Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor podcast where we explore important new developments in the world of consumer finance, what they mean for your business, your customers, and the industry. This is a weekly podcast 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 Senior Counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program.

Now, we're going to be talking about a topic today that we've talked about on other podcast shows in the last five or so years since we've been doing our weekly show. But there's been a new development in the area that prompted me to consider, and then to decide that we definitely needed to do a show on this topic.

So let me give you the background, and then I'm going to be pleased to introduce our two guests today. On September 13th, a group of nine consumer advocacy organizations filed what's called a petition for rulemaking. They filed it with the CFPB and it would prohibit the use of predispute arbitration clauses in consumer contracts in favor of posts-dispute arbitration clauses that would permit consumers to choose between arbitration and litigation only after a dispute has arisen. The CFPB responded the next day on September 14th and said it was carefully considering the proposal and will be opening a public docket and taking public comment on it. This petition for rulemaking is not unique to the CFPB. In fact, in Section 553(e) of the Administrative Procedure Act, it says that each agency shall give an interested person the right to petition for the issuance amendment or repeal of a rule. So that's where this all fits in.

What I found very surprising is that the CFPB on September 14th, without any fanfare, indeed without any real notice of any kind, unless you were doing some very deep, deep excavation on the CFPB's website, you would never know about this thing. They started soliciting comments on the petition and the comment deadline ends on November 14th. I went on, looked at their docket today, there were 10 comments submitted which were all submitted by consumers, and they were basically a sentence or two. They weren't the kind of comments that you would expect in response to a potential rulemaking of this magnitude. So given the uncharacteristic speed with which the CFPB responded to the petition here, it looks to us like the whole thing was orchestrated by the consumer groups and the CFPB. But regardless of how it came about, this development is particularly disturbing since the CFPB recently spent five years from 2012 to 2017 promulgating a rule that would've prohibited companies from including class action waivers in consumer arbitration agreements.

Congress ultimately overruled that rule under the Congressional Review Act, which precludes an agency from promulgating a regulation that's substantially the same as the rule that was overridden. The petition filed by the consumer groups asserts that the CRA "poses no barrier" to the proposed rulemaking. But there's a very strong argument that we'll get into today that is absolutely to the contrary. At its core, this petition embodies an ill-disguised policy preference for class action litigation over individual arbitration. even though the CFPB's own empirical study of arbitration in the prior rulemaking that it did showed that individual arbitration is faster, less expensive, and more beneficial financially to consumers than class action litigation. This development is potentially just as dangerous for financial services companies as the CFPB's earlier rulemaking. The proposed regulation would effectively, in my opinion, spell the end of the use of consumer arbitration and the class action waivers that are typically contained in consumer arbitration clauses.

The door would be wide open for countless new consumer class actions to be filed in the state and federal courts, and the only beneficiaries of that would be the lawyers for the class, not the class members themselves. So today's guests will offer their views on this important development from two

different perspectives, and I'm very pleased first to introduce to you our very special guest and that is David Sherwyn. David is the John and Melissa Ceriale Professor of Hospitality Human Resources and Professor of Law. He's also the director of the Cornell Center for Innovative Hospitality Labor and Employment Relations. He has published numerous law review articles on alternative dispute resolution, and he has a forthcoming piece in the ABA's, it's American Bar Association, Labor and Employment Journal, and that provides data, hard data proving that arbitration is more employee friendly than litigation. We're going to be talking first about an earlier study that is right on point to this petition for a new arbitration rulemaking. So David, a very warm welcome to you.

David Sherwyn:

Thank you. I really appreciate it. It's great to be here. Thanks.

Alan Kaplinsky:

Thanks, David. Let me introduce somebody that should be no stranger to any of you that regularly listen to our podcast show, and that is my colleague, my longtime colleague and friend Mark Levin. Mark is Senior Counsel of Ballard Spahr, a member of the firm's Consumer Financial Services group and our Litigation Department. He has decades of experience in structuring and enforcing consumer arbitration clauses and defending financial services companies in consumer class actions brought in both federal and state courts. Indeed, Mark and I pioneered the use of class action waivers in consumer arbitration agreements some 15 or maybe even longer ago. I was going to say 15 years ago, but time goes very quickly. It might actually be longer than that. Am I right, Mark?

Mark Levin:

More like 25 years.

Alan Kaplinsky:

Oh, okay. Well, I'm off by 10 years. But we both played a leading role in opposing the CFPB's earlier arbitration rule that was overridden by Congress and that proceeding that went on for five years, Mark and I represented the American Bankers Association and the Consumer Bankers Association. For each of the past 25 years, Mark and I have published an update on arbitration law decisions that are germane to the consumer financial services industry that appears in an American Bar Association section of business law periodical called The Business Lawyer and the Consumer Financial Services committee of that section of business law publishes each year an annual survey of important legal developments in the consumer finance world. So Mark, a warm welcome to you as well.

Mark Levin:

Thanks, Alan.

Alan Kaplinsky:

Okay. So Dave, let me start with you. You're the author of a 70-page study. I think it was early in the 2000s that was titled, Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication. It was published actually in 2003 by the Berkeley Journal of Employment and Labor Law. Your study found that while arbitration is fair to all parties, post-dispute arbitration simply doesn't work because it's extremely rare for both the plaintiff's and defense attorneys in a case to select arbitration after a dispute has arisen.

Moreover, parties should not agree to post-dispute arbitration because it hurts them. You call this the mandatory voluntary paradox. Can you explain to us, David, in more detail the findings of your study?

David Sherwyn:

Absolutely, and thanks, Alan. Let me give a little background on the study. Before I started teaching at Cornell's Hotel School, which now part of the Cornell Johnson School of Business, I was a management side labor and employment lawyer in Chicago. And in Chicago In the '90s there was a professor at Loyola University of Chicago named Lamont Stallworth. Lamont is a labor relations professor and he entered into an agreement with the Illinois Human Rights Commission, and that was the branch of government that administered employment discrimination cases in the state. And when you had a case that had been through the investigation process and now the parties couldn't get together on a settlement and the case they found enough cause to bring it forward into a trial, the case was sent to Lamont and then Lamont would reach out to the lawyers from both sides. And as a practicing lawyer, I would get this letter and the letter simply said, "We see that you're ready for trial," or, "Your case is going to go litigation now. And instead of litigating, we can arbitrate it. What do you think? And would you choose to arbitrate?"

And I got a number of these letters and there were times when I would say yes and there were times when I would say no. And the only thing that was consistent was that we never had an arbitration. And the reason that I would sometimes say yes and sometimes say no was a strategic decision about my case. Sometimes I would look at my case and say, "This case is better in arbitration, this case is better in litigation," and make that call. And when I chose, both sides had to choose arbitration to go forward. When I chose arbitration, obviously the other side didn't choose arbitration. So fast-forward 10 years, and now I'm a professor at Cornell and I've written another article on arbitration laying out the positives and the negatives and so on. And what's bandying about at the time is this call that predispute mandatory arbitration takes away people's rights. It's not a great system. What we should do is post-dispute voluntary arbitration.

And so now I'm remembering five, eight, 10 years or earlier, whatever it was, I remember Lamont Stallworth sending me these letters, "Would you like to arbitrate?" So I call Lamont and say, "Hey look, I'd love to look at all your data and see how many arbitrations you had." And Lamont said, "I didn't have any." And I said, "What do you mean you didn't have any?" And he said, "There were no situations, cases where both sides chose arbitration." And I said, "Well, that's a really interesting result, but I don't think I can publish." Lamont said, and he said, "No, you can't." So I said, "Do you have the data?" And he said, "I do. It's in a box and I've got all of the physical letters that people wrote back." This is early '90s, it was pre-email for the most part. So Lamont sent me this huge box and all these files and I went through case after case after case, and the numbers, I think it was 1,800 or so.

And there were times when the plaintiff chose arbitration and in those times the defendants didn't. And there were times when the defendant chose arbitration and on those times the plaintiff didn't. And it comes down to when your case is ripe, when your case is alive, the forums have different features. If you don't have a great case as a plaintiff, litigation sounds great because you're using cost of defense as a way to push your settlement. If you don't have a great case as an employer, you may say, "You know what, I don't want to go before an arbitrator in six months. I'd rather drag this out for three years and file a lot of motions and maybe the plaintiff will get tired." Whatever reasons, lawyers are smart, they've done this before, the forums are different.

And if you look at two cases that, I mean if you look at a case that's a ripe case from both sides, the odds of both sides wanting one forum or the same forum are low. And in this case they were zero. So we had

a system for post-dispute voluntary arbitration, and it yielded no arbitrations. So if we're looking to make this a viable concept post-dispute voluntary simply is not.

Alan Kaplinsky:

Right. Well now, you focused on employment disputes, because that was the area that you practiced in. Our interest primarily is in the area of consumer disputes and this petition of course, the only thing the CFPB can regulate are consumer financial services disputes. Do you think, what you concluded back in 2003 that that would apply to a consumer dispute the same way that what you've said is applicable to employment disputes?

David Sherwyn:

Yes, I do. I think that it's the same concept. You can imagine situations where both sides will look at the forums. I mean, the concept here is that for the most part, the consumer is the plaintiff and the company or the provider of services or goods is the defendant. And so since defendants are the ones that are generally putting forth these policies, the belief is that well, they'll always want arbitration. But the fact of the matter is when you are putting together an arbitration policy, one of the things that you're trying to avoid is litigation. That the cases are not valid or just really weak cases that get into the system, and then the fees start rolling, and then you're settling. And so that is often a driver of someone who's pushing arbitration. But post-dispute voluntary, if one individual person wants to bring a case forward, you can see the employer or company saying no to that.

This one-off case, good, go find a lawyer, go start this whole process and you're not really wanting to do this. And it's the same thing on the other side. They may have a case that they want to bring to arbitration, it's maybe not a super high value case, maybe they can't find a class and they want to do it quickly. So again, the provider of services would say no versus the other thing where now the provider of the services wants arbitration and that's the time that the plaintiffs wants litigation. It's the same thing, the arbitration versus litigation decision made predispute is looking at the best way to resolve future disputes. Post-dispute, the question is, what's the best way for me to win? And it's really rare in any case, whether it's employment or consumer, that both sides look and say, "This forum's better for me to win," and they mean the same forum. It just doesn't happen.

Alan Kaplinsky:

Yeah. So if the CFPB were to decide to propose a rule that the consumer advocates have petition for, in effect it would do away with arbitration. There'd be no reason that I could think of why a company would want to put in a post-dispute arbitration provision.

David Sherwyn:

Absolutely. I mean, you can put it in because in one out of a million cases where both sides want arbitration, I guess it cost you a piece of paper to offer it. I actually once had, somebody told me after my study that they did actually have an arbitration under this system in Illinois. And I said, "How could that be? How did that happen?" And the defense lawyer said, "Plaintiff's lawyer was retiring," only had six months left as a lawyer and said, "I got to get this done. I'd rather be in litigation for this case, but I got to get it done." And so my buddy said, "Yeah. Okay. Fine. Let's do it." But the thing is, there's two issues here. One is that the reason that we're looking for alternative dispute resolution is that we find a problem with litigation.

And so if you want alternative dispute resolution, you got to have it where it actually makes a dent and people use it. And so post-dispute voluntary doesn't solve that problem because people don't use it.

Now some people will say, "Well, that's a victory," because arbitration has these problems and people always talk about all the problems of arbitration. And yes, arbitration is not a perfect forum. And then the fallback is this belief. We don't even talk about it. We're like, "Arbitration's bad because of this, this, and this." And then there's this unbelievable other option out there called litigation and we never look at that and try to judge it.

Anyone who's been through litigation hates it. It's a horrible, horrible system. And so is arbitration perfect? No, but it's often much, much better than litigation. And that doesn't get into the discussion. And as you're saying, you're putting out this rule of regulation that we'll only do post-dispute voluntary implicit in that is, and if both sides never choose arbitration, we're good because we've got this great other forum litigation. The only problem is it's not great. It's really awful.

Alan Kaplinsky:

Yeah. Right. Right. Of course, I can't picture a class action lawyer who's taken on a matter and he or she wants to prosecute ever deciding to go to arbitration. They always want to be in court, they'll never, because that's the system that they're used to. That's where they know their gravy train is located. They've got no track record in arbitration. Particularly if they go to arbitration, they could only arbitrate the claim of the name plaintiff. It'll never happen. So in effect, these consumer advocacy groups might as well have just petitioned the CFPB to ban arbitration altogether, because that's really what they are trying to accomplish here.

David Sherwyn:

And the other thing that they're doing, because I've talked to plaintiff's lawyers in the employment world who will say, "Well, the plaintiff should be able to choose the forum." And you look at it and say, "So let me get this straight. Whenever you want to use cost of defense and the rule 23 costs and all these things to push a settlement, you can have that. And then when you don't want to do that and you want to have a single plaintiff and you want it to be quick and you want it just to be focused on that, then you can have that. That is something that no employer, no company would ever do. I will choose to put myself in the worst situation every time." It's crazy. No one will do that.

Alan Kaplinsky:

Yeah. So Mark, you've heard what David has talked about and you've litigated these cases for 45 years, consumer cases. In your view, are David's findings and insights, has it been your experience that they also apply in the consumer context?

Mark Levin:

Absolutely, Alan. I mean, insofar as arbitration's concerned, there's not a whole lot of difference between an employee and a consumer. They're both individuals. They're both on the other side of the V in litigation when the employer or a bank or a credit card company is on the other side. And for each of the past 10 or probably even more years, there's been a bill introduced in the House and/or the Senate of the United States called the FAIR Act, Forced Arbitration Injustice Reform. And if it were ever passed, it would prohibit companies, both employers and financial services businesses from requiring employees and consumers to arbitrate disputes through predispute arbitration agreements. And it says, "No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute or consumer dispute." So Congress treats employees and consumers as the same, fungible, I think, insofar as arbitration's concerned. And I think David's findings and insights in the employment context are clearly relevant in the consumer arbitration area.

Alan Kaplinsky:

Okay. So let me get back to you, David. You may have already answered this question, but maybe you haven't. And that is the back half of your study is an appendix that discusses an empirical survey that you conducted and the data you collected and analyzed. Have you already described that survey that you did that I thought that you might've?

David Sherwyn:

Yeah. Well, what we did on top of that, we did two things. We looked at the fact of what happened with Lamont's study, and then we did a survey of lawyers on both sides of the aisle and put together some case situations. And it was when would you choose arbitration? When would you choose litigation? And we put some different scenarios together and it came out similar to what happened with Lamont's group is that when we had a case and several or numerous plaintiff's lawyers said, "I want litigation." The employer said they wanted arbitration, and then when the plaintiff's lawyers, and then sometimes in the employment context you would want arbitration for a couple of reasons. And that's when the time that the management lawyer said, "No, they would put this one in litigation." So we did a double with what happened, what really happened, and then some hypotheticals just to see. And our results were the same that, again, post-dispute doesn't work.

So if you want a different way to resolve disputes, it has to be predispute. And the problem is that we've changed the name from predispute mandatory arbitration to forced arbitration. That's just, I don't know how that happened, but it did. And we have a bunch of, at least in the employment context, a whole bunch of empirical work on which system is more plaintiff friendly, which I'm not really sure why we put plaintiff friendly as our goal should be, which system is more just, but that's a whole other story. But when we look at which system is more plaintiff friendly, we have data that is extraordinarily flawed and yet Congress last year passed a statute stating that predispute arbitration of sexual harassment and sexual assault claims are unenforceable. As if litigation is a better place for that, I can quote my friend and probably one of the best neutrals in the country, Martin Scheinman. And Martin's line was, "I've yet to meet a sexual harassment plaintiff who wants their case to be public." They want it as private as possible, and yet Congress passed a statute that said, "The private forum is unenforceable."

Alan Kaplinsky:

Yeah. That is very ironic for sure. So Mark, when the CFPB announced that it was going to publish this petition and invite public comments, you published a blog in consumerfinancemonitor.com concerning why the CFPB should not engage in rulemaking on predispute consumer arbitration agreements. How does David's study, which you cited in the blog, fit into that?

Mark Levin:

Well, it fits in perfectly. There's really nothing new about what the petitioners are proposing. It's just the latest spin on an argument that's been around for decades by consumer advocates that arbitration agreements should only be entered into after a dispute has occurred, not before, because consumers aren't fully cognizant of their rights until then. But the proponents of post-dispute arbitration agreements have never made a convincing case, and the same is true of the petition. And as David points out so well in his article, limiting consumer arbitration to post-dispute controversies would severely curtail consumer arbitration. Because once the in terrorem threat of expensive and prolonged litigation as a negotiating tool is on the table, it becomes a tactic.

Plaintiff versus defendant and whatever one wants the other one doesn't want. But that tactic is eliminated if the parties have agreed to arbitrate the dispute prior to the dispute arising. So post-dispute

arbitration is a theory that might sound superficially appealing, but it fails in real life, whereas predispute arbitration puts both sides on the same playing field and on the same page and really evens the table there. And David's study actually backs that up with empirical evidence and I think is a very important study insofar as post-dispute arbitration is being urged on the CFPB.

Alan Kaplinsky:

Right. So Mark, in addition to the fact that post-dispute consumer arbitration doesn't work, what are some of the other reasons why the CFPB should not undertake rulemaking on consumer arbitration agreements again?

Mark Levin:

Well, first and foremost, as you pointed out in your introduction, Alan, Congress in 2017 basically vetoed the CFPB's arbitration rule, which would've forbidden the use of class action waivers and consumer arbitration agreements. And under the Congressional Review Act, which is what Congress acted under, an agency cannot issue a later rule in substantially the same form as the one that was overturned unless Congress has passed a new statute authorizing that action. The petition that was filed asserts that the Congressional Review Act, the CRA, poses no barrier to the proposed rulemaking. But I think that's really wishful thinking. On virtually every page it's quite evident, every page of the petition that the real goal here is to eliminate class action waivers and the consumer arbitration agreements that house them.

It really embodies an ill-disguised policy preference for class action litigation over individual arbitration. I think a very strong argument could be made that the proposed rulemaking would be barred by the CRA because it's substantially the same as the earlier CFPB rule barring the use of class action waivers that Congress vetoed. In addition to that, the petition seems to be premature. First of all, the CFPB should defer doing anything with respect to the petition unless and until it finalizes its proposed rule that would create a registry of non-banks that use arbitration provisions and that has been in use for a while. Until that's done, the CFPB simply doesn't have the data it needs about the prevalence of consumer arbitration. The proposed rule would also trample on Congress's power for the CFPB to undertake proposed rulemaking while Congress is considering bills such as the FAIR Act that I mentioned that would ban consumer arbitration altogether. And as a practical matter, the petition has been filed at a very inappropriate time when the Supreme Court, and the case was just argued a few weeks ago, is poised to consider whether the CFPB has been unconstitutionally funded.

I think ultimately the CFPB and the consumer groups who filed this petition would be a lot better served by devoting time and resources to educating the public about the many benefits that arbitration has to offer. And that would go a long way to achieving what the petition purports to strive for, which is, "Competitive markets where consumers can make informed and meaningful choices about the products they use in the terms of service they are bound to." I think ultimately education, not regulation, is the key to improving consumers' financial literacy.

Alan Kaplinsky:

Okay. Well, I certainly agree with you on that. And boy, when I testified at one of the hearings, there were three hearings the CFPB had on its proposed arbitration ruling or regulation. I remember sitting right next to then Director Richard Cordray and chastising him and his agency for having this very, a lot of money devoted to educating consumers about consumer financial services matters. But they hadn't spent one penny on education, absolutely nothing. And of course he was unable to deny that.

Mark Levin:

Yeah. They have a whole division called the Division of Consumer Education and External Affairs, but somehow arbitration never makes it onto the agenda.

Alan Kaplinsky:

They don't like to educate consumers on things where they're afraid that consumers might disagree with the policy position that the CFPB already has. And that is they don't like arbitration and they are fearful that if they educate consumers about it, more of them will use it and they'll like it. So sad state of affairs.

Mark Levin:

Oddly enough, and we found out about this when we were doing battle with the CFPB on its earlier rule, the CFPB itself in its internal procedures recommends alternative dispute resolution as a way for CFPB employees to resolve workplace disputes, which I always thought was interesting. And you have to remember too, that even the proposed rule that would've banned the use of class action waivers did not ban arbitration per se. They said, "Wow. There might be something to it and we're not going to take the step of trying to ban arbitration altogether."

Alan Kaplinsky:

Right. Right. So Dave, I want to get back to you. Consumer advocates argue that predispute arbitration agreements are being forced on consumers who don't read them, they don't understand them, and don't realize they're waiving their right to a jury trial or their right to be a named plaintiff or a member of a class in a class action. Even if there were merit to those arguments, would you still maintain that predispute arbitration clauses are better for consumers than post-dispute clauses?

David Sherwyn:

Well, a couple of things. Is it true that people click away at things without reading them? Yes. I mean, I do it. You're trying to buy something or do something and it's like, "Agree to our terms and conditions," "Yes," And you don't do that. So it's an interesting concept to say, "We can't enforce these contracts, we have to make them illegal because one party won't read it." So it's like, "Since people are lazy, let's get rid of the contract." That's an interesting concept. But even if people don't know what's inherent in the argument of people are unaware is that if they knew they would have said no, does that mean they wouldn't have bought the product? Or they would've tried to renegotiate and say, "I don't want to arbitrate any disputes. I want to litigate the dispute," which comes back to what we said before, this belief that you're waiving your right to this great thing called litigation in exchange for this not great thing called arbitration.

When the fact of the matter is what you're waiving though years and years of motions and depositions and costs. And then you're ultimately, somebody's going to say to you, "And this is what we've resolved and this is what you get," as opposed to having your own case and being able to go forward with it. So if you ask me what would I prefer? Would I prefer to be in control of my case? Would I prefer to have my dispute and move forward with it? Or would I like to have some master lawyer say, "I'm in charge of everything, now you sign on this, now you give up all your rights to me and I will call you up one day and you may get a hundred cents on the dollar, but in all likelihood it'll be a lot less. And if it's 2 cents on the dollar that's what you get."

And one of the other things that is part of this debate, again in this inherent argument that somehow litigation is great and arbitration is not great, is something that you look at from 30 years ago. 30 years ago when I was a practicing lawyer and we had an arbitration case. My firm in its library had these red loose-leaf notebooks and it had arbitrators resumes in those notebooks. And lawyers in the firm would

make notes on them and you would flip through them and try to figure out if this arbitrator was somebody that you would want to choose for your case. And sometimes you got the list from the American Arbitration Association and nobody on the list was in your notebook. And so now you were just picking based on names and trying to find information. That was 1993.

In 2023, you can Google any of these people. It is not a difficult concept to know who the arbitrator is. It is not difficult to understand how the process works. The information age has leveled this playing field. So I come back and say, "If you have a case and you have a dispute and you want to resolve this dispute, this is a way to do it that you can actually pursue your case." Arbitration in general, six, nine months is you're looking from beginning to end, which sounds really long until you realize that litigation is more likely three to 10 years. You can get your day and you can move on. So if you believe that, as I do, that the forum is better for employees and consumers, the fact that you failed to read your agreement and now you're in arbitration and you didn't know because you clicked without reading, I would propose to you, you're better off.

Alan Kaplinsky:

Yeah. Thanks, Dave. And Mark, how do you respond to the arguments that predispute arbitration agreements are unenforceable because they are forced on consumers and consumers are clueless about what they mean?

Mark Levin:

Yeah. Well, this term “forced,” as David pointed out a little bit earlier, is a term that people like to bandy about. And I guess if you say it long enough, people will start to think it's true. But on one level, virtually all arbitration agreements these days give consumers the right to opt out within 30 or 45 days or 60 days of entering into a contract. All they have to do is send back a simple written note saying, "I don't want to be a part of the arbitration clause," and it doesn't affect any other part of the contract. So they do have a choice, of course they have to read the contract, but they do have a choice. Interestingly, the American Law Institute recently approved a restatement of the law in consumer contracts, and it found that there are actually many benefits to standard form contracting and that the market efficiencies of using standard form contracts can benefit all market participants, including the consumers.

And it said that standardization supports efficient production and distribution resulting in lower prices and lower transaction costs and the introduction of new forms of products and services. And this really reflected the collective input of hundreds of professors and consumer advocates and industry lawyers who carefully considered what the rules ought to be. So simply saying something is adhesive doesn't really begin to tell the real truth about benefits that can accrue from using form contracts. And “clueless,” that's become another catchy phrase that you see around, but it's really portraying the consumer as somehow a victim of a big bad company. Consumers don't have to be clueless. They can read the contract if they want to, and most courts say, "If you had a chance to read it and didn't, you're still bound by it." Another thing you hear is consumers being influenced by dark patterns on companies' websites that are intended to mislead them.

But in point of fact, most companies go out of their way in their arbitration clauses to point out that there is an arbitration clause. There is a right to opt out. They go beyond what the law requires. They use capital letters in italics and boldface type to highlight the most important parts of the clause, including the waivers. And consumers, unfortunately, and consumer advocates want to take the position that no matter what you do to help educate the consumer, the consumer doesn't have to do it, doesn't have to abide by it, can refuse education and still be in a superior position when it comes to enforcing the arbitration clause. So I think there are studies that talk about, "Well, does the consumer really

understand what they're entering into?" But the fact of the matter is these studies are based on the premise that the consumer doesn't read any part of the contract.

And when you focus just on the arbitration clause, that really contravenes federal policy that says that you can't pick on arbitration, you can't give special adverse treatment to an arbitration clause. It has to be treated the same as any contract term. So I think it's really a very bad policy to say consumers can enforce a contract that they never read and can refuse to abide by the arbitration clause in the contract even though they're benefiting from all the other parts of the contract, and in fact got exactly what they wanted, which is the product or service that's to blame. So it seems to me that if consumers are clueless about arbitration, it's really not the company's fault. It's the fault of consumer advocates and agencies like the CFPB, which have the resources to better educate them.

David Sherwyn:

So I like the term of clueless about arbitration. I would contend that all of the folks lobbying against arbitration are either self-interested in litigation or clueless about litigation. So the trial lawyers are self-interested about litigation and those that are out there fighting against arbitration are clueless about it. They just don't know how bad of a system or forum it is. And it's amazing while you have conversations with this, and my friends across the street at Cornell's ILR School, School of Industrial Labor Relations, the faculty I think as a whole voted that they were against "forced arbitration." And I was surprised that the historians would vote for that also. And then, they had somebody who came in and did a job talk. This is what academics do when I'm applying for a job, I come and I tell you about a paper I'm working on.

And this paper had talked to and surveyed and done a bunch of qualitative research on people who had been through litigation winners, losers. One thing that stayed constant is that everybody hated the process. Everybody found the process to be demeaning, expensive, long, stressful, that everybody said it was the worst thing they had gone through. And we've got government agencies and politicians, a lot of academics who have jobs for life. So they don't worry about things all sitting there saying, "This is a really bad system," and then silence on looking at litigation. If you started analyzing litigation, if you did a what if, this is how I wanted to resolve disputes, this is what's going to happen. If something happens to you, it's way too expensive for you to file a claim.

So what you have to do is find a lawyer who thinks that your claim is interesting and now has to find hundreds or thousands of other people who have the same dispute, and all those people need to sign on, and then we start a process. And then in two, four, six, or maybe 10 years, you might get some relief, but what you'll get will be determined by a law firm somewhere else and you'll get a letter, "How does that sound?" Everyone would say, "That sounds horrible." That is what is the residual if we get rid of arbitration.

Mark Levin:

Well, I think interestingly, everything you say is bolstered by the CFPB's own arbitration study, which was a massive 700 plus page empirical study of arbitration. And maybe they never thought people would read between the lines or connect the dots, but when you actually look at the data, you find that consumers who prevailed in an individual arbitration recovered an average of $5,389. But the average class action settlement for consumers who got cash payments was $32.35, and they had to wait years to recover that paltry amount. But class counsel in the class actions that the agency studied recovered $424 million and change, they're the ones who benefited from litigation.

Alan Kaplinsky:

So that's a good segue to the last thing I want to ask you about, Dave, before we wrap it up. And that is, I mentioned during my introduction of you that you're working on an article right now for this ABA Journal of Employment. And I'm wondering if you could, for our audience, summarize what you found or what you've determined and what is soon going to be published.

David Sherwyn:

Thank you. So in the preamble to the statute that prohibits the enforceability of sexual harassment and sexual assault claims, arbitration for those such claims, it states that there's empirical evidence, strong empirical evidence that arbitration is, or litigation is more employee. This is all employment/employee-friendly than arbitration. And I have been studying this for years and I have been in numerous conferences and law review symposiums and so on. And I'm always shocked because all of these studies compare arbitration results after the arbitration, and the term is called an award, even if the employer prevails, it's an award of zero, but we call them arbitration awards versus litigation verdicts. And throughout the years there's different studies, different data sets, every case is different, but you can pretty much say that when it comes to litigation, employees win between a third and 40% of their cases. And when it comes to arbitration, it's closer to 25 to 30% of their cases.

And there's a couple studies that come out differently, but for the most part that is the argument and that is the correct analysis of arbitration awards versus litigation verdicts. And so that is what drove this statute and has driven a lot of the discussion. And for 20 some odd years, I have been arguing along with a small handful of academics against hundreds on the other side, "Why do you not include dispositive motions?" Motions to dismiss and summary judgment motions when you're comparing win-loss records. Settlements, our data shows the settlement rate in arbitration and litigation is generally very, very close with arbitration having more settlements than litigation. So it's not like settlements are much different. So let's look at the cases that are ended by the court or the arbitrator. There's either been a trial or an arbitration or there's been a dispositive motion.

And our study found that in arbitrations, 40% of the cases end in motion, and in litigation, 97% of the cases end in motion. And in arbitration, even though our study found a 30% win rate of cases that were arbitrated and a 40% win rate in cases that were litigated, when we threw the motions in and just did cases ended by the arbitrator or by the court, employees won 19% of the time in arbitration and 1% of the time in litigation. And the other thing is that 60% of the time the employees got their day, they got to tell their story, this is what happened. And in litigation it was 3% of the time. So we came up with the term, we coined it, we hope it makes us famous, but we know it won't, which is the effective win rate. Let's not look at who won at the end when 3% of the cases in litigation actually get there.

Let's include and look at all of the cases ended by the court. And when you do the effective win rate, you come out 19 to one and somehow all of that was lost on Congress. And Congress just went ahead with these flawed studies. And you can apply this to consumer also because it is the same situation. Cases get knocked out all the time by motions, go away, and we don't know about those. Those are losses. When the case goes away by motion, it is a loss, and yet it has been kept out of the data for decades and it has created a false narrative. And it's disconcerting that we're making law on false narratives.

Alan Kaplinsky:

Yeah. So Dave, the article that you referenced and just talked about, when is that going to be published? Do you know?

David Sherwyn:

That's always a question. The editors have sent it off to the journal. The journal is now putting it in into a page proofs. I would hope that we'll see it by February or March.

Alan Kaplinsky:

Okay. It's not on, I take it, SSRN yet, is it?

David Sherwyn:

No, we haven't put it on an SSRN. We're in all likelihood, we're going to wait for it just to come out.

Alan Kaplinsky:

Okay. And you have a co-author?

David Sherwyn:

Yeah. I have two co-authors. I have Professor Harry Katz, who's the former dean of the ILR school and Paul Wagner, who is an adjunct at Cornell's Hotel School and is a principal in the firm, Stokes Wagner, which a firm that has on the employment side has been very, very active in the arbitration world. And in fact, they are, I guess, famous or known for at least, they propose for some of their clients giving up employment at will and giving individual employment contracts in exchange for doing alternative dispute resolution and have been extraordinarily successful. And I will say one more thing about on the employment side, but it does work on the consumer side too. We did a study, it's in Stanford Law Review, it came out in the early 2000s. I'm going to think '05 or '04-05, so mid-2000s.

And what we found was that in arbitration versus litigation, one company's win-loss stayed very similar, percentage of settlements stayed very similar, but on average they resolved their cases in two weeks as opposed to, or 90% of their cases were resolved in two weeks or under. And the point is when you don't have all of these procedures that are inherent in litigation, and you realize that in six, seven months, one person in all likelihood is going to decide the case, the parties know that they can't play games, they can't extend this forever, they got to look and see the problem and resolve it. And they found that their resolutions just sped up so much and that they were able to maintain a relationship with the party on the opposite side, more than 90% of their employees stayed employed.

Now, consumers a little different, but the thing is there's no reason that everyone wants to hate each other. Litigation leads to that hate and arbitration, which is part of an alternative dispute resolution program, leads to saying, "Let's figure this out and let's resolve this, because if not, in a couple months, somebody's going to do a 1-0 and neither one of us probably wants a 1-0. So let's resolve this right now." And that's extraordinarily helpful.

Alan Kaplinsky:

Yeah. Okay. Well, we have come to the end of our program for today. And first of all, I want to thank you, David, for taking the time to share with our audience this vast experience that you've had and several articles that you've written. And the one that's in process right now sheds a lot of light on this petition that the CFPB has received. So again, my thanks to you.

David Sherwyn:

Thanks to both of you. I really appreciate you inviting me to be part of this. It's a really interesting topic. It's something that I've spent most of my career on. And at the end of the day it comes down to is disputes are inevitable, resolution is what we are going for, and we're looking for a fair and just

resolution. And as part of to be just, it's got to be resolved in some timely manner and litigation just doesn't have that. And you'd also like the parties to the dispute to have some say in the resolution, and again, litigation just often doesn't have that.

Alan Kaplinsky:

Right, right. And Mark, my thanks to you, of course, you've been a guest on our show many times, but always like to hear what you have to say on this topic that you're so knowledgeable about.

Mark Levin:

Well, it's my pleasure. And I think David has really provided some tremendous insights that we can use in our sphere to further the cause.

Alan Kaplinsky:

Okay. Thank you very much for listening and have a good day.