Consumer Finance Monitor (Season 7, Episode 20): A Discussion of Industry and Consumer Perspectives on Mass Arbitration

Speakers: Alan Kaplinsky, Mark Levin, and Richard Frankel

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services, what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr law firm, and I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now, special counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program.

For those of you who want even more information, don't forget about our blog, consumerfinancemonitor.com. We've hosted the blog since 2011 when the Consumer Financial Protection Bureau became operational. So there's a lot of relevant industry content there. We also regularly host webinars on 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 at ballardspahr.com.

And if you like our podcast, please let us know about it. You can leave us a review on Apple Podcasts, YouTube, Spotify, or wherever you access your podcast programs. And also, please let us know if you have ideas for other topics that we should consider covering or speakers that we should consider inviting as guests on our show.

And I'm also finally, by way of introduction, very pleased to tell our listeners that our podcast show was recently ranked by Good2BSocial as the number one podcast among law firm podcast shows in the country devoted exclusively to consumer financial services. Good2BSocial is a prominent law firm consulting firm that's owned by the company Best Lawyers. We're very gratified by this recognition from one of the country's leading social media consultants for law firms.

So we're going to be talking about a topic today that we covered one other time. It was about a year ago. On May 25th of last year, we did a podcast show that was devoted to the topic of mass arbitration. Andrew Pincus was a guest on that show, and my good colleague Mark Levin, was a guest on that show. A lot of developments have occurred with respect to the topic of mass arbitration over the last year, and we decided we were ready to take fresh look at it. And wouldn't you know, our very special guest today, professor Richard Frankel from Drexel University's Thomas R. Kline School of Law, has written an article. It's going to be published in Vanderbilt Law Review either late this year, early next year, it's called Fighting Mass Arbitration: an Empirical Study of the Corporate Response to Mass Arbitration and its Implications for the Federal Arbitration Act.

I found out about this article by reading a short blog on the Consumer Law & Policy blog, authored by a good friend and colleague of mine and of Mark's, Professor Jeff Sovern at University of Maryland Law School. And he was the one that really brought this article to my attention. And one thing led to another, and boy am I real happy that we were able to connect with Rich.

So let me just tell you a little bit more about Rich. He's a professor of law and the director of the Civil Litigation and Dispute resolution Concentration at the Drexel University, Thomas R. Kline School of Law in Philadelphia. One area of his scholarly focus concerns mandatory arbitration provisions in consumer and employee contracts. Richard writes and speaks frequently in this area, has also testified before the U.S. Congress regarding proposed legislation on mandatory arbitration. And as I mentioned earlier, his recent work Fighting Mass Arbitration is going to be published in the Vanderbilt Law Review.

And now let me introduce my colleague, Mark Levin. Mark is senior counsel at Ballard Spahr and a member of the firm's Consumer Financial Services Group. His practice is focused on consumer financial services litigation and he has extensive experience in the structuring and enforcement of consumer arbitration clauses and the defense of financial services companies and consumer class actions. He's enforced arbitration agreements with class action waivers in the US Supreme Court and numerous federal and state appellate and trial courts. And he's tried both individual and class arbitrations. He, like Richard, has

testified before Congress, before a subcommittee, the US House Judiciary Committee, at an oversight hearing on whether pre-dispute arbitration provisions in consumer contracts are fair to consumers. He's published more than 50 articles on consumer arbitration, including for each of the past 25 years, an update on important developments pertained to consumer finance arbitration in the American Bar Association Business Law Section's publication called The Business Lawyer, part of their annual survey.

And Mark is truly a pioneer in this area having worked with me to develop that clause that is hated by our other guest today, Richard Frankel, the infamous class action waiver.

Well, anyway, before we get to the questions that I have, Richard, a very warm welcome to you. Delighted to have you on the program.

Richard Frankel:

Thank you for having me here. I'm delighted to speak with both you and Mark today.

Alan Kaplinsky:

Okay. And Mark, always a pleasure to have you back on our podcast show.

Mark Levin:

Always great to be here, Alan. Thanks.

Alan Kaplinsky:

So I got some questions. The way we're going to proceed today is I'm going to pose the questions initially to you, Richard, and in some instances I'm going to ask for Mark's reaction or response because the goal of our show today is to give a well-rounded explanation of what mass arbitration is all about, what the problems are, what the benefits are, etc, etc. So for those listeners on our show who aren't familiar with mass arbitration, maybe they didn't hear the podcast show a year ago where we did take a deep dive into it. What does the term refer to Richard?

Richard Frankel:

At its base, it's really what it sounds like. It's just a large number of individuals filing arbitration claims when they have suffered injury or have alleged injury involving a similar type of misconduct. And so, when all those individuals suffer similar injury and file claims at a similar time and you collect them together, it looks like a big mass number of claims. And so it's been called mass arbitration.

Alan Kaplinsky:

Right. And I take it they're generally represented by the same counsel or maybe a couple of law firms that are working together, right?

Richard Frankel:

Often. And I think to understand the context for that, it's helpful to take a bit of a step back to talk about the class action waiver that you mentioned in your introduction. Generally, at least in court, the preferred mechanism for dealing with injuries that affect a lot of people by a similar type of action by a defendant when those injuries are of a size that it's not really feasible for each individual to bring their own claim is through a class action. And that is supposed to create efficiencies in the litigation system where there are similar injury across a lot of individuals.

As you mentioned, as arbitration became more prominent in the consumer and employment spaces, many companies started instituting class action bans or class action waivers prohibiting class or aggregation of claims and requiring not just arbitration, but individualized bilateral arbitration. That got litigated for a little while. And as you hinted, the US Supreme Court ultimately decided that a federal law called the Federal Arbitration Act permits companies to use those class action waivers in many

contexts. So after that happened, it became much harder for individuals to seek relief in the arbitration system because they didn't have class-wide mechanisms available anymore.

And after that, some attorneys and law firms have started to try to find ways to aggregate individual claims together and to file a large number of individual arbitrations sometimes at the same time because they don't have the procedure that allows them to file a single collective action. And so that's why I think you're seeing these situations where it's a law firm or a series of law firms representing a large number of clients in these individual mass arbitrations.

Alan Kaplinsky:

Of course, I just want to respond to one point that you made. You made it appear as if mass arbitrations were sort of the only way in which consumers could react to the fact that class action waivers have been upheld in arbitration agreements and therefore they were unable to institute class arbitrations and they couldn't be part of a class action in court. But the one thing you didn't mention, and it's not in your article, and if your article isn't completed, I would suggest you add something. There is another way that people can be vindicated and can get a recompense for whatever injury they've had. And that is, complain to the State attorney's general. We happen to be in Pennsylvania. Pennsylvania Attorney General is very active, but there's a lot of Attorney general offices throughout the country. And they're there to deal with systemic issues, the kinds of things that could be brought in a class action.

But the nice thing about going to attorney general office is they don't take any money off the top. Unlike plaintiffs' class action lawyers who when they settle a matter, they get a nice cut of that and they get paid in cash of course. And everybody else very often ends up with coupons or something, or even a dollar amount that's not even as large as, well, it could be a few bucks. It could be, as I recall in a class a study done by the CFPB, they found that the average amount received by a consumer in a class settlement was about $32.25.

Mark Levin:

35 cents, Alan.

Alan Kaplinsky:

Oh, okay. Okay. All right, well that makes a difference.

Mark Levin:

I did the math.

Alan Kaplinsky:

But anyway, so you've got all the government enforcement that is available and is particularly suitable for systemic kinds of issues that a class actions were used for before Mark and I got involved in developing class action waivers. And it's actually better than, well, I mentioned one thing, the government doesn't take a cut off the top of any settled amount or anything that any amount that consumers may recover. And the government doesn't have to jump through all the hoops that class action attorneys have to jump through under Rule 23 of the Rules of Civil Procedure, it's not easy to get a class certified. So you've got all that state enforcement, you've got the Consumer Financial Protection Bureau, the Federal Trade Commissions, three federal banking agencies. They're all going and have gone to war on behalf of consumers and recovered much more money than plaintiff's class action attorneys can recover.

And unfortunately, Mark and I had not been able to figure out a way in which we can enforce an arbitration agreement against the government. So what about now? I'd like to get your reaction to that.

Richard Frankel:

It's a great point. I appreciate the feedback and I certainly will mention something in the article. Public enforcement alongside private enforcement is a great way to make sure that corporations are held to account. I would love to see the Consumer

Financial Protection Bureau have even greater power than it has now. And perhaps Congress could widen the scope of its regulatory authority. I'd love to see attorney generals take more action where they're not taking it now. But I think the fact of the matter is attorney generals and CFPB are aware of all of the cases in which private action is going on, but they're not acting. Either they're not able to act because they don't have the resources, or they might have statutory or regulatory constraints over what kinds of actions they can take. And if you ask most attorney general offices, from what I've read, they see these private actions as necessary for maintaining accountability for bringing corporate misconduct to account. Precisely because they are so limited either in terms of their budget, their person-power, or their regulatory scope.

So, for example, regarding the CFPB, I think in that same study you were referring to about class actions emphasized that private class actions over the period they studied brought an average of $500 million of monetary awards for consumers. Whereas in the same period of time, individual arbitrations only brought $170,000 of cash relief and maybe another $190,000 of debt forbearance. So not even half a million dollars compared to $500 million.

So I think if you talk to most regulators and attorney generals, I think they would see, I can't speak for everybody, but I think they would see individual private claims or class private claims as a necessary part of the accountability structure.

Alan Kaplinsky:

Yeah, yeah. Mark, before we move on, and I want to dig much deeper in a mass arbitration, just wondering if you have any reaction to what Rich had to say about government enforcement.

Mark Levin:

I do. Everything that Richard said is accurate in terms of government enforcement being a possibility. But the reason that mass arbitrations have become so popular is that at least some of the lawyers representing the claimants figured out that they could use a mass arbitration to try to achieve very quick, albeit very expensive settlements, with the target companies. That's because when you have an aggregate number of individual arbitrations, under the rules of the arbitration administrators, whether it's AAA or JAMS, or there are a lot of them, there's a filing fee that needs to be paid. And the filing fee is mostly paid by the respondent company. And there's a cap of a few hundred bucks on what the consumer has to pay. Well, when you have 100 or 1,000 or 10,000 individual arbitrations, the company in each one of those cases has to pay three or 4,000 bucks just to get the arbitration started.

And that adds up in some cases to tens of millions of dollars in filing fees just to have the AAA or JAMS or whatever open an arbitration docket. And what happens is, companies receive a letter from a mass arbitration lawyer saying, we represent 1,000 of your customers. They're all listed on the attached exhibit, on the attached spreadsheet, and we're going to file individual arbitrations on behalf of each one of them, unless we can resolve this quickly and before anything else happens. The first reaction, of course, is absolute outrage. The companies say we're being extorted, and then they do the math and they start to look at the realities. And a large number of settlements do occur. Now you could say, well, isn't that good for the claimants?

Well, I think there are a couple of reasons why the claimants consumers are hurt by that process. First of all, they get hurt because a mass arbitration is, in my view, a deliberate distortion of a dispute resolution process that was designed to reduce the company's litigation costs, while still ensuring a fair result to the consumers if it's permitted to run its course. And consumers are harmed when the cost of goods and services cannot be reduced because litigation expenses are running rampant. Mass arbitration tactics cause all the delays and expenses of litigation that individual arbitration was designed to prevent, and that harms all of the parties, including the consumers. And secondly, in my view, mass arbitrations are unfair to consumer claimants because the way these things work, they all are treated as fungible. All their claims are treated as being the same, neither good nor bad just claims that have to be disposed of in a settlement process that typically results in the same amount, maybe $1,000 being given to every claimant.

Some claimants may actually have good claims. And they might have claims that are worth a lot more than $1,000, but they get all lumped in with people who have very marginal claims but also receive $1,000 because everything is being handled on a mass basis. I mean the CFPB when it did its empirical study of consumer arbitration, found that consumers with legitimate claims fare very well in an individual arbitration. And Richard, you were talking about statistics, well, they found that consumers average about $5,300 in an individual arbitration. If a consumer was part of a class action that settled, they got the $32.35 cents that Alan mentioned.

So bringing hundreds and thousands of individual arbitration simultaneously and without any real intention of actually arbitrating them, just using them to get a settlement, means that consumers with legitimate claims are going to be lost in the shuffle. And in any event, everybody's claims are going to be delayed and sometimes diminished or even extinguished before the process is over.

Alan Kaplinsky:

Thanks, Mark. You presented certainly the industry position on why mass arbitration not a good thing. But I want to hear from Richard why he thinks it is a good thing. I hear all the time consumer attorneys tongue in cheek say to me, or I hear them say publicly, "You want arbitration Alan? Well, I'm giving you plenty of arbitration. How can you complain this is exactly what you wanted?" So Richard, why is mass arbitration a good thing?

Richard Frankel:

Yeah, and I want to take a step back to address that question as well. I start from the premise, if someone has been wronged in a way that violates the law, they should have an opportunity for a remedy. That's our goal, to allow people with successful claims to get relief. People with unmeritorious claims shouldn't get relief. And we should have a system that allows people to, and that should help people to seek that justice and that should deter companies that are committing misconduct from doing so in the future. So when you have arbitration and litigation and you have class and individual claims, you can break that down into four options, right? In litigation, you can have individual litigation or second, some type of aggregate litigation. In alternative dispute resolution or arbitration, you have the same thing. You could have individual arbitration or you could have aggregate or collective arbitration.

The way the arbitration clauses are written right now is of those four options, the clause only permits one alternative, right? It bans any kind of litigation, right? For the vast majority of claims, you can't do collective litigation, you can't do individual litigation, you have to arbitrate. Within arbitration, you can't do any sort of collective or aggregate arbitration. It has to be individualized arbitration. So from the plaintiff's perspective or the person who's suffered a wrong, they only have one option by virtue of what the contract that they've been forced to sign. And that option is individual arbitration. So even if it feels like a distortion, as you mentioned, their backs are against the wall. They are using the only alternative that they have been given. And so I would start from that premise that if it is a distortion, it's a distortion that's a product of the arbitration clause to begin with.

So that's the reason why I think they are good, even if they may not be ideal. If we were designing a system from scratch, this may not be the system we would pick. But the reason why I think it's good is that within those constraints, it gives individuals an opportunity to seek some sort of relief. Whereas previously, they would have very, very limited opportunity to seek relief. The fact of the matter is, most individuals who have suffered a wrong in the consumer or employment space do not file individual arbitrations either because they don't know that they have been mistreated, or because the amounts involved are small enough that an individual action is not really feasible.

And so Mark makes an interesting point about when people have strong claims and they do individually arbitrate, they get an average of $5,300, which is much greater than the $32.35 cents from an average class settlement. But what the CFPB found in its study was that on average, there were only 411 individual arbitrations per year. And so multiply that by $5,300, that comes out to about, I think $200,000. I'm Doing that math on the fly, so that could be wrong. And that for people with claims of $1,000 or less, the typical kinds of claims that a class action or collective litigation or arbitration is supposed to address, there are only 25 individual arbitrations filed per year.

Before the concept of mass arbitration came around, the number of people who were getting relief in any year is what, 436 is the number of people who are filing a claim and only some subset of that is winning. So not even all of those claimants are getting relief compared to thousands of people who would get relief under a collective procedure. And I would say, if there are some people with stronger claims who you're saying their claims are getting lumped in with weaker claims in the mass arbitration process, it's important to remember that the judicial system has a process for that. It has an answer to that, right? The class action mechanism allows parties to opt out their claims and proceed individually if they don't think they're adequately represented by the class process. So a class action and litigation could help those consumers. But again, that option

is no longer available to them because that's been taken away by the arbitration clause that the defendant has required them to adhere to.

Alan Kaplinsky:

So Mark, how do you respond to Richard's point, which sounds at least to me, well, I'm going to use it superficially, attractive, but it makes you wonder why aren't individual arbitrations being brought? Why are there so few to be the devil's advocate if it's such a good process and procedure? How come consumers aren't using it?

Mark Levin:

Well because their lawyers, most of whom have practiced for many, many years in the court system, want to stay in the court system and they don't feel comfortable going to arbitration. They want to be in front of a jury. Maybe they think they know the judge, that their firm contributed to their election of. And they want to stay in court.

First of all, I mean as to Richard's point, virtually every arbitration agreement, consumer arbitration agreement that's in existence, gives consumers the right to go to small claims court without having to arbitrate. And that's because the arbitration administrators, AAA, JAMS, etc, have that as part of their consumer due process rules.

Now, small claims, I mean you might say, oh, it's five bucks. Well, it can be as much as $15,000. It varies from jurisdiction, but it covers a lot of the claims that are consumer claims and you really don't even have to have a lawyer to go. The judges are really quite sympathetic to consumer claims.

But there's another point that I think plaintiff's lawyers are overlooking. And that is, if you have a statutory claim against a company, a UDAP claim Truth in Lending Act, EFTA, debt collection claims, the statutes, at least most, of them provide for fee shifting if the consumer prevails. And we actually tracked for a number of years how many individual claims such as that like Truth in Lending Act claims were being filed in the court system. And there were actually quite a few, even when somebody would bring a class action, we would research how many times that lawyer has gone to court individually. And when they do that, they can recover a very nice amount of attorney's fees, that's a zillion times more than the actual claim of the client.

So that is available to them. They don't have to have a class action in order to bring an individual claim, but the lawyers feel more comfortable.

Alan Kaplinsky:

Mark, even going beyond that, I know when we've drafted arbitration provisions, we create a contractual fee-shifting clause so that even if the statute under which the consumer is proceeding doesn't provide for fee-shifting, we provide as a matter of contract.

Mark Levin:

Right. That covers common law claims like breach of contract as to which there's normally no fee-shifting in court, but there would be under the arbitration clause. And in fact, that's one of the reasons why the Supreme Court in the Concepcion case looked at AT&T's clause, which had various incentives to go to arbitration and said, "Hey, the Concepcion's can do better in arbitration than they could ever make out in court."

One final point, what's the honeypot in class action work that attracts the lawyers? The enormous amount of fees that they can recover in a settlement or if they prevail. And the CFPB when it did its arbitration study, found that about a half a billion dollars was being paid to attorneys while their clients, the consumers were getting 32 bucks a piece. The lawyers were making out royally and getting the lion's share of the awards. So that's why plaintiffs lawyers would rather stay in court, would rather bring a class action rather than go to individual arbitration.

Alan Kaplinsky:

You left one important thing out, Mark. And that is, that unfortunately neither the Consumer Financial Protection Bureau, the FTC, the banking agencies or state attorneys general have spent one penny on educating consumers about the benefits of arbitration.

Mark Levin:

Yeah, I mean, the CFPB has its own division that is titled the Division of Consumer Education. And for years, we've been imploring them, take some of that money, instruct your clients, the consumers, that there are benefits that can have with arbitration. Not a penny.

Alan Kaplinsky:

Not a penny. Actually, I spoke at a conference with Richard Cordray and I confronted him with that in a nice way, of course, and he didn't deny it. Of course, they're not going to educate consumers about it because they're trying to get rid of it. They're trying to promulgate regulations, they're trying to enact legislation to get rid of it.

Mark Levin:

One point, ironically, when you look at the CFPB's own internal guidelines, they advise employees, the CFPB employees, who have a workplace dispute to use arbitration to resolve it.

Alan Kaplinsky:

Anyway, we got to dig into Richard's article. So we've provided a lot of background here.

But Richard, tell us about how your paper addresses mass arbitration. You did the first empirical study where you actually looked at arbitration provisions to see how companies have reacted to mass arbitration. I want you to tell the audience about that.

Richard Frankel:

Sure, I'd be happy to. And I should say, this article is building on the work of some other people who have explored mass arbitration as well. And particularly Professor Maria Glover of Georgetown wrote a very thorough work laying out the concept of mass arbitration several years ago. Both she and another law professor Myriam Gilles have looked anecdotally at what a couple different companies have done in response to mass arbitration. So there's a lot of that work going on as well.

What this article did was to look at how are companies that use arbitration clauses responding to mass arbitration in terms of how they amend or design the arbitration clauses as they are using. What are companies doing in that space? And so in this article, we looked at, I think about little over 90 different companies, either Fortune 500 companies or companies that are largely consumer facing companies, to see are they continuing to use arbitration as mass arbitration has become more prominent, and what have they changed?

And so we found a couple of things. One is that very few companies have decided to respond to mass arbitration by eliminating arbitration altogether. I think 82 of the 92 companies we looked at still use arbitration clauses in some form, and they still ban class actions. But they have imposed a couple different things that the article talks about. One of the most notable or most common is what the article calls pre arbitration exhaustion. So if your arbitration clause requires you to arbitrate any dispute, for about 80% of the clauses, it says that even before you can arbitrate, you have to go through some pre arbitration procedures. You have to contact the company, lay out a statement of your claims, seek to resolve the dispute informally through a mediation process of at least 60 days typically, and then only if all of that fails can you go forward and file an arbitration.

And while mediating is a perfectly fine way to resolve claims, the clause states that anyone who fails to go through that can't bring their claim, either it will be dismissed or it will be delayed until you can go through that mediation process. So that's one feature. A second feature is what we call batching or bellwether claims. This is a process where if there's a lot of arbitrations all

being filed at the same time, they're not all addressed at the same time, but they're addressed in sequential batches, the parties might pick 10 or 20 claims to resolve first. Those are individually arbitrated to set a benchmark value or an estimate of what the overall claims are worth. And then that's followed by a mediation session between both parties to see if they can globally resolve the whole universe of claims.

If that succeeds, I guess that ends the matter because there's been a settlement. If that doesn't succeed, you arbitrate a second batch of 10 or 20 claims and so on and so forth until all of the claims are resolved. And then third, we looked at whether arbitration providers are changing their rules to address mass arbitration, changing their fee structures to address the concern Mark raised about the high number of filing fees just to initiate the case, and whether companies are changing which provider they use based on what rules they have.

Alan Kaplinsky:

Yeah, so Mark, you've been involved, I assume, on probably more than one occasion, where a client has come to you and said, "I've been reading about what's been happening with Uber and Lyft and Amazon getting hit with these mass arbitrations involving thousands and thousands of people. And it sounds horrible. And it seems to be mostly in the employment area, doesn't seem to have infected consumer finance contracts, at least in the initial stages of mass arbitration when it developed as a phenomenon. What do we do? What are some ideas?"

Now, Richard looked at the contracts, I think of 82 companies that had put certain things, at least not all of them, but a number of them had put things in there that were obviously designed to prevent the kind of extortionate demand that you described, Mark, where somebody comes to you with, writes you a letter and says they represent 10,000 people, we know it's going to cost you $1,500 a pop. If we file an arbitration, we'll settle for 50% of that right now. So what are some things that very quickly that you've recommended?

Mark Levin:

Sure. Well, there are a number of things you can do in terms of drafting that might help deter a mass arbitration with the qualification that there's no magic bullet. The theory here is that if you can make the arbitration clause a little less consumer friendly and require the plaintiff's lawyers to do some work on an individual basis, then maybe they'll pass your clause over and go for what I call the low-hanging fruit where the company has already offered to pay all the fees if you ask. In other words, they'll take the easy way out if they can. But again, the small claims court exception should be in the clause and it needs to be bilateral so that the company's in a position to argue that they want the case sent to small claims court and not administered by the AAA or JAMS, and therefore no filing fee is due.

And that helps take the sting out of mass arbitrations. The arbitration cost provision, again, typically before class action waivers were upheld, many companies were very consumer friendly and say, "We'll pay all the fees. You don't even have to pay your $200 share of the filing fee." However, if you change that to say the parties will follow the administrator's rules, even if a consumer only has to pay $200 to file the arbitration, if you multiply that by 100 or 1,000 or 10,000, that does require some financial outlay. So that might be a hurdle for a plaintiff's firm. So tightening the cost provision is one thing. Adding a bad faith provision like a Rule 11 type of thing, which arbitrators typically have in their own rules. If something is brought frivolously or for purposes of harassment, then the arbitrator can award sanctions and award costs to the other party.

That becomes important because a lot of mass arbitration clients are gotten through social media advertising with very little vetting. And this list that you get of claimants when you compare it to your own company's account records, a lot of times a significant percentage turn out to be not customers of the client. Some are deceased. Sometimes you can weed out 25 to 33% of the claimant list just by looking at the various accounts. So that's not bringing a claim in good faith if you're having somebody sue, who's not even a customer of the company. But again, nothing is guaranteed. And the most important thing, as Richard had mentioned, your choice of administrator. For a long time, most arbitration clauses had AAA in JAMS. JAMS has no special rules dealing with mass arbitrations, unlike AAA and unlike virtually every other administrator. And as a matter of policy, they just don't want to do it.

So if the mass arbitration lawyer says, we're going to go to JAMS to arbitrate all these claims, you don't have any procedures that deal with batching or bellwether claims because they just refuse to get into it. AAA, to its credit, I mean, it had mass arbitration rules starting in 2021, but just this past January, they revised it. And the most significant revision was instead of

having a huge amount due as a filing fee, they require only $11,250 of which 3,125 bucks is paid by the claimants, and $8,125 is paid by the company. And for that, you get to open a docket, you can have an administrative review of the filing, and an administrative call with the AAA, an appointment of a process arbitrator. So you get your foot in the door without having to spend $10 million in filing fees.

So AAA is there. There's another great company, National Arbitration and Mediation, NAM, which has extensive mass arbitration procedures. So that's another thing that companies have to consider, but in the end, if somebody wants to bring a mass arbitration, they just bring it no matter what you have in the clause.

Alan Kaplinsky:

Yeah. So Richard, I know the things that you've described and the things that Mark described, they are not things that you like, right? You have problems with them. I mean, some of the things you didn't address in your article, some of the things that Mark mentioned, but that was probably because they weren't part of your sample that you looked at. But assuming these things are troubling to you, what could be done about it? What do you think should happen?

Richard Frankel:

Yeah, and I want to start by saying I do have some concerns about, as the article says, I have concerns about some of these provisions.

Alan Kaplinsky:

Yeah, well, why don't you tell us what the concerns are and then tell us what do you think can be done about it.

Richard Frankel:

Mediation in general, I'm not opposed to, but a mediation as a condition to bringing arbitration, where if you overlook it or you have trouble contacting the company's representative, or for some reason you make a misstep, all of a sudden your claim goes away and you can't bring it. I think that's a problem. The more hurdles you place in front of an individual trying to bring a claim, the more individuals are going to be deterred or unable to bring that claim.

Alan Kaplinsky:

Let me just stop on that point for a second. Okay. What about something that I've seen in some arbitration provisions that don't require mandatory mediation as a prelude to bringing arbitration, but require that the consumer provide a notice to the company of the dispute that it's having and to give the company an opportunity to correct the dispute, to provide recompense to the consumer, possibly to make the consumer whole, as a prelude to arbitration, but not mediation in front of a third-party media. Are you okay with that?

Richard Frankel:

I'm not okay with it when it becomes some kind of mandatory precondition that if you fail to do it, you lose your right to bring the claim or your claim is substantially delayed. So if someone by accident skips that step and goes straight to filing the arbitration, you could maybe stay the arbitration and do that exact same process then. As long as it's done in good faith and both parties are reasonably trying to reach an agreement and not just trying to delay proceedings or create something that will deter someone from bringing a claim.

Alan Kaplinsky:

No, but assume with me, the consumer is knowledgeable about it, it's not a situation where it was overlooked. Ordinarily, a company gives notice to the consumer when they're in default making repayment on a contract. In the Fannie Mae/Freddie Mac Uniform Mortgage Instrument, there's a requirement that notice has to be given by the company under Pennsylvania law, under so-called Act 6, the Loan Interest and Protection Law, there's a requirement to give notice and an opportunity to cure

the default. As a matter of policy, isn't it better to reduce the number of disputes either in court or in arbitration? And one good way to do that is to get the parties talking to each other. What could be wrong with that?

Richard Frankel:

I don't have a problem with the parties talking to each other, and I don't have a problem with parties reaching a mutual agreement. The same thing happens in litigation, right? Parties settle the case, great. I don't think every case has to be litigated to trial, right? Lawyers are problem solvers for their clients, and you want to help best represent your client's interest and get them what they're looking for, we'll make them feel better about what happened.

Alan Kaplinsky:

I interrupted you. You were going through the litany of devices and you were talking about the mandatory mediation. You're about to get into batching and bundling.

Richard Frankel:

And batching, same idea. I don't think there's anything inherently nefarious about batching, but the inevitable effect of batching is it's going to really delay some people's ability to have their claim heard, could be for a very long time. And so there was recent litigation involving Verizon, or I guess it was called their official name, Cellco Partnership around their batching provision. And I think the district judge who was evaluating their clause said that if the batching played out to its conclusion, it would take 156 years to resolve all the claims through that batching provision. I agree that this batching provision is atypical, but it does provide some window into, for people who have suffered an injury and want to have a remedy waiting five years, 10 years for that remedy when it could be achieved more quickly, has a real cost to that person who suffered an injury in that time. It prevents them from getting closure. And so I think that if this delay leads to cases not being resolved or people not getting the remedy that they might be entitled to, that's where it becomes a problem.

And I guess the same thing with the arbitrator fees or the arbitration provider. I do see changes in how arbitration companies are adjusting their rules, but if so much of it is coming from defense bar where they're saying, these are the changes we need to see, and those are the changes that come in, I think it's going to raise questions in people's eyes and even provisions that seem fair might be viewed with a sense of suspicion because they feel like it's coming from one side of the table. And I think those rules need to be evaluated to make sure, are these enabling claims to be heard or are they making it harder for claims to be heard?

Alan Kaplinsky:

Right. So Richard, you've got a second part of your article where you make the point that if you add to an arbitration provision, all these bells and whistles that you've described, and Mark has described, it's no longer covered by the Federal Arbitration Act, and that means that it's open season for state legislatures to ban some of these provisions. And maybe even authorize the bringing of class action lawsuits again. Tell us about that if you would.

Richard Frankel:

Yeah, I think that's correct. I do think state legislatures have a role to play, and the article does encourage state legislatures to take a look at regulating aspects of mass arbitration developments that they find to be unfair to consumers and employees. I think a lot of consumer advocates and employee advocates have long wanted to see state legislatures jump in and regulate unfair arbitration provisions, which is what states try to do with class action bans. The problem they ran into was this federal law called the Federal Arbitration Act, which as it's been interpreted by the Supreme Court, preempts state law or prevents states from adopting legislation that would interfere with the purposes of the act, which is to help enforce arbitration agreements in particular circumstances. But the act covers agreements to arbitrate. And the Supreme Court, in my view, has identified a very particular vision of what constitutes arbitration, something that's speedy, that doesn't have delay, that's supposed to be cost-effective, that doesn't have procedural complexity. That's how they've described arbitration.

Once you start adding in things like pre-arbitration exhaustion, which delays proceedings and makes it take longer to get to arbitration, once you start adding things like process arbitrators that have to analyze complex questions that go across multiple claimants in the mass arbitration space where they're making judgments about common questions of law, applying decisions from one case to someone else's case, this looks exactly like the kind of procedural complexity that the Supreme Court has said the Federal Arbitration Act is not designed to cover. That's when you get outside of what the Supreme Court considers to be arbitration.

And so if these changes to the arbitration provisions, the arbitration look so much different that it's no longer arbitration as covered by the Federal Arbitration Act, the Federal Arbitration Act no longer prevents states from getting involved, and they should feel free to regulate. Whether that's limiting the use of pre-arbitration exhaustion provisions, limiting the penalties associated with failing to exhaust, limiting the amount of delay that can occur when you have a batching provision, maybe allowing batching only if class arbitration is also allowed alongside of it or other matters that I think states as they continue to research the problem, might decide would be in consumer employees best interest, I think they should feel free to do so.

Alan Kaplinsky:

Have any states done anything like what you're talking about?

Richard Frankel:

Not a lot. The one law that the article does talk about is a bill in California, which is designed to require companies to pay their arbitration fees within a certain amount of time after the arbitration has been initiated. And there's been some litigation already about whether the Federal Arbitration Act blocks that law. There's been disagreement among the courts. I think most courts have said the Federal Arbitration Act does not block the law, but at least one court has said that it does. And so I think it's still actively being litigated.

Alan Kaplinsky:

Yeah. So Mark, I'd like to hear your response to a point made by Richard that arbitration is supposed to be speedy. It's not supposed to be complicated, it's supposed to be a simple process, not limited discovery of any discovery. And all these, I guess, Richard would call them obstacles, I would call them steps, that consumers have to go through before they can prosecute an arbitration. Is he right? I mean, what does the Supreme Court have to say about that?

Mark Levin:

Well, I do not think that Richard is right, but I congratulate him in coming up with the argument because I hadn't seen that before. And I think it's a very interesting and thought-provoking way of looking at things. And I had to think for a while about what do I do with this? And what I came up with was the fact that there's another line of Supreme Court cases that says that the FAA not only protects resolution that's individualized and fast and efficient, but also the right of the parties to choose procedures that do not have those characteristics.

And I look back at a case from, I don't know, 30, 40 years ago, Volt information Sciences versus Board of Trustees of Stanford University, one of the old line arbitration cases. And in that case, the Supreme Court said that the FAA protects the right of parties to choose the law and the procedures that will govern the arbitration, even if that law, and even if those procedures are contrary to the principles embodied in the FAA. So I think that theory would explain why if parties agree to use batching or bellwether procedures, it would be protected by the FAA because that's what they agreed to in a written contract affecting interstate commerce, and therefore it's protected by the FAA. But it took me a while to get there.

And again, my hats off to Richard for formulating that argument. It's a very interesting argument. I think we're going to hear more about it.

Alan Kaplinsky:

Yeah, but Mark, I think it's an interesting argument also, but the Volt case that you cited, which I recall reading from a long time ago, it seems to kill that argument. Basically says parties can design the arbitration agreement however they want to design

it. So Richard, how do you react to those Supreme Court cases? Does the Supreme Court have to, well, one of the things you advocated is they ought to overrule Concepcion. Should they overrule Volt also?

Richard Frankel:

No. I'd love to see them overrule Concepcion, don't get me wrong. But Volt, in my view, is perfectly consistent with the argument that the article makes. So I think it's important to draw this distinction between what does the FAA permit and what does the FAA compel. The holding of Volt was that the FAA did not preempt the party's attempt to do something that was different than what, in their contract, something that would not be permitted by the FAA itself. The only question was does the FAA bar the parties from contracting to do something different than what the FAA required? And the court said, no. Parties can go outside of that. Once they do that, the FAA has no role to play. Now, we're outside of the scope of the FAA. It was not saying that once parties contract to do something outside of the FAA, the FAA necessarily compels enforcement of that contractual agreement. That wasn't the argument the parties were making. It was only about whether the FAA preempted their action. It said no.

And I'm saying the same thing. The FAA does not preempt actions that go outside the scope of arbitration. There, I think they wanted to stay arbitration pending litigation. And the Court said that's perfectly within the realm of the parties to do. And it's perfectly within the realm of the states to regulate once we get outside the scope of the FAA. So I think actually Volt is consistent with the view here, and I think it has to be. The FAA is not saying any contractual agreement whatsoever will be enforced, the FAA is saying that the law provides some protection to agreements to arbitrate. And what this article says is, once you add all these mass arbitration procedures that transform what dispute resolution looks like, it's no longer an agreement to arbitrate within the meaning of the FAA because arbitration has a very specific meaning that's been refined by the Supreme Court in a number of decisions that have come out since Volt.

So in that sense, I think that Volt stands for the entirely uncontroversial proposition that parties can contractually agree to make rules that differ from what the FAA requires, and then the FAA is out of the picture. It has no role to play once that happens. So if states want to get involved, they can, but if they don't get involved, that's fine too.

Alan Kaplinsky:

Mark, do you have a response to that?

Mark Levin:

Yeah, I read Volt differently. I mean, Volt says that whereas here the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the FAA would otherwise permit it to go forward. By permitting the courts to rigorously enforce such agreements according to their terms, we give effect to the contractual rights and expectations of the parties without doing violence to the policies behind the FAA. So we differ somewhat in whether we think the FAA is really displaced by this argument or not displaced, but I think it's one of the key principles underlying the FAA is that agreements to arbitrate have to be enforced according to their terms. So I think there would be a lot of back and forth in litigation on this point, but a very interesting topic.

Alan Kaplinsky:

Right. Well, we could go on for several more hours on this topic, but we can't, unfortunately, we've gotten to bring this show to a close.

And I first want to thank you, Richard, for taking the time of day to describe to our audience this very provocative law review article that you've written and remind everyone, first of all, it's available on SSRN, which it's free and it can be downloaded, but it is going to be published in Vanderbilt Law Review, either toward the end of this year or the beginning of next year. And I highly commend it to all of our listeners, whether they're on the consumer side, the government side, the industry side, because it really is a very well done, very scholarly article.

So Richard, thanks for being on our program. Good luck with your article.

Richard Frankel:

Thanks so much. Thank you for having me.

Alan Kaplinsky:

And Mark, always a pleasure to have you back on our podcast show. So be on the lookout for other provocative articles in this area of arbitration, and you can be assured that you will provide a counterpoint to whatever else the article has to say.

Mark Levin:

Well, I appreciate that opportunity, and it's been a pleasure talking with Richard and you on this very, as you say, provocative article.

Alan Kaplinsky:

So to make sure you don't miss any future episodes of our show, you should subscribe to our show on your favorite podcast platform, whether it's Apple Podcasts, YouTube, Spotify, or whatever platform you use. We're on all the major ones. Don't forget to read our blog, which also goes by the name of Consumer Finance Monitor for daily insights on the consumer finance industry. And if you have any questions or suggestions for our show, please email us at podcast, that's singular, podcast@ballardspahr.com. Stay tuned each Thursday for a new episode of our show. Thank you for listening today, and have a good day.