifically, I don't think I got enough in light of what I believe were completely horrific working conditions, including that I had to work multiple night shifts in store rooms, sleeping on cardboard boxes next to snakes. When I had COVID, I wasn't given time off. When my mother died, I wasn't given time off. And I don't think I was compensated as much as I was owed based on that. Others said, look, I think I got plenty of money and I think I did far better than I would have in a parallel class action. But as with any settlement, whether it's a class action settlement or an individual settlement in court, or an individual settlement in arbitration, they're always the unanswered questions.

Maria Glover:

Did the person and family dollar get less than they were owed under the law? Did they get less than they were owed as a matter of the evidence they could produce with regard to how many hours they worked? We don't know. And then as mass arbitration continues, what are going to be the average awards? We don't know. What we're seeing right now is it is possible and certainly true for some plaintiffs that they have recovered more in the mass arbitration than they would have, again, in a rare apples to apples window, into the parallel class action than they would have in the class action. Now, as for do consumers do better in arbitration versus court generally? I think you have to unpack a little bit of what's behind the CFPB study. The CFPB also found that most consumers, 70 to 80%, don't even know what arbitration is.

Maria Glover:

So a sophisticated consumer that understands their arbitration agreement, just speaking personally as an attorney, I prefer that because it's a relatively easy pre-dispute process. And more than that, I know good and well that the defendants would rather pay off a few individuals, perhaps even at a premium, which is explicitly baked in to the AT&T type clauses, that economic calculus isn't a secret. They would rather pay a premium to deal in a pre-dispute arbitration proceeding with a few individual consumers than they would a class of them. Now, look, there's multiple ways to look at that. Different people are going to have a different view of that. Some people are going to say that only the best claims, only the meritorious claims are going to be the ones that are pursued. And therefore, that's a good system. If we have an aggregated mechanism, all it's going to do is incentivize non-meritorious claims.

Maria Glover:

The response to that, of course, is that what's doing the work in discouraging people from filing claims and arbitration individually is A, most people don't know what arbitration means. B most people don't know how to do arbitration. C, there are any number of reasons that individuals might not want to arbitrate or litigate in a participatory fashion. That's the entire theory behind absent class members. There might be any number of reasons that have nothing to do with the merits that they might not arbitrate.

Maria Glover:

So those are empirical questions that ask us to investigate a negative. We can't investigate why claims weren't filed, we just know that they aren't. We can posit that maybe some weren't filed because they weren't meritorious, but there are other explanations which are supported in the CFPB study, as well as the economics of some of the arbitration contracts themselves, that suggest that there are other reasons they're not being filed. So we can't really draw the conclusion that absolutely consumers are better off here than there. And that doesn't even get at questions of determinants, which I will pause there, which people debate as well.

Alan Kaplinsky:

Well, I think the reason I agreed with part of what you said, the claims aren't filed or haven't historically been filed in individual arbitration because the consumers don't understand the process well enough. And I think there's a lot of fault to go

around there, but I would point my finger first at the government agencies, like the CFPB and maybe the Federal Trade Commission, and maybe other federal and state agencies who have done an absolutely wretched job in even making an attempt to explain to consumers what arbitration is, how does it compare to litigation? What's a class action? What's a mass arbitration? As much money as the CFPB has in its coffers, and as much as it devotes to consumer education, you know how much money they've spent, Maria, educating consumers on what I've just described? Not one penny, nothing, they've done nothing.

Alan Kaplinsky:

I think industry could do more as well in doing it, but I really think it's really the function of the government here to describe it and to describe it in a neutral kind of way, without pushing the consumer in one direction or the other. Anyway, that's my two cents. Let's move on because we've got a few more things to cover and I want to make sure we get to everything. So can you tell me how do plaintiff's attorneys find all these clients that they come up with? How they've been able to do that's a mystery to a lot of us.

Maria Glover:

So, just to put a quick cap on the prior discussion, I think it's important just to note that it's not just a question, although in the consumer area, it might be predominantly a question of dollars and cents. The only thing people might care about at the end of the day is the extent of compensation, but the broader debate about arbitration and mass arbitration and requiring arbitration has to include and includes debates about deterrence, but also when you talk about educating, whether it's consumers or employees or whomever, about what arbitration is for purposes of what procedures they're entitled to, whether it's public or not. And top of the list of hot topic debates in this area is arbitration agreements and the nondisclosure agreements that go along with claims for sexual assault and harassment in the workplace. And so I think I'd be remiss if I didn't state that maybe in the consumer arena, it largely boils down to dollars and cents and educating about the processes and choices along those lines.

Maria Glover:

But there are other areas where the terms of the debate really don't break down so easily economically, but so just thought I needed to say. And then to your question about how do they find their claimants? Obviously that's fairly proprietary and quite rightly the firms were not going to tell me precisely how they did these things. And there are third party outfits that develop individualized claim apparatus, tech apparatus, that sell for quite a bit of money, but fundamentally here's what seems to be going on. The details are proprietary and not going to be made public, nor was I told them, nor should I have been, but fundamentally it's not fundamentally different from the kinds of targeted campaigns that might go on in an NBL and not fundamentally different from what we might expect different technology companies like Facebook, like Instagram, TikTok, companies like Amazon. The companies at the other side of the mass arbitration V, the defendants in these cases.

Maria Glover:

Like the fact that Amazon can target its ads is by way of technology that logically speaking would be no less available to the legal industry than it is to Amazon, no less available to the legal industry than it is to Facebook. And we're seeing this, we're seeing the evidence of it. We're seeing that people are receiving invitations to file claims against a particular defendant on Facebook. And it's not a blast ad, it's an ad that is reaching people who are probably consumers or customers of that company. And there was a startup called FairShake that I studied that targeted ads toward Comcast customers AT&T customers, and then help them file their claims. So the short answer is, it's technology, it's targeted ads, it's targeted outreach. It's not fundamentally different from what we see, either in NBL and, or in other industries. But I will say there is a distinction with NBL in that the lawyer referral networks are not going to be as effective as they would in mass arbitration simply because they're unlikely to reach who they need to reach in an efficient and targeted way.

Alan Kaplinsky:

I have heard, what you've described is I guess not surprising, and I'm not sure there is anything wrong with advertising for clients, whether you're doing on the internet or otherwise, but I've heard stories of some plaintiff's attorneys who are commencing a class action lawsuit, and then trying to get a list of the members of the class before the court rules on a motion to compel individual arbitration. And I guess in some cases, the courts have required the defendants to turn over a list. And that that's been used. Have you heard of that too?

Maria Glover:

Yes. In fact, that's at the core of the dispute in the DirecTV potential mass arbitration as to whether the class list will be released, thereby making the filing of individual demands a far less onerous project, either is a matter of filing them, or is a matter of paying for it, but it's hardly necessary. I think that arguments that release of a class list is, or is not an abusive process is, or is not too gamesmanshipy for what is. Come on. If you're going to hate anything, hate the game, not the players, the defense bar's doing what it's going to do. The plaintiff's bar's going to do what it's going to do. Arguably this is our adversarial system at work. This is a free market at work, but to the extent that you might argue that it's untoward to get the class list, I'm not positive it's as necessary as perhaps it might have been even five years ago with the proliferation of social media, broad reaching social media, targeted advertising, the algorithmic identification.

Maria Glover:

Again, when I go on Amazon after this, it's going to send me ads for things I've already talked about. When I go on Google, it's going to send me ads for stuff we've been talking about. The technology is there, whether we're at the tipping point where technology and other similar means for efficiently and cost effectively obtaining claimants has been reached, I think it's too early to say, classes are still important, or firms wouldn't be pursuing them. But I think we're at the tip of the iceberg for seeing how claimant groups are reached, aggregated and how their claims are pursued. And I think our old constructs aren't nearly as relevant as they're going to be.

Alan Kaplinsky:

Yeah. Let me ask you, and I think we're going to have to wrap this up after we go into this one other area that I think is really important. And that is, this is a little bit of a cat and mouse game, between the plaintiff side and the defense side. And I'm wondering what you think about rewriting of arbitration agreements to basically counter this mass arbitration phenomenon. For example, one thing I think you alluded to already, and that is instead of the defendant bearing a hundred percent of the arbitration fees, there's no requirement even under, I guess, Armendariz, that case in California, that a defendant pay a hundred percent. So that's one change, I guess, that could be made.

Alan Kaplinsky:

Another change that could be made is to make sure that there's a carve out in the arbitration agreement for claims that could be brought in small claims court in a particular state. And if you do that and nevertheless, a plaintiff initiates a whole bunch of mass arbitrations, or threatens to do that, defendant can then invoke that carve out and just say, it's not covered by arbitration, or another thing I think someone could do is just stop using an arbitration administrator. Don't name AAA, don't name JAMS, and under the FAA when that happens, it's up to the court to select an individual arbitrator. Don't you think those kinds of changes, which have their, each one of them has drawbacks, but don't you think that would largely solve the problem from a defense point of view?

Maria Glover:

Will the arbitration contracts change? Yes. Will they all change at once? Not if past experience proves true, not every defendant can nimbly change their agreements. Not every defendant is online and can change them automatically. Frankly, not every defendant is even aware that a lot of this is going on, or that they might need to change their agreements. So, as I say in the article to some degree, this 1.0 model which hooks into the contracts as they existed in 2018 is going to persist, but maybe

not for web-based defendants, it's going to persist, but maybe not for the most nimble of defendants who are on the cutting edge of these issues, but will likely persist for non-web based defendants, defendants who maybe aren't as on top of things or can't change their agreements so quickly.

Maria Glover:

How will the agreements change? Well, yeah, fees, that's going to be one of the first set of changes. What are the outer limits to that? We don't know. As you mentioned, the California has a case called Armendariz, and the rule is that an arbitration agreement cannot impose costs on the claimant that would exceed those the claimant would be required to pay in court. It does not make defendant liable or on the hook for a hundred percent of fees. It just doesn't allow the defendant to impose more costs on the claimant than they would have to pay in court. So that's still a lot for the defendant, but that might and outer limit. Does Armendariz persist? Does it bleed over into other jurisdictions? Does the Supreme Court agree with it? It's not like it hasn't gone up on cert before. It just hasn't been granted.

Maria Glover:

So we have to see what happens there. And we have to see whether there are outer limits to the Supreme Court's jurisprudence. Justice Kegan in her dissent in American Express against Italian Colors seemed to suggest that there was troublingly not an outer limit to how far the contractual provisions could go in functionally eliminating most claims, if not explicitly saying you may not sue us under this statute. We know they can't do that, but how far down the line can they go to functionally eliminate it? How far does America Express and Epic Systems go? That's an open question.

Maria Glover:

What about carve outs for small claims court? Okay. We're starting to see that a little bit, some defendants are considering it. Would that mean though that we don't see this model? I'm not sure it does. I think we could see something like this model in small claims court. This model is hardly constrained by arbitration. It is a hybrid model of individualized claiming, an aggregate claiming that is a manifestation of the age old inevitability of aggregate settlement that many scholars have talked about. So this is a template that, yes, it relies on some of the features of arbitration like its fees and arbitration contracts to function, but I'm not sure that those are critical. You could have a hybrid individualized claiming model in small claims. You could have it in front of an agency. So maybe we see that, maybe we don't. How attractive it is to defend it might depend on whether the exportation of the mass arbitration bottle arrives behind the scenes in small claims court by way of a less involved attorney who is nonetheless doing some coordination.

Maria Glover:

What about other changes? You don't name an arbitral forum. What we're seeing isn't yet that, it's more naming more defendant friendly arbitrary forum, and frankly I'm not sure they couldn't go further and just name an arbitral forum that isn't capable realistically of processing the volume of claims, which would hamstring to some extent, the ability of plaintiffs firms to leverage the costs of actually arbitrating these things to harness the cost of individualized claiming to their advantage, whether that would be okay under unconscionability 3.0, effective indication 3.0, that's going to have to get litigated. What if they didn't name an arbitrator and they left it to the court? That might happen. Similar questions. Here's something else defendants have done, Amazon in particular. They just say, forget it, forget it. We're not going to have arbitration agreements, sue us. And by the way, sue us in Washington State where we are headquartered.

Alan Kaplinsky:

Well, that would be good topic for another podcast show Maria. Okay. Well, I think we've really covered a lot of territory today and I want to thank you very much for taking the time that you've taken to share your thoughts on mass arbitration. I know your article, I believe is, am I right? It has not yet been published in a law review, it's still in draft form or am I wrong?

Maria Glover:

It's not fully published, but it is accepted for publication and forthcoming with the Stanford Law Review volume 74.

Alan Kaplinsky:

Oh, okay. Yeah. And it is available now for people. How would people get a copy of it if they wanted to read it?

Maria Glover:

Sure. So it's available for download on Scholarly Comments on SSRN. I update the draft every time I do a new round of edits, it is approaching final stages and really quickly, let me say what I mean by final. It doesn't mean mass arbitration is done, and this is the only chapter on it and everything's closed. It is the first study, it's the most comprehensive study, but at some point you have to say, this is a picture in time. This is a comprehensive study of what we have so far. Stay tuned.

Alan Kaplinsky:

Okay. Well, again, thank you. I also want to thank all of our listeners today, who downloaded the show, and just remind everyone that our podcast show is a weekly show. We release a new show every Thursday and it's available wherever, whatever platform you may use to obtain podcast shows that you enjoy listening to. Also, if you want more information on the subject that we talked about today, or basically anything in the world of consumer finance, I would direct you to our blog, which is also goes by the name Consumer Finance Monitor. We've been doing that since July 21st, of 2011, the very date that the CFPB got stood up. So with that, I want to hope everybody enjoys the rest of their day.