Consumer Finance Monitor (Season 6, Episode 21): A Deep Dive into Mass Arbitration, with Special Guest Andrew Pincus, Partner, Mayer Brown

Speakers: Alan Kaplinsky, Mark Levin, and Andrew Pincus

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean to the industry, what they mean to consumers, and what they mean to your business. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spar Law Firm, and I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now Senior Counsel of the Consumer Financial Services Group at Ballard Spar. And I'm very pleased to be moderating today's program. For those of you who want even more information about the topic that we're going to be talking about today or anything else in the world of consumer finance, don't forget about our blog and subscribe to it, consumerfinancemonitor.com, goes by the same name as our podcast show. We've hosted the blog since 2011.

There's a lot of relevant industry content there. We also regularly host webinars and subjects of interest to those in the industry, so to subscribe to our blog or to get on the list for our webinars, please visit us ballardspar.com. And if you like our podcast show today, please let us know about it. You can leave a review on Apple Podcast, Google, Spotify, or whatever platform you're using to access our podcast show. Also, please let us know if you have ideas for other topics that we should consider covering on our show or if you want to recommend speakers including yourself perhaps, that we should consider as guests on our show. So let me get to the topic of today, and this is a topic when I describe it very briefly to you, a lot of people out there will know this is very near and dear to my heart and near and dear to the hearts of my two guests today.

So we're going to be talking about arbitration and we're going to be talking about a development that has occurred that has become increasingly problematic. It's been ongoing now, I'd say for five years maybe. It was something that began in with respect to employment arbitration, but has morphed little by little into the world of consumer finance. And it is an outgrowth of the US Supreme Court opinion in AT&T versus Concepcion, which one of our guests actually argued and won before the US Supreme Court where the court held that the use of a class action waiver in an arbitration agreement is valid, not withstanding any state law that would consider the class action waiver to be unconscionable or against public policy. And as some of my friends that are in the consumer bar have put it, you wanted arbitration, Alan, we're giving you plenty of arbitration.

Why are you objecting? So the topic we're talking about is mass arbitration and let me now introduce our two guests. First of all, our very special guest is Andrew Pincus. He's a partner at the Mayor Brown Law Firm. His practice focuses on the US Supreme Court and appellate litigation in general. He's argued 30 cases in the United States Supreme Court, including the AT&T versus Concepcion case that I mentioned, and he appears regularly before federal and state appellate courts and federal district courts. And he co-founded and serves as co-director of Yale Law School's Supreme Court Advocacy Clinic. He's a former assistant to the Solicitor General and at one time served as general counsel of the United States Department of Commerce. Andy, a very warm welcome, really happy to have you on our program today.

Andrew Pincus:

Thanks, Alan. It's great to be with you and Mark. We've had a lot of discussions about arbitration over the last 10 or 20 years and it's good to have the opportunity to have another one.

Alan Kaplinsky:

Great. And now let me introduce to you my colleague, Mark Levin. Mark is known for his work in complex commercial and class action litigation with particular emphasis on consumer finance litigation, also known for structuring and enforcement of

consumer arbitration clause, which of course is very pertinent to our discussion today, and the defense of financial services companies in class actions and arbitration. Mark and I were, while we weren't representing any party to the Concepcion case, we filed an amicus brief on behalf of several bank trade associations. So Mark, a warm welcome to you too. Happy to have you, of course.

Mark Levin:

Great to be here, Alan, and good to see you, Andy.

Andrew Pincus:

Same here.

Alan Kaplinsky:

Okay. So Andy, you and your colleagues at Mayor Brown recently authored an 80-page report for the US Chamber of Commerce Institute for Legal Reform titled quote Mass Arbitration Shakedown, Coercing Unjustified Settlements, unquote. So I've got a number of questions for you on that. First of all, define for our listeners, because not all of them are going to be arbitration mavens like you are, Andy, and Mark, what is a mass arbitration?

Andrew Pincus:

So there's no formal definition, but here's how I think about it. It's the simultaneous filing of thousands or even tens of thousands of arbitration demands with identical claims. It can be in the consumer context or the employment context, and just to put a little meat on the bones, as you know, under the rules of arbitration providers like the AAA or Jams, the filing of those claims triggers an immediate obligation to pay a filing fee, and typically the company is obligated to pay all or almost all of that fee. So it's the combination of mass filings, identical claims, triggering a big filing fee.

Alan Kaplinsky:

So the report that you helped the chamber with, it's got a very provocative title, I guess that's maybe the best way to put it. What do you mean by a shakedown, and why should financial services companies be concerned about these mass arbitrations?

Andrew Pincus:

So obviously people write titles because they want people to read the content, so we wanted to get people's attention a little bit, but really what we're talking about is what I just alluded to. Under the rules of arbitration providers, when these mask claims are filed, they trigger very significant payment obligations. And just to take one real world example, a company faced more than 6,000 filings with the fees of nearly 12 million dollars payable upon the filing. Another was faced with a threat to file 12,000 claims that would've triggered more than 30 million in filing fees. And there are many, many similar examples. So what we're concerned about is nobody's planning to arbitrate those thousands of claims simultaneously. What happens in the real world is that either imposing or threatening to impose that huge upfront cost is designed or certainly will have the effect of putting incredible settlement pressure on the target of those claims. And most significantly to me, the settlement pressure is entirely unrelated to the underlying merits of the claims. It's just to avoid this huge upfront payment to the arbitration provider.

Alan Kaplinsky:

Right. So I mentioned in my introduction how this phenomenon began originally in the employment arbitration area or also in the area where independent contractors are being used. There was litigation involving Lyft. I think there may have been something involving Uber and a lot of delivery services got involved in these things. But our audience here today, Andy, are principally consumer finance lawyers and business people. How widespread is mass arbitration in the consumer finance industry and in terms of frequency, are they beginning to tail off or are they increasing? What's happening there?

Andrew Pincus:

So I think companies in just about every industry have been targeted. The key, obviously in the consumer context, is a large customer base and maybe we'll talk a little bit about how the claims get put together to the extent we know, obviously looking in from the outside. But the key is a large customer base and I don't think there's any sign that it's letting up. Companies are fighting back in different ways. So we have some skirmishing about the merits and the ability of plaintiff's law firms to do this, but I think this is a phenomenon that at least as far as I know, has no signs of letting up and is being pursued actively across the board.

Alan Kaplinsky:

Yeah. So your report mentions several plaintiff's law firms that seem to be focusing on this area, I guess that you could call it a cottage industry that's developed of plaintiff's attorneys that have jumped into this area. Is this a niche business that only a few firms are engaging in or is any consumer oriented firm capable of bringing a mass arbitration?

Andrew Pincus:

I think it was developed by a few firms, but others are catching on and I think the use of the technique is spreading. What does it take? The ability to use a website to solicit the targets customers, because obviously this is a volume game, and so aggregating a sufficient number of claimants is key to the effectiveness from the plaintiff's bar perspective of this tool. So they need the ability to use advertising in a website to solicit clients and a claim that at least arguably is shared by many or all of the targets customers so that they have a large audience to pitch their claims to.

Alan Kaplinsky:

Yeah, and the thing that I have noted, the way it usually begins is a letter gets sent to the target by the plaintiff's attorney or to the targets outside law firm if the plaintiff's attorney knows who that is. And there's usually a list that, as you pointed out, could be hundreds, could be thousands, I suppose it could be in the millions. I mean very, very high numbers. And the plaintiff will point out that under the arbitration agreement, you've got the obligation to pay all the arbitration fees and there's certain front fees that need to be paid. I think for AAA, the fee is something like $2,500 that's got to be paid up upfront. And the plaintiff's attorney will say something like, "I'll give you a bargain. You can settle with my client for 50% of that amount right now before I initiate all these arbitrations, or we can go to arbitration and you can pay X millions of dollars of fees." That's the game that gets played here.

So Andy, let's assume, put on your hat, you're not the outside council now you're the risk manager for a consumer financial services company. How can you assess the risk or the likelihood that a mass arbitration will be brought against your company? Or I guess put differently, what makes a company more or less vulnerable to being the target of a mass arbitration?

Andrew Pincus:

Well, if you think about it, what are the ingredients? As I said before, large customer base that's reachable, at least a significant portion, reachable through internet advertising and other internet outreach, and look at your arbitration clause. Have you addressed in your arbitration clause the risk of mass arbitration? We'll talk about later, I think, some ways in which you can do that. But if your arbitration clause doesn't address that risk and you're using either the AAA or Jams or many other providers, you are going to be vulnerable to these very significant upfront costs. As you mentioned, Alan, it's $2,500, and even I think people should be aware that the AAA adopted some mass arbitration rules, but the moderation of the upfront payment is very minimal. When you get into the world of hundreds or thousands and in many cases tens of thousands of claims, you're still talking about potentially tens of millions if not up to a hundred million, in these upfront fees.

So you've got to look at those questions. Another thing to look at, and I'm sure we'll talk about it, is do you have as many companies do a pre-filing mediation process for your claims? That's a way to at least find out whether something might be coming down the pike. If your arbitration agreement says before you file, you have to approach us with your claim and a demand so that we have an opportunity to settle and resolve this amicably. And so does your arbitration have one of those things? That may be a deterrent to some of the firms that use this because it's obviously an additional step that they have to go

through. So if you don't have any of those things, I think you have to worry about being at risk. If there are, and certainly consumer financial companies are in the business where there are a number of statutes that impose detailed requirements that apply across the board, and it could be that some technical claim or even a claim that doesn't seem to have a lot of merit can be raised based on an alleged failure to comply with those requirements.

Alan Kaplinsky:

A lot of the times I've found that the claims attorneys are pretty sloppy in ... They don't worry so much about finding a violation. They can be very general. Well, Mark and I had a client that just a few days ago got a letter just saying, "Your deposit account agreement violates Reg E." It listed just a bunch of statutes, but it was not specific at all. A lot of the lawyers are not that worried about whether there's really a bonafide claim. You agree?

Andrew Pincus:

I think that often is true. And I think just to step back a little bit from where we've been and take a bigger view here, to me, the most important thing about our legal system is that the outcomes should be tied in some way to the merits. We all know trials don't get litigated all the way to the end. It's too expensive, too much risk. So we do have this court system that's a little off kilter because the procedures are all leading up to this trial, getting all the evidence, having all the pretrial skirmishes, the trial that never happens. So to me, the key question has always been does the system provide the right settlement incentives as a case moves through so that legitimate claims, meritorious claims, should get big settlements and frivolous or non-meritorious claims should get little or no settlement? But I think what you've just pointed out is in mass arbitration, the merits don't matter.

It's all about the filing fee and the pressure that that creates, and as you say, the offer that, "Here's your situation, either pay these tens of millions of dollars to the AAA or Jams or pay 50%, 75% to me." And of course from the company's view, paying those fees is just the start. They're going to have to hire a law firm to defend themselves against those claims if they decide to go forward in arbitration, and they'll have other arbitration costs if the claims go forward. So to me, that's, in a big picture way, what is disturbing about this gambit, is that it really unlinks the whole process from the merits. And what was good to me about Concepcion and about arbitration in general is that there are merits determinations. If you file a claim, you will get a quick determination or the company will see that you can get to a decision maker and you'll get a settlement that's commensurate with the underlying merits.

Alan Kaplinsky:

Okay. Mark, let me turn to you. So you've handled a lot of these mass arbitrations, but you've also been very much involved in helping clients revise their arbitration agreements in order to include within them what I would call, in a way, I'm not going to call it a shark repellent provision, you use that phrase in connection with articles of incorporation and bylaws, but let's say deterrence, provisions that will deter or give pause to a plaintiff's attorney who's thinking of initiating a mass arbitration against a client. So one of the things that is apparent from a quick reading of the Federal Arbitration Act, there's no requirement that you hire an administrator. It doesn't say you have to hire AAA or Jams or anyone else. The parties can select an arbitrator and if the parties can't agree on an arbitrator, the FAA provides that the court will designate an arbitrator. So I want to get your reaction, Mark, to whether that's a solution to the problem. If you don't have an administrator, there are no filing fees to pay. So what's wrong with that?

Mark Levin:

You're right Alan. You don't have to have an administrator named, but I don't realistically think of that as a solution to the mass arbitration problem because there are a lot of risks in not naming an administrator, even though having an administrator runs the risk of being subject to a lot of filing fees. But there are a lot of risks in not having anyone. For example, if you use AAA as an administrator, AAA since before the year 2000, probably from 1998 on, has been developing a lot of due process rules and due process protocols as part of its administration system. And when you tell a court this is a AAA arbitration, that brand comes along with it and is somewhat reassuring at least to a lot of courts that consumers are going to be treated fairly.

You would have to if you did not have an administrator, and let me say that the New Jersey Supreme Court just a few years in an employment case, out powered an arbitration agreement that didn't have an administrator. So it worked in at least one instance. But when you're talking about a company that has millions of customers and thousands or tens of thousands of them are claimants in a mass arbitration, you have to be really careful because you could have an arbitration clause that replicated or basically copied all of the trip away due process standards and said, "We'll follow those," and also lays out what will happen if there's a mass arbitration, nowhere calling for an administrator, just saying "If we can't agree on an administrator, the court rule appoint went under section five of the AAA. But that's a really radical step and you're going to be a target for countless plaintiff's firms who will try to pick apart your arbitration clause and raise unconscionability issues, contract issues, et cetera.

And realistically, the thought of having to petition courts to appoint arbitrators in all those cases, it's never going to happen. It takes a long time just to petition a court to appoint an arbitrator even in one or two cases, but in thousands of them, it's just not a realistic thing, in my opinion. Nobody's equipped to handle something like that. There is interestingly enough, a variation of not having an administrator that the AAA offers and it's called their Arbitrator Select service. It's not advertised on their website, but it's still there. And unless you use the AAA to compile a list of arbitrators and for an additional fee, it will also vet the arbitrators for their capacity to serve. So you don't have to go through that yourself.

But then the AAA provides no other services and there's no filing or administrative fee since it's not administering the arbitration. But there are still significant costs to that because the AAA charges you to send you a list of potential arbitrators, and even more to vet them. In terms of the arbitration clauses themselves, I mean there are things as you say, that you can do to help try to deter a mass arbitration.

Alan Kaplinsky:

Andy mentioned that, and one of the things he mentioned was a pre-filing mediation. I think sometimes we refer to it as a notice secure requirement. Tell us about that.

Mark Levin:

Well, as Andy mentioned, it requires the claimant to give notice of the claim before commencing some sort of action or arbitration proceeding, and it affords the company a chance to try to resolve the dispute informally. And a company could respond by making settlement offers, maybe each one a little bit different to every one of the claimant. And ethically, the plaintiff's lawyer would have to take those offers to the claimants to discuss it with them. And it requires a lot of individualized work, which is a disincentive to plaintiff's lawyers because they're looking for low hanging fruit in my view, when they go to start a mass arbitration, and the less work they have to do, the better it is. Their only concern is having volume, and as Andy said, they're not really interested in the merits of each case. They just want to threaten fees.

But not all courts enforce the notice and cure provisions. Some courts have said, "Well, you are erecting an impediment in the claimant being able to actually just go to court or commence an arbitration. It's something that's not really called for in the rules," and it's a burden for them to have to go through that. And there are potential statutes of limitations issues too, depending on how long that process takes. You have to build that into the arbitration clause. And in theory, if you have a notice and cure provision and the plaintiff ignores this and said, "I'm just going to start an arbitration or start a class action," you might try to dismiss that claim for failure to abide by the contract. But again, not all courts will enforce that, and those that do tend to do so only in breach of contract claims and not statutory or U-dep claims.

Alan Kaplinsky:

Mark, let me ask you this, I'm aware of some case law, there's not a lot I don't think, dealing with notice and cure. By the way, the genesis of that idea was what Fannie Mae and Freddie Mac did in their uniformed instruments many years ago. And when the industry was telling Fannie Mae and Freddie Mac to put arbitration provisions in their uniform instruments, they wouldn't do that because I think it would've been politically incorrect for them to do that. But they did put in this notice and cure language so that a plaintiff can't bring any kind of a claim against a mortgagee unless they've given that mortgagee notice and an opportunity to resolve whatever the problem may be. What I'm wondering Mark, is what about having a third party mediator? In other words, what this notice in cure provision is, it's just between the company and the consumer. But what if you, let's say you've named AAA as your AR arbitrator. What about saying that you utilize the mediation services of AAA?

Mark Levin:

Well, I don't really think Alan, that that changes the picture. It's still something in between the claimant with a complaint in his or her hand and the courthouse door or the arbitration administrator's door that some courts might say is a burden on the consumer. And in terms of enforceability, I mean mediation, a lot of courts say it's not the same thing as arbitration because the process isn't binding. And a lot of courts will not compel mediation, for example, like in an arbitration under the FAA. So you could try doing that, but there's not a guarantee that it's going to work. On the other hand, if a plaintiff's lawyer has a mass arbitration firm and is looking for the easiest target to go after, they might look at that and say, "It's too much trouble. Even if we don't do the mediation, we're going to have to brief the enforceability and it's too much work," and maybe they'll go somewhere else.

Alan Kaplinsky:

Yeah, a deterrent, as I refer to it. So Mark, putting that aside, notice and cure, are there other drafting strategies that you think can help dissuade a plaintiff's attorney from initiating a mass arbitration?

Mark Levin:

Yeah, there are several. One is to bolster the small claims court exception that the AAA has. Under the AAA consumer rules, you have to permit, either party has the right to go to small claims court if the claim is within the jurisdiction of that court. And the AAA rules go even further and say that if a claim is filed in arbitration and the defendant company thinks that it belongs in small claims court, you can tell the trip away that, and in theory, they dismiss the arbitration so that the parties can go to small claims court, which again, in theory should alleviate having to pay filing fees since nothing is really starting. But it's important that the small claims court language in your contract be bilateral. In other words, that either party, which is what the AAA rules say, either party can do it, but back before Concepcion, when it was particularly important to be ultra consumer friendly to convince a court that the arbitration clause was not unconscionable, the arbitration clauses would often say if the consumer goes to small claims court, the company won't compel arbitration.

It didn't include the outburst of that, which is that the company has the right to go to small claims court. The other thing is the arbitration cost language, again, pre-Concepcion, a lot of arbitration clauses said, "At your request, we will pay your filing fees and administrative fees and arbitrator fees." Some clauses didn't even say at your request. They just said, "We'll pay them," which leads right into the ploy of mass arbitration, which is to make you pay all those fees. We could tighten up the language and try to make the claimant's firm, the mass arbitration firm, responsible for at least paying the consumer's share of the filing fee, which is like $225, small one compared to the thousands of dollars that the company owes. But still, when you multiply that by hundreds or thousands or tens of thousands of claimants, it's serious money.

And if the firm is not all that well funded, it could be a difference. So there are ways to tighten that language. Also, I think it's good to add a bad faith provision, which says that if the arbitrator finds that you were acting frivolously or for purposes of harassment, the arbitrator can shift fees. The AAA rules actually have that provision. But I think it's good to put that on the face of the contract because as either you or Andy was saying, when you get this list of mass arbitration claims and the company looks through each record, and in my experience, you can often eliminate a large percentage of claims because they were vetted through social media and there were mistakes made or the plaintiff's lawyers were acting hastily and people weren't even your customers. So having a bad faith provision reinforces that the plaintiff's lawyers need to do some due diligence.

And the final thing that I'll mention is usually as part of the class action waiver, arbitration clauses used to say that the arbitrator cannot join or consolidate claims. These days, there's an issue about whether you can have in a mass arbitration, whether you can try to resolve those through bellwether claims, as I think Andy was saying, batches or tranches of arbitration claims that are joined for purposes of trying to resolve a mass arbitration. So I think that taking that little piece of the class action waiver and saying that unless all parties otherwise agree, the arbitrator can't join, which gives you some wiggle room if you later want to do a batch proceeding or a bellwether proceeding.

Alan Kaplinsky:

I'm going to get into that now with Andy. Andy, I've got a question for you on bellwether proceedings, but before I do, do you want to either comment on any of the ideas that Mark had or whether you have some other ideas for drafting purposes?

Andrew Pincus:

No, I guess the one thing I would say about requiring the consumer to pay the consumer's fees is there's a little bit of a risk that with respect to small claims, that there could be some sort of an unconscionability challenge to that requirement. Who knows whether it would succeed or not? Probably depends a lot on what the state's general unconscionability rules are, but that's certainly a risk, you get confronted with the argument that the $200 is more than the individual's claim. So requiring them to pay it locks them out of the arbitration process. So anyway, that's just a risk there.

Mark Levin:

Andy, let me add a footnote there if you don't mind me interjecting for a second. Because the other part of the drafting is to say the parties pay their own fees as set forth in the AAA fee schedule, but let's say if the claimant makes a written request and has tried to get a fee waiver from the administrator and is acting in good faith, then we will pay the fee. So it makes the claimant have to do more work, submit affidavits to the AAA about financial worth and things like that in order to have us pay, but it doesn't eliminate the possibility of the company pending payments. That's sort of the back end of this.

Alan Kaplinsky:

So let's turn now Andy to the so-called bellwether procedures. Your report advocates the use of them to help achieve a global resolution of the claims. Tell us if you would, what is a bellwether procedure and what are its benefits in a mass arbitration?

Andrew Pincus:

Sure, and this really goes back to my earlier comment that what we should be looking for, that I would think everyone's common goal is to try to reach, have a system where the resolutions are tied to the merits. So this basically keys off of an approach that's been used in the multi-district litigation context in federal court to deal with a similar problem where you have thousands, maybe tens of thousands in some cases, hundreds of thousands, of similar claims brought by individuals. As you know, that's typically in the mass torts or product liability context. And the MDL system gives those claims coordinated pretrial proceedings before a single federal judge. And as part of that process, judges have used bellwether trials with the agreement of the parties, to facilitate settlements. So the way that works is the parties work with the court to select representative cases that are selected and tried. What does that do? It forces the parties, both the plaintiffs and the defendants, to put together their factual cases, make a realistic assessment of their claims, and then get actual decisions by juries and courts.

And what's been the reality in the MDL process is when there's a representative group of claims chosen, that can precipitate a global settlement. That's the idea, and it often happens. So the notion is to apply that model in the mass arbitration context. You have, as Mark was previewing, the arbitration agreement says when there are a massive number of claims filed either by one firm or by a group of law firms working together, they'll be accepted for filing by the arbitration forum in batches. So the fees will be triggered 50 cases at a time. Those cases would be agreed upon by the parties and then heard and decided by separate arbitrators the way the arbitration system works. And that would give the parties a lot of critical information. If the plaintiffs run the tables in the 50 cases or win 40 out of 50, presumably the defendant is going to realize that it has a big potential liability on its hands and will have an interest in settling.

If the reverse happens, that may lead the plaintiffs to be less demanding in the amount that they'll require for settlement. So the idea is get those results, have a mediation step built in with an independent mediator, and then if there isn't a settlement, go to the next 50. And that that process, as in the MDL context, would be highly likely to result in a global resolution and also a global resolution that would produce a merits based as opposed to just a what are the level of arbitration fees based decision.

Alan Kaplinsky:

Right. Now, at least one court, maybe there's more than one, has looked at scans at this procedure. A California district court recently held that the bellwether procedure involving Verizon's arbitration clause were unconscionable because according to the court, it would take decades for all the claims to be resolved and statutes of limitation would expire. And the plaintiffs in the case involving Ticketmaster are claiming that it's bellwether procedures are Kafkaesque and absurd. How do you explain those situations? Is there a way for companies to avoid similar problems if they want to provide for bellwether procedures in their arbitration clause?

Andrew Pincus:

Well, first of all, I think we have to get beyond labels and look at what's really going on here. And as you know, the courts that initially decided the question of class action waivers that was ultimately resolved by the Supreme Court in Concepcion, there were lots of different results reached in the decade or so before that issue got to the Supreme Court. So I think we have to step back and look at what's really going on and what these criticisms are and what's the basis. And the Verizon case, I know because we're involved in it for Amicus, is on appeal right now. But let's look at the criticisms because I think it's important. One is a reasonable argument has been raised about the statute of limitations and what happens as these cases are lined up to get beyond the statute of limitations.

So it's obviously critical and essential if you're going to use this process to have a tolling provision in the arbitration agreement that tolls the statute of limitations. So that is easily dealt with. Then the question is, will it take decades for all the claims to be resolved? Well that's of course true even in the mass arbitration context. If someone files 10,000 or 20,000 or 50,000 arbitrations, and the fee in the hypothetical world or maybe the world for some defendants where the fees are paid, it's not like they're all going to get results simultaneously. The plaintiffs don't have the resources to do that, the defendants don't have the resources to do that, and the arbitration forum doesn't have the resources to do that. So it's going to take a long time to resolve those claims. Just as in the MDL system, when there are 10,000 or 20,000 or 50,000 claims piled up, even if they are sent, the pretrial process is completed and they're sent back to the districts where they're filed, it will take many, many years for all those claims to be tried.

So I think you can't look at this in the abstract. It's compared to what adjudication system is going to get things resolved quicker, and there doesn't seem to be one A and B, as in the MDL system where you're building a process that looks to facilitating settlement, you're likely to get resolutions much more quickly than even if you allowed all the claims to be filed at once and they just pile up like planes over Washington National Airport in a thunderstorm and most of them never get to land. So I think that's a reality that people have to really think about, compared to what and look at the experience of the MDL system and the fact that settlements are reached in the overwhelming number of cases. Finally, let me just address one other criticism because it's out there and people have said, "Oh, the companies will have incentives to stall, they won't settle no matter what."

And I think if you look at the way the litigation system works, companies are pretty realistic about trying to resolve things. They don't want to pay the costs of defense over and over and over again in cases, they want to get a resolution off their books, often they're continuing relationships with the plaintiffs who are customers and they want to resolve them. So I think it's pretty unrealistic to believe that companies who would otherwise be facing a parade of arbitration fees and litigation costs on infinitum will not want to settle. Just as companies facing MDL claims settled, you can make the same argument, put off the day of reckoning, may require every case to at least get to the doorstep of trial, but companies don't do that. They resolve their liabilities in a rational way. And again, merits based resolutions, to me, are the key.

Alan Kaplinsky:

So let me turn to another thing, Andy, that is in your report and it cites that others have suggested that Mass Arbitration Council may be committing ethical violations in the way they retain and represent the mass arbitration plaintiffs, and they further suggest that state bar associations look into the issue. What is your understanding of what the ethical issues are that have been raised and are you aware of any state bar associations that are looking into it? And I guess finally, is it realistic to expect that any will do so and that anything positive will come out of that?

Andrew Pincus:

Well, I could answer the last question. First, I'm no expert on the state bar ethics processes in the 50 states, and I don't know of anything underway, but we've tried to report what companies have said in their filings, and Mark alluded to one of the issues that comes up frequently, which is that when there are these mass arbitrations, when a company gets the letter that you referred to, Alan, at the beginning of our podcast that says, "Attached is a list of the 5,000 people that we are going to represent and who are going to file arbitration claims," companies look at that list, they do their due diligence and find that often a very significant percentage of them have never been customers or were customers at a different period, couldn't possibly have been affected by whatever the alleged claim is. Some have passed away.

And it's probably inevitable, as Mark said, if you're receiving claims over the internet, the question is how much vetting is it possible to do? But as you know, and we all three of us know, there are a lot of rules governing lawyers. You've got to be admitted to the jurisdiction in which you practice. If you have some client who's in a different state, you have to think about where is this claim being filed, how is it being filed, what jurisdiction am I practicing in for terms of rules of practice, in terms of soliciting business, their regulations, advertising regulations, regulations in terms of the due diligence that's required before his claim is filed. Regulations in terms of communicating settlement offers to clients. And I think the questions that companies have raised is, is it really feasible that all of these kinds of rules are being complied with? And I think that's just a question that's out there about this process.

Alan Kaplinsky:

So Mark, let me ask you how the most widely used administrators, namely AAA and Jams have reacted to the mass arbitration phenomenon? Have they changed the rules to take mass arbitrations into account? I think you referred to very briefly something AAA has done. Should financial services companies be considering other arbitration administrators besides AAA and Jams? You speak with companies all the time about drafting and revising their arbitration clauses. Have you seen any trend or an uptick in interest about mass arbitration and the use of alternative administrators?

Mark Levin:

Sure, Alan. Well, I'll start with Jams. Jams refused to implement mass arbitration rules. There were companies that had asked them to do so, but they decided that their business model was to stick with the policies and procedures they already have, which just is one to one arbitrations and collecting a filing fee in each individual case that's going to be pursued. But AAA, which had also come under some pressure to respond to mass arbitrations, in August of 2021, did implement supplementary rules for multiple case filings under which a multiple case filing is 25 similar arbitration claims that have been filed by or against the same party, by the same or related counsel. And there are special filing rules for that. There is some lessening of the filing fee that the company is responsible for, although as Andy said, it's not a great deal.

And the company is still responsible for administrative fees and arbitrator fees in the cases, but it does create at least an opportunity for council to address mass arbitration problems and issues under the rubric of AAA guidance. There's a process arbitrator that can be appointed and a merits' arbitrator. Not a great deal of detail about how counsel should handle these claims and it encourages counsel to try to agree to it, but it does not specifically talk about bellwether procedures if my memory is correct. But certainly it's something that if council agreed to it, they would probably go along with.

But that was a step forward for people who have AAA in their agreement and are worried about a mass arbitration issue, it's still a step in the right direction. There are other administrators, I've talked to several clients who have eliminated Jams from their clause because of the mass arbitration issue and are looking at other administrators. There's a company called National Arbitration and Mediation known as NAM, which has promulgated extensive mass arbitration rules and policies and fee schedules. And in December 2021, they came out with mass filing and dispute resolution rules and procedures, and they've been making a big push to basically step into the void that was Jams. And I know of at least a couple of companies that have named them.

You can't always tell who is in a clause until a litigation or an arbitration breaks out, but other administrators that the company can look at. There's a company called Fed Arb, which also has mass arbitration rules and a company called New Era, which their business model is to have the company pay a subscription fee upfront annually for reduced filing fees and case management fees in the event of a mass arbitration

Alan Kaplinsky:

Mark isn't there a legal challenge pending involving the New Era administrator? I seem to recall.

Mark Levin:

Yeah. Yeah, it has been attacked in some court filings. There was a suggestion that the lawyers who were defending the company had some dealings with New Era and they've had other challenges to their procedures. I'm not sure if anything definitive has come of that. And as Andy said, you have this long view too. I mean, in the heat of litigation, almost anything is subject to attack, but whether it proves to be of any value or merit sometimes takes a long time to be determined. And I will say too that it's possible, if you want to use AAA, you don't have to name a second administrator. A lot of companies only have a single one, and there's some cases that say that it's not unconscionable to have only one administrator. We used to think, well, it's really good to offer a second choice so it doesn't look like you're forcing people to use one administrator, but that's still an option. But I think a lot of administrators, when they see all the mass arbitrations that are erupting are stepping in and try to get some of that business.

Alan Kaplinsky:

Right. So no, thanks Mark. So Andy, you are certainly a well renowned Supreme Court advocate and you know the court very well. Do you think this whole issue of mass arbitrations has embedded in it any Federal Arbitration Act issue that the Supreme Court would consider? What's your feeling about that?

Andrew Pincus:

I think we have to wait and see how courts treat these provisions. We don't have a lot of data yet. As you know, the whole goal of the FA was to allow parties to decide on the procedures on a contractual basis and to enforce those contracts as written as the court has said and as the statute says. And so the question I think will be, is there some basis for invalidating them? And I think we don't really know yet what those bases will be to the extent it's generally applicable unconscionability rules. First of all, are generally applicable rules being applied, as you know, the argument of the California Supreme Court in the rule that eventually got overturned in Concepcion. But the argument defending it was that it was just unconscionability being applied in a specific case that turned out not to be something that the US Supreme Court was going to be willing to adopt. And there may be a similar problem with things that target these very arbitration specific provisions. So I think we have to wait and see what happens in the lower courts.

Alan Kaplinsky:

Yeah. Now how do you respond to the argument that I hear a lot of plaintiff's attorneys making to the effect that, and even some judges have said, it's hypocritical for companies to criticize mass arbitration, since companies spent years convincing courts and ultimately the US Supreme Court, that class action waivers were valid and enforceable with the result the consumers are required to arbitrate individually. Well, yeah, there's a lot of arbitrations being requested here and being resisted. Aything hypocritical about that?

Andrew Pincus:

I find that a very cynical and depressing response. As I said when we started this conversation, it seems to me we all should want a legal system that promotes merit-based resolutions. I think you couldn't look at the class action system, and I'm happy to talk about that, and say that that system where cases don't really, virtually never, except in the rare case, get to a resolution on the merits. Many of those resolutions are not merits based. They're based on litigation costs. And it seems to me the mass arbitration filings are really a cynical response, which is to exploit a benefit that the company pays the lion's share or all of the arbitration expenses in order to make arbitration available, in order to put coercive settlement pressure on a company that one academic has said, "The coercive settlement pressure from these fees is much greater than what companies faced in the class action context."

So again, what is there to applaud about a result that says, "Ha ha, you've been forced to pay a lot of money," without regard to the underlying merits. It's not as if these millions of dollars come magically out of the air, they come out of the pockets of shareholders or consumers in the form of increased prices. Do we really want a system that does that regardless of whether the company has done anything wrong? So I understand that there are people who have never liked arbitration, but as we talked about earlier, at least in arbitration, the merits do matter. You get a merits based resolution. And I think the virtue of our bellwether proposal is its another way to do that. But can anyone believe that it's really great to force a settlement with pressure more intense than in the class action context? I just don't see what's positive about that.

And maybe those people would say, "Oh, let's go back to class actions." But if you look at every study of class actions, and we've done several, but look at what other people have done, 80% of them, there isn't a class certified. So the class members get nothing. And in the remainder, as the FTC found, government studies, 96% of the class members based on a weighted average of the cases it analyzed, didn't submit claims and therefore got nothing. So 4% of class members recovered. Given all of the litigation costs and all the money that's expended, is that really a great method for getting relief to people? As I've always said, great system for lawyers, defense lawyers, plaintiff's lawyers, great for lawyers, but does it really work for real people?

Alan Kaplinsky:

I'm going to ask this question of both of you, what do you think of companies such as Amazon that have abandoned arbitration all together in response to mass arbitration? Do you think that we're going to see that kind of a trend where people who have become victimized by these mass arbitrations say, "We used to think arbitration was a good way of dealing with resolving disputes with consumers and it was a lot more cost-effective than litigating cases in court, including class actions, but we give up, this mass arbitration thing is just out of control"?

Andrew Pincus:

Yeah, I mean obviously companies are going to make their own judgment. I think as we've been talking about, there are ways to create a process that's fair to both sides to resolve these kinds of claims. And I would hope that courts eventually and arbitration providers would facilitate those processes. So to me, it's a little early in the game to say we're going to pull the plug on arbitration. But I think companies obviously have to look at the risks that they face and whether it's possible to work through them while the law is a little bit unsettled. So it seems to me companies are making different decisions, as you say, Amazon decided to get rid of arbitration. Other companies have adapted their arbitration clauses to address this, as Mark and I have been talking about. I think it's important to point out that getting rid of arbitration is a cost to consumers.

Because as we know, there are lots of harms that people suffer that don't support, aren't classable, they're individualized, and aren't big enough to attract a lawyer to represent them. And the fact is, the arbitration system especially the AAA system where you can file things online, you can submit it on the papers, is a very user-friendly system that real people can navigate. And when a company says no more arbitration, that again may be good for lawyers because that means all the claims that go to court will go to court and lawyers will have to represent both sides, but it eliminates something that I think is a great benefit to consumers.

Mark Levin:

Yeah, all good points, Andy. The only thing I can add to that is I tell companies, "You have to consider what your risks really are." I mean, there are a number of mass arbitrations being brought and that will continue to be brought, probably growing numbers in the future. On the other hand, you still want to have protection against class actions. And I think there are at least presently, a lot more class actions that get filed than there are mass arbitrations. So while eliminating arbitration gets you away from having to pay big filing fees, it still leaves you exposed to class actions. And is it more likely that you're going to get hit with a class action as opposed to a mass arbitration? I think that's just something that each company has to think about, knowing its tolerance for risk and what the issues are in its industry and make a decision. But I agree with Andy. I think at this point, it's an extreme move that does leave you with your flank exposed to class actions.

Andrew Pincus:

And I think a lot of companies do tout their system. As you know, AT&T built in a lot of incentives for people to bring claims that are meritorious if the company doesn't settle and the consumer claimant wins more in arbitration, there are significant bonus payments and attorney's fee payments that come into play. So I think a lot of companies do see, even putting the class action issue to one side, that as a way to have a dispute resolution that's friendly to their customers and that their customers themselves, if they feel that there's a wrong can access and use to resolve their disputes, that that's a powerful benefit that they don't want to give up.

Alan Kaplinsky:

Well gentlemen, we have come to the end of our show and I want to thank both of you, Mark, and our special guest, Andy Pincus, for just doing a terrific job in explaining to our audience what this mass arbitration thing is all about. And a lot of, I think, valuable ideas were shared by both of you as to various strategies that companies ought to consider in trying to fend off these kinds of attacks. So my thanks to you and I just want to say at the end of it, to make sure that you don't miss our future episodes, remember to subscribe to our show on your favorite podcast platform, Apple, Google, Spotify, or whatever platform you use. And don't forget to check out our blog, consumerfinancemonitor.com for daily insights about consumer finance. And we do cover a lot of arbitration developments on our blog.

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