

Consumer Finance Monitor (Season 5, Episode 14): Has America's civil justice system crashed? A conversation with special guests and consumer advocates Harvey Rosenfield, President of the Consumer Education Foundation, and Laura Antonini, Policy Director of #REPRESENT

Speakers: Alan Kaplinsky, Harvey Rosenfield, and Laura Antonini

Alan Kaplinsky:

Welcome to Consumer Finance Monitor Podcast, where we explore important developments that are of interest to the consumer financial services industry and consumers. I'm Alan Kaplinsky and I'm senior counsel at the law firm of Ballard Spahr. I'm formerly the chair of the consumer financial services group at Ballard Spahr. I will be the host at today's podcast.

Alan Kaplinsky:

And we have a very important show today and some very special guests that I'm going to tell you about right now. So I guess it was in late February, not that long ago, I found out that there was an organization that was being led by two individuals that were literally doing a survey of the topic generally of consumer protection. And they had written a tome, a document that was almost 300 pages in length, that obviously was very, very thoroughly and extensively researched, where they covered the waterfront when it comes to the issue of consumer protection.

Alan Kaplinsky:

And as you will find out, they don't think that the United States has done a very good job in protecting the rights of consumers. That neither the legislatures at the state level, nor Congress, nor the regulatory agencies, nor judicial branch has done an effective job. And they, in their 300 roughly page report, they chronicled these abuses. And boy, there is a lot there to chew on.

Alan Kaplinsky:

So just to give you a taste of what I'm talking about, Public Citizen on February 25th, issued a press release where they focus on this topic and it's called Consumer Advocates Propose New Model State Consumer Protection Act. And the subtitle, I guess, of this press release is Hacked By Big Corporations America's Civil Justice System has Crashed, Consumer Advocates say. And then they go on to describe what we're going to get into a lot of detail about.

Alan Kaplinsky:

So the name of the actual study is called Reboot Required: The Civil Justice System Has Crashed. And it's published by an organization called Represent. And it's a project of the Consumer Education Foundation. And the authors of the report are our guests here today, Laura Antonini and Harvey Rosenfield.

Alan Kaplinsky:

First, let me introduce Laura. Laura is an attorney and the policy director of Represent. She focuses on reforming deceptive practices law and class action litigation procedures. Antonini has provided guidance on class action best practices and

consulted with the European Union on their collective redress law. She also works on privacy, data collection and automation issues. Previously she was a staff attorney at Consumer Watchdog, where she focused on complex litigation in federal and state court, as well as on California insurance regulatory issues.

Alan Kaplinsky:

Let me introduce now her co-author Harvey Rosenfield. Harvey is the president of the Consumer Education Foundation. He's one of the nation's foremost consumer advocates. He founded the nonprofit consumer advocacy organization, Consumer Watchdog in 1985, where he is presently outside council. Trained as a public interest lawyer, Rosenfield authored insurance reform, California proposition 103, and organized the campaign that led to its passage. His bio goes on and on, and his biographical information appears in the report so I'm not going to get into any more detail. But first of all, a very warm welcome to both Laura and Harvey. Thank you for coming.

Laura Antonini:

Thank you so much for having us.

Harvey Rosenfield:

Thank you for inviting us.

Alan Kaplinsky:

Okay. So let's get into it. And my first question is a very general one, and that is to tell us about why you think there is a problem in protecting consumers today?

Harvey Rosenfield:

Well, Alan, thanks again for having us on your show. People who practice in this field and consumers who are in America's marketplace every day, know that the system is broken. And Laura can discuss some of these examples in more detail, but in engaging in any kind of contractual or financial transaction with major corporations in the United States, the consumer is at an enormous disadvantage and it's at costly disadvantage. It costs people money. It costs people their time, which is a very precious commodity.

Harvey Rosenfield:

And the remedies are no longer sufficient to enable people to obtain justice when they've been wronged in a financial transaction. And if you can't obtain justice, then you're left with nothing. You're nowhere. So to the extent that you were asking us why we think there's a problem, I guess I would say that's beyond dispute and we chronicle that at length in Reboot Required, which by the way, can be found on our website, representconsumers.org.

Alan Kaplinsky:

Okay. Do you want to add anything?

Laura Antonini:

I agree with what Harvey was saying, ask any average person about any problems they have with companies that they're customers of, and they can list a litany of abuses that they've been subject to with no recourse, whether it's through customer service or not being able to file a lawsuit or having a lawsuit dismissed because of some unfair doctrine that was the result of corporate efforts. So I believe consumers are at a extreme disadvantage because of 50 years of corporate propaganda has put us in a position we're in now.

Alan Kaplinsky:

Yeah. Well, let me ask you a couple of follow up questions related to what both of you said. A fundamental, I guess I would say just a basic principle, that underlies this idea of consumer protection is that consumers have to, that companies can't negotiate the individual terms of contracts with consumers. That would be completely inefficient. It would be extremely costly. Those costs would have to be passed onto consumers and consumers actually wouldn't want that. I know you spend part of your study talks about take it or leave it contracts and I must say that one very useful part of your study is the fact that includes a lot of definitions, different practices and things that those of us that are in the industry, we understand it, but a lot of consumers may not. But what about this basic idea that you have to have form contracts, it can't work any other way?

Laura Antonini:

Okay, well, you can have form contracts, but corporations should not be allowed to slip in any provision they want into those contracts that consumers can't negotiate. You shouldn't be able to say, "Hey, we can change any term of this contract at any time," which most consumer contracts have a provision like that. "Hey, we're going to charge you a penalty fee if you stop using our service." Or, "Hey, we can collect whatever data we want from you if you visit our website." Those contracts are filled with extremely unfair terms that are just imposed on consumers and that's not fair.

Alan Kaplinsky:

Okay, so it's not so much that you have a problem with the concept of a take it or leave it contract, but your belief is that we've got to do a better job at policing.

Laura Antonini:

No, I believe there's certain situations where no contract is required at all. But in situations where you might actually need a contract, let's say, if you're signing up for health insurance or something like that, it shouldn't be filled with all these onerous terms in legalese that let the company do whatever they want and treat consumers unfairly and charge them whatever they want and deny them services. So in situations where a contract is truly necessary, it shouldn't have all these onerous terms that basically put consumers at the mercy of the corporation.

Alan Kaplinsky:

Well, somebody's got to police that, right? And companies aren't going to do that voluntarily. They've been advised by their lawyers over a long period of time that you should put this in the contract, you ought to put that in the contract. And the contracts become very prolix and I acknowledge that very few people actually read them. I know I don't read contracts that I sign or become subject to, but someone's got to police it and who is equipped to do that? I mean, you are critical of what the legislatures have done, of what Congress has done, of what the regulatory agencies have done, even what the courts have done. And so how is this going to be accomplished?

Harvey Rosenfield:

Alan, let me push back a little bit on the premise of your question. You said initially that it would be really inefficient and costly for consumers to negotiate their own contracts, but let's examine that a little bit, inefficient and costly for whom? You suggested consumers really aren't interested in being able to do that. There, I have to really just disagree with you. The corporations are not using these contracts to enter into what we all understood to be a meeting of the minds type agreement, these contracts have now been basically deployed against consumers. They've become a way for corporate lawyers, as you pointed out, over hundreds or dozens of pages, to protect the corporation from any accountability or responsibility.

Harvey Rosenfield:

I think what Laura said a few moments ago was that there is a you really don't need contracts. What we think in effect, these really aren't contracts. They're just one sided rules that are imposed upon consumers as a condition of doing business. And this

notion that there's a contract is based on 18th century versions of, or models of consent, that as you just pointed out really don't exist, right? That's why corporations want form contracts/

Alan Kaplinsky:

But Harvey, even consumers want to have contracts, too. I mean, if you're getting a mortgage, you're going to want that interest rate to be in writing, you want the company extending the credit to you to be bound by that. You want to know what other kind of fees are going to be charged at loan origination. You may want even want to know what a late fee might be if you're late in paying on the mortgage. You want to know the term, you want to know the monthly payment. So it's not everything that's in the contract only benefits the company. A lot of it's there to benefit the consumer.

Harvey Rosenfield:

I mean, I take your point, but I think those provisions are there, what you're describing is the notice or the informational provisions of a contract. Yeah, it's great that the American consumers can find out what their interest rate is going to be. Presumably they've negotiated that. But at the end of the day, if the rest of the contract strips you of your ability to go to court in order to challenge a violation of the contract, then the contract itself is worthless.

Harvey Rosenfield:

And so I'm going to ask Laura, explain how our proposal would address these kinds of terms that really just operate to protect corporations when they violate the terms of the contract.

Laura Antonini:

First of all, we would prohibit what we consider unfair, deceptive and unlawful terms, some of which I described earlier, like you can't unilaterally change the term of a contract in the middle of a contract. You can't include terms that would limit a company's liability. You can't make a transaction contingent upon a waiver of any rights. And the remedies we provide for that would allow consumers to either void the contract, reform the contract, or get damages if a corporation violates those provisions.

Alan Kaplinsky:

Well, let me, first of all on the unilateral changing of contracts, that doesn't exist in all contracts. I mean, of course my area that I practiced in is consumer finance. And if you get a 30 year mortgage or even a three or four year automobile loan, and it's a what we call closed end loan or installment loan, those terms are fixed. I mean, they can't, nobody, if you put in language in a contract like that saying the company has got the right to change the terms on that kind of a contract, that would be an elusory contract. And that kind of provision would be completely unenforceable.

Alan Kaplinsky:

Where I see changes in terms being used is with respect to credit card agreements or revolving credit or open end credit, or other kinds of things that are analogous to that, where it's anticipated that it's an open ended transaction without a definite term to the contract.

Alan Kaplinsky:

So that's number one, but I want to get back to the first question I asked, and that is relating to the problems that the consumers are facing and how these problems are going to be solved. And you've suggested that the courts are the best way to solve it. Certainly I know you're against the use of arbitration and we'll get to that in a couple of minutes, but I'm not sure whether you even trust the court system to do it because the courts, as you point out, are there sort of the last resort for consumers and the common law, the way it's developed over the years, doesn't favor consumers. Courts will say, if you sign your name to a take it or leave it contract, you're bound by its terms, regardless of whether you read them or not, it's irrelevant. That is, again, a basic, I guess you could say a common law principle. There are many courts that have decided that's not the

law. So who's going to provide the help here for the consumers who you say are being really run rough shod over by industry and corporations? Who's going to help?

Laura Antonini:

One of the provisions that I forgot to mention in our model law is we get rid of the duty to read defense, which has been employed in California. And as you yourself just admitted, you don't read contracts.

Alan Kaplinsky:

Yes. I don't think I've ever read one.

Laura Antonini:

So by eliminating the duty to read defense, essentially consumers might not have to be bound by any of these unfair provisions and a court would be required to reject that defense.

Harvey Rosenfield:

The thesis of our report Reboot Required is that big corporations have corrupted the entire judicial system. They've taken advantage of their resources to block needed legislation to protect consumers, to repeal current legislation that protects consumers, to put people, this is the most appalling thing to me as a once upon a time law student, they've managed to unabashedly get judges appointed or elected in state and federal courts who are unabashedly pro-corporation.

Harvey Rosenfield:

And so our proposal is first, we need the law to change as Laura just mentioned, for example, getting rid of the duty to read defense so that if you didn't read it like you didn't Alan, and somebody had the temerity to take advantage of you, you could go to court and not have to worry that you'd be thrown out because you didn't read that 100 page contract and the accompanying privacy notice, et cetera.

Harvey Rosenfield:

And then to of me, the only way to really solve the problems that consumers are experiencing in the marketplace is to change the law and then require the courts to follow the changes in the law and get rid of these antiquated procedural obstacles that you're very familiar with. One of them is mandatory arbitration, which started off as a kind of benign thing, and has turned into a nightmare for the average consumer, that can't be squared away with American principles of justice. But I know you want to get to that separately.

Alan Kaplinsky:

Yeah. Oh yeah. Well, thank you for the lead in, because arbitration, as you may or may not know, is a subject near and dear in my heart.

Harvey Rosenfield:

We know.

Alan Kaplinsky:

A lot of people have called me the pioneer of the class action waiver in arbitration provisions. And I mean, it is true that myself and another partner of mine, Mark Levin several years ago, I mean, probably close to 20 years ago now, we were mired in litigation in state courts in Alabama, Mississippi, where our clients could not get a fair shake. Part of the problem I see with the judicial system, at least as I viewed it at that time in a couple of the states where our clients were having extraordinary problems, is the judges, just the opposite of what you indicated, the judges were all elected. And they were, I believe co-opted

by the consumer plaintiff's bar and so you couldn't get one of those state courts to grant a motion to dismiss or a motion for summary judgment. Everything thing would go to trial. And if it went to trial, good luck. You would run into a major problem because litigation had become a cottage industry at that time. And for cases that were real worth a few dollars, you might get hit with a judgment of a half a million dollars. That was very common.

Alan Kaplinsky:

And a lot of the litigation I got involved and dealt with door to door sales of satellite dishes. And there's absolutely no doubt that there was fraud that occurred and misrepresentations that occurred, but these cases, in order to settle, you had to be willing to pony up a half a million dollars a case. So our clients said, "Can you figure out a way to level the playing field?" And that's why I got involved in looking at arbitration.

Alan Kaplinsky:

And then I noted that as Mark Levin and I were doing the research, that it might be possible to curb class actions, we were seeing tremendous class action abuse. And I think some of the class action abuses you probably would agree with me about, at least according to the report that you've written. There were class actions being filed just to extort settlements, not by serious class action lawyers who really had identified a horrible practice and were intent on following through with the class action from beginning to end.

Alan Kaplinsky:

So anyway, I noted that arbitration might have an impact on class actions and came up with the idea of putting class action waiver language in consumer contracts. So I know you really think arbitration is terrible, but organizations like the AAA, American Arbitration Association, I dealt with them for years, they go out of their way to be even handed. I'm not talking about, let's not talk about the national arbitration form, which is a relic of, I don't know, 10, 15 years ago, but AAA and JAMS, which is former judges, both sides of the political aisle are involved in it. And I find arbitration to be a very fair process.

Alan Kaplinsky:

The problem that exists is that consumers aren't educated enough about it. And I blame the government agencies, including the CFPB. And I blame the media. You cite some studies, my studies show the consumers do well in arbitration, those that go through it. The arbitration fees are generally paid entirely or largely by the industry. Often there are all kinds of incentives that are given to consumers who use arbitration, such as paying a premium like the AT&T arbitration clause to consumers, if the company does not enter into a reasonable settlement with the consumers. So why are you so hell bent on assuming that arbitration is a bad thing?

Harvey Rosenfield:

Well, let's use the word assume, your clients who were big corporations, you said, couldn't get a fair shake in court, but I want to make clear that your definition of what a fair shake is, or your client's definition, the corporate definition of what a fair shake is much different than the consumer's definition of a fair shake. And you said things like, the courts have been co-opted by consumers and the plaintiff's lawyers and litigation is a cottage industry. And somebody's out a few bucks, but then there's a half a million dollar settlement, all of this really misrepresents what's going on.

Harvey Rosenfield:

The one thing I thought you said that was most interesting is you wanted your clients, big corporations want to level the playing field. Actually, what arbitration does, Alan you know this, is it gets rid of the playing field. Instead of being able to go to court, instead of being able to have the traditional American trial by jury and have your day in court, the consumer is confronted with a private arbitration process overseen by corporate lawyers, judges chosen by, private judges chosen by a system that is paid for by corporations. And the result is, contrary to what you said, and I'm sorry, I have to really push back on you in this, because I have some experience with arbitration clauses and taking on big companies.

Harvey Rosenfield:

We sued one of the biggest telephone companies in the United States, and we got quite a bit of confidential discovery, which I cannot reveal to you, but that company at the time had 70 million customers. And there were a dozen arbitrations among 70 million customers. Now, I suppose that company would say, "See, nobody has a complaint about our service. We provide great cell service." But the fact is millions of people complain about that cell service. What they don't want to do, what they don't have the time or energy or resources to do is navigate a 50 page arbitration agreement, and then fill out all the forms themselves, and then hope that at some point they get their \$10 a month overcharge adjudicated.

Harvey Rosenfield:

The entire system is predicated upon a misrepresentation of how the legal system versus arbitration really works. And if you are a consumer, you simply do not have the ability to engage that process, which is why it almost never happens. There's almost never arbitrations. In fact, we make a point in our report that in a situation where some law firm figured out a way to request mass arbitrations on behalf of many consumers who were no longer allowed to bring a class action because of your class action waiver clause, the companies have started to decide, oh, maybe we should let these things go to court because we actually really are not prepared to defend against a bunch of arbitrations, we just really wanted arbitration to kill the ability of consumers to obtain justice.

Alan Kaplinsky:

Let me raise an issue with one of the things that you said, and you talked about how few arbitrations occurred out of 70 million customers affected by a particular practice. But what you don't know, Harvey is how many of the problems got resolved informally. That is by just the consumer picking up the phone or typing a complaint to the company on his or her computer. And companies are in business to keep consumers happy. They don't want 70 million angry consumers. And if things get resolved informally through customer service, it seems to me, that's a good thing for consumers. That's better, a lot better than being part of a class action that will go on for five years and may never make it to the finish line.

Harvey Rosenfield:

Have you called customer service lately?

Alan Kaplinsky:

Yes.

Harvey Rosenfield:

I mean, one of the things-

Alan Kaplinsky:

Some are good and some are bad.

Harvey Rosenfield:

The proposal that we have made, which people again can see at representconsumers.org, is to create a system that your clients are going to hate. Your clients are going to hate it because it levels the playing field, because it gives consumers far more rights than they've ever had before to hold corporations accountable. And from our point of view, the only way you can ensure that a corporation will treat you fairly is if you can threaten a corporation with a lawsuit that will affect their bottom line so profoundly that they will feel compelled not to violate your rights. In other words, corporations are about one thing only, making money. They don't care how many customers they have as long as they're making money. So if some customers get abused and leave, that's okay with them. But what we need to have in this country and what our model legislation does, is require a set of procedures and substantive protections and damages that will deter corporations from taking advantage of people. And the only way you can do that is by making those rights available to people to go to court.

Alan Kaplinsky:

Well, there are two things I want to raise and like to get your views Laura, on some of this, because I know on one of the issues I'm going to raise, you've done a lot of work and that is the question of class action litigation. Is that really the answer? I mean, let's assume that all these various principles that you're advocating, including the no duty to read principle, that all of that becomes part of the fabric of our law, either statutory or common law and companies violate that in some fashion, so the consumer has got a claim or cause of action. Is the class action device the way to resolve that, or wouldn't it be better, much better to have it resolved by government agencies, who I think are a lot better equipped than plaintiff's class action lawyers to prioritize first of all, to identify what serious wrongdoing is and to go after that on a priority basis, isn't the government better equipped to do that?

Alan Kaplinsky:

Assuming that the government has got the funding to do it, but isn't the government better equipped than a plaintiff's class action lawyer, who many of them, not all of them, but many of them are motivated by what is going to benefit them the most? Where are they going to have the opportunity to make a lot of money themselves?

Alan Kaplinsky:

So Laura, I'd like to get your thoughts on class actions. I mean, I hope that you'll agree they're not the greatest device in the world.

Laura Antonini:

I disagree with that. But on the point of government agencies, I mean, you said assuming they have the resources, they don't have the resources to prosecute every company. And as we know, by a recent Supreme Court decision that hobbled the Federal Trade Commission's ability to get remedies for consumers, some of their authority has been limited to get refunds to people. So they're not always in the best position to get justice for consumers.

Laura Antonini:

And when the original class action rule, as we know it today came about in 1966, it was meant to empower plaintiffs. It was meant to incentivize citizens to join together and challenge misconduct that affects people's civil rights, health, safety, economic security, in situations where each individual person isn't going to bring a lawsuit if they lost a hundred dollars or \$200. And so, yes, the class action device is a device of justice.

Laura Antonini:

And in 1966, the Advisory Committee drafted these amendments to Rule 23, to enable structural reform and broad remedial relief for civil rights injustices with the goal of empowering plaintiffs and encouraging more frequent use of class actions. And when this passed, Brian Fitzpatrick chronicles this in his book, *The Conservative Case for Class Actions*, those amendments passed with very little controversy, no one really cared. It was only until that device became so powerful that the corporate machine decided, hey, we've got to stop this because too many people are getting justice.

Laura Antonini:

And so, yes, I do believe the class action device, there are issues that we point out in our report where some reform is needed, but I think it is the best way to hold corporations accountable, prevent illegal behavior and to pay people back. And on the point of arbitration, I'm just going to quote the American Association of Justice, who found that a consumer is more likely to be struck by lightning than to win a monetary award in arbitration.

Alan Kaplinsky:

Yeah. Well, let's instead of quoting that organization who made a statement like that without actually documenting it, let's look at the, well, the CFPB did this vast study of arbitration, right? That went on for several years. And then they ultimately came

out with a proposed rule and then they finalized the rule and then Congress overrode the rule under the Congressional Review Act. But they did a lot of work in trying to compare the benefits of arbitration to the benefits of being a member of the class in a class action. And they studied certain class actions that were filed in, I think that was all in federal court because they that's where they had the data. They didn't have the data available in the state court system.

Alan Kaplinsky:

And they found that the average recovery of an individual in a class action was about \$32 and I think, 45 cents, that was the average. And they compared that to the average recovery in AAA consumer arbitrations, which was in the several thousands of dollars. It just seemed pretty apparent to me, that consumers weren't doing very well in class actions.

Alan Kaplinsky:

And I've been on the defense side of class actions for practically my entire career. And I can count on less than one hand the class actions where I felt were really meritorious and where the consumers really got vindication. Take a look at the job the CFPB has done. I think, I hope you'll agree with me that when Richard Cordrey was the director of the CFPB and now with Rohit Chopra, as the new director of the CFPB, they are very pro consumer and they're very active and they have a ton of resources. They're not even using all the money that Congress allocated to them for use. They can continue to add people. They've got the resources to bring, if they see wrongdoing to take care of it.

Alan Kaplinsky:

And boy, they're the ones that industry are afraid of. The industry's not afraid of what a class action lawyer can do because the industry knows that in many instances, class action lawyers aren't really serious, that you can get rid of a class action by very often on an individual basis, by paying the named plaintiff five or 10 grand and paying the attorney 25 to 50 grand. But at the government, you can't do that with the government if they go after you. And particularly the CFPB, you got a big problem and they don't settle for pennies on the dollar.

Laura Antonini:

I think that class action settlements that might not pay people out as much, that problem we actually solve in our model act by bolstering the remedies that are available. For example, if you include in a consumer protection statute, statutory damages, that gives plaintiffs lawyers much more leverage to negotiate a settlement that's going to give people money. Because of the corporate advantage that Harvey and I have been talking about, plaintiff's lawyers have less leverage to negotiate better settlements. So if we improve that process and make it give plaintiff's lawyers more leverage by having stronger remedies available in statutes, I think that will produce much more beneficial class action settlements.

Alan Kaplinsky:

Yeah. Let me ask you another question. There's no doubt that if your model statute were to become the law, there would be the costs imposed on industry would be draconian. I mean, it's going to cost a fortune for companies. The reason why you've got these, what you could say are pro corporate, pro industry provisions in form contracts is to keep costs under control, to have certainty. And there would be no certainty involved for industry, if your statute were to become the law. And honestly, there'd be a lot of companies that would be driven out of business. There'd be less competition. The prices would definitely go up or interest rates would soar.

Alan Kaplinsky:

And so consumers will pay in one of two ways. One, those that are still eligible for credit or want to buy the product are going to pay more for it. And very few consumers, when they're buying something or getting loan, are thinking about gee, well, what happens if I get in a dispute with the company, I'm going to be giving up this right and that right. And there's some people to think that way, but not many. Many want to get the product. And so you've got all these costs and they're going to be born by somebody, it's either going to be the consumer or it's going to be the shareholders of the company, or some combination of

the two. And so my question to you is, are you sure that the consumers that you represent would want that to happen would want to pay higher prices? Because what's going to happen.

Harvey Rosenfield:

Alan, I think Laura and I have over the last 20 years or so as we've advocated for consumers, have confronted the argument you just made in many different forms. But I have to respectfully say, it all comes down to these scary buzzwords, oh, it's going to be draconian and consumers will pay more and they'll get less and there'll be no competition and some companies will leave the market. I mean, these are all the sort of propaganda argument that big companies make whenever they're confronted with a demand that the law changed to protect consumers or protect the environment or protect the rights of citizens, civil rights. So I think we can't let your statement go unopposed, unchallenged. There's no evidence that any of that will happen, but what will certainly happen is that companies will decide it is no longer in their interest to take advantage of consumers.

Harvey Rosenfield:

And building fairness and justice back into our marketplace, that won't be that expensive, but whatever it costs to be honest, I think the American people are ready for it, because the alternative now, what we have now is basically the absence of the rule of law. One of the byproducts of this corporate assault on the legal system over the last 50 years that we document in our report is that people have lost confidence in the judicial branch and they've lost confidence in the class action system. And we know what happens now. We've seen it in the last year what happens when people lose confidence in the legal system and in the rule of law, you have anarchy and violence.

Harvey Rosenfield:

In our report, we draw a direct connection between the corporate successful, amazingly successful corporate attack on the legal system and the ability of many, many Americans to feel that violence is justified because they have to obey the law, but the elites, the wealthy and the big corporations don't. There's an income disparity in our country, and now there's a justice disparity.

Harvey Rosenfield:

And so the threat is not just to people's pocketbook anymore. It's to our democracy, it's to everything that I'm sure you in your own way feel you have some allegiance to, which is the rule of law. But the work the corporations have done over the last 50 years has undermined that. And rather than talk about draconian and all the threat that if any of these reforms pass consumers will end up getting screwed anyhow, let's focus on making the system work better.

Harvey Rosenfield:

But honestly, one thing I can't argue about that you have said, it is going to really upset your clients, these corporations, that they can't get away with murder anymore. They're going to have to be honest in the marketplace. They're going to have to comply with the law. The law's going to be much more stringent, and that's going to oppose some costs on that, for sure.

Alan Kaplinsky:

Let's talk and what I'd like to turn to in our remaining time is what's the next step? I mean, what happens next? I mean, you issued your report. You've drafted the model statute. Are you planning to go to the National Commissioners on Uniform State Laws and try to see if they would take your model statute and use that as a basis for creating a uniform consumer, state consumer protection law, or you contemplate doing something at the federal level, at Congress, how do you go from where you are now to where you want be?

Harvey Rosenfield:

Those are good suggestions, actually. I mean, I think we need to go to every forum we can. We talked before the show today about the American Law Institute, a lot of the quote, legal think tanks, the so-called independent entities that weigh in on legal issues in our country are actually dominated by corporate lobbyists and corporate lawyers. I think in our thinking, we don't really see a lot of opportunity there.

Harvey Rosenfield:

What we want to do is go to the state legislatures and Congress, start with hearings. Let's have to hearing, Alan, when was the last time that Congress held a on this state of justice, civil justice in the United States? I mean, I can't remember one, so it's time to have a sort of a very high level inquiry following up on what we've done as two consumer advocates in Congress and in the state legislatures. And there are many, of course legal fora for the discussion of these kinds of proposals. We'd like to bring it to all of them and get the discussion going. And I suspect, it's going to be a significant amount of pushback from big corporations and their allies and these various entities and in legislatures, in Congress, but we don't see, as you can probably tell from the way we've been discussing this, we don't see any alternative now to forcing a debate on something that is so important to our country.

Alan Kaplinsky:

Well, do you have a timetable in mind? I mean, are you thinking that, I know you think, well all this is extremely important, but the wheels of, I was going to say the wheels of justice, but the wheels of legislatures, state and at the federal level, grind, move very slowly. In many instances, such as Congress, there are very few things that Congress is able to agree on these days. And so I guess you're looking for a pragmatic solution here. You want something to actually be accomplished. You embarked on this study, and not just as a way of adding to the literature dealing with consumer protection, you want real action. I still don't see how you're going to get it. I don't see where it's coming from.

Harvey Rosenfield:

Well, I totally take your point. I think whenever we in the past have proposed something that seemed extreme and radical at time, for example, that proposition that I was involved in on regulating insurance rates in California, the first response from everybody was, "That will never pass." Second response is, "Could never work." And here we are, 35 plus years later, and it saved consumers in California over 154 billion dollars just on their auto insurance. Took effect, the voters passed it. The legislature wouldn't hear of it because the insurance industry controls the legislature.

Harvey Rosenfield:

I relay that because I think you're right. I mean, we're not unaware of the power of big corporations and the extent to which they've managed to infiltrate and dominate state and federal legislatures. But I think what we're going to do is get a conversation going in the news media first, and something of this magnitude, it's going to take a while to get that ball rolling, but there isn't a day that goes by that people, you can't read something on in the news or on Twitter about somebody getting hurt or ripped off by a big company.

Harvey Rosenfield:

I mean, I'm just dealing with something right now as individually, that is just involving an order I made online. It's happening every day to millions and millions of Americans. Once we tell people, once we recognize what's happening to people and tell them that there is a solution, I think it'll start to take off. And at a certain point, these things, there's a tipping point at which even the politicians have to acknowledge they have to do something.

Alan Kaplinsky:

Yeah. Well, it just occurred to me that, not that I want to give you any ideas, but you got proposition 103 passed by going to a public referendum. And there are certain states like California, where things can be done through a referendum that you'd never be able to get through the legislature. I guess if I were you, that's where I would focus my efforts.

Harvey Rosenfield:

As you pointed out, it's a 240 page report, then the model legislation, the actual legislative changes that we propose another 150 pages, but Laura and I could take those proposals and turn them into a couple of paragraphs, maybe a thousand words, accomplish 80% of what we want to accomplish. Put it before the voters and it'd be in plain English. And of course the corporations will spend a hundred million fighting it at the ballot box, but at the end of the day, I think the voters would pass it. So that's an option here in California.

Alan Kaplinsky:

Yeah, no, I know in California, I do believe that. We've drawn to the end of the hour, but I want to give both you and Laura, I give you the last say if there's anything really important that we haven't covered.

Laura Antonini:

Yeah. I truly believe that a lot of the injustices that we point out, it's not really like a Republican Democratic issue, as Harvey said, these are things that are happening to people all the time, whether it is perpetuated by financial institutions or other types of companies, fees, customer service issues, these one-sided contracts, I mean, these are real things that are keeping consumers down. And I do think that we can all come together on these issues. And I think that Harvey and I can make progress by tapping into these daily indignities that we're all experiencing. So I don't think it's a long shot, but I'm excited about what we're doing.

Alan Kaplinsky:

Yeah. Okay. Harvey, anything you'd like to add before we wrap it up?

Harvey Rosenfield:

No, I think Laura put it exactly right. I want to thank you for your embracing the opportunity to have this discussion with us.

Alan Kaplinsky:

Yeah, no and as you move along, if certain milestones are achieved, please let me know about it and I'll welcome having you come back on our show to talk about what's occurred. But again, final thank you to both of you. Want to thank all of our listeners today for downloading our show and just remind everybody that we release a new show every Thursday, except for a couple of holiday weeks in November and December, and our podcast show is available on whatever platform you may use to access your podcasts, be it Spotify, Google Play, we're on all of them. We're also on our firm's website, Ballardspar.com.

Alan Kaplinsky:

Once again, my thanks to our listeners and to Laura and Harvey.