Consumer Finance Monitor (Season 8, Episode 12): "Accidental Arbitration" -- A New Theory that Would Rein in Consumer Arbitration Clauses and the Scope of the FAA

Speakers: Alan Kaplinsky, Mark Levin, and David Horton

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast, where we explore important new developments in the world of consumer financial services and what they mean 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. I'm your host, Alan Kaplinsky, the former Practice Group Leader for 25 years, and now Senior Counsel of the Consumer Financial Services Group at Ballard Spahr. I'm pleased to be moderating today's program.

For those of you who want even more information, don't forget about our blog, which like our podcast show is called Consumer Finance Monitor. We've hosted our blog on the very same day that the CFPB became operational July 21, 2011. There's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. To subscribe to our blog or to get on the list for our webinars, please visit us at ballardspahr.com. If you like our podcast, please let us know about it. You can leave us a review on Apple Podcasts, YouTube, Spotify, or whatever platform you use to get your podcast shows. 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.

Now, today, we're going to revisit a topic that always seems to be important and also very topical, something that our clients are very, very interested in, and that is a topic of consumer arbitration. Over the years, since we've been doing our podcast show, we have done a lot of programs dealing with that topic. If you want to get more information on them, you should go on our website, look in under our podcast show, and there are archives there that you can scan and pick out the topics that are of interest to you.

Today, our very special guest is David Horton. David is the Martin Luther King Jr. Professor of Law at the University of California, Davis. His work on arbitration has appeared in some of the nation's top law reviews. He's been widely cited by the courts and he has won the Association of American Law Schools' Scholarly Paper Competition, the Association of American Law Schools' Dispute Resolution Section's Best Article Award, and the Mangano Dispute Resolution Achievement Award. What we're going to talk about today is a very interesting law review article that will be published this year in Washington University Law Review, but is available for reading right now on SSRN. That's how we found out about the article. The title of the article is Accidental Arbitration. I'm not going to give away too much of what the article is about right now, because David can describe it in much more accurate detail than I can, but David focuses very much on how courts should be interpreting certain provisions that are in very often seen in consumer arbitration provisions.

Then there are three different things that David focuses upon, one of them dealing with the issue of who decides whether something is arbitrable. Should it be a court or should it be the arbitrator? Another one deals with the issue of third parties who are not signatories to the consumer arbitration agreement, but yet under various court opinions, the courts have conferred third-party beneficiary status to some of these third parties who didn't actually sign or become legally bound to an arbitration provision. And the third deals with the breadth of arbitration. A contract gets signed that says it will cover any disputes arising out of or under or related to the particular contract that the consumer is entering into. And the question is, but if a contract deals with, let's say the sales of goods or services, should it also cover unrelated torts or torts slip and fall cases. Somebody signed, let's say a credit card arbitration agreement with a particular retailer, and the person slips and falls on the sidewalk on the way into the retailer, should it cover that kind of a claim.

Anyway, I don't want to give away any more of the story. Well, first of all, David, a very warm welcome to you. Delighted to have you on the program today.

David Horton:

Thank you so much for that kind introduction and it's wonderful to be here.

Alan Kaplinsky:

Okay. Usually, when we're talking about our arbitration, I would be not doing the right thing if I didn't call on my colleague Mark Levin, who has been somebody that's worked with me for decades now, really did a lot of pioneering in the area of consumer arbitration and the use of class action waivers and has litigated literally I don't know how many cases dealing with the enforceability of arbitration and class action waivers; I'm sure all three issues that are the subject of your law review article, David. But Mark, very warm welcome to you.

Mark Levin:

Thanks, Alan. Always a pleasure to be here.

Alan Kaplinsky:

Okay. David, I'm going to start with a real softball question. You're the author of this 50-page article entitled Accidental Arbitration, and it's an intriguing title. It's what caught my interest and made me read the article to see if this would be something that would be worth covering on our program. What do you mean by accidental arbitration?

David Horton:

Thanks. Accidental arbitration occurs when a company tries to compel arbitration, by capitalizing on an ultra-broad arbitration agreement to send a claim to arbitration in a way that's kind of surprising: a way that maybe the parties at the time of contracting really wouldn't have foreseen would be possible. You might've seen a story in the news a few months ago about this couple who were eating at a restaurant on Disney property, and it turned out that the wife had a severe allergic reaction and died. And so her husband sued Disney for wrongful death and Disney moved to compel arbitration of the claim. Disney couldn't argue that the couple had signed any contract before they sat down to eat at this restaurant on its property. But what Disney did argue is that years earlier, the husband had signed up for a free trial of the Disney+ streaming service, and that has within it an arbitration clause that purports to apply very, very broadly. And so Disney argued that essentially the couple had agreed to arbitrate any claim they would ever have against Disney in the future. That's accidental arbitration.

Alan Kaplinsky:

Yeah, that's a very, very good description of one of the three issues. You characterize your article as a blueprint for analyzing these three issues that contribute to arbitrations being accidental. I'd like to focus on each of the issues, and I'd like to get Mark's reaction to each of them. You first argue that the Federal Arbitration Act should apply only to disputes that "arise out of" the contract containing the arbitration clause, which you end up calling the container contract. That's because that's the language used in Section 2 of the FAA. Can you explain that argument in more detail, David, and tell us why you think the current Supreme Court justices might find it appealing?

David Horton:

Yeah, sure. This is what I call the contractual nexus theory, and it's actually pretty simple. Section 2 of the FAA says that it makes specifically enforceable, as a matter of federal law, some arbitration agreements. Which ones? Among other things, Section 2 says that it validates a written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract. Section 2 expressly says that it only applies to agreements to arbitrate claims that "arise out of" the container contract. So some attempts to compel accidental arbitration do not involve allegations that arise out of the container contract.

If you think about that widely publicized Disney+ case, the asserted wrongdoing there is negligence at a restaurant on Disney property, and there's absolutely no relationship between the contract that contained the arbitration clause, which as you might remember was in Disney+ streaming terms of service and the horrible tragedy at the restaurant. Section 2 by its own terms does not apply in this type of case. Now, what that means is that state arbitration law applies, which raises a bunch of other issues, but my key point is that Section 2 falls away.

Alan Kaplinsky:

If I could stop you there for a moment, David, isn't what you're talking about really just a question of drafting? In other words, I get your point that there's no relationship what happened, that tragedy that happened where someone got an allergic reaction and they earlier signed an arbitration provision that didn't deal at all with eating at a restaurant at a Disney property. But we've drafted arbitration contracts that very expressly say this covers any kind of dispute that we have with you, whether related to this contract or not related, including any tort, any other claim. And we might even give examples of that. Isn't it really just a drafting issue, or if not, then aren't you really calling for a change in the law? The FAA says you can arbitrate as many claims ... whatever you want to arbitrate, you can put it in a contract. You don't have to arbitrate everything, but if you want to arbitrate the whole ball of wax any dispute arising in the future, why wouldn't that take care of the problem?

David Horton:

Right. First of all, the FAA does not say that. The FAA only says that it validates arbitration clauses to decide claims and arbitration that arise out of container contracts. What you're describing is why there is a problem. Drafters understandably will draft arbitration clauses that are extremely broad, what I previously called infinite arbitration clauses, because they straight up say this covers any claim you have against us, period. So the scope of the clause says it's all-encompassing. However, the FAA is not all-encompassing. The FAA expressly requires a claim to arise out of the container contract. Really, all I'm asking the Supreme Court is to read the text of the FAA.

Alan Kaplinsky:

Okay. I get your point. I'm sorry I interrupted you while you were ... I think that you had some more you wanted to say. I do want to get Mark's reaction, but before we go to Mark, want to make sure you've had an opportunity to say anything more.

David Horton:

No, I appreciate that. The only thing I was going to add was just to answer your really good question about why I think this might actually appeal to the Supreme Court. And so I completely admit that 20 years ago, this argument would've been a non-starter, because most of the sitting justices back then tended to resolve cases based on the vigorous policy in favor of arbitration that emanates from the FAA. A cynic might say that the court resolved cases based on vibes, but that's changed.

Over the last five, eight years, even pro-business conservatives like Justices Gorsuch and Thomas have ruled in favor of plaintiffs, consumers and employees in interpretive disputes about what the FAA means, and they'd done so largely by looking at what the ordinary public meaning of the statute was at the time it was enacted. This is a court that pays really close attention to the text. They've parsed all kinds of words in Section 2 and the rest of the FAA. They look at contemporaneous dictionaries to see what those words meant in 1925. If the court does that for the phrase "arising out of", it will conclude that there needs to be some kind of link between the claim and the container contract for the FAA to apply at all.

Alan Kaplinsky:

Okay. Mark, your reaction?

Mark Levin:

I have a few points to make about that and really just focusing on the words "arising out of". I think, David, what you're describing is a textualism or just focusing on the text of the contract or the statute. I think there's still going to be an issue of where you draw the line in terms of causation, and I think it's going to require a case-by-case analysis. "Arising out of", in my

view, is not as narrow a concept as you're suggesting, and would not necessarily result in the conclusion that you've come up with. "Arising out of" is often defined and used to mean a direct or indirect causal connection. It's not as limited as the concept of, say, proximate causation in tort. The standard language used in a lot of, probably almost 99%, of arbitration clauses is "arising out of" or "relating to", because that phraseology was adopted by the American Arbitration Association probably 70 or 80 years ago. If you want to put an arbitration clause in your contract, here's the language you should use and it says "arising out of" or "relating to".

But I've seen a lot of arguments that the "relating to" part of that phrase, which ostensibly is supposed to be broader than "arising out of" is actually superfluous because "arising out of" is broad enough in itself to encompass both concepts. I'm dubious that imposing an "arising out of" standard would necessarily limit the breadth of the FAA's application in real-world contexts. I think in every situation there's going to be a question, where do you draw the line in terms of causation? How far does the scope of "arising out of" go? Even in your situation, there wouldn't have been a relationship between the people at the theme park and Disney if there hadn't been a contract that created that relationship. And arbitration clauses typically apply to future events. That's why they're pre-dispute and not just post-dispute.

Secondly, your article contends that the Federal Arbitration Act, the FAA, would not apply where claims are unrelated to the container contract. But in saying that, I think the obverse of the argument is also true. In determining whether a claim is unrelated to the contract, a court is necessarily also determining whether the claim is related to the contract. As a practical matter, you still end up with "arising out of" or "relating to". That's the standard that is going to apply even if the contract itself only uses the words "arising out of". And finally, when you look at the language of Section 2 of the FAA, Section 2 is not limited to claims arising out of the container contract. It also applies to claims arising out of the transaction involving commerce that is evidenced by the container contract. And Section 2 uses disjunctive language, "thereafter arising out of such contract or transaction" which suggests that the FAA's application may be a little broader than what your article suggests. Those are my thoughts.

Alan Kaplinsky:

Okay. Thank you, Mark. David, let's get to your second argument now, and that's that companies use what you call "artificial privity" to extend the protection of the arbitration clause to a large number of allies who become parties or quasi parties, even though they're not signatories to the container contract. You contend that these non-signatories should not have rights under the arbitration clause because they never "agreed" to arbitrate. Can you explain that argument in more detail?

David Horton:

Yeah, thanks. I think maybe it would be most helpful to try to start by explaining what this idea that I call artificial privity is not. What artificial privity is not is an attempt by some non-signatory to invoke a state law doctrine that allows third parties to invoke contractual rights to compel arbitration. It's not an attempt by some non-signatory to use the third-party beneficiary doctrine. It's not an attempt by a non-signatory to use the doctrine of equitable estoppel. You might want to quibble with the way courts have applied those rules, but that's not what I'm focusing on. What I'm focusing on is something different. It's language in an arbitration clause that essentially says that a consumer or an employee needs to arbitrate claims against "us." Then "us" is defined not just to include the company that has drafted the clause, but this dazzling array of others; their employees, their subsidiaries, their parents, their affiliates, their beneficiaries, their agents, or their assigns.

What that language purports to do is to make dozens or hundreds of parties who have never signed, have never assented, are not even aware, most likely, of this contract, full-blooded parties. And the reason this matters is because if you are a party to a contract, you don't have to rely on a state law doctrine that allows third parties to compel arbitration. You don't need to try to use the third-party beneficiary rule or equitable estoppel. Instead, you can argue that you have this direct right of enforcement. The reason it matters is because sometimes there are parties who fall within the textual definition of "us" who, like the contract, makes full-blooded signatories who could not satisfy the third-party beneficiary doctrine or equitable estoppel or any of the exceptions.

I think the best example of this, there were these two wild lawsuits, one in the Fourth Circuit and one in the Ninth Circuit, involving consumers who were suing DirecTV for allegedly illegal robocalls. These consumers had never ever contracted with DirecTV. They weren't DirecTV customers, they never had a DirecTV contract, but they did, however, have wireless service

with AT&T Mobility. As I think you guys know, the AT&T Mobility wireless contract is incredibly broad, and it has this artificial privity thing that I've mentioned that says that any affiliate of AT&T is a party to the arbitration clause. The reason it matters is because long after these consumers opened their AT&T Mobility accounts, Mobility and DirecTV merged, making DirecTV an affiliate of Mobility.

So when DirecTV was defending against these TCPA lawsuits that these consumers had filed, it argued that it was essentially AT&T Mobility for the purposes of compelling arbitration under Mobility's arbitration clause. Its argument was, "Look, we are a Mobility affiliate. That makes us Mobility." My objection is that that is not, as my kids say, a thing. Contract law doesn't allow you to just magically make signatories or parties through fine print. Instead, a signatory or party is someone who manifested assent at the time of contracting to the terms. That could not have been DirecTV, which was one of AT&T's rivals at the time these consumers signed up for Mobility service. So it's an attempt to sort of end run the traditional state law doctrines that require parties to prove that they can compel arbitration under someone else's contract. That's artificial privity.

Alan Kaplinsky:

Okay. Thanks, David. Mark, how do you react to that?

Mark Levin:

Well, back in the 1990s, back in the ancient days when we started doing a lot of consumer arbitration work, we had a list of things that you want to make sure you include in your contract. One of those things is, I guess, what you're calling artificial privity because without it, arbitration becomes a lot more complicated than it needs to be. The reason for that is that companies that do have some relationship with the transaction, even if they're not technically a party to the contract, ended up getting sued by consumers. For example, a credit card issuer, which is a party to the credit card agreement, but it also has a servicing agent which actually does the behind-the-scenes handling of the account. But the servicing agent typically is not a party to the contract. Under your scenario, the claims against the servicer would be litigated in court because they're not "a party", while the claims against the card issuer would be arbitrated.

Now, under the FAA, to be sure, piecemeal litigation is permitted. You can have a dispute, part of which is resolved in arbitration and part of which is resolved in court. But why do you want to go through all that trouble and expense and the risk of inconsistent results if you can solve the problem by simply putting language in the original contract that extends it to others who may end up playing a role like a servicer. It's much more efficient, I think. I call the servicer a third-party beneficiary of the contract. You may be using a definition of third-party beneficiary that's more technical based on different state law concepts, but to me, if you name somebody, like a servicer, I think of that as making them a third-party beneficiary because they have the benefit of the arbitration clause if they get sued, and then all the claims can be resolved in one arbitral proceeding.

Also in the consumer context, in consumer financial services context, accounts are often assigned or sold or acquired in a merger, and companies also change the identity of a servicing agent once or twice or many times throughout the relationship with the consumer. Why shouldn't those entities, assuming that they're named in the contract as affiliates or as assignees or whatever, why shouldn't they have the benefit of the arbitration clause even if they weren't there at the inception of the contract, because it's clear that the card holder agreed to arbitrate claims with somebody, some company. So what's it matter whether it's the one that issued the card originally or a purchaser or successor who subsequently acquired the rights of the original issuer? Again, I think it's really important from almost a public policy concept to reduce congestions in the courts by permitting claims that are going to be resolved at least in part in arbitration, to be wholly resolved in arbitration.

Alan Kaplinsky:

The other thing that I would add, maybe stating it a little bit different than what you said, Mark, is I think, David, you would agree that under Supreme Court jurisprudence, an arbitration agreement can't be disfavored versus any other type of an agreement. You can't single out arbitration for any kind of special adverse treatment. If, as a matter of state law, you can create a third-party beneficiary to a non-arbitration agreement, it seems to me if you say, "Well, yeah, you can do that, but you can't create a third-party beneficiary to an arbitration agreement," you are disfavoring an arbitration agreement versus a non-

arbitration agreement. How do you get around that? Because most states under common law contract jurisprudence do allow parties to a contract to agree to confer a benefit on a non-signatory.

David Horton:

Yeah, absolutely. I just want to try to clarify. In most cases, the issue is whether a non-signatory can invoke the third-party beneficiary doctrine or a doctrine like equitable estoppel to do what they could do under normal contract law, which is piggyback on someone else's contract, a contract to which they're not a party. I have no objection to that. That, for all the reasons you stated, that's a rule that states could not discriminate against and should not discriminate against. The thing that I object to is different. It is obviating the need to ask whether a non-signatory does in fact satisfy third-party beneficiary or equitable estoppel. Just cutting that inquiry completely out by naming a whole bunch of people and entities as "parties", but they're not parties. They didn't sign.

Alan Kaplinsky:

I understand the distinction you're making. Let's turn to your third argument now, David, and that's having an arbitration clause that delegates arbitrability issues to the arbitrator. You say that also encourages accidental arbitrations. Can you explain that argument in more detail and tell us how having the court possess sole jurisdiction over arbitrability issues would help prevent accidental arbitration?

David Horton:

Right. Great, thanks. I'll try, but I've got to tell you, these issues really make my head spin. I think the thing that really stands out to me are these decisions in which you have some kind of attempt to compel what I call accidental arbitration, and you've also got a delegation clause in the contract. And so just the most mind-blowing issues arise. I think the best example I've seen so far comes from Airbnb's Terms of Service. Airbnb has a very broad arbitration clause, what I've called an infinite arbitration clause, because it applies to any claim you have against Airbnb in the future, and it also has a delegation clause. There have been, I think, three or four cases with the following facts.

Somebody signs up for Airbnb, they don't rent any property, and then later they just happen to be at someone else's Airbnb rental when they're either killed or severely hurt. And so either their estate or them, they sue Airbnb, and Airbnb tries to send the claim to arbitration and acknowledges, "Hey, look, there is an open question whether or not there is any relationship whatsoever between the accident and the contract that contains the arbitration clause." Because remember, these plaintiffs have only signed up for Airbnb service, but they haven't rented property. They just happen to be at someone else's Airbnb rental when they were hurt. It's an attempt to compel accidental arbitration, but more than that, it's an attempt to send that dispute to the arbitrator to decide the question of whether the claim falls within the scope of the arbitration clause.

The point I was trying to make in my paper is simply that there's this threshold issue in this scenario, which is whether the FAA even applies. Because if you accept the contractual nexus theory, there needs to be some kind of link between the allegations and the contract that contains the arbitration clause, and in the Airbnb situation, there just isn't. It was someone else's property that happened to be an Airbnb rental where the accident occurred. So because there's this threshold issue of whether the FAA applies at all, that is not delegable. That is something that a court must decide under the New Prime case. We know that courts decide whether or not Section 1's transportation worker exception applies. Similarly, courts should decide as a threshold matter whether or not Section 2's "arising out of" contractual nexus requirement is met. That's one part of this crazy scramble when you add the delegation clauses.

The other issue relates to attempts by people who are not signatories to invoke a delegation clause in someone else's contract and have the arbitrator decide whether or not they're entitled under some theory, whether it's artificial privity, equitable estoppel, third-party beneficiary, or so on, to piggyback on the clause. The reason this is so confusing is that if you look at it one way, it's totally fine to have arbitrators decide whether or not a third party can invoke someone else's arbitration clause. Arguably, it's just a question of interpreting the arbitration clause. It's just a question of the clause's scope, and we delegate those questions all the time.

But if you look at it another way, what the plaintiff is saying is, "I did not agree to arbitrate anything with this third party. I didn't agree to arbitrate the merits of my claim, and I didn't agree to arbitrate whether I agreed to arbitrate the merits of my claim." Essentially, there's a risk that the arbitrator has no power at all because the plaintiff has never agreed to arbitrate anything with this third party. So courts are really hopelessly split over this last issue. And the reason why I think it also should be non-delegable is that if you allow any third party to compel arbitration under a delegation clause and have the arbitrator decide whether or not the third party has rights under a stranger's contract, there is no limiting principle. Anybody anywhere in the world could invoke a delegation clause in some random contract and have the arbitrator decide whether or not they have third-party rights under that contract. And that just seems absurd.

Alan Kaplinsky:

Mark, do you agree?

Mark Levin:

Well, on this issue, I do tend to agree that it's better to have a court determine fundamental threshold questions of arbitrability than an arbitrator in most situations. But my reasoning is different than yours. Under a relatively famous Supreme Court case, Oxford Health versus Sutter, if an arbitrator makes a mistake, there's no review by the courts as long as the arbitrator is purporting to interpret the contract that's at issue. The award is typically sustained even if the arbitrator made a mistake. But if you're in a court of law, if a court makes a wrong decision about arbitrability, you almost in all cases have an automatic right to appeal to a court of appeal, and maybe multiple court of appeals all the way up to the US Supreme Court.

I think as a practical matter, I'd rather have the court make a mistake than the arbitrator, because there's no recourse if the arbitrator makes the mistake, and that can be really crucial to the case. For example, back before the US Supreme Court upheld the validity of class action waivers in consumer arbitration clauses, the courts were split almost evenly on whether you could do that. If you let an arbitrator make that decision, there would be no recourse. In fact, Alan and I had a case many, many years ago around, I don't know, 2002, 2003, where an arbitrator was sent the case by a court. The court had compelled arbitration. The court had compelled arbitration with a class action waiver and said that's enforceable. When it got to arbitration, the arbitrator said, "I'd like to rethink that because I'm not convinced that class action waivers should be enforced in consumer arbitration agreements." And we had to go to the district court, this was in the Middle District of Alabama, and basically get an injunction enforcing the original decision. But without that, we would've ended up in a class-wide arbitration, which is not an enviable position to be in.

So I don't disagree with the result of what you're saying, that it's better to let courts determine a lot of issues about the parties to the arbitration and the scope, but for a very practical reason that you may be better off appeal-wise to letting a court do that. Also, I guess another point is that the Supreme Court does seem pretty much wedded to this concept of delegation, and what they really look to see is whether you use the right language to do that, whether it's clear and conspicuous enough, and justices on all sides of the spectrum have approved that. Starting with Justice Breyer in the First Options case up through Justice Scalia in the Rent-A-Center case, and is compounded by the difficulty that the rules of the AAA and JAMS, which are the major consumer arbitration administrators, allow the arbitrators to determine jurisdiction.

I think as a practical matter, it might be hard to convince the Supreme Court that they should put the brakes on delegation when so many cases have recognized it and basically said it's really up to the parties to decide. It's a question of whether the parties agreed to it, not whether it's proper or not.

Alan Kaplinsky:

Thanks, Mark. David, you argued that accidental arbitration disputes should be decided under state law, not the FAA, but I think that you would agree that practically all states, if not all of them, have enacted their own arbitration statutes, which are patterned after the Uniform Arbitration Act. The Uniform Arbitration Act is very similar to, in many respects, the FAA. So, isn't that an impediment to your goal of eliminating accidental arbitrations, since state statutes are typically modeled after the FAA, or for years have been interpreted in light of FAA case law?

David Horton:

Yeah, no, you're absolutely right. Almost every state has a broad arbitration statute. Some are even broader than the FAA, but there are two crucial differences between state law and federal law when it comes to the enforceability of arbitration agreements. One of them is that states still have on their books many statutes that protect certain types of plaintiffs that states deem to be vulnerable or exempt certain types of claims from arbitration. For example, here in California, we've had this long-standing labor code provision that exempts claims for stolen wages brought by an employee from arbitration. Now, if the FAA applies, it's preempted. In fact, that's what Perry versus Thomas held. But that assumes that the FAA applies. If, as I argue, the FAA does not apply when a company tries to compel accidental arbitration, then this normally preempted labor code provision and many other rules that are scattered throughout state statutes, they come to life and they invalidate arbitration clauses.

In addition, as you guys know, the Supreme Court has made very clear that you cannot rely on the uniqueness of an agreement to arbitrate, to hold that it's unconscionable. There have been a bunch of decisions that have held that, what I call infinite arbitration clauses, are unconscionable because they're too broad. That reasoning is suspect. I mean, that seems awfully like holding that some arbitration clause is unfair simply because it requires the arbitration of claims, even if those claims might be unexpected, or arbitration of those claims might be unexpected. These decisions may very well be preempted, but again, that assumes that the FAA applies. And if you take the contractual Nexus theory seriously, the FAA does not apply in these attempts to compel accidental arbitration, which means that courts would have more freedom to essentially hold that compelling arbitration in a way that would be surprising is unfair, and therefore the arbitration clause is not enforceable to the extent that it tries to compel accidental arbitration.

Alan Kaplinsky:

Mark, I don't know if you have ... Do you have a response to that?

Mark Levin:

Well, only that I'm guided by the principle that a matter is arbitrable under the FAA unless the FAA says it's not arbitrable. I think that's the guiding principle that I certainly follow. Your argument's really based on the predicates of your other three arguments that I don't really agree with 100%, so I'll just incorporate my thoughts on those by reference.

Alan Kaplinsky:

Okay. All right. Let me go back to you, David, because we have a few more questions; not too many more, at least in my mind. In arguing that accidental arbitration should be governed by state law rather than the FAA, you note that many states, quoting now from your article, "still have laws on the books that require the class actions be available when a plaintiff alleges that a corporation deprived many individuals of small amounts of money." You also contend that making the FAA vanish would mean, and I'm quoting again, "there's no federal impediment to acknowledging the brute truth that for many plaintiffs being forced to arbitrate means forfeiting valuable rights." It's pretty obvious that you'd like to see the Supreme Court opinion in AT&T v. Concepcion, the 2011 opinion in which is Supreme Court authorized the use of class action waivers in consumer contracts under the FAA notwithstanding, contrary to state law, that be overturned. But why do you assume that a consumer with a small dollar claim is better off being a member of a putative class rather than arbitrating on an individual basis?

David Horton:

That's a great question, and I have to be honest, I've been thinking a lot about this. I think that we will all agree that some class actions are absolute nonsense, that there are manufactured claims that don't really seek redress for any social harm and that they're primarily filed to benefit the lawyers. I think maybe unlike you guys, I feel like there's also another category of class actions that's a little bit more noble, where the underlying allegations are actually pretty serious. I think there's at least an argument that the class action mechanism has a deterrent function. But the thing that I'm really struggling with is that I don't know if I disagree with you about consumers being better off arbitrating individually because of the advent of mass arbitration.

Lately, plaintiffs' lawyers who can't pursue class actions in court and can't pursue class arbitration have been doing exactly what these big companies are asking them to do by filing hundreds, thousands, tens of thousands of individual arbitrations. This is, to quote the New York Times, scaring companies to death, because of the fact that in order to arbitrate 10,000 individual cases, companies have to pay filing fees. And those filing fees alone add up to tens of millions of dollars before you even get to the merits. I really don't quite know what to think because, personally, I think the mass arbitration phenomenon is a little bit of a shakedown. I think that some class actions are a shakedown. I also think some class actions have social value. And so, yeah, I just don't quite know where I come down on this.

Alan Kaplinsky:

Okay. What do you think, Mark?

Mark Levin:

Well, I'm very encouraged and appreciate your candor in acknowledging that not every class action is something that ought to go forward, and that mass arbitrations are something of a shakedown. The point that I think it's important to remember is that when you analyze issues as you have in an article, which I have to say is very well written and really a pleasure to read and very well researched, but you have to keep in mind that arbitration in many, many instances can be very beneficial to the consumer, and in most cases, more beneficial than being a putative class member.

I'll only note that the CFPB back in 2015 to 2017, when it released its preliminary and final rules on arbitration, and the CFPB wanted to eliminate class action waivers in arbitration agreements; not arbitration itself, it actually uses arbitration, or used arbitration to resolve its own workplace disputes. It issued a 730-page empirical study of consumer arbitration. When you look at the data, it showed that individual arbitration is faster, cheaper, and more efficient than class action litigation, and that the real beneficiaries of class actions are the lawyers for the class, who were recovering up to half a billion dollars in counsel fees while the class members were receiving either coupons or 30 bucks in cash.

Plus, there are a lot of reasons besides economics that explains why consumers actually prefer arbitration to having to go to court and all the complexities and inefficiencies that being in court entails. Again, I appreciate your candor on at least the outer fringe of what you would view as the outer fringe of class actions and mass arbitrations as being something that is not socially responsible. I think that's enough said on that topic. But individuals do fare well in arbitration notwithstanding years and years of class action lawyers saying, "Don't ever arbitrate. You need to stick with the class. That's the only way you'll recover." It's just not the case.

Alan Kaplinsky:

Okay. Well, thank you, Mark. David, you argue that infinite arbitration clauses are outside the scope of the FAA because they're not closely tethered to the container contract. You also acknowledge that if a party did agree, then federal law kicks in. If you have a consumer who read and understood every word of the infinite arbitration agreement and knowingly agreed to its terms, wouldn't that clause be governed by the FAA and not be accidental?

David Horton:

Right. I mean, I could see why you would just not use the "accidental" label to describe what happened there because you have this consumer who knowingly consents. But on the question of whether the FAA applies, the FAA still does not apply, and the reason is that there are exclusions in the FAA that exempt claims from its orbit, no matter how knowingly, lovingly, voluntarily you consent to the terms of an arbitration clause. For example, you work on the railroad and you're a transportation worker, and it doesn't matter how aware you are of the arbitration clause you just signed, it's not covered by the FAA because it's excluded by Section 1's exemption for transportation workers. And the same thing is true with my contractual nexus theory. It doesn't matter how aware you are of the terms of an arbitration clause, Section 2 of the FAA says that even a crystalline, beautifully formed arbitration clause only applies, or the FAA only applies to it, with respect to claims that arise out of the contract that contains that arbitration clause. So consent really isn't the linchpin.

Alan Kaplinsky:

Mark, any reaction there?

Mark Levin:

Yeah. I mean, I think, again, your analysis of what arising under means, or arising out of, is subject to interpretation, whereas the railroad exclusion, the transportation exclusion is concrete. As I said before, the FAA applies except where the FAA says it doesn't apply. Railroad workers aren't covered because the FAA says so. But whether somebody is in a dispute that arises out of a contract is something that could be fiercely debated in just about every case.

Alan Kaplinsky:

Right. We're drawing toward the end of our program today, but I can't resist asking you, Mark, a final question that relates to the CFPB. You mentioned earlier, Mark, that the CFPB did a 735-page study of arbitration as they were required to do under a provision of the Dodd-Frank Act, and they ultimately decided to issue a regulation not banning arbitration altogether, but rather ban ... the main thing it did was to ban the use of class action waiver language in arbitration agreements.

That ultimately was rejected by Congress under the Congressional Review Act shortly after Richard Cordray had resigned as director of the CFPB and you had a new administration in the White House, namely we're talking about Trump 1.0. During the Rohit Chopra era, while he was director, while President Biden occupied the White House, CFPB didn't really do much of anything dealing with arbitration. Am I right? There was a petition filed by a lot of consumer advocacy groups. There was a lot of concern about that. I know you and I commented on that. We did a podcast on it. Why don't you just, to bring everybody up to date, complete the story and speculate, I guess, informed speculation on what you think is going to happen in the next four years at the CFPB with respect to this issue.

Mark Levin:

Well, the CFPB couldn't do anything more with class action waivers because under the Congressional Review Act, it's forbidden to try to put in a rule that's substantially the same as a rule that was overridden. The fact that Congress overrode the final rule, which was to prohibit class action waivers in consumer clauses, made it basically impossible for the CFPB to promulgate a new rule that would've prohibited class action waivers. Nevertheless, throughout the entire time period, it was really receiving a lot of pressure from consumer advocates and plaintiffs' lawyers to do something about arbitration. Even if it couldn't pass another no class action waiver rule, could it somehow limit consumer arbitration in a different way? As you said, most recently, numerous scores and scores of professors and consumer advocates and consumer groups filed a petition asking the CFPB to limit arbitration to post-dispute situations and to basically prohibit pre-dispute arbitration clauses, which is the kind of clause you see in credit card agreements and bank account agreements and so forth.

We did submit lengthy comments in opposition to that. That petition ultimately got denied, I think at the end of December, early January, because I think the CFPB understood that it wasn't going to be in place after Trump 2.0 became effective. Nevertheless, it continued up until the very end here when Director Chopra resigned. They tried to propose rules that would maybe lay a roadmap for state attorney generals and consumer groups to follow, even if something happened to the CFPB. For example, very recently, it proposed a rule that would limit the kinds of contract terms that you can have in consumer contracts, and while it didn't specifically prohibit arbitration, it would've affected the ability to change the terms of contracts, which is often used with arbitration clauses.

That, I suppose now, is something that the CFPB is not going to be able to carry forward with, but it maybe gives direction to enforcement officials on the state level and plaintiffs' lawyers on the state level to the types of attacks they can make on consumer arbitration if they have the resources to do it. I think for the next four years, if the CFPB continues as an entity, I don't think arbitration is going to be a focus of the agency, but Chopra did the best he could to plant seeds of ideas that maybe would germinate in state-level enforcement against arbitration clauses.

Alan Kaplinsky:

Or maybe, again, in four more years, right?

Mark Levin:

Right. It could start all over again.

Alan Kaplinsky:

Yeah. Okay. Well, thank you, Mark. David, I want to thank you again very much for joining us today. I agree 100% with Mark that while there are things in your article that we don't completely agree with, it's a very, very well done article. Very interesting, very different, I think, and adds to the arbitration literature for sure. Thank you, David.

David Horton:

Thank you so much. I really appreciate that, and I really appreciate you having me on and reading the article and your great questions.

Alan Kaplinsky:

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